



## THE CAYMAN ISLANDS LAW REFORM COMMISSION



### CONTEMPT OF COURT

FINAL REPORT  
31<sup>ST</sup> MARCH, 2020

## **The Cayman Islands Law Reform Commission**

**Chairman:** Mr. Hector Robinson, QC

**Commissioners:** Honourable Justice Alexander Henderson, QC  
Mr. Vaughan Carter, Attorney-at-Law  
Mr. Abraham Thoppil, Attorney-at-Law  
Ms. Reshma Sharma, Solicitor General  
Mr. Patrick Moran, Director of Public Prosecutions

**Director:** Mr. José Griffith, Attorney-at-Law

**Senior Legislative Counsel:** Mrs. Karen Stephen-Dalton, Attorney-at-Law

**Paralegal Officer:** Mrs. Katherine Wilks

**Administrative Secretary:** Mrs. Lourdes Pacheco

## TABLE OF CONTENTS

<b>INTRODUCTION</b>	3
<b>SUMMARY OF RECOMMENDATIONS</b>	7
<b>PARTIAL STATUTORY CODIFICATION SUMMARY OF THE CONTEMPT OF COURT BILL AND THE PENAL CODE (AMENDMENT) BILL</b>	8
<b>CONCLUSION</b>	11
<b>APPENDIX A - CONTEMPT OF COURT BILL, 2020</b>	12
<b>APPENDIX B - PENAL CODE (AMENDMENT) BILL, 2020</b>	13
<b>APPENDIX C - UK CONTEMPT OF COURT ACT, 1981</b>	14
<b>APPENDIX D - CONTEMPT OF COURT CONSULTATION PAPER</b>	15
<b>APPENDIX E - CONTEMPT OF COURT - THE SUB JUDICE RULE</b>	16
<b>APPENDIX F - CONTEMPT OF COURT - CONSULTATION PAPER</b>	17
<b>APPENDIX G - CONTEMPT IN THE FACE OF THE COURT</b>	18
<b>APPENDIX H - CAYMAN ISLANDS LAW SOCIETY RESPONSE TO CONSULTATION PAPER</b>	19

## FINAL REPORT

### CONTEMPT OF COURT

#### INTRODUCTION

1. Lord Diplock stated in *A-G v Times Newspapers Ltd*<sup>1</sup> that-

“In any civilized society it is a function of government to maintain courts of law to which its citizens can have access for the impartial decision of disputes as to their legal rights and obligations towards one another individually and towards the state as representing society as a whole. The provision of such a system for the administration of justice by courts of law and the maintenance of public confidence in it, are essential if citizens are to live together in peaceful association with one another. “Contempt of court” is a generic term descriptive of conduct in relation to particular proceedings in a court of law which tends to undermine that system or to inhibit citizens from availing themselves of it for the settlement of their disputes. Contempt of court may thus take many forms.”.

2. Several Law Reform Commissions and Committees<sup>2</sup> over the years have undertaken the task of reforming the law of contempt, an area of the law seen by many as vague and difficult to understand. Some argue that the law of contempt contravenes normal legal principles in that it requires a judge to act, not merely as a judge, but also as a witness and prosecutor, in contravention of normal legal principles.<sup>3</sup> The Law Reform Commission of Hong Kong (“the Hong Kong Commission”)<sup>4</sup> was of the view that the reason for this lack of understanding in Hong Kong and other jurisdictions may arise from the fact that only some of the law is in statutory form and many provisions are scattered over a number of legislative enactments.

3. The Attorney-General, the Honourable Samuel Bulgin, in 2003 instructed the Legislative Drafting Department to provide a bill to codify the law relating to contempt of court. A draft bill was prepared in 2004 and subsequently transferred to the Law Reform Commission in 2005 for more in-depth research. The draft Bill was reviewed by the staff of the Commission in February 2009 and a revised Contempt of Court Bill (“the draft Bill”) was submitted to the Commissioners for their consideration on 5 March, 2009. The Bill, inter alia, dealt with the following-

- (a) power to punish for contempt in face of court;
- (b) failure to obey or comply with order of court;
- (c) contempt in face of a tribunal;
- (d) definition of spoken or written contempt;
- (e) innocent publication and distribution;
- (f) contemporaneous publication of fair and accurate reports; and
- (g) confidentiality of jury’s deliberations.

