CAYMAN ISLANDS
LAW REFORM COMMISSION

Contempt of Court

Consultation Paper

Friday, July 15, 2016

THE CAYMAN ISLANDS LAW REFORM COMMISSION

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TABLE OF CONTENTS

Part	Page
PART 1 - INTRODUCTION	3
PART 2 - CODIFICATION	4
PART 3 - EXECUTIVE SUMMARY	6
PART 4 - CONTEMPT IN THE FACE OF THE COURT	7
• **Recording of proceedings** • **Professional privilege**	7 8
PART 5 - CONTEMPT BY PUBLICATION IN RELATION TO PARTICULAR PROCEEDINGS	9
PART 6 - JUROR CONTEMPT	10
PART 7 - SCANDALISING THE COURT	11
PART 8 - ACTS INTERFERING WITH THE COURSE OF JUSTICE	12
PART 9 - CIVIL CONTEMPT	12
PART 10 -JURISDICTION, PROCEDURE AND PENALTIES	12
• **Jurisdiction** • **Procedure** • **Penalties**	12 12 14
PART 11- STATUTORY CONTEMPTS	14
PART 12 - TRIBUNALS	17
APPENDIX A- CONTEMPT OF COURT BILL, 2016	19
APPENDIX B- PENAL CODE (AMENDMENT) BILL, 2016	20

CONSULTATION PAPER

CONTEMPT OF COURT

PART 1- INTRODUCTION

1. Contempt of court is one of the few non-statutory criminal offences in the Islands. It is governed entirely by common law principles, both as to the scope of the offence and the method of disposal, principles which have been developed over the years on a case by case basis. It is also one of the few criminal offences in the Islands for which no maximum penalty, whether by way of imprisonment or fine, is prescribed.

2. Two relatively recent developments justified an examination of this branch of the law. The first is the increasing use of the internet as a method of communication, not just on a personal basis but as a means of conveying information to the world at large. For many, the internet has replaced newspapers and broadcasts as their principal source of information. This has brought with it the so-called "citizen journalist". It has also brought with it one particular aspect of "juror contempt", that is, the risk that jurors, despite the traditional warning from the judge, will be tempted to "surf the internet" hoping to find some item relevant to the case in respect of which they are jurors.

3. The second development is the enactment, as Part 1 of the Cayman Islands Constitution Order 2009, of the "Bill of Rights, Freedoms and Responsibilities". Sections 7 (Fair Trial) and 11 (Expression) in particular are relevant to any consideration of the present law of contempt. In those circumstances, on 10 January 2014, we issued a Consultation Paper ("the CP") which attempted to address the impact of those two developments but also took the opportunity to consider whether any, and if so, which parts of the law of contempt merited codification, amendment or repeal.

4. On 16 April 2014, we received a very helpful response from the Cayman Islands' Law Society ("the CILS Response" or "the Response") which broadly agreed with the approach we had adopted in the CP. We indicate below the areas where we differ from the views expressed in the CILS Response and give our reasons for so doing. We regret that we did not receive any formal responses from representatives of the media.

5. This paper broadly adopts the same treatment of the topic as in the CP although we have prefaced that treatment with some general observations on codifying the law of contempt or any part of it and included an executive summary. We have also added after the treatment of the principal topics some discussion of our attempt to rationalise the existing statutory contempt-like offences and, finally, a brief discussion of contempt in relation to tribunals, a topic which was not covered in the CP.

6. We attach as appendices A and B respectively copies of a draft Contempt of Court Bill ("the Contempt Bill") and a draft Penal Code (Amendment) Bill ("the Penal Bill") which contain proposed provisions of which references are made below.

PART 2 - CODIFICATION

7. Some of the matters raised in the CILS Response have caused us to reconsider the extent to which it is either practicable or desirable to codify or, alternatively, convert into statutory offences without codification, the law of contempt or any part of it. Since this reconsideration has caused us to recommend an approach which is not entirely consistent with all the views expressed in our earlier Consultation Paper, it will be convenient to begin with a few general observations relevant to that topic. We use the word "codify" to mean the process whereby the constituent elements of a common law offence are expressed in statutory form[1]; we use the word "convert" to mean the process whereby a common law offence is expressed in statutory form but without any attempt at identifying its constituent elements[2].

8. Expressed at its broadest, contempt of court is any act which interferes with or obstructs the due administration of justice whether in relation to particular proceedings or generally. Yet a detailed examination of decided cases would provide examples of circumstances which might be thought to come within that broad definition but have been held not to amount to contempt and vice versa.

9. As a basis for a statutory offence that definition is far too broad to form an adequate basis for criminal liability and any attempt to refine it by setting out the constituent elements of the various types of contempt by reference to decided cases is likely to prove either impossible or dangerous or both. Impossible because of the amorphous nature of the common law offence, dangerous because legislation, by its very nature, cannot anticipate all eventualities. That danger is, of course, a risk inherent in all attempts at codification but where the interest at stake is the due administration of justice, we do not believe that it is a risk which should be taken.

