



Law Reform Commission of Western Australia

DISCUSSION PAPER
ON
CONTEMPT IN THE FACE OF THE COURT

PROJECT NO 93(I)

August 2001

The Law Reform Commission of Western Australia

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EXECUTIVE SUMMARY

The second term of reference in the Law Reform Commission of Western Australia's reference on the law of contempt is:

to inquire into and report upon the principles, practices and procedures relating to contempt in the face of the court and whether the law pertaining thereto should be reformed and, if so, in what manner.

The law relating to contempt in the face of the court in Western Australia has some unique features. It is the only criminal offence in the State that is not a creature of statute; and it is tried by a mode of trial unlike that for any other offence.

Liability for contempt in the face of the court is based on the general concept of 'interference with the due administration of justice'. Such a broad and potentially discretionary test can no longer be justified in light of contemporary demands to make the application of the law more certain and consistent. This discussion paper will conclude that the existing general test be replaced by a series of specific statutory offences.

The mode of trial for contempt in the face of the court is summary. Significantly, this means that a number of features now regarded as fundamental to the right to a fair trial are absent. The summary mode of trial is designed to reflect the peculiar considerations that arise in relation to the law of contempt. The Law Reform Commission of Western Australia ('the Commission') acknowledges that those considerations justify a continued role for an appropriate summary procedure. Nevertheless the Commission suggests that, save in exceptional circumstances, charges for contempt in the face of the court should be accompanied by greater procedural safeguards.

Sentencing powers for contempt in the face of the court at common law were unlimited as to the term of imprisonment or size of fine. That position persists in a number of courts in Western Australia. The Commission considers that the sentencing powers of courts in relation to contempt in the face of the court be better defined and more consistent with other sentencing regimes.

Finally, rights of appeal in relation to contempts in the face of the court have developed in a piecemeal and unsatisfactory way. In some instances there are no rights of appeal at all. It will be recommended that comprehensive rights of appeal be enacted for persons convicted of contempt in the face of the court.

While the findings in this discussion paper are expressed in terms of concrete proposals for reform, the paper's purpose is nevertheless a dialectic one. The findings and recommendations should not be regarded as final. Rather, it is the intention of the Commission that those findings and recommendations will promote discussion and feedback to enable it to formulate its final report. The Commission therefore welcomes comment on all aspects of the discussion paper.

(ii)

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I. INTRODUCTION

In 1974, Lord Diplock offered the following description of ‘contempt of court’:

‘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.¹

Notwithstanding the wide and general nature of contempt of court, attempts have been made in the past to divide its many manifestations into various categories. One clear distinction that has been traditionally drawn is between criminal contempt and civil contempt. In *Witham v Holloway*, the High Court described the distinction in the following terms:

In general terms, the distinction between civil and criminal contempt is that a civil contempt involved disobedience to a court order or breach of an undertaking in civil proceedings, whereas a criminal contempt is committed either when there is a contempt in the face of the court or there is an interference with the course of justice.²

This discussion paper, being concerned with contempt in the face of the court, is therefore solely concerned with criminal contempt.

While the distinction between civil and criminal contempt is of less practical significance than in former times (the standard of proof required to establish a criminal or a civil contempt, for example, is the same),³ it has important implications for the reform of the law of contempt in Western Australia. In particular, it is significant that, with the single exception of contempt of court, the criminal law of Western Australia is entirely the creature of statute.⁴ Contempt of court, in its criminal form, is the only common law crime and being a common law crime, brings with it issues of intention or *mens rea*.⁵ In common law jurisdictions there has been considerable controversy over whether a mental element is required in the case of contempt and, if so, what the nature of that mental element is.⁶

In Western Australia questions of intention in the criminal context have, since the enactment of the *Criminal Code* in 1913, been a matter of statutory interpretation. As a general rule, unless specifically identified in the statutory provision creating the offence, proof of a particular mental element is not

1 *Attorney General v Times Newspapers Ltd* [1974] AC 273, 307 (Diplock LJ).

2 *Witham v Holloway* (1995) 183 CLR 525, 530 (Brennan, Deane, Toohey & Gaudron JJ).

3 See generally *Witham v Holloway* (1995) 183 CLR 525.

4 *R v Lovelady; Ex parte Attorney General* [1982] WAR 65, 66 (Burt CJ); *Criminal Code Act 1913* (WA), s 7.

5 *R v Minshull; Ex parte Director of Public Prosecutions for Western Australia* (Unreported, Supreme Court of Western Australia, Full Court, 21 May 1997, Library No. 970255) 12-13 (Malcolm CJ).

6 See for example C.J. Miller, *Contempt of Court* (3rd ed. Oxford: Oxford University Press, 2000), [1.53]-[1.59], [4.108]-[4.115]; Australian Law Reform Commission (‘ALRC’), *Contempt*, Report No 35 (1987), [80].

required. Moreover, where an accused person's state of mind forms the basis of a defence, such as accident or mistake, the issue is explicitly dealt with in Chapter V of the *Criminal Code*. The provisions of Chapter V apply to all statutory offences in the State.⁷ The resolution of questions of intention by recourse to both the specific statutory provisions and Chapter V has been a scheme that has served the administration of justice in Western Australia well. The incorporation of the law of contempt of court into the scheme has much to commend it. Indeed, it is already the case that many forms of conduct that would constitute contempt of court at common law are the subject of specific statutory offences.⁸ In addition, in a number of inferior courts in Western Australia, the jurisdiction to punish for contempt in the face of the court is purely statutory, although the statutory provisions are not uniform. The codification and standardisation of the law relating to contempt in the face of the court could be taken further.

It will therefore be recommended that the law in relation to contempt in the face of the court be the subject of reform. Areas of potential reform to be dealt with in this discussion paper may be divided into the following four categories:

1. Reform of the substantive basis for liability for contempt in the face of the court;
2. Reform of the procedure whereby liability for contempt in the face of the court is determined;
3. Reform of the imposition and administration of sentences for persons convicted of contempt in the face of the court;
4. Reform of the rights of persons convicted of contempt in the face of the court to appeal against both conviction and sentence.

Before identifying any proposals for reform, it is necessary to provide an overview of the existing law in Western Australia as it relates to contempt in the face of the court.

⁷ *Criminal Code (WA)*, s 36.

⁸ See *Criminal Code (WA)*, Chapter XVI.

II. CONTEMPT IN THE FACE OF THE COURT — EXISTING LAW

SUBSTANTIVE LIABILITY

As indicated earlier, the power of Western Australian courts to punish contempts committed in the face of the court takes a number of different forms.

The source of the contempt powers of the Supreme Court of Western Australia resides in the common law and in the *Supreme Court Act 1935*.⁹ The Supreme Court is a superior court of record¹⁰ with general civil and criminal jurisdiction.¹¹ As such, it has an inherent jurisdiction to punish contempts of court, including contempt in the face of the court.¹² The content of the power is considered below.

Additionally, there are a variety of courts in Western Australia whose powers to punish what would, at common law, constitute a contempt in the face of the court are derived from statutory provisions. They include the Family Court of Western Australia,¹³ the District Court of Western Australia,¹⁴ Local Courts¹⁵ and Courts of Petty Sessions.¹⁶ The legislative means for conferring these powers can take two general forms. Firstly, there are provisions, such as in the *Family Court Act 1975*, which simply provide that the court may punish persons for 'contempt in the face of the court'. According to that formula the scope of the power is determined by reference to what, at common law, would constitute contempt in the face of the court.