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<sup>1</sup> [1974] AC 273.

<sup>2</sup> E.g. Australia, Canada, Hong Kong, Bermuda and UK.

<sup>3</sup> “Contempt in the face of the Court”- Ireland Law Reform Commission (LRC 46- 1994).

<sup>4</sup> Report on Contempt of Court (Topic 4) 1986.

4. The draft Bill was discussed by the Commissioners between September and December 2009. It was agreed in March 2010 to deal with the review in three stages (similar to the approach taken by the Law Commissions of Western Australia and Tasmania) which are (a) contempt in the face of the court (b) contempt by publication and (c) contempt by disobedience to a court order. There will however be a single final report that encompasses the law of contempt as a whole. An internal paper was considered by the Commission in September, 2010.

5. Between 2010 and 2014 the topic of contempt was discussed several times by the Commission. Due to the wide scope of the law in this area the Commission decided in 2014 to continue to deal with the law in stages. As a result three consultation papers were written on the subject, two in 2014 (January 10<sup>5</sup> and March 21<sup>6</sup>) and one in July, 2016<sup>7</sup>.

6. Two relatively recent developments also 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.

7. 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.

8. It was noted in the January, 2014 paper that any paper which attempts to cover the whole of the law of contempt is immediately faced with a problem of classification. The methods by which the due administration of justice can be prejudiced, are many and various ranging from disrupting court proceedings to dismissing your employee because he has given evidence against you. Various classifications have been suggested over the years. For convenience in that paper the Commission dealt with the existing law, and possible changes to it, under the following broad heads -

- (a) contempt in the face of the court;
- (b) contempt by publications tending to prejudice the conduct of particular proceedings;
- (c) juror contempt;
- (d) scandalising the court;
- (e) acts interfering with the course of justice;
- (f) jurisdiction, procedure and penalties; and

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<sup>5</sup> Appendix D.

<sup>6</sup> Appendix E.

<sup>7</sup> Appendix F.

- (g) contempt by disobeying a court order or, what amounts to the same thing, by breaching an undertaking given to the court.

9. The Commission was assisted in the preparation of this paper by the work of other Law Reform Commissions. We refer in particular to the Hong Kong Law Reform Commission's Report (December 1986), the exhaustive Australian Law Reform Commission's Report No 35 (1987), the Western Australia Law Reform Commission's Report, Project No 93 (June 2003) and the UK Law Reform Commission's Consultation Paper referred to above. We would also refer to our earlier Consultation Paper dated 3 September, 2010<sup>8</sup> dealing with contempt in the face of the court.

10. In the paper of January 2014 several questions were posed therein. Those questions included the following-

- (a) Should the existing law of contempt in the face of the court be-
  - (i) Left as it is both substantively and procedurally;
  - (ii) Codified as part of a retained law of contempt; or
  - (iii) Replaced by separate statutory offence?
- (b) If the existing law is to be codified or replaced by separate statutory offences, what should be their substantive content? In particular, to what extent should the codified or new offences contain a mental element other than that the conduct alleged was intentional?
- (c) If the existing law is to be retained or codified, what changes, if any, should be made to the summary manner in which the offence is disposed of? In particular, should there be statutory provisions which regulate disposal and to some degree replicate the protections which an accused would ordinarily be entitled to.
- (d) If the existing law is to be replaced, what immediate powers, falling short of criminal sanctions, does a court require to preserve the integrity of proceedings before it?
- (e) Should the law concerning the reporting of proceedings be clarified by legislation or left to develop by judicial decision as and when required?
- (f) Should there be introduced a specific statutory offence, based on section 41 of the UK Criminal Justice Act 1925 prohibiting the taking of photographs, etc. in court or the publication of such photographs?
- (g) Should such offence extend to the making of video recordings or television broadcasts of proceedings?
- (h) What restrictions should there be on the introduction and use in court of sound recording devices or the publication of recordings thereby obtained?
- (i) Is there a need for the introduction of a qualified privilege similar to that in section 10 of the 1981 Act and, if not in the same terms as section 10, in what terms?
- (j) When should proceedings be treated as becoming and ceasing to be active? In particular, to what extent should the sentencing and appeal processes be treated as active?