10. It would, of course, be possible to abolish contempt as a common law offence and simply provide that any person who acts in contempt of court is guilty of an offence and liable to imprisonment for, say, four years. Although that could not be described as codification, in the sense that we use that term, it would at least bring into play the various methods of disposal provided for by the Criminal Procedure Code. On this basis, procedure and penalty would be statutorily prescribed but guilt or innocence would remain to be determined by reference to the substantive common law. But, apart from the fact that this would result in a radical departure from the provisions of the Penal Code which not only impose penalties for various offences but define those offences, this approach is fraught with difficulty.

11. The law of contempt encompasses both the trivial and the serious. The trivial might include refusing to stand when the judge enters the courtroom. The serious would include the publication, shortly before or during a criminal trial, of the accused's previous convictions with

[1] As with the definitions of manslaughter and murder in the Penal Code (2013 Revision), section 180 et seq.

[2] Apart from, possibly, section 27 of the Grand Court Law, we have been unable to find any examples of this which would indicate that the creation of a statutory offence by reference to some common law rule but without defining its constituent elements would be setting an undesirable legislative precedent. A hypothetical example would be a provision stating that a person who murdered another person was guilty of an offence and liable to imprisonment for life.

the object, intended and achieved, that the trial has to be postponed or, worse still, that the proceedings are permanently stayed on the ground that the publicity is such that the accused cannot get a fair trial. Unless some element of codification or classification is introduced, it would not be possible to distinguish between cases which should only be triable summarily, those which should only be tried on indictment and those which can be tried "either way".

12. Even if that problem could be overcome, which we do not believe it can, provision will have to be made, by way of an exception to the current regime under the Criminal Procedure Code, for all trials on indictment to be by way of judge alone. We do not believe that the determination of guilt or innocence in contempt cases should be left to a jury. Although many proposals have been made in different common law jurisdictions for contempt to be triable on indictment, we are not aware of any such jurisdiction where that determination is in fact currently made by a jury. The law of contempt exists to protect the due administration of justice both in relation to individual cases and generally - both that determination and the imposition of an appropriate penalty should remain exclusively in the hands of the judiciary.

13. The other difficulty is that the only court which currently has, as part of its inherent jurisdiction, the power to try contempt cases is the Grand Court. The Summary Court has only such jurisdiction as is conferred upon it by statute. Save in respect of statutory contempt-like offences, we do not propose any change in that regard. But conversion without codification raises the prospect, depending on the mode of trial, of the Summary Court trying offences which relate not to contempt of the Summary Court but to contempt of the Grand Court. We would regard this as an unacceptable inversion.

14. A third difficulty is that there are some types of contempt which do need to be dealt with summarily. Examples would include the failure to attend the hearing having been duly summoned to attend or, having attended, refusing to give evidence or to produce some document which has been ordered to be produced. Offences of this nature have an immediate impact on the ability of the court to dispose of the matter before it in a way which a minor disturbance in court does not. If all such offences could only be tried by invoking the full panoply of the Criminal Procedure Code, innocent parties or, in the case of criminal proceedings, the public interest, may suffer. As with civil contempt, this type of contempt is more concerned with ensuring compliance than exacting punishment.[3]

15. Nor do these difficulties lessen if considered in relation not to the law of contempt as a whole but to the classification of contempts as found in contemporary academic writings. Despite the broad definition mentioned above, that classification divides the substantive law of contempt up into "contempt in the face of the court", "contempt by publication in relation to particular proceedings" – which we refer to as the strict liability rule[4] - "juror contempt", "scandalising the court", "acts interfering with the course of justice" and "civil contempt".

[3] And thus the threat is usually more effective than the actuality: but without the latter, the former will be hollow and, indeed, improper.

[4] Sometimes referred to as the "sub judice rule" although, following the UK Contempt of Court Act, 1981, we prefer the expression used in the text.

16. There is some legislative precedent for so referring to one of these branches of the law of contempt but that was in the context of the UK repeal of the concept of "scandalising the court" without any statutory replacement, clearly something different from the conversion without codification of any of the branches into statutory offences.[5]

17. Two of these branches could be codified without any great difficulty. The strict liability rule has, in effect, been modified and codified by the UK Contempt of Court Act, 1981 ("the 1981 Act"). Both aspects of juror contempt, being relatively confined, could easily be codified and, indeed, the UK Criminal Justice and Courts Act, 2015, does so.[6] Civil contempt is probably also amenable to the same treatment. But with those exceptions, codification or conversion of the other branches, that is, "contempt in the face of the court", "scandalising the court" and "acts interfering with the course of justice", would give rise to precisely the same difficulties as discussed above in relation to the law of contempt as a whole.

PART 3 - EXECUTIVE SUMMARY

18. A summary of our recommendations is as follows:

    (1) We do not recommend any changes in the substantive law relating to contempt in the face of the court. The concept of what conduct can be described as having been committed "in the face of the court" has been stretched so far that there must be some doubt as to whether it serves any useful purpose to treat this as a separate category. We also note that many acts which could be said to fall within this category are also covered by some statutory contempt-like offences.