The alternative means of conferring power is to particularise the conduct identified as giving rise to the contempt. For example, section 63 of the *District Court of Western Australia Act 1969*, provides that a District Court judge may punish a person who:

- (a) wilfully insults a District Court judge, any juror, any Registrar, the bailiff, clerk or officer of the Court during his sitting or attendance in Court or any District Court Judge in going to or returning from the Court;
- (b) wilfully interrupts proceedings of the Court;
- (c) ...
- (d) being summoned and examined as a witness in any cause or matter or being present in the Court and required to give evidence, refuses to be sworn or answer any lawful questions;
- (e) is, in the opinion of the District Court Judge before whom the person is appearing as a witness, guilty of wilful prevarication; or
- (f) misbehaves in Court.

9 See *Supreme Court Act 1935* (WA), s 6.

10 *Supreme Court Act 1935* (WA), s 7.

11 *Supreme Court Act 1935* (WA), s 16.

12 *R v Dunabin; Ex parte Williams* (1935) 53 CLR 434,442 (Rich J) .

13 *Family Court Act 1975* (WA), s 88.

14 *District Court of Western Australia Act 1969* (WA), s 63.

15 *Local Courts Act 1904* (WA), s 156.

16 *Justices Act 1902* (WA), s 41.

The *Justices Act 1902*, by section 41, provides a power to punish any ‘person who insults any justices sitting in the exercise of their jurisdiction ... or wilfully interrupts the proceedings of justices so sitting’. Another variation appears in section 156 of the *Local Courts Act 1904*, which confers contempt powers where a person ‘wilfully insults, interferes with, or obstructs’ an officer of the court or a witness or who ‘wilfully interrupts the proceedings of the court, or otherwise misbehaves himself in court’.

Provisions such as these effectively codify the court's contempt powers. Furthermore it has been held that, even where the court may be described as a superior court,¹⁷ the provisions displace any common law powers to punish for contempt.¹⁸

A further general source of contempt powers relates to courts exercising federal jurisdiction invested by Commonwealth legislation.¹⁹ In such a case the exercise by the court of the judicial power of the Commonwealth, conferred by section 71 of the *Australian Constitution*, carries with it a power to punish for contempt as an inherent attribute of the judicial power so exercised.²⁰ In cases where Commonwealth statutory provisions purport to confer power on courts exercising federal jurisdiction to punish contempt of court, those provisions will be taken to be merely ‘declaratory of an attribute of the judicial power of the Commonwealth which is vested in those courts by section 71 of the *Constitution*’.²¹ Where the source of contempt powers is the judicial power of the Commonwealth, its content will be ‘informed by the common law’.²²

In relation to each of the above sources of contempt powers in Western Australian courts the common law continues to play an important role in determining the limits of what constitutes contempt in the face of the court. It is therefore necessary to consider that issue in more detail.

In *Izuora v The Queen*²³ the Privy Council observed that it ‘is not possible to particularize the acts which can or cannot constitute contempt in the face of the court’.²⁴ The test for whether conduct constitutes contempt in the face of the court at common law is in the broadest possible terms. The essence of the test is ‘conduct, active or inactive, amounting to an interference with or obstruction to, or tendency to interfere with or obstruct, the due administration of justice’.²⁵ As with the other categories of contempt of court,

17 Such as the District Court of Western Australia in the exercise of its criminal jurisdiction (see *District Court of Western Australia Act 1969* (WA), s 42).

18 *Cullen v The Queen* (Unreported, Supreme Court of Western Australia, Full Court, 25 September 1986, Library No. 6450) 6-8 (Burt CJ).

19 Whether generally, such as by the *Judiciary Act 1903* (Cth), s 39, or in relation to particular subject matters, as in the *Family Law Act 1975* (Cth), s 41(3).

20 *Re Colina; Ex parte Torney* [1999] HCA 57, [16] – [19] (Gleeson CJ & Gummow J with Hayne J agreeing) .

21 *Ibid* [16] (Gleeson CJ & Gummow J with Hayne J agreeing); followed in *McGillivray v Piper* [2000] WASCA 245, [17] (Anderson J with Kennedy ACJ and Wallwork J agreeing) .

22 *Re Colina; Ex parte Torney* [1999] HCA 57, [19] (Gleeson CJ & Gummow J with Hayne J agreeing) .

23 *Izuora v The Queen* [1953] AC 327.

24 *Ibid* 336 (Lord Tucker).

25 *Ex parte Bellanto; Re Prior* [1963] SR (NSW) 190, 202 (Herron A.C.J., Sugerman and Ferguson JJ).

contempt in the face of the court is aptly described as 'the Proteus of the legal world, assuming an almost infinite diversity of forms'.²⁶

Nevertheless, attempts have been made to identify some general categories of conduct that constitute contempt in the face of the court. Miller, for example, has recently classified contempts in the face of the court under the following headings:

- (1) Disruptive Behaviour;
- (2) Insulting and Disrespectful Behaviour;
- (3) Contempt by Advocates and Solicitors;
- (4) Contempt by Jurors;
- (5) Contempt by Witnesses, including the refusal to answer questions;
- (6) Photographs, Portraits, Sketches and Cameras in Court without Leave;
- (7) Tape Recordings without Leave.²⁷

Applying the general test as to whether particular conduct amounts to contempt in the face of the court raises a number of issues.

Firstly, what of the relevant intent required? The answer will depend upon whether the liability arises pursuant to the common law or one of the statutory provisions referred to above. In relation to conduct which is said to offend statutory provisions, such as section 63 of the *District Court of Western Australia Act 1969* or section 41 of the *Justices Act 1902*, it is significant that those legislative provisions use the expression 'wilfully'. The courts in Australia have consistently interpreted 'wilfully' to require an intention to deliberately interfere with, or obstruct, the judicial proceeding. In *Lewis v Ogden*, for example, the High Court held that:

[T]he word 'wilfully' means 'intentionally', or 'deliberately', in the sense that what is said or done is intended as an insult, threat, etc. Its presence does more than negative the notion of 'inadvertently' or 'unconsciously'.... The mere voluntary utterance of words is not enough. 'Wilfully' imports the notion of purpose.²⁸

This interpretation of the statutory provisions has been directly applied in Western Australia.²⁹

Less clear is the question of liability for contempt in the face of the court at common law. For other forms of contempt of court, such as interference with jurors or witnesses, there is ample authority for the proposition that the relevant acts of the contemnor must be 'calculated'³⁰ to interfere with the course of justice, thereby importing a notion of purpose into the mental element. Such was the conclusion of the Supreme Court of Western Australia in relation to an allegation that the contemnor had threatened and

26 Moskowitz 'Contempt of Injunctions, Civil and Criminal' (1943) 43 Col. LR 780, quoted in Miller, above n 6, 1.

27 See generally, Miller, above n 6, [4.18]-[4.107]; ALRC, above n 6, [77]-[78].

28 *Lewis v Ogden* (1984) 153 CLR 682, 688 (Mason, Murphy, Wilson, Brennan & Dawson JJ).