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<sup>8</sup> Appendix G.

- (k) Should the strict liability rule be abolished or modified other than by reference to the question of innocent publication or distribution?
- (l) If so, should the mental element of the modified offence be defined by reference to intention or knowledge and, if the latter, knowledge of what?
- (m) Should the burden of proving any modified offence remain with the prosecution or should the absence of intention or knowledge simply be a defence?
- (n) Should a core definition of contempt by publication be introduced by legislation?
- (o) Should intentional contempt be preserved as a separate category or, as we favour, remain a matter for sentencing rather than liability?

11. The second consultation paper dealt only with the sub-judice rule. The media and the former Cayman Islands Law Society were the main responders to the paper in January 2014. The issue which was raised by the media is central to any law of contempt, namely, how to achieve a proper balance between freedom of expression and the right to a fair trial. Therefore the second paper principally discussed the rule commonly referred to as the “sub judice” rule, that is, the rule restricting (or, more accurately, postponing) publications commenting on pending court proceedings until after those proceedings are concluded.

12. After further consideration by the Commission, in July 2016 a Penal Code (Amendment) Bill, 2016 and a Contempt of Court Bill, 2016 together with a third consultation Paper was submitted for public comment. This third paper broadly adopted the same treatment of the topic as in the prior consultation paper although the Commission had prefaced that treatment with some general observations on codifying the law of contempt or any part of it and included an executive summary. The Commission had also added, after the treatment of the principal topics, some discussion of its 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 prior consultation paper.

13. The third consultation paper in July 2016 followed the positive response received by the Commission from the former Cayman Islands Law Society in respect of the Commission’s view that most of the law of contempt should not be codified.<sup>9</sup> The CILS considered that the existing law should be left as it is substantively, retaining the Court’s summary power to preserve the integrity of the proceedings before it, but that there should be some new statutory provisions applicable to the majority of cases that ensure that contempt proceedings are conducted fairly, comply with Section 7 of the Human Rights Bill and afford the alleged contemnor the formal protections of the Criminal Procedure Code. The former Law Society also agreed that there should be introduced a specific statutory offence, based on section 41 of the UK Criminal Justice Act 1925 prohibiting the taking of photographs, etc. in court or the publication of such photographs and that such offence extend to the making of video recordings or television broadcasts of proceedings.

14. This final report contains the recommendations made by the Commission. Also attached are copies of a draft Contempt of Court Bill 2020 (“the Contempt Bill”)<sup>10</sup> and a draft Penal Code (Amendment) Bill 2020 (“the Penal Bill”)<sup>11</sup> which contain proposed provisions of which references

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<sup>9</sup> See Appendix H.

<sup>10</sup> See Appendix A.

<sup>11</sup> See Appendix B.

are made below. The 1981 UK Contempt of Court Act<sup>12</sup> was the principal legislation used in the drafting of the Bills.

## SUMMARY OF RECOMMENDATIONS

15. After lengthy research and consideration the Commission's recommendations are as follows-
- (a) 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.
  - (b) We recommend restricting and codifying the strict liability rule along the lines of the UK Contempt of Court Act, 1981, sections 1 to 7, but with modifications to reflect the procedural law of the Islands and to take account of more recent developments.
  - (c) 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 6 above.
  - (d) Despite its abolition as a separate category of contempt in the UK, we do not recommend abolishing contempt by scandalising the court.
  - (e) 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.
  - (f) 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.
  - (g) 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 the contemnor 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.
  - (h) 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 needs to be made compliant with section 7 of the Bill of Rights.

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<sup>12</sup> See Appendix C.

- (i) 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.