    (2) We recommend restricting and codifying the strict liability rule along the lines of the UK Contempt of Court Act, 1981 ("the 1981 Act"), sections 1 to 7, but with modifications to reflect the procedural law of the Islands and to take account of more recent developments.

    (3) We do not recommend any changes to the substantive law concerning juror contempt largely because of the modification of the traditional judicial warning to cover the risk referred to in paragraph 1 above.

    (4) Despite its abolition as a separate category of contempt in the UK, we do not recommend abolishing contempt by scandalising the court.

    (5) Acts interfering with the course of justice is, in effect, a rag-bag for all contempts which do not fall conveniently into any other category. We do not recommend any changes to the substantive law.

    (6) We see no need for any changes in respect of so-called civil contempt, that is, the failure to comply with a court order, usually an injunction, or to honour an undertaking given to the court.

[5] See paragraph 35 below.
[6] See sections 71-75; and Part 6 below.

(7) One of our more important recommendations is the introduction of a provision to ensure that, on an application for committal or where the court acts of its own motion, it will not proceed to consider the guilt or otherwise of the alleged contemnor, unless it is first satisfied that he is, or has been, accorded certain protections which, in effect, replicate the relevant provisions of section 7 of the Bill of Rights. This will affect the way in which common law contempts are disposed of including all of the different categories referred to above. We also recommend the introduction of maximum penalties for common law contempt.

(8) In so far as statutory contempt-like offences, we draw a distinction between those which effectively by-pass the Criminal Procedure Code by giving the court summary powers of disposal similar to those exercised by the Grand Court in dealing with common law contempts and those which create statutory offences stricto sensu, the prosecution of which is governed by the Criminal Procedure Code. The former need to be made compliant with section 7 of the Bill of Rights. In so far as the latter are concerned, we make some minor proposals which are discussed below.

(9) With regard to tribunals, there can be no doubt that the Grand Court, in the exercise of its supervisory jurisdiction, can punish contempts committed before, or in relation to, those tribunals which possess the characteristics of a court of law. We do not propose any changes in this regard.

PART 4- CONTEMPT IN THE FACE OF THE COURT

19. We agree with the CILS Response that no attempt should be made to alter the substantive law. The Response went on to make certain recommendations as to the manner in which contempts of this kind should be disposed of. We deal with procedural aspects in Part 10 below.

Recording of proceedings

20. To a degree this topic has been overtaken by events. In the CP, we referred to section 9 of the 1981 Act which makes it a contempt, except with the leave of the court, to use, or to bring into court for use, any tape recorder or other instrument for recording sound, or to publish a recording of proceedings made by such means to the public or any section of the public. Section 41 of the UK Criminal Justice Act, 1925, makes it a summary offence to take photographs in court of the judge, any juror or witness or any party to the proceedings. The expression "in court" is defined to include the building or the precincts of the building in which the court is held, the prohibition extending to photographs of any person entering or leaving the court, such building or precincts.

21. On 6 January, 2014, that is, after the CP had gone to press but before it was published, Practice Direction No 1 of 2014 and a related Practice Guidance were issued. Both deal with the "use of portable cameras, recording and electronic devices, including cellular phones and laptop computers, in and from court buildings, courtrooms and judge's chambers". The Practice Direction deals with the use of such equipment by attorneys, counsel, assistants, etc., the Practice Guidance with use by the press and the general public. We consider that the Practice

Direction and, provided it is brought to the attention of the general public whether by posting in and about court buildings or otherwise, the Practice Guidance are sufficiently comprehensive to obviate the need for any legislation in this area.

22. The one area which is not covered is the taking of photographs of, in particular, those accused who are in custody being escorted by police or prison officers into and/or out of the main court building. We are not aware that this causes any problem even in cases where identity is an issue in the trial. The jury, if there is a jury, will see the accused in the dock and, even if the trial goes into a second day, it is difficult to see what difference their seeing a picture of the same person being escorted into the building by police or prison officers will make to their verdict. Different considerations apply, where identity is in issue, to the publication of photographs at an earlier stage of the prosecution process unrelated to court appearances. In that situation, the question will relate to the application of the strict liability rule. Accordingly, we do not recommend any legislation restricting the taking, or publication, of photographs, etc., of persons entering or leaving court buildings.

Professional privilege

23. Section 10 of the 1981 Act was designed to give journalists a modified form of privilege if questioned in the witness box concerning their sources of information. It provides that any person who refuses to disclose his sources will not be guilty of contempt "unless it be established to the satisfaction of the court that disclosure is necessary in the interests of justice or national security or for the prevention of disorder or crime". Prior to the introduction of this section, a journalist who refused to disclose his sources was guilty of contempt of court.

24. We have two comments relevant to whether a similar provision should be introduced here. First, we doubt whether the issue is ever likely to arise here. The pre-1981 cases in the UK concerned proceedings before tribunals of inquiry established pursuant to the UK Tribunals of Inquiry Act, 1921, tribunals which are invariably chaired by a High Court judge and have significant investigative powers. We have no similar legislation here. The only area where the privilege might come into play is in relation to disclosure actions pursuant to the *Norwich Pharmacal* jurisdiction. Although that jurisdiction has from time to time been exercised in the Islands we are not aware that there is any instance of a person, journalist or otherwise, being asked to reveal his sources of information.

