



THE CRIMINAL BAR ASSOCIATION

RESPONSE

TO THE CRIMINAL PROCEDURE RULE COMMITTEE INVITATION TO COMMENT ON A PROPOSAL TO REVISE PART 62 OF THE CRIMINAL PROCEDURE RULES:

CONTEMPT OF COURT

The Criminal Bar Association

1. The Criminal Bar Association represents about 3,600 employed and self-employed members of the Bar who appear to prosecute and defend the most serious criminal cases across the whole of England and Wales. It is the largest specialist bar association. The high international reputation enjoyed by our criminal justice system owes a great deal to the professionalism, commitment and ethical standards of our practitioners. The technical knowledge, skill and quality of advocacy guarantee the delivery of justice in our courts; ensuring on our part that all persons enjoy a fair trial and that the adversarial system, which is at the heart of criminal justice, is maintained.

Introduction

2. On the 25th May 2010 the Criminal Procedure Rule Committee Secretariat, published an invitation to comment on a proposal to amend the existing part 62 of the Criminal Procedure Rules (which came into force in October 2009¹) to deal additionally with ‘contempt in the face of the court’². It stated at paragraph 77:

“By section 69 of the Courts Act 2003, Criminal Procedure Rules are to govern the practice and procedure of the criminal courts. It might therefore be expected that the Criminal Procedure Rules would comprise a substantially complete set of rules governing the court’s procedure. When considering the exercise of a power to make an order for committal for contempt in the court-room, a reader might be surprised to find instead only rules relating to contempt by way of disobedience of an order of the court. For the rules to be incomplete, leaving the relevant procedural requirements to

¹ Schedule 6 of the Criminal Procedure (Amendment) Rules 2009

² Consultation Letter 250510

be explained in various cases, may promote confusion, misunderstanding and, potentially, injustice”.

3. It added at paragraph 78:

“The Committee now proposes to make rules to govern the procedure in criminal courts in cases of contempt in the face of the court as set out in annex 1:

- a. so that the rules will extend to the exercise of the power to deal with contempt of court in the face of the court, providing a separate, simple, procedure;
- b. with the objective of making rules that are –
 - i. concise but comprehensive,
 - ii. capable of being understood by non-lawyers as well as by lawyers,
 - iii. sufficiently clear nonetheless to avoid ambiguity,
 - iv. in terms that accurately incorporate procedural requirements established by relevant case law,
 - v. annotated to identify the relevant jurisdictional provisions (meaning, provisions that confer powers on the court); and
- c. in accordance with the statutory duty imposed on it by section 69(4) of the Courts Act 2003, which requires that “any power to make or alter Criminal Procedure Rules is to be exercised with a view to securing (a) the Criminal Justice System is accessible, fair and efficient, and (b) the rules are both simple and simply expressed”.

4. The rules at present make provision only for disobedience to a court order. In other words the current rules permit the Crown Court to deal with what would ordinarily be recognised as a ‘civil’ contempt – a breach of an order, requiring a remedial or coercive response, rather than a ‘criminal’ contempt – “in the face of the court”, after which punishment follows such as a fine or custody³. It is intended that proceedings for a ‘civil’ contempt should be instigated by one of the parties to the litigation; but that a ‘criminal’ contempt in the face of the court should be started by the tribunal itself⁴.

5. However a reading of the proposed rules makes it abundantly clear that such a division is aspirational only and that there is no procedural limitation on either a person or the court in applying for or enquiring into either form of contempt.

³ Invitation to Comment (“ITC”), General Comments, paragraph 13

⁴ ITC, General Comments, paragraph 16

6. In relation to a ‘criminal’ contempt the court has three options available to it: (a) a summary procedure (b) a formal procedure (still classified as summary but usually invoked at the end of the substantive case) (c) referral to the prosecuting authorities⁵.
7. In relation to the first of these – the summary procedure; the suggested amendments to part 62 draw heavily upon the Civil Procedure Rules and the preserved Rules of the Supreme Court (“RSC”) Order 52 and the associated practice direction⁶. However, it is noteworthy that the proposed rule changes *presume* that the procedure to be followed will be the formal procedure, unless there are powerful reasons for proceeding summarily⁷.
8. This rule as amended would continue to apply in the Magistrates’ Court, Crown Court and Court of Appeal (Criminal Division). It would not apply in the High Court where existing rules make provision for such contempt⁸.
9. The matter as a whole came to prominence in **R v. M** EWCA Crim 1901, a decision of the Court of Appeal (Criminal Division) delivered on 14th August, 2008, when there was a challenge to the jurisdiction of the Crown Court to punish for contempt a breach of a term of a restraint order. The court upheld the jurisdiction but concluded that the procedure was unclear.
10. As a result the present part 62 was enacted. The Criminal Procedure Rule Committee decided against dealing with contempt as a small section of other parts; instead opting for a stand alone part to deal with all matters⁹.
11. The *powers* of the various courts to deal with contempt in the face of the court, as opposed to the *procedure* has been set out fully by the Secretariat in the invitation to comment at paragraphs 22-25. It is of some importance to note that findings of contempt are not convictions and, for example, therefore a community punishment is not an option¹⁰. There is a question of whether any period of custody ordered by the court for contempt (unless otherwise stated, a maximum of 1 month in the