**PARTIAL STATUTORY CODIFICATION  
SUMMARY OF THE CONTEMPT OF COURT BILL AND THE PENAL CODE  
(AMENDMENT) BILL**

16. The Contempt of Court Bill, 2020 seeks to codify the strict liability rules along the lines of section 1 to 7 of the UK Contempt of Court Act, 1981 but with modifications to reflect the procedural law of the Islands and to take account of more recent developments.

17. The Contempt of Court Bill and the Penal Code (Amendment) Bill propose the amendment or repeal of certain existing statutory contempt-like offences. The relevant provisions are section 27 of Grand Court Law (2015 Revision), section 39 of the Summary Jurisdiction Law (2019 Revision) and sections 107 and 111 of the Penal Code (2019 Revision).

18. There are two types of provisions which the Commission does 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 (2017 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<sup>13</sup>. 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”<sup>14</sup> 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.<sup>15</sup> In the context in which those statutory references appear, we incline to the latter view.

19. In clause 14 of the Contempt of Court Bill, the Commission proposes 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.”.

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<sup>13</sup> A procedure exempted from the personal liberty section of the Bill of Rights: see section 5(2)(d).

<sup>14</sup> See Summary Jurisdiction Law, section 39, Penal Code, section 111(2).

<sup>15</sup> See Bill of Rights, section 5(2)(e).

20. Section 27 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.
- (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.

21. In clauses 3 and 4 of the Penal Code (Amendment) Bill, the Commission proposes 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, the Commission would prefer its repeal. The Commission doubts 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.

22. The Commission considers 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 a maximum of five years for common law contempt.

23. Clause 4 of the Penal Code (Amendment) 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.

24. 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.

25. 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.<sup>16</sup>

26. The Commission does not consider it either desirable or necessary to replace the remaining paragraphs of section 111. Our reasons for this conclusion are as follows-

- (a) Paragraph (d)<sup>17</sup> 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.
- (b) Paragraph (e)<sup>18</sup> is covered by clause 11 of the Contempt Bill.
- (c) Paragraph (h)<sup>19</sup> deals with a situation which is normally remedied by the issue of a writ of restitution rather than an application to commit for contempt.<sup>20</sup> 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.

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<sup>16</sup> 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.

<sup>17</sup> “A person who – (e) publishes a report of the evidence taken in any judicial proceeding which has been directed to be held in private”.

<sup>18</sup> “A person who – (e) publishes a report of the evidence taken in any judicial proceeding which has been directed to be held in private”.

<sup>19</sup> “A person who – (h) wrongfully retakes possession of land from any person who has recently obtained possession by a writ of court”.

<sup>20</sup> See *Alliance Building Society v Austen* [1951] 2 All ER 1068.

## **CONCLUSION**

27. The review of the law of contempt was one of the longer projects of the Commission. The Commission endeavoured through its three consultations papers to educate the public and to solicit responses to one of the most fundamental but complicated areas of the judicial system.

28. It can be seen by the research that most of the law should be dealt with by the common law which would permit greater growth and development than codification. It is hoped that the Government accepts our approach and learning in this area and proceed to bring some clarity and reform in the areas addressed in the draft legislation.

**Cayman Islands Law Reform Commission**

**31<sup>st</sup> March, 2020**

**APPENDIX A**

**CONTEMPT OF COURT BILL, 2020**

**APPENDIX B**

**PENAL CODE (AMENDMENT) BILL, 2020**

**APPENDIX C**

**THE UK CONTEMPT OF COURT BILL, 1981**

**APPENDIX D**

**CONTEMPT OF COURT - CONSULTATION PAPER  
10<sup>th</sup> January, 2014**

**APPENDIX E**

**CONTEMPT OF COURT - THE SUB JUDICE RULE**  
**21<sup>st</sup> March, 2014**

**APPENDIX F**

**CONTEMPT OF COURT - CONSULTATION PAPER  
15<sup>th</sup> July, 2016**

**APPENDIX G**

**CONTEMPT IN THE FACE OF THE COURT  
3<sup>rd</sup> September, 2010**

**APPENDIX H**

**CAYMAN ISLANDS LAW SOCIETY RESPONSE TO  
CONSULTATION PAPER (10<sup>th</sup> January, 2014)**