25. Secondly, the reference in section 10 to disclosure being necessary "in the interests of justice" is, unless a restrictive interpretation of that phrase is adopted, in danger of emasculating the protection intended to be afforded. If a question is not relevant, it should not be asked: if it is relevant, a refusal to answer it may not be in the "interests of justice".

26. The CILS Response agreed that the introduction of a provision similar to section 10 was unnecessary but went on to add that it might be prudent "to clarify the extent of the protection accorded to journalists and, in particular, when journalistic sources are <u>not</u> protected" (CILS emphasis). We have some difficulty in following this. Absent section 10 or something similar, journalists are in the same position as any other witness- if the question is relevant, they must

answer it under pain of contempt. In the context of giving oral evidence, journalistic sources are not protected at all.

27. We do not recommend the introduction of section 10 or any other statutory provision dealing with the protection of sources of information from examination or cross-examination.

PART 5 - CONTEMPT BY PUBLICATION IN RELATION TO PARTICULAR PROCEEDINGS

28. As indicated above, we favour the introduction of provisions similar to those appearing in sections 1 to 7 of the 1981 Act but with certain modifications. Sections 1 to 7 of the 1981 Act first defines "the strict liability rule" and then subjects it to certain qualifications. The CILS Response agreed broadly with what was proposed in the CP. Part 2 of the Contempt Bill incorporates our recommendations and it will be sufficient to address here the respects in which those provisions differ from those contained in sections 1 to 7 of the 1981 Act.

29. The principal differences are as follows:

    (1) We have added to the definition of "publication" in section 2(1) of the 1981 Act, after the words "addressed to the public at large or a section of the public", the words "or which, having regards to the nature of the communication, the person making the communication should have been aware that the same would or might come to the attention of the public at large or a section of the public". We are seeking comments on whether this addition is really necessary but it is designed to prevent the perhaps unlikely situation where a citizen journalist has responded online to an invitation to comment on some item from an online publication claiming that he was not aware that his online comment would or might end up in the public domain. We say "or might" since, although we have had no response from the media, we cannot believe that they do not have some monitoring system to protect themselves not only from contempt proceedings but libel actions.

    (2) Clause 2(4) of the Bill deals with one by-product of the internet age. Newspapers have a limited shelf-life. Broadcasts are necessarily instantaneous. But online items may remain there, and be accessible to the public, long after they first appear. Special provision has to be made for such items, the continuing accessibility of which may prejudice a fair trial notwithstanding that they first appeared before the relevant proceedings became "active" within the meaning of clause 5 of the Bill. It is thought to be too burdensome to expect those responsible for the first appearance of such items to have to trawl through their archives with a view to deleting such items on pain of being in contempt. Clause 2(4) reflects the non-statutory practice adopted in the UK and recommended by the UK Law Commission for dealing with this problem.

    (3) Clause 5(2) reflects the relevant provisions of the Criminal Procedure Code (2014 Revision) dealing with the initiation of the criminal process. More generally, Clause 5 is not markedly different from its 1981 Act counterpart except that, where there is no jury involvement, that is, in criminal proceedings, after verdict but before sentence, and in appellate proceedings,

we see no sufficient reason for regarding the proceedings as "active". Notwithstanding that juries are rarely employed in civil cases, we propose to treat such cases as active within the limits specified in clause 5(5) to avoid the possibility of witnesses being influenced by prejudicial material.

(4) Clause 7(2) of the Contempt Bill codifies the existing practice in both the UK and the Islands.

(5) In Clause 9, the savings clause, we have not followed section 6(c) of the 1981 Act in exempting from sections 3 to 8 of the Contempt Bill, intentional contempts, that is, those which not only have the tendency of interfering with the due administration of justice but which were intended to do so. In the UK, section 6(c) has led to some debate as to what kind of intention is required and, in particular, whether recklessness is sufficient. We think, and the CILS Response agreed, that these debates are best avoided by leaving the mental element, if it exists at all, to be decided at the penalty stage.

30. In the CP, following the traditional textbook treatment, we dealt with the publication of information relating to proceedings held in private as if, like contemporary reports of proceedings held in public, it formed part of a consideration of the strict liability rule. This is not strictly accurate. Section 4 of the 1981 Act which dealt with public proceedings is truly a qualification of the strict liability rule which we have adopted in clause 7 of the Contempt Bill.

31. However, the equivalent UK legislation dealing with private proceedings, section 12 of the Administration of Justice Act, 1960, is designed not to introduce a qualification of the strict liability rule but to clarify the uncertainty at common law as to whether the publication of information relating to private proceedings amounted to contempt merely by reason of the fact that the proceedings were held in private. This led us to propose the adoption of section 12 of the UK 1960 Act, cross-referenced to the equivalent legislation in the Islands, but with the omission of the words "of itself" in section 12(1), a proposal with which the CILS agreed. On reflection, we have decided to retain those words since we do not consider it appropriate to exempt the publication of information relating to private proceedings from any possible contempt liability simply because it does not fall within any of the instances specifically excepted from such immunity by clause 11(1). It is not difficult to imagine circumstances where such publication would be prejudicial to the same or other proceedings which are then active. The only alternative would be to insert a phrase such as "without prejudice to the application of any other branch of the law of contempt" which is more cumbersome and adds nothing to the words "of itself".