⁵ ITC, Procedure – Prosecuting Criminal Contempt, paragraph 61; **R v. AS** [2008] EWCA Crim 138, per Thomas LJ

⁶ ITC, Procedure – Prosecuting Criminal Contempt, paragraphs 66-67

⁷ ITC, Proposed Criminal Procedure Rules relating to Contempt, paragraph 80

⁸ ITC, Introduction, paragraph 3

⁹ ITC, Introduction, paragraphs 10-11

¹⁰ ITC, General Comments, paragraph 27 (b)

Magistrates' Court and 2 years in a senior court¹¹) is or is not a sentence and whether the provisions governing the length of time actually served apply. The senior courts do have a power to 'suspend' any order for committal to custody¹². It is simply unclear whether the Magistrates' Court has a similar power¹³.

12. It is important to note that there is some confusion over whether in the senior courts there exists a jurisdiction to discharge a contemnor from any period of custody being served. The Secretariat proposes a 'note' within the amended rule setting out the relevant statutory provisions after concluding that the lack of clarity should not prevent a rule being made¹⁴.
13. The Secretariat has made a detailed case in relation to having to distinguish the various powers, procedures and issues such as instigation of proceedings, evidence, bail / remand et al, depending on (a) the court and (b) the nature of the contempt. As a result the rules may be more complex than the ideal, however to do otherwise would inevitably cause more confusion than that which the rules are supposed to clarify¹⁵.
14. In keeping with that theme, the proposal is that part 62 be divided into sections. This currently occurs only in parts 6 and 76 of the current Criminal Procedure Rules, but it is suggested that to keep the content of the proposed part 62 clear a similar course should be followed¹⁶.

Executive Summary of Answers

15. The CBA supports the changes to part 62 as set out in the proposed rule annexed to the invitation to comment. However there are certain omissions that CBA has some concerns about which are reflected below in the answers given to the questions posed.
16. Our comments and suggestions are made to seek to clarify the position in relation to a small number of areas with the particular concern that many respondents, especially in relation to contempts said to be committed in the face of the court (and therefore

¹¹ ITC, General Comments, paragraph 29

¹² ITC, General Comments, paragraph 40

¹³ ITC, General Comments, paragraph 45

¹⁴ ITC, General Comments, paragraph 38

¹⁵ ITC, General Comments, paragraphs 46-56

¹⁶ ITC, Proposed Criminal Procedure Rules relating to Contempt, paragraph 83-84

likely to be the subject of an enquiry by the court rather than on application by a person), will be litigants in person.

Answers to Questions

17. The following questions are posed and answered:

Consultation question 1: Is it helpful to make rules about contempt in the courtroom etc in the Criminal Procedure Rules?

18. The CBA agrees that a codification of the procedures that have evolved in relation to contempt is useful.

Consultation question 2: Are there any significant differences in the jurisdiction of the criminal courts to deal with contempt that have not been mentioned in this paper that should be taken into account by the proposed rules?.

19. Although not a question of jurisdiction, the CBA would ask whether a note would be useful indicating whether any period of custody for a contempt is subject to the early release provisions. In this way judges will know what sentence they are actually imposing (and respondents will know precisely what sentence they are receiving) and it may avoid unnecessary and expensive applications to discharge.

Consultation question 3: Are the differences in the jurisdiction of the criminal courts for dealing with contempt adequately met by the procedural requirements of the proposed rules?

20. The CBA agrees that as a whole the relative differences in the jurisdiction of the criminal courts for dealing with contempt are properly reflected in the proposed rules; subject only to the suggestions made in this response overall.

Consultation question 4: Do consultees agree that there is no need for rules about bail to be included in the new Part 62 rules about contempt?

21. The CBA suggests for the sake of the utmost clarity that, given respondents to such contempt applications or enquiries may well be *in personam*, it may be beneficial to mention at an appropriate place, either as a rule or as a note that (a) in relation to an allegation of contempt by virtue of breach of an order there is no power to remand in custody (b) in relation to allegation of contempt in the face of the court if a hearing is postponed beyond the limits of immediate temporary detention a person cannot be

thereafter detained therefore (and that in relation to the senior courts such immediate temporary detention is limited to a remand until the next business day – although it is accepted this appears in proposed rule 62.14) (c) that bail must be considered and in so considering (d) that Article 5 of the European Convention on Human Rights applies to bail in contempt proceedings.