29 *Gliosca v Ninyett* (1992) 10 WAR 562, 566-567 (Murray J).

30 *Giscombe* (1984) 79 Cr App Rep 79, 84 (Lord Lane CJ); see also *Weston v Central Criminal Courts Administrator* [1977] QB 32, 43 (Lord Denning MR) and the other cases referred to in Miller, above n 6, at [4.112].

intimidated a Crown prosecutor, not in court, but at a bus stop and in the course of a journey to the Central Law Courts.³¹ In that case the Full Court dismissed a motion for contempt on the basis that the Crown had failed to prove beyond reasonable doubt that the contemnor had the purpose or intent of obstructing or otherwise interfering with the performance by the prosecutor of his duties.³²

There is also authority, however, for the proposition that where conduct occurs in the face of the court that is deliberate (in the sense that it is not inadvertent) and which objectively tends to lessen the authority of the courts, it will constitute a contempt, notwithstanding that there is no intention to obstruct or interfere with the administration of justice. In *Ex parte Tuckerman; Re Nash*,³³ for example, the applicants raised their arms in a clenched fist salute to a sitting magistrate. The action formed part of the applicants' ongoing political protests against the Vietnam War. In concluding the gestures constituted contempt in the face of the court, the New South Wales Court of Appeal observed:

[W]hatever in fact the gestures of the applicants were intended by them to represent, in our opinion, acts, words or other forms of behaviour which give rise to the appearance of defying the authority of a Court of law or which by intimidation, ridicule or otherwise tend to lessen the authority of the courts to administer the law and seek to apply even-handed justice between parties in a calm and orderly manner may be regarded as contempt of Court.³⁴

The precise mental element required to be proved in relation to contempt in the face of the court, therefore, remains unclear.

Another issue is the extent to which the relevant conduct must be committed in view of the presiding judicial officer (i.e. 'in the face of the court'). Again the authorities conflict on the question. The traditional view appears to have been that the contempt was only 'in the face of the court' where the judicial officer was able to personally observe all of the circumstances constituting the alleged contempt.³⁵ Blackstone, for example, referred to the judge in the case of a contempt in the face of the court as having 'perfect' knowledge of the matters constituting the contempt.³⁶

The scope of what occurs 'in the face of the court' has, however, been broadened by judicial decision. There is support now for the proposition that 'the face of the court' will extend to the courtroom, the passageways, the verandah and the steps leading to it.³⁷ Such formulations of the rule,

31 *R v Minshull; Ex parte Director of Public Prosecutions for Western Australia* (Unreported, Supreme Court of Western Australia, Full Court, 21 May 1997, Library No. 970255).

32 Ibid 15-16 (Malcolm CJ).

33 *Ex parte Tuckerman; Re Nash* [1970] 3 NSW 23.

34 Ibid 28.

35 Although see P Seaman, *Civil Procedure: Western Australia* (Sydney: Butterworths, 1990) [55.3.1], to the effect that the power 'was never confined to what the judge saw with his or her own eyes but extended to any gross interference with the course of justice in a case which was about to be tried, or being tried'.

36 Blackstone, *Commentaries on the Law of England*, Book IV, quoted in *European Asian Bank AG v Wentworth* (1986) 5 NSWLR 445, 453 (Kirby P).

37 See *Ex parte Tubman; Re Lucas* [1970] 3 NSW 41.

however, introduce a degree of uncertainty as to precisely when the jurisdiction may be invoked. As Kirby P rhetorically asked:

If it is not to be reliant on the senses of the judge, what is the criterion to be adopted for 'in the face of the Court'? Is it a geographic notion to be fixed at the vestibule? Is it the liftwell? Is it the lobby? Is it the street outside the court? Is it the adjacent city block? ... For if the judge does not have to see, hear or otherwise sense the alleged contempt, it is necessary to be able to define the 'geographic proximity' that authorises him to exercise, by summary procedure, this exceptional power.³⁸

As can be seen from these remarks the precise identification of the extent of the 'face of the court' has implications for the procedure to be adopted for dealing with the alleged contempt. As stated above, the commission of a contempt in the face of the court brings with it a summary procedure. The importance of the relationship between the category of contempt and the procedure for its determination has led some judges to a purposive test of whether contempt occurs in the face of the court. For example in *Registrar, Court of Appeal v Collins*,³⁹ Moffitt P identified the purpose of the summary power to punish for contempt in the face of the court as the need to protect proceedings 'then in progress or then imminent in that court'⁴⁰ and formulated the following test:

The elements of immediacy and necessity to which earlier reference has been made require that before the power is exercised there must be such proximity in time and space between the conduct and the trial of the proceedings that the conduct provides the present confrontation to the trial then in progress. Each case will require consideration on its own facts.⁴¹

The difficulty with this test is that while there is merit in its flexibility, it lacks certainty in its application. It has, for that reason, been criticised by later authority.⁴² Given the significance of the summary procedure, however, to any understanding of the power to punish contempt in the face of the court, it is necessary to consider that procedure in some detail.

PROCEDURE

Liability for contempt in the face of the court is determined by a procedure unlike that for any other criminal offence. It is not sufficient merely to describe the procedure as 'summary', as summary determination of criminal offences before magistrates or justices under the *Justices Act 1902* is commonplace and generally accepted in Western Australia. The summary determination of contempt in the face of the court is unique, as will be seen below.

The fact that, historically, contempt in the face of the court was constituted by conduct actually occurring in the presence of the presiding judicial officer influenced the procedure adopted for determining whether a contempt had

38 *European Asian Bank AG v Wentworth* (1986) 5 NSWLR 445, 458 (Kirby P).

39 *Registrar, Court of Appeal v Collins* [1982] 1 NSWLR 682.

40 *Ibid* 707 (Moffitt P).

41 *Ibid* 708 (Moffitt P).

42 See *Fraser v The Queen* [1984] 3 NSWLR 212; *European Asian Bank AG v Wentworth* (1986) 5 NSWLR 445.

been committed. The contemnor was tried by the presiding judge closely upon the commission of the offence and upon the judge's own perception of the relevant conduct. The charge need not have been reduced to writing. Witnesses other than the judge may not necessarily have been called. In such circumstances any extension of the offence to conduct beyond the observation of the presiding judge would give rise to problems of proof and procedure.