PART 6 - JUROR CONTEMPT

32. In the CP, we considered two aspects of juror contempt, first, jurors surfing the internet in search of items which they perceive to be relevant to the case in respect of which they are sitting as jurors and, secondly, the disclosure of information concerning the jury's deliberations.

33. Our views on the first aspect, with which the CILS Response agreed, have also been overtaken by events, namely, the publication of Practice Direction No 3 of 2014. This Practice Direction contains a model direction which, among other things, states that a failure to comply will be a

contempt of court punishable by imprisonment or a fine. This accords with the views expressed in the CP and the CILS Response.

34. In England and Wales, following a recommendation from the Law Commission, this and related types of conduct have now been made the subject of specific statutory offences, triable on indictment and punishable with a term of imprisonment of two years, a fine or both.[7] Although we have considered the discussion in the relevant report of the Law Commission[8], we consider that it would be premature, following so closely upon the heels of the Practice Direction, to introduce similar legislation here. There is no evidence that juror research takes place here although we agree with the CILS Response that it very likely does. In England and Wales, on the other hand, there have been a number of recent reported decisions which demonstrate that the problem is by no means uncommon. If subsequent events suggest that the Practice Direction is less than effective this issue can be revisited.

35. The views expressed in the CP relating to the second aspect of juror contempt, namely, that nothing equivalent to section 8 of the 1981 Act should be adopted for the reasons given in paragraph 71 of the CP, were accepted in the CILS Response. In this context, we should refer to further statutory changes made in England and Wales following the recommendations of the Law Commission in the report mentioned above.[9] Section 8 has been repealed and replaced with a similar prohibition on jury disclosure but with exceptions which permit disclosure to specified persons or bodies for the purposes of revealing instances of juror misconduct either to facilitate the prosecution of the relevant juror or the correction of a miscarriage of justice.[10] The Law Commission's recommendation that a further exception should be introduced to permit authorised research into the jury system appears not to have been adopted.

36. We do not see the need to introduce anything equivalent to section 8 of the 1981 Act with or without the exceptions. Although the possibility that juror misconduct may occur from time to time, whether or not resulting in a miscarriage of justice, cannot be ruled out, there is no, not even anecdotal, evidence that such is the case. Nor are we convinced that the common law relating to jury disclosure cannot be accommodated to deal with that possibility particularly since the advent of the Bill of Rights. It should be remembered that the UK Law Commission was concerned to address the blanket prohibition introduced by section 8 of the 1981 Act, a provision which is not part of the law of the Islands.

PART 7 - SCANDALISING THE COURT

37. Section 33 of the UK Crime and Courts Act, 2013, provides that "scandalising the judiciary …… is abolished as a form of contempt of court under the common law of England and Wales" but also that "that abolition does not prevent proceedings for contempt of court being brought against a person for conduct that immediately before that abolition would have constituted both scandalising the judiciary and some other form of contempt of court". In the CP we

[7] Criminal Justice and Courts Act, 2015, sections 71-73 (amending the Juries Act, 1974).
[8] Law Commission Report: "Contempt of Court (1): Juror Misconduct and Internet Publications" (Law Com No 340).
[9] Ibid.
[10] Criminal Justice and Courts Act, 2015, section 74.

expressed the view that, in this context, the circumstances affecting the Islands were different from those affecting England and Wales and that here the total abolition of this form of contempt was inappropriate. The CILS Response agreed. We went on to suggest that "scandalising the court" should become a purely statutory offence with which the CILS Response also agreed adding that it should be triable on indictment only. A consideration of the practical difficulties of this approach, which we have summarized generally in Part 2 above, have led us to change our view but, since these are essentially procedural questions, we discuss them further in Part 10 below.

PART 8 - ACTS INTERFERING WITH THE COURSE OF JUSTICE

38. In the CP, we said that "we would be inclined to take this residual category out of the law of contempt altogether and attempt to impose some kind of consistency" in the existing statutory offences which might be said to fall into this category. The CILS Response, although expressing no strong view on the matter, shared our inclination. Again, for the reasons referred to in the previous paragraph, we now take a different view which we discuss in Part 10 below.

PART 9 - CIVIL CONTEMPT

39. The CILS Response agreed with our view that this form of contempt, which is generally confined to civil cases, works perfectly satisfactorily and that, other than in respect of the introduction of maximum penalties, it can be left as it is.

