Law Commission proposals on contempt in the face of court

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01 March 2013

Contempt of court has been in the news repeatedly over the last few years, with cases such as jurors researching defendants and individuals tweeting the names of rape victims making the headlines. It is in this climate that the Law Commission has proposed a range of reforms to the law of contempt (http://lawcommission.justice.gov.uk/docs/cp209_contempt_of_court.pdf). One specific area addressed by the consultation paper is the law relating to contempt in the face of the court: empowering the courts to punish behaviour that affronts the dignity of the courts and prejudices the proper administration of justice. Examples of such contempt include displaying a ‘wilful’ defiance of or disrespect to the court; refusing to engage with the legal process; or behaviour that undermines the rule of law, such as refusing to be sworn or refusing to produce evidence.

The court has a variety of powers of disposal in its armoury when faced with an instance of contempt. It can take no action and, indeed, selective deafness to a minor contempt is the preferred option for some members of the judiciary. The court can give a judicial warning to desist from such conduct. For an act that also amounts to a criminal offence, assault for example, the court can refer the matter to the police for investigation in the usual way. In the Crown Court, the judge can make a referral to the Attorney General for an order for committal in the Divisional Court. Or the court can open an enquiry of its own volition into the contempt and deal with the matter immediately – referred to as ‘summary enquiry’.

However, this current system is far from perfect. Firstly, the decision about which means of disposal should be employed when faced with contempt is, in practice, largely left to the subjective opinion of the presiding judge. The lack of guidance or clarity as to which option the court should take in the circumstances leads to a lack of uniformity in approach, which may result in inconsistency of outcome and sentence. Secondly, the unique nature of contempt proceedings gives rise to uncertainty as to whether they are criminal or civil proceedings. This raises corresponding issues over the right to bail, and the evidential rules that should apply to contempt proceedings. Further inconsistency arises with regard to sentencing for contempt, as the maximum sentence in the Crown Court differs enormously from the Magistrates’, meaning that those disrupting a trial in the Magistrates’ Court can be treated vastly differently from their counterparts in the Crown Court. In addition, there are concerns that the summary enquiry procedure, although swift and robust, does not comply with the requirements of Article 6 ECHR. Specific concerns include the lack of time given to prepare a defence, and potentially the lack of an independent tribunal, for example if the contempt consists of insults directed at the judge.

With this myriad of overlapping issues, it was always going to be a difficult task for the Law Commission to come up with a practical solution. It has suggested three potential models for reform:

- Leave the law as it is and allow the common law to resolve difficulties as they arise
- Abolish the common law power for the Crown Court to deal with contempt in the face of the court itself and create a new, statutory power for the Crown Court to deal with such contempt
- Create a new statutory power applicable to both the Crown Court and the Magistrates’ Court, similar to s12 Contempt of Court Act 1981, but clearer and without the defects of s12.

It is arguable that none of the Law Commission’s proposals for reform go far enough in addressing the difficulties in the current law, and that a more radical overhaul is needed. Perhaps one way of balancing the two conflicting objectives is to establish a two tier procedure for dealing with instances of contempt. If the act of contempt is relatively minor, it could be dealt with by the court as a civil offence with the maximum penalty being an unlimited fine. If, however, the offence is more serious, it may be dealt with as a criminal offence. This offence could be committed by the commission of any act that is likely to cause harassment, alarm or distress to the court or any person therein (with the wording modelled on Section 5 of the Public Order Act 1986). The offence would be triable either way and it is suggested that the maximum penalty could be life imprisonment. If the judge presiding over a court felt that such an
act of contempt had taken place, he would decline to use the civil penalty procedure, and would refer
the case to the police and CPS in the same manner as with any other crime.

The principal attraction of a two tier system is that minor instances of contempt could be dealt with
expeditiously, and could perform the same role as the summary enquiry procedure, whilst more serious
examples could be dealt with in the same manner as any other criminal offence. Once an offence has
been referred to the CPS to be dealt with, it is clear that the strict rules of evidence and procedure
would apply, ensuring that the defendant enjoys all the safeguards of criminal proceedings. This two tier
division would also solve the issue of whether contempt is a criminal or civil offence, according to the
specific nature and characteristics of the act in question. A two tier system would create cohesion
between the powers of a magistrate and a judge in the Crown Court, which would ensure that there
would no longer be a 'location lottery' involved, either in relation to procedure or sentencing.

The law relating to contempt in the face of the court is unclear, and it is laudable that the Law
Commission is addressing the problems. However, without a radical, statutory, overhaul of the current
system, resulting in a consistent and clear approach across all courts, this area of law will remain mired
in controversy and confusion.

Robert Brown spoke at the Law Commission symposium in January 2013 which formed part of the
consultation on reform of the law of contempt of court. Corker Binning is a law firm which specialises in
business crime, regulatory litigation and general criminal work of all types. To speak to one of our
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