Furthermore, it is often the case that where a person is alleged to be in contempt of court during proceedings it is the judge who initiates the charge of contempt. Taking into account all these procedural aspects it is clear that a number of different roles, such as prosecutor, witness, judge and jury, traditionally separated in the criminal process, may be performed by the same person where contempt in the face of the court is concerned. It is the absence of traditional safeguards of impartiality and independence in the process that has been the subject of trenchant criticism in the past. The summary nature of the procedure has, to an extent, been tempered by judicial authority in recent times, which has sought to preserve certain minimum standards of fairness. In *Coward v Stapleton*, for example, in the context of a person committed for contempt for refusing to answer questions in bankruptcy proceedings, the High Court observed:

[I]t is a well-recognized principle of law that no person ought to be punished for contempt of court unless the specific charge against him be distinctly stated and an opportunity of answering it given to him: *In re Pollard*; *R v Forster*; *Ex parte Isaacs*. The gist of the accusation must be made clear to the person charged, though it is not always necessary to formulate the charge in a series of specific allegations: *Chang Hang Kiu v Piggott*. The charge having been made sufficiently explicit, the person accused must then be allowed a reasonable opportunity of being heard in his own defence, that is to say a reasonable opportunity of placing before the court any explanation or amplification of his evidence, and any submissions of fact or law, which he may wish the court to consider as bearing either upon the charge itself or upon the question of punishment.⁴³

Procedural safeguards of this kind have recently been reiterated in the High Court⁴⁴ and the Supreme Court of Western Australia.⁴⁵ An additional safeguard would appear to be a power, at common law at least, for the presiding judge to refer the matter to another member of the court.⁴⁶

Notwithstanding the courts' concern to uphold principles of natural justice as enunciated in *Coward v Stapleton*⁴⁷ in the context of contempt in the face of the court, contempt powers continue to be exercised with immediacy unlike any other determination of criminal liability. In late 2000, for example, a judge of the District Court of Western Australia imprisoned a person for 18 months for assaulting the accused in a criminal trial in the presence of the

43 *Coward v Stapleton* (1953) 90 CLR 573, 579-580.

44 See *Lewis v Ogden* (1984) 153 CLR 682, 693 and *MacGroarty v Clauson* (1989) 167 CLR 251, 255-256.

45 *Gliosca v Ninyett* (1992) 10 WAR 562, 567-568 (Murray J).

46 See ALRC, above n 6, [84].

47 (1953) 90 CLR 573.

judge. Only 10 days elapsed between the commission of the contempt and the imposition of the sentence.⁴⁸

In Western Australia, even where contempts committed at common law are concerned, there has been a degree of codification of the procedure relating to contempt in the face of the court, for example, Order 55 rule 3 of the *Rules of the Supreme Court*.

Under Order 55 most contempt powers are to be exercised summarily by the Full Court,⁴⁹ a requirement that has been criticised by the Full Court itself on a number of occasions.⁵⁰ The only circumstances in which an order for committal may be made by a single judge is where the contempt 'is committed in the face of the Court or in the hearing of the Court, or consists in the disobedience to a judgment or order of the Court or a breach of an undertaking to the Court'.⁵¹

Order 55 rule 3(1) provides that where it is alleged or it appears to the court that a person is 'guilty of contempt of court committed in the face of the Court or in the hearing of the Court'⁵² the presiding judge may by oral order, direct that the person be arrested and brought before the court. Order 55 rule 3(2) continues:

- When the contemnor is brought before the Court, the Court shall –
- (a) cause him to be informed orally of the contempt with which he is charged;
 - (b) require him to make his defence to the charge;
 - (c) after hearing him proceed, forthwith or after adjournment, to determine the matter of the charge; and
 - (d) make an order for the punishment or discharge of the contemnor.

The rule largely mirrors the position reached by the course of judicial decisions. Given the explicit reference to 'the presiding Judge' in Order 55 rule 3 and the reference to the contemnor making his or her defence upon being informed of the charge, it is questionable whether the presiding judge retains the power to refer the matter to another member of the court. It is suggested that such a residual power may be accommodated within the rule.⁵³

The various statutory offences identified in relation to the District Court and courts of summary jurisdiction also refer to an immediate summary process which may be regarded as incorporating the principles in *Coward v*

48 See 'Attack Aborts Trial', *The West Australian*, 29 September 2000, 11; 'Prison for Court Attacker' *The West Australian*, 7 October 2000, 3.

49 *Rules of the Supreme Court (WA)*, Order 55 rule 2(1).

50 *R v Lovelady; Ex parte Attorney General* [1982] WAR 65, 66 (Burt CJ) ; *R v Minshull; Ex parte Director of Public Prosecutions for Western Australia* (Unreported, Supreme Court of Western Australia, Full Court, 21 May 1997, Library No. 970255), 16-17 (Malcolm CJ) .

51 *Rules of the Supreme Court (WA)*, Order 55 rule 2(3).

52 It is open to doubt whether the addition of the expression 'in the hearing of the Court' widens or narrows what would otherwise be within the jurisdiction of the court to deal with the contempt in a summary manner: see generally, *Fraser v The Queen* [1984] 3 NSWLR 212, 230 (Kirby P and McHugh JA) .

53 In light of the approach to construction referred to in *European Asian Bank AG v Wentworth* (1986) 5 NSWLR 445, 453 (Kirby P).

Stapleton.⁵⁴ However, it would appear to be the unavoidable construction that the alleged contempt in the courts is to be dealt with in all cases by the presiding judicial officer.

SENTENCE

At common law, a court punishing a contemnor for a contempt committed in the face of the court had wide sentencing powers. Lord Denning MR described the sentencing powers in the following terms:

It is a power to fine or imprison, to give an immediate sentence or postpone it, to commit to prison pending his consideration of the sentence, to bind over to be of good behaviour and keep the peace, and to bind over to come up for judgment if called upon.⁵⁵

Besides the requirement that any fine or term of imprisonment be for a fixed amount or a fixed term, there was no limit at common law to the fine or term that may be imposed.

Sentencing powers at common law are largely preserved in both the Supreme Court of Western Australia, which may impose a term of imprisonment or a fine or both,⁵⁶ and the Family Court of Western Australia, which may also suspend punishment and order the giving of security for good behaviour.⁵⁷

In the courts where punishment of contempt is dealt with by statutory offences, maximum fines and terms of imprisonment are prescribed. In the Local Courts and Courts of Petty Sessions, the penalties are 12 months imprisonment or a fine of \$5,000 or both.⁵⁸ The District Court of Western Australia may impose a term of imprisonment of 5 years or a fine of \$50,000 or both.⁵⁹

The law in relation to sentencing for criminal offences generally has received much attention from the legislature in recent years. The *Sentencing Act 1995* and the *Sentence Administration Act 1995*, for example, have greatly expanded sentencing options open to the courts and have sought to prescribe with greater particularity matters to be taken into account in sentencing offenders. It is notable therefore, that the power of superior courts to punish for contempt of court and the analogous powers in the District Court of Western Australia, Local Courts and Courts of Petty Sessions are expressly excluded from the operation of the *Sentencing Act 1995*.⁶⁰ The effect is to prevent these courts, in relation to contempt, from using sentencing options such as community-based orders, intensive supervision orders and suspended sentences and, arguably, prevents a person guilty of contempt being granted eligibility for parole.

54 *Coward v Stapleton* (1953) 90 CLR 573: indeed, so much is explicit in *Gliosca v Ninnyett* (1992) 10 WAR 562, 567-568 (Murray J).

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

56 *Rules of the Supreme Court (WA)*, Order 55 rule 7.

57 *Family Court Act 1975 (WA)*, s 88(2) and (4).

58 See *Local Courts Act 1904 (WA)*, s 156 and *Justices Act 1902 (WA)*, s 41.

59 See *District Court of Western Australia Act 1969 (WA)*, s 63.

60 *Sentencing Act 1995 (WA)*, s3(3).

A follow-on effect is that the *Sentence Administration Act 1995* has been held not to apply to a person undergoing a sentence of imprisonment for contempt of court,⁶¹ effectively excluding such a person from consideration by the executive for work release programs or home detention.