PART 10 - JURISDICTION, PROCEDURE AND PENALTIES

Jurisdiction

40. We do not recommend any change to the existing respective jurisdictions of the Grand Court and the Summary Court, namely, that the determination whether there has been a contempt at common law and the imposition of an appropriate penalty will remain exclusively with the Grand Court irrespective of whether the particular contempt relates to the Grand Court or the Summary Court or to proceedings in either. The Summary Court's jurisdiction will be limited to, first, exercising those summary powers which it has under existing legislation modified by reference to the matters referred to in section 7(2) of the Bill of Rights and, secondly, trying statutory contempt-like offences which, having regard to the Criminal Procedure Code, fall to be tried in the Summary Court.

Procedure

41. As indicated above, there are three separate categories of offence to consider which, absent any statutory provisions, would likely constitute common law contempts. First, there are those contempts which continue to be governed exclusively by the common law. Secondly, there are those few existing statutory provisions, of limited application, which are not subject to the Criminal Procedure Code and can be disposed of summarily. Thirdly, there are those statutory offences which attract the application of the Criminal Procedure Code.

42. The procedure for disposing of common law contempts will be governed by clause 12(1) of the Contempt Bill which provides that, whether on an application for committal or on the court acting of its own motion[11], the court will not proceed to consider whether the alleged contemnor is guilty of contempt unless it is first satisfied of certain matters. Those matters replicate the provisions contained in section 7(2) of the Bill of Rights which afford a fair trial to the alleged contemnor.

43. For the reasons given in paragraph 14 above, we consider that, in respect of those cases which fall into the second category, the court should at least have the option to continue to deal with them summarily but subject to suitable section 7 protection. The provisions in question are sections 28 and 29 of the Summary Jurisdiction Law and sections 42 and 45 of the Criminal Procedure Code.[12] This we seek to achieve by section 12(2) of the Contempt Bill.

44. Those in the third category will continue to be disposed of in accordance with the provisions of the Criminal Procedure Code, provisions which afford to the accused no lesser protection than section 7. We should emphasize that these categories are not writ in stone. For example, it would be open to any court faced with a case in the second category which is also covered by a statutory offence falling in the third category to decline to exercise the summary method of disposal and simply refer the matter to the relevant prosecuting authority.

45. As mentioned in paragraph 18 above, the CILS Response to that part of the CP dealing with contempt in the face of the court agreed that the substantive law should be left as it is. However, it went on to express the view that "there should be some new statutory offences applicable to the majority of cases that ensure that contempt proceedings are conducted fairly, comply with Section 7 of the Human Rights Bill[13] and afford the alleged contemnor the formal protections of the Criminal Procedure Code" (our emphasis). This view is equally applicable to all contempts and not just those which can be regarded as being "in the face of the court". While we agree that all proceedings for common law contempt, whether in the face of the court or otherwise, should be conducted fairly and comply with section 7 of the Bill of Rights, we cannot see how it is practicable to also impose on them the requirements of the Criminal Procedure Code. If this approach were to be adopted, it might be more straight-forward to abolish the common law of contempt and simply make the whole, or specified branches of it into statutory offences, an approach which gives rise to the various difficulties we have attempted to highlight in Part 2 above. We accept that the rights referred to in section 7(2) are expressed to be "minimum rights" but, given that it is not practicable or desirable to codify the whole of the law of contempt or, with the exceptions noted above, any branch of it, we consider that it is necessary to preserve a degree of flexibility somewhere between the current peremptory methods of disposal and the full panoply of the Criminal Procedure Code. That we have sought to achieve in both subclauses (1) and (2) of clause 12 of the Contempt Bill and in section 111(2) of the Penal Bill. Where questions of contempt arise, we are confident that,

[11] The need for this provision is most likely to arise where the court is acting of its own motion since Part I of GCR Order 52 goes some way to affording the alleged contemnor his section 7 rights.

[12] Section 39 of the Summary Jurisdiction Law and section 111(2) of the Penal Code are also relevant in this context but we deal with these provisions separately: see paragraph 52 below.

[13] i.e.the Bill of Rights

while affording to the alleged contemnor his or her section 7 rights, the court will adapt its procedures to the circumstances of the particular case.

46. As mentioned in paragraph 35 above, the CILS Response to that part of the CP dealing with scandalising the court, agreed with the view expressed in the CP that this branch of the law of contempt should be put on an exclusively statutory basis and added that it should be tried on indictment only. As indicated above, we now take a different view for the reasons given in Part 2 above. Although there are some statutory contempt-like offences which might come within the common law concept, we now favour retaining scandalising the court as it is both substantively and, save for the protection afforded by clause 12 of the Contempt Bill, procedurally.

Penalties

47. The CILS Response expressed the view that there should be no statutory maximum term of imprisonment in the case of intentional contempts. (We take the reference to intentional contempts to mean contempts where the consequences which in fact occur are intended by the contemnor or he is at least reckless as to whether or not they occur.) We disagree. Section 14(1) of the 1981 Act imposes a maximum term of imprisonment of two years. That provision applies to intentional contempts since it is not in that part of the 1981 Act which excludes intentional contempts from the benefit of the modifications of the strict liability rule dealt with in sections 1-5 of the 1981 Act: see section 6(c). We are not aware that cases of contempt are any more prevalent in the Islands than they are in the United Kingdom or that there is any other reason for not imposing a maximum term of imprisonment. The more difficult question is what that maximum should be. We are conscious of the fact that the Penal Code, in dealing with contempt-like offences imposes maxima ranging from four years to seven years. We believe that some of these maxima are too high[14] but, at the same time, we accept that there should be some correlation between the respective maxima for common law contempt and for statutory contempt-like offences. Doing the best we can we would propose a maximum of four years.[15] As in the UK, the power of the Grand Court to impose unlimited fines will remain as will the power to allow earlier discharge where, for example, the contemnor purges his contempt.