***Consultation question 5:** Is it clear from rule 62.1 which rules apply to which contempt proceedings?*

22. The CBA agrees it is clear which rule applies to which contempt proceeding. However we pause to note again that the division within the proposed rules is between those allegations of contempt begun on application by a ‘person’ (a word undefined; as opposed to the ‘respondent’ which is defined) and those begun on enquiry by the court. If that is the intent it has been achieved.
23. If the intent, as expressed in terms of aspiration in the body of the invitation to comment, is to divide allegations of contempt into ‘civil’ and ‘criminal’ then it is not clear.
24. However the CBA supports the division that has in fact been made within the proposed rules. There is no logical reason for prohibiting a ‘person’ from making a complaint about a contempt in the face of the court, nor, perhaps more pertinently, from prohibiting the court from enquiring on its own motion into an allegation of a breach of an order.

***Consultation question 6:** Proposed rule 62.2 requires the courts’ determination in contempt proceedings to take place at a hearing but omits any requirement of the sort found in the civil procedure rules that, where, at a hearing in private, an offender is found guilty of contempt of court, when next sitting in public the court is required to name the respondent and state the terms of any contempt proved and the penalty imposed. Should proposed rule 62.2 include some, or all, of these additional requirements?*

25. The CBA does not believe that such a requirement is necessary or appropriate. However it may be beneficial to amend proposed rule 62.2 (1) (a) to read: ‘at a hearing held in public, unless the court considers it appropriate to proceed in private’ (or something similar) and thereby preserve the traditional position in the criminal courts.

26. In other words the CBA sees no reason to depart from the norm in terms of whether a hearing should be public or in private because the subject matter is one of contempt.

Consultation question 7: *Are the general rules in Section 2 appropriate?*

27. The CBA agrees that the rules in section 2 are broadly appropriate.

Consultation question 8: *Should the lists in proposed rule 62.13 include any additional procedural requirements that derive from the Civil Procedure Rules Practice Direction or from case law?*

28. The CBA suggests adding to the list in an appropriate place that a Respondent may take time to consider his response. The CBA is concerned that informing a Respondent about the use of immediate temporary detention does not become (an albeit unintended) bludgeon to a Respondent to admit a behaviour or apologise for something they in fact have not done or should not apologise for. It may be that the court should be required when setting out to a Respondent that it has this power the circumstances under which it might be exercised rather than simply leaving the concept hanging over a Respondent.

29. It may also be worth including as a note that a Representation Order is available for the purposes of contempt and pointing a Respondent to the relevant regulation governing such an application. This will also be a factor militating against proceeding immediately.

Consultation question 9: *Paragraph 3 of proposed rule 62.13 aims to reflect the requirements of the Civil Procedure Rules Practice Direction at paragraphs 12 – 13, that “Normally, it will be appropriate to defer consideration of the behaviour to allow the respondent time to reflect on what has occurred. The time needed for the following procedures should allow such a period of reflection ...”*

- (i) *Does it adequately do so?*
- (ii) *Is the scope of Para (3) of rule 62.13 appropriate? As a general rule, it will apply to all contempt proceedings initiated by the court of its own volition, even where those proceedings might be for a civil contempt of court. (Paragraph 12 of the CPR PD from which it derives relates to committal applications for contempt in the face of the court.)*

Rule 62.14 Review after temporary detention

Rule 62.15 Postponement of enquiry

30. See the answer to question 8 above. The CBA cannot see a paragraph 3 in proposed rule 62.13. If this is a reference to 62.13 (a) (iii) then again see the answer to question 8 above.

Consultation question 10: *Are any of the proposed rules confusing when compared with case law and Civil Procedure Rules' Practice Direction from which they derive?*

31. The CBA considers that the rules are not confusing whether compared to case law or previous rules or practice directions or otherwise.

Consultation question 11: *Should the proposed rules include any provisions that have been omitted?*

32. The CBA is concerned that there is no mention in the proposed rule of the issue of potential bias, as reflected in RSC Order 52 II (13) (6)¹⁷. It maybe that, again in part reflecting the position that many respondents will be litigants in person, either proposed rules 62.13 (2) and 62.14 (4) can make explicit mention of the issue and any application that might be made or a note can be added regarding the same.

33. Other than the comments and suggestions already made the CBA does not believe that adding anything further to the proposed rule will assist.

Consultation question 12: *Do you think these draft rules accurately codify the procedure?*

34. The CBA agrees that procedurally the proposed rule does what it has set out to do; subject to the comments and suggestions already made however we are a little concerned about the potential consequences of rule 62.15 (2) in Section 4 Procedure on Enquiry. If a member of the public has been disruptive in court, is it usually witnessed by the judge. If the enquiry is postponed under rule 62.13 or 62.14, then, pursuant to 62.15, "The court must arrange for the preparation of a written statement..." If the judge is the sole eye witness to the disruptive behaviour, s/he will have to prepare a witness statement that will then be received in evidence under rule 62.16 (3)

¹⁷ ITC, Procedure – Prosecuting Criminal Contempt, paragraphs 66

(a). In such a scenario, the judge will be the witness and, absent any recusal, the fact finding tribunal. Both aspects are troublesome.

ALAN KENT Q.C.

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1st September 2010