RIGHTS OF APPEAL

Right of appeal is purely a creature of statute. Accordingly, appellate rights for persons found guilty of contempt in the face of the court in Western Australia depend upon the particular statutory provisions governing each court.

In the case of contempt committed in the face of the Supreme Court, or the analogous offence in the District Court, the contemnor is likely to be without any effective rights of appeal. This is because the rights of appeal in criminal cases from those courts are provided for by section 688 of the *Criminal Code*, which only applies where a person is 'convicted on indictment'.⁶² As has been already observed, a finding of guilt of criminal contempt may be a criminal conviction but it is not 'on indictment'.⁶³ Thus an appeal to the Court of Criminal Appeal from such a conviction is incompetent.

In the case of the District Court the inherent supervisory jurisdiction of the Supreme Court is preserved so that, in certain circumstances, the Supreme Court may issue a writ of *certiorari* or prohibition directed to a District Court judge.⁶⁴ Such a basis for review, however, would be restricted to jurisdictional error and error of law on the face of the record:⁶⁵ a poor substitute for comprehensive appellate rights.

Under the *Justices Act 1902* an appeal lies by leave of the Supreme Court from a 'decision of justices'.⁶⁶ 'Decision' is defined broadly in the *Justices Act 1902* and includes a conviction analogous to contempt under section 41. Indeed, there are reported instances of appellate rights being exercised in relation to such convictions.⁶⁷ The position in the Local Courts is less clear, as rights of appeal under the *Local Courts Act 1904* are based on whether there is a 'judgment',⁶⁸ an expression not ordinarily importing concepts such as criminal convictions. Nevertheless, given the wide meaning of 'judgment' in the *Local Courts Act 1904*⁶⁹ it is likely that a person convicted under section 156 of that Act would have a right of appeal to the District Court.

The right to appeal to the High Court in relation to contempt in the face of the court committed in the Supreme Court is conferred by section 73 of the *Australian Constitution*.⁷⁰ Given the restriction on rights of appeal from

61 *McGillivray v Piper* [2000] WASCA 245, [29] (Anderson J with Kennedy ACJ and Wallwork J agreeing) .

62 *Criminal Code* (WA), s 688.

63 *Cullen v The Queen* (Unreported, Supreme Court of Western Australia, Full Court, 25 September 1986, Library No. 6450) 9 (Burt CJ).

64 See *District Court of Western Australia Act 1969* (WA), ss 80-83.

65 As to the limitations of which see generally *Craig v South Australia* (1995) 184 CLR 163.

66 *Justices Act 1902* (WA), s 184.

67 See *Gliosca v Ninyett* (1992) 10 WAR 562.

68 See *Local Courts Act 1904* (WA), s 107.

69 See *Local Courts Act 1904* (WA), s 3.

70 For an example of the attempted exercise of such rights see *Lovell v Hamersley Iron Pty Ltd* (Unreported, High Court of Australia, 20 October 1999, P35 of 1998).

contempt convictions generally in the Supreme Court, an appeal to the High Court may be the only remedy available. In this regard the ability effectively to appeal to the High Court is, of course, subject to the requirements of the grant of special leave under section 35(2) of the *Judiciary Act 1903* (Cth).

The rights of appeal against convictions for contempt are less than comprehensive. While the courts have in the past had occasion to comment on the absence of such rights, it is noteworthy that those comments have not gone so far as to recommend legislative reform. For example, Barwick CJ observed in *Keeley v Brooking*⁷¹ that the need for immediate action in the case of contempt in the face of the court and the reliance by the court on demeanour in identifying a contempt suggested that appellate rights from such convictions may not be justified.

Before any reforms to the law in relation to contempt in the face of the court are proposed it is necessary to ask whether any constitutional restrictions may stand in the way of reform.

71 *Keeley v Brooking* (1979) 53 ALJR 526, 528 (Barwick CJ) ; quoted in *Cullen v The Queen* (Unreported, Supreme Court of Western Australia, Full Court, 25 September 1986, Library No. 6450) 9-10 (Burt CJ) .

III. CONSTITUTIONAL LIMITS ON REFORM

Any proposed reform of the law of contempt, including contempt in the face of the court, must be consistent with the limitations on legislative power, express or implied, in the *Australian Constitution* or the *Constitution Act 1889* (WA). Two constitutional limitations in particular require consideration:

- (a) the implied constitutional freedom of political communication;
- (b) implications arising from the separation of the judicial power of the Commonwealth imposed by Chapter III of the *Australian Constitution*.

THE IMPLIED FREEDOM OF POLITICAL COMMUNICATION

There is to be implied from the *Australian Constitution*, in particular sections 7 and 24, a freedom of political communication as necessary to maintain the system of representative and responsible government provided for by the *Constitution*.⁷² A similar implication can be drawn from the *Constitution Act 1889* (WA), and in particular section 73(2)(c).⁷³

The implied freedom is a limitation on legislative and executive power. In order for a law affecting freedom of political communication to be valid it must, firstly, be enacted for an object that is compatible with the constitutionally prescribed system of representative and responsible government and, secondly, must be reasonably appropriate and adapted to achieving that legitimate object.⁷⁴

The legitimate object of laws in the nature of contempt of court is obvious: the proper administration of justice. Moreover, the kinds of restrictions imposed upon freedom of communication by the existing law of contempt have been held to be consistent with that freedom. In *Theophanous v Herald & Weekly Times Ltd*,⁷⁵ for example, Deane J, who formulated the widest scope of the implied freedom, observed:

[N]othing in this judgment should be understood as suggesting that the traditional powers of Parliament and superior courts to entertain proceedings for contempt are not justifiable in the public interest. In that regard, it is important to remember that ... the justification of proceedings for contempt of court or parliament lies not in the protection of the reputation of the individual judge or parliamentarian but in the need to ensure that parliaments and courts are able effectively to discharge the functions, duties and powers entrusted to them by the people.⁷⁶

72 See generally *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 561-562 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ) .

73 *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211.

74 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 561-562 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).

75 *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104.

76 *Ibid* 187 (Deane J).

This passage has been adopted and applied by the Full Court of the Supreme Court in relation to the law of contempt of court in Western Australia.⁷⁷

The implied freedom of political communication is only relevant to the extent that the proposed reforms are likely to restrict the freedom to communicate beyond the level of restriction imposed by the common law. Any reform extending the freedom to communicate would necessarily be consistent with the constitutional imperative.

Moreover, it is likely that the implied freedom will have more impact on the reform of contempt by publication than on contempt in the face of the court. Nevertheless, issues of freedom of communication arise in relation to the requirement of certain witnesses (such as journalists) to answer questions, the ability to record proceedings and disruption of court proceedings for a political purpose. The *Nash* case referred to earlier⁷⁸ is an example of politically motivated disruption of proceedings.

The Commission suggests that none of the reforms proposed in this discussion paper would be such as to restrict freedom of political communication in a manner inconsistent with the implied constitutional freedom.

CHAPTER III OF THE AUSTRALIAN CONSTITUTION

The second constitutional limitation to be considered operates in the opposite way to the implied freedom of political communication. As indicated earlier, where a court exercising federal judicial power under Chapter III of the *Constitution* (as most courts in Western Australia do from time to time) the power to punish for contempt of court will be necessarily implied into the grant of the judicial power itself.⁷⁹

Given that the contempt powers inherent in the judicial power of the Commonwealth derive directly from the *Constitution*,⁸⁰ it follows that Parliament can not authorise what would otherwise constitute a serious contempt of court. This is not to say that any reform of the law of contempt would offend Chapter III of the *Constitution*. It is possible that the content of the contempt jurisdiction implied by Chapter III is not necessarily fixed as at a certain date⁸¹ and also that the constitutional contempt power, being confined to that which is 'necessary',⁸² would be narrower than contempt powers at common law.

At the very least, however, any reform of the law of contempt must empower courts exercising federal jurisdiction to preserve the essential integrity of the judicial process and the independence of that process from the other arms of

77 *Hamersley Iron Pty Ltd v Lovell* (1998) 19 WAR 316, 343 (Anderson J with Pidgeon J agreeing) .

78 *Ex parte Tuckerman; Re Nash* [1970] 3 NSW 23.

79 *Re Colina; Ex parte Torney* [1999] HCA 57, [16] – [19] (Gleeson CJ and Gummow J with Hayne J agreeing) .

80 *Ibid* [16] (Gleeson CJ and Gummow J with Hayne J agreeing) ; followed in *McGillivray v Piper* [2000] WASCA 245, [17] (Anderson J with Kennedy ACJ and Wallwork J agreeing) .

81 *Re Colina; Ex parte Torney* [1999] HCA 57, [19] (Gleeson CJ & Gummow J with Hayne J agreeing).

82 *Ibid* [48] (McHugh J).

government.⁸³ Thus any contempt powers conferred on a court acting in the exercise of state jurisdiction may be invalid to the extent that they are incompatible with the exercise by that court of federal jurisdiction.⁸⁴

Again, the Commission suggests that none of the reforms proposed in this discussion paper would impair the essential integrity of the judicial process and would be consistent with Chapter III of the *Constitution*.

83 *Victoria v Australian Building Construction Employees' and Builders Labourers' Federation* (1982) 152 CLR 25, 105 (Murphy J) and 165 (Brennan J); *Hammond v The Commonwealth* (1982) 152 CLR 188, 207 (Deane J) .

84 See generally *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.

IV. PROPOSALS FOR REFORM

The proposed reforms of the law of contempt in the face of the court will be dealt with in the same four categories used to discuss the existing law:

1. Reform of the substantive basis for liability for contempt in the face of the court;
2. Reform of the procedure whereby liability for contempt in the face of the court is determined;
3. Reform of the imposition and administration of sentences for persons convicted of contempt in the face of the court;
4. Reform of the rights of persons convicted of contempt in the face of the court to seek appellate review of both conviction and sentence.

SUBSTANTIVE LIABILITY

Reform of the substantive basis for liability for contempt in the face of the court involves consideration of two broad issues:

- (a) whether to abolish the general concept of 'interfering with the due administration of justice' in favour of codification of particular offences constituting contempt in the face of the court; and
- (b) changes to the particular categories of contempt of court and whether to narrow or widen the basis for liability.

As to the first issue, it has already been noted that precise content of contempt in the face of the court defies definition. A wide and open-ended test, of course, has the apparent benefit of flexibility; it is able to meet unforeseen (or unforeseeable) circumstances and may be adjusted to suit contemporary values and attitudes to the judicial process. According to this view of the benefits of such a test codification of the law of contempt would not only be futile but would have the potential to hinder the ability of courts to protect their own processes. These are clearly important considerations and not to be dismissed lightly.

Nevertheless, these concerns are largely illusory. Codification of other areas of the law (including the general criminal law in Western Australia) has been achieved without adverse effect. There is no reason why the law of contempt should be more difficult to particularise and codify than any other offence. Indeed, codification of powers to deal with contempts committed in the face of the court has already been achieved in the inferior courts in Western Australia without apparent problems.

Codification would bring greater certainty to the identification of the basis for liability and clearer guidance to participants in judicial proceedings. It would not necessarily give rise to an unacceptable rigidity in the application of the

law; offences prohibiting a person from 'interrupting' proceedings,⁸⁵ for example, allow a measure of flexibility of application to particular circumstances.

It has been noted above that in Western Australia the basis for liability for contempt in the face of the court varies across jurisdictions without apparent justification. The variations seem purely to be the result of the piecemeal manner in which the courts have been established and their powers conferred. By replacing the existing law of contempt with statutory offences, uniform standards could be introduced for all courts.

Codification would also bring the law of contempt, particularly as it applies in the Supreme Court of Western Australia, into line with every other offence in the State by making it statute based. Codification would, moreover, bring contempt offences within the ambit of Chapter V of the *Criminal Code*, thereby providing a ready source of principles for the determination of criminal responsibility.

For these reasons it is recommended that the existing laws relating to contempt in the face of the court, including the common law, should be replaced by a series of statutory offences. The offences would apply to all courts of civil and criminal jurisdiction in Western Australia.

Proposal 1

The existing laws relating to contempt in the face of the court, including the common law, should be replaced by a series of statutory offences, applying to all courts of civil and criminal jurisdiction in Western Australia.

Precisely what offences should be enacted to replace the existing provisions and common law principles will be determined following the consultation process generated by this discussion paper. The Commission has formulated the following offences as a guide:

1. A person shall not wilfully insult the presiding judicial officer or officer of a court acting in the course of his or her official duties.
2. A person shall not interrupt or disrupt proceedings of a court without reasonable excuse.
3. A person appearing as a witness before a court shall not refuse to be sworn or make an affirmation when so ordered by the court.
4. A person appearing as a witness before a court shall not, subject to the laws relating to privilege, refuse to answer a question when so ordered by the court.
5. Except where the recording is made for the purpose of a fair report of the proceedings and the court has not made an order to the contrary, a person shall not make a sound recording of proceedings in a court without the leave of the court.

85 Such as in the *District Court of Western Australia Act 1969* (WA), s 63(1)(b).

6. Where a sound recording is made for the purposes of a fair report of proceedings in a court, a person shall not publish or broadcast the recording without the leave of the court.
7. A person shall not, without the leave of the court, make or publish a videotape recording of proceedings in a court.

These offences (hereafter referred to as 'contempt offences') are discussed in more detail below.

Proposal 2

The offences to replace the existing law of contempt in the face of the court shall provide the following:

1. A person shall not wilfully insult the presiding judicial officer or officer of a court acting in the course of his or her official duties.
2. A person shall not interrupt or disrupt proceedings of a court without reasonable excuse.
3. A person appearing as a witness before a court shall not refuse to be sworn or make an affirmation when so ordered by the court.
4. A person appearing as a witness before a court shall not, subject to the laws relating to privilege, refuse to answer a question when so ordered by the court.
5. Except where the recording is made for the purpose of a fair report of the proceedings and the court has not made an order to the contrary, a person shall not make a sound recording of proceedings in a court without the leave of the court.
6. Where a sound recording is made for the purposes of a fair report of proceedings in a court, a person shall not publish or broadcast the recording without the leave of the court.
7. A person shall not, without the leave of the court, make, publish or broadcast a photograph or videotape recording of proceedings in a court.

As to the reform proposals, the Commission makes a number of comments.

The first of the contempt offences, insulting the court, was not recommended for inclusion as an offence in the Australian Law Reform Commission's *Contempt* report. The preferred recommendation was that a statutory offence should be drawn in terms of 'substantial disruption' of proceedings and that insulting or disrespectful behaviour should not attract criminal liability.⁸⁶

It is suggested that the Australian Law Reform Commission's conclusion gives insufficient weight to the capacity for insulting or disrespectful behaviour to detract from the authority of the court. While not all insulting behaviour should be the subject of criminal prosecution, and often, as is

86 ALRC, above n 6, [114]- [115].

presently the case, may be ignored by the court, there is no reason why it should not give rise to the potential for conviction. In a context where recent legislation has prohibited insulting behaviour towards public officers such as fisheries officers,⁸⁷ it is difficult to see why courts should not be afforded similar protection where the circumstances warrant it.

Nevertheless, the Commission suggests that, unlike other contempt offences, the offence of insulting the court should contain a specific mental element, as reflected in the use of the expression 'wilfully'. A person would, therefore, only be guilty of this contempt offence where he or she has insulted the officer of the court with an intention of doing so.

As to the question of *mens rea* generally, it is to be noted that the proposed contempt offences do not generally include a mental element. This again differs from the recommendation of the Australian Law Reform Commission, which observed that *mens rea* is a 'long standing ingredient of liability under the ordinary criminal law'.⁸⁸ While perhaps true of non-Code states such as New South Wales, this proposition is certainly not true of the criminal law in Western Australia. Indeed, Sir Samuel Griffith, upon whose work the *Criminal Code* is substantially based, expressly stated that the aim of the *Code* is that 'it is never necessary to have recourse to the old doctrine of *mens rea*'.⁸⁹

The Commission's view is that the application of Chapter V of the *Criminal Code* to contempt offences would make sufficient provision for matters of criminal responsibility. By way of illustration, in justifying a general requirement of *mens rea*, the Australian Law Reform Commission referred to purely careless conduct, such as 'knocking over chairs or exhibits in the courtroom'.⁹⁰ In Western Australia such accidental conduct would almost certainly be excused under section 23 of the *Criminal Code* relating to accident.

The Commission therefore proposes that, save where expressly provided in relation to specific offences, *mens rea* should not be a general requirement for contempt offences.

Proposal 3

Save where expressly provided in relation to specific offences, *mens rea* should not be a general requirement for contempt offences.

The proposed contempt offences in relation to sound and videotape recordings are substantially the same as the Australian Law Reform Commission's recommendations and those of the New South Wales Law Reform Commission. Justification for the recommendation on sound

87 See *Fish Resources Management Act 1994* (WA), s200(b).

88 ALRC, above n 6, [116].

89 *Widgiee Shire Council v Bonney* (1907) 4 CLR 977, 981 (Griffith CJ).

90 ALRC, above n 6, [116].

recordings is the efficient and accurate reporting of court proceedings and the terms of the offence are so framed. By contrast, it remains a significant area of controversy whether the use of photographic and video recording equipment has a beneficial or a detrimental effect on judicial proceedings. Accordingly, the use of photography and videotape would continue to remain within the discretion of the court.

The contempt offence of refusing to answer questions when required by the court raises the controversial issue of the protection of confidential sources. Often a person giving evidence in judicial proceedings, particularly a journalist, has refused to answer questions on the grounds that it would disclose confidential sources. The issue has received recent attention, in the context of contempt of a Royal Commission, in the Supreme Court of Western Australia.⁹¹ The law is clear that in such a case there is no right to refuse to answer questions in relation to the source, regardless of any journalistic code of ethics, and that repeated refusal will amount to a contempt in the face of the court.⁹²

Whether retaining such a rigid test is justified is open to question. Freedom of communication, as reflected in the constitutional implication discussed above, is one of the essential features of representative democracy. Freedom of the press is an integral part of that freedom of communication. In that context the European Court of Human Rights has observed:

Protection of journalistic sources is one of the basic conditions of press freedom ... Without such protection sources may be deterred from assisting the press in informing the public on matters of public interest. As a result the vital public watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected. Having regard to the importance of the protection of journalistic sources for press freedom in a democratic society and the potentially chilling effect an order of source disclosure has on the exercise of that freedom, such a measure [must be] justified by an overriding requirement in the public interest.⁹³

In the United Kingdom the law relating to contempt by witnesses has been reformed by the insertion of section 10 of the *Contempt of Court Act 1981*. Section 10 provides:

No court may require a person to disclose, nor is any person guilty of contempt of court for refusing to disclose, the source of information contained in a publication for which he is responsible, unless it is 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.

The section, in effect, creates a new form of privilege available to journalists and publishers (subject to the overriding dictates of the public interest) seeking to strike a balance between the freedom of the press to disseminate

91 *R v Parry; Ex parte Attorney General* (Unreported, Supreme Court of Western Australia, 1 May 1997, Library No. 970196).

92 See *McGuinness v Attorney General of Victoria* (1940) 63 CLR 73, 102 (Dixon J); *R v Parry; Ex parte Attorney General* (Unreported, Supreme Court of Western Australia, 1 May 1997, Library No. 970196) 29 - 31 (Malcolm CJ).

93 *Goodwin v UK* (1996) 22 EHRR 123, [39], quoted in Miller, above n 6, at paragraph [4.55].

information (especially at the behest of anonymous whistleblowers) and considerations which have traditionally led to the rule denying any confidentiality to such sources. The Commission supports the introduction of such a provision.

Proposal 4

Refusal to reveal the sources of information upon which a publication is based should not constitute the contempt offence of refusing to answer questions, unless disclosure is necessary in the interests of justice or national security or for the prevention of crime.

Traditionally the liability of a witness, and in particular a journalist, to be committed for contempt for refusing to answer questions has been subject to a requirement that the question asked of the witness was relevant and necessary to the proceedings in question.⁹⁴ That is, it has been held⁹⁵ on a motion for committal for contempt, brought after the conclusion of the relevant proceedings, that if the question in relation to which the refusal was made was not relevant and necessary to the proceedings, the contemnor was not guilty of contempt. Moreover, it was held that whether the question asked was relevant and necessary falls to be determined at the end of the case and in light of all other relevant evidence.⁹⁶

This requirement, it is suggested, serves no useful purpose and is apt to undermine the authority of the court in which the witness refuses to answer questions. It is inconsistent with the maintenance of the authority of the court that a witness, when charged with contempt, should be in a position, in effect, to 'second guess' the ruling of the trial judge as to whether a question was relevant and admissible. Rather, as it is the authority of the court contempt offences are designed to protect, the Commission considers that, subject to any valid claim of privilege, a witness should be in contempt for failing to answer any question that he or she is directed to answer by a presiding judicial officer.

Particularly in light of the above recommendation in favour of protecting journalistic sources, the Commission considers there should be no additional element of relevance or necessity before a refusal to answer a question which a witness is directed to answer constitutes a contempt offence.

Proposal 5

Where the presiding judge directs a witness to answer a question, there should be no additional element of relevance or necessity before a refusal to answer the question constitutes a contempt offence.

94 See *Attorney General v Mulholland* [1963] 2 QB 477; *Attorney General v Lundin* (1982) 75 Crim App R 90. Note that a similar requirement is often reflected in specific statutory provisions in relation to contempt of tribunals: see the discussion of the *Royal Commissions Act 1969* (WA) in *R v Parry; Ex parte Attorney General* (Unreported, Supreme Court of Western Australia, 1 May 1997, Library No. 970196).

95 *Attorney General v Lundin* (1982) 75 Crim App R 90 at 97.

96 *Ibid.*

The issue of when witnesses may lawfully be required to answer questions (and conversely when they may lawfully refuse to answer questions), inevitably is governed by the substantive law of privilege and the extent to which the categories of privilege should be expanded. The issue of journalists refusing to answer questions has been addressed in this discussion paper because it most often arises in cases of contempt of court and is therefore appropriately dealt with in that context. There remain, however, a number of significant relationships involving confidentiality which, traditionally, the law has not protected by way of privilege. The two most obvious are the relationship of priest and penitent and the relationship of physician and patient. It is considered that the substantive obligations attaching to such relationships are beyond the scope of the current term of reference.⁹⁷ These areas may well require further consideration in the future.

Any proposal to introduce contempt offences in substitution for the existing statutory and common law rules in relation to contempt in the face of the court, should also address the issue as to the extent to which the conduct must take place within sight or hearing of the judicial officer concerned. However, as has already been noted, the requirement for the court to have personally observed the alleged contempt is intimately linked with the summary procedure for the determination of those offences and will be dealt with in more detail under suggested procedural reforms.

A major issue is whether the contempt offences should be enacted as amendments to the *Criminal Code* or in a separate piece of legislation, such as a Contempt of Court Act.

As to the first alternative, it is recognised that contempt offences could be conveniently incorporated in Chapter XVI of the *Criminal Code* which covers offences relating to the administration of justice. It is also noted that the general approach of the Commission, in its recent *Review of the Criminal and Civil Justice System* was to recommend the rationalisation of criminal offences into two acts.⁹⁸

Nevertheless, the unique features of contempt offences seem to justify a separate Contempt of Court Act. Two arguments support this recommendation. Firstly, as will be seen, it is considered that contempt offences should continue to be determined in accordance with a separate and distinct procedure to that applying to other offences. Secondly, to the extent the law of contempt of court by way of publication or disobedience (the subject of further discussion papers on the law of contempt to be published by the Commission) is also to be reformed, each area of reform should be contained in the same piece of legislation.

Proposal 6

The contempt offences should be contained in a new Contempt of Court Act.

⁹⁷ In particular, because the regulation of those relationships (especially physician and patient) raises issues far broader than merely the giving of evidence, such as discovery, waiver of privilege and expert evidence.

⁹⁸ Law Reform Commission of Western Australia, *Review of the Criminal and Civil Justice System in Western Australia: Final Report*, Project 92 (1999), Recommendations 14 and 15.

PROCEDURE

The existing summary procedures in relation to contempt of court have often in the past been the subject of substantial criticism. On at least two occasions the Supreme Court of Western Australia has highlighted the need for reform of the summary procedures applicable in that Court. Those particular criticisms, however, have predominantly related to the requirement for contempts other than those in the face of the court to be determined, summarily, by the Full Court. In 1981, for example, Sir Francis Burt observed:

The summary trial for contempt must now be accepted although, in my opinion, that way of proceeding in its application to constructive contempts, by which I mean contempts not in the face of the court, and being contempts which have no impact upon particular proceedings then pending or in train, has nothing to recommend it. It can be readily conceded that contempt in the face of the court which in some way obstructs the administration of justice in a particular case must be immediately dealt with 'to remove the obstruction and to facilitate the progress of the proceedings': Barwick CJ in *Keeley v Brooking* (1979) 25 ALR 45 at 49; 53 ALJR 526 at 528. In such a case necessity supports the use of the summary procedure.⁹⁹

These comments were endorsed by the Full Court in 1997¹⁰⁰ when Malcolm CJ detailed the repeated calls for the law and procedure of contempt to be reformed.

Critics of the summary procedure for dealing with contempt in the face of the court have focussed on the lack of the usual safeguards that apply to criminal offences generally. Those safeguards, and their apparent absence in the case of contempt in the face of the court, have been identified as:¹⁰¹

1. The Presumption of Innocence. It has been suggested that the power of the presiding judicial officer to institute proceedings where it appears to him or her that a contempt has been committed and also to determine liability reverses the presumption of innocence. The Australian Law Reform Commission went so far as to suggest that the current procedure involves a 'presumption of guilt'.¹⁰²
2. The Rule Against Bias. Judicial officers determining liability for a contempt committed in their courtroom (particularly insulting judicial officers themselves), gives rise to a reasonable apprehension of bias on the part of the judicial officer.
3. The Right to a Fair Hearing. The ability of the presiding judicial officer to rely upon his or her own perceptions, without provision for cross-examination as to those perceptions has been said to cause concern both as to whether natural justice is afforded to the contemnor and generally as to the adequacy of such perceptions as a basis for determining criminal guilt.

99 *R v Lovelady; Ex parte Attorney General* [1982] WAR 65, 66-67 (Burt CJ) .

100 *R v Minshull; Ex parte Director of Public Prosecutions for Western Australia* (Unreported, Supreme Court of Western Australia, Full Court, 21 May 1997, Library No. 970255) 16-18 (Malcolm CJ) and 2 (Franklyn J).

101 See ALRC, above n 6, [110] and [112].

102 ALRC, above n 6, [110].

Each of these criticisms has merit and, together, they provide a sufficient justification for reform of the existing procedure.

The criticisms should not, however, be overstated. For example, it should not be regarded as wholly inimical to the administration of justice that a presiding judicial officer can institute proceedings for an alleged contempt and also make a final determination as to whether the offence is established. Judicial officers are routinely required to distinguish between the *prima facie* effect of evidence and final conclusions based upon that evidence. It has not been suggested, for example, that a judge or magistrate trying a criminal prosecution should not continue to hear a matter after he or she has rejected a no case submission.

Similarly, criticism directed at the reliance by the presiding judicial officer upon the demeanour of the contemnor fails to give sufficient regard to the importance placed in other areas of the law upon judicial assessments of demeanour. The natural advantage a trial judge has seeing and hearing witnesses at first hand, for example, is one of the main reasons appeal courts are reluctant to interfere with findings of fact by a lower court particularly when the findings depend on the credibility of witnesses.¹⁰³

Taking into account these competing considerations, the alternatives for reform of the procedure for contempt offences are:

1. retain the existing summary procedure;
2. have contempt offences tried by jury on indictment;
3. have contempt offences tried summarily by a magistrate;
4. introduce a hybrid procedure.

For the reasons set out above, the retention of the existing summary procedure for all contempt offences cannot be justified. In the interests of justice the safeguards normally applicable to criminal trials should, as a general rule, apply to contempt offences.

Trial on indictment or according to the procedure under the *Justices Act 1902* are also not recommended. It is suggested that, in relation to all contempt offences, their instigation should remain with the court concerned and not be the subject of executive decision. It is fundamental to the law of contempt of court, particularly contempt in the face of the court, that the court be in a position to protect its own processes. Indeed, were that function to be assumed by the executive it is arguable that, in the case of courts exercising federal jurisdiction, the independence required by Chapter III of the *Constitution* would be infringed.

Furthermore, in