PART 11- STATUTORY CONTEMPTS

48. We have already dealt with such procedural amendments as we propose in respect of the three categories referred to in paragraph 39 above. The Contempt Bill and the Penal Bill propose the amendment or repeal of certain existing statutory contempt-like offences which fall into our third category. The relevant provisions are section 27 of Grand Court Law (2015 Revision), section 39 of the Summary Jurisdiction Law (2015 Revision) and sections 107 and 111 of the Penal Code (2013 Revision).

[14] See Part 11 below for our proposals in this regard it should be remembered that although the maxima are rarely imposed, they do affect the tariff for all offences falling within the particular category.

[15] Under section 38(1) of the Penal Code, four years is the maximum term of imprisonment where no other term is specified.

49. There are two types of provisions which we do not regard as penal in nature and do not therefore engage section 7 of the Bill of Rights. First, the Grand Court has an inherent power to order and procure the removal from court of persons who misconduct themselves. This power is recognised by section 35(1)(b) of the Judicature Law (2013 Revision) and is, by section 35(2), extended to the Summary Court. Although where a court is sitting in public, any member of the public has a right to attend, that right is not unqualified. It is dependent on good behavior. Secondly, provisions designed to secure the attendance of witnesses at court cannot be regarded as penal even if their attendance is ultimately secured by an arrest warrant[16]: However, the imposition of sanctions for non-attendance are penal whether they fall into our second or third category or both. Whether the deprivation of liberty, even for the short time between the offending act and "the rising of the court"[17] can be regarded as engaging section 7 depends upon whether that can be regarded as part of the trial process or no more than equivalent to a remand in custody.[18] In the context in which those statutory references appear, we incline to the latter view.

50. In clause 14 of the Contempt Bill, we have proposed the repeal of section 27 of the Grand Court Law. Section 27(1) provides that "without prejudice to any powers conferred upon the Court under section 11(1), the Court shall have jurisdiction to order the arrest of and to try summarily any person guilty of any contempt of the Court or any act insulting to or scandalising the Court or disturbing the proceedings thereof, and any person convicted under this section is liable to imprisonment for six months and to a fine of five hundred dollars". Section 27(2) provides that "for the purposes of this section, contempt of court shall include any action or inaction amounting to interference with or obstruction of, or having a tendency to interfere with or to obstruct, the due administration of justice."

51. This section is not entirely easy to construe but, that apart, it is subject to the following objections:

    (a) It is unnecessary. Section 11 confers upon the Grand Court "the like jurisdiction within the Islands which is vested in and capable of being exercised in England by" the High Court and the Divisional Court. There can be no doubt that this confers upon the Grand Court the inherent jurisdiction of a superior court of record in cases of common law contempt both of the Grand Court itself, the Summary Court and any inferior courts.
    (b) The power to try summarily is, without more, contrary to section 7 of the Bill of Rights. At the very least, section 27 would need to be amended to make it subject to clause 12 of the Contempt Bill.
    (c) The definition of "contempt of court" in section 27(2) arguably encompasses the strict liability rule but without the modifications we recommend in Part 2 of the Contempt Bill. Again, at the very least, some appropriate amendment would be required.
    (d) Some of the acts encompassed by the phrase "insulting or scandalising the Court or disturbing the proceedings thereof" are covered and will continue to be covered by provisions of the Penal Code.

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[16] A procedure exempted from the personal liberty section of the Bill of Rights: see section 5(2)(d).

[17] See Summary Jurisdiction Law, section 39, Penal Code, section 111(2).

[18] See Bill of Rights, section 5(2)(e).

(e) For some conduct which would fall within this section, the maximum penalties are too low.
(f) We are not aware that section 27 has ever been invoked.

52. In clauses 3 and 4 of the Penal Bill, we propose the amendment of section 107 and the repeal and substitution of 111 of the Penal Code respectively. With regard to section 107, clause 3 provides for the repeal of paragraph (d) which makes it an offence to do "anything in order to obstruct, prevent, pervert or defeat the course of justice." This provision, like section 27 of the Grand Court Law, is expressed in extremely broad language but, unlike section 27, it carries a maximum sentence of seven years. It arguably includes much of the common law of contempt such as contempt in the face of the court, the strict liability rule and scandalising the court but without the limitations to which those forms of contempt have been subjected by judicial decisions. Nor does it give the accused the benefit of the modifications of the strict liability rule which we are proposing in Part 2 of the Bill. It also raises the alternative prospect of what are, in effect, contempt cases being tried either by the Summary Court or by a jury, neither of which we would regard as desirable. Rather than subject paragraph (d) to special procedural limitations, we would prefer its repeal. We doubt whether this will result in any person who might have been successfully prosecuted under this paragraph escaping criminal liability given the overlap with those forms of common law contempt mentioned above.

53. We also consider that, whether or not our proposed deletion of paragraph (d) is accepted, seven years is too high a maximum term of imprisonment for the various offences falling within section 107. Generally, four years is the maximum for contempt-like offences under Part IV of the Penal Code, the only exceptions being perjury, subornation of perjury and fabricating evidence where the maximum is seven years. As pointed out above, four years is also the "default" maximum and we have proposed an equivalent maximum for common law contempt.

54. Clause 4 of the Penal Bill replaces the existing section 111 of the Penal Code ("Offences relating to judicial proceedings") with a new section 111. Paragraphs (a) and (b) of the new section replace paragraphs (a), (b) and (i) of section 111(1) and section 39 of the Summary Jurisdiction Law. These provisions deal with conduct which might otherwise constitute contempt in the face of the court or scandalising the court.

55. Paragraph (c) is similar to the existing paragraph (b) but expressed in language derived from sections 28 and 29 of the Summary Jurisdiction Law and sections 42 and 45 of the Criminal Procedure Code. As indicated above, these sections deal with defaulting witnesses but provide for summary disposal. We consider it desirable that, as under the present law, the court retains the option of simply referring the matter to the relevant prosecuting authority rather than exercising its summary powers particularly as the latter will need to be qualified by reference to the protections contained in section 7(1) of the Bill of Rights.

56. Paragraph (d) will replace paragraphs (f) and (g). These provisions deal with wrongful interference with a witness whether before or after he has given evidence.[19]

[19] Although some overlap with section 107(1)(b) of the Penal Code will remain, we are not unduly concerned about that since, if our proposals are accepted, both offences will carry the same maximum penalty, namely, four years.

57. We do not consider it either desirable or necessary to replace the remaining paragraphs of section 111. Our reasons for this conclusion are as follows-

(1) Paragraph (d)[20] would appear to cover matters which fall within either the fair and accurate reporting of proceedings, the strict liability rule or scandalising the court but are not necessarily co-extensive with their common law equivalent. We consider that they should be dealt with as common law contempts and not as statutory offences to be tried, irrespective of the court in which the relevant judicial proceeding is being held, either by the Summary Court or with a jury.

(2) Paragraph (e)[21] is covered by clause 11 of the Contempt Bill.

(3) Paragraph (h)[22] deals with a situation which is normally remedied by the issue of a writ of restitution rather than an application to commit for contempt.[23] Similarly, we do not see the need for a specific statutory offence: there does not appear to be any similar statutory offence in respect of a judgment debtor who wrongfully retakes possession of goods taken under a writ of fieri facias.

PART 12 - TRIBUNALS

58. In *A-G v BBC*[24] the House of Lords decided that a local valuation tribunal was not "an inferior court" within the meaning of RSC Order 52, rule 1(2)(a)(iii) and accordingly that the Queen's Bench Divisional Court did not have exclusive jurisdiction to deal with contempts committed in relation to such a tribunal. Although this decision might seem to be of limited application, the reasoning both in that and subsequent decisions was to the effect that a superior court's supervisory jurisdiction to punish for contempt of court in respect of inferior courts or tribunals was not as extensive as its jurisdiction to correct errors, etc., by way of judicial review.

59. Contempt of court assumes that the body in relation to which the contempt is alleged to have been committed must be a court of law, that is, a body established by law to exercise the judicial power of the state rather than administrative functions. GCR Order 52 is framed in different terms to RSC Order 52 and, in particular, contains no reference to "an inferior court". However, in view of the English authorities, we consider that the power of the Grand Court to punish for contempt of court extends to those, but only those, inferior bodies which can properly be described as courts of law. These will undoubtedly include the summary court and the coroner's court and may include the various appeal tribunals such as the Immigration

[20] "A person who – (d) while a judicial proceeding is pending, makes use of any speech or writing misrepresenting such proceeding or capable of prejudicing any person in favour of or against any parties being taken or had."

[21] "A person who – (e) publishes a report of the evidence taken in any judicial proceeding which has been directed to be held in private".

[22] "A person who – (h) wrongfully retakes possession of land from any person who has recently obtained possession by a writ of court".

[23] See *Alliance Building Society v Austen* [1951] 2 All ER 1068.

[24] [1981] AC 303.

Appeals Tribunal and the Planning Appeals Tribunal. Whether a particular body qualifies for protection from contempts will have to be decided on a case by case basis.

60. In the light of the foregoing, we see no need either to extend or restrict the existing jurisdiction of the Grand Court in respect of contempts of court committed in relation to inferior bodies and, accordingly, we make no recommendations in this regard.

Law Reform Commission

APPENDIX A

CONTEMPT OF COURT BILL, 2016

APPENDIX B

PENAL CODE (AMENDMENT) BILL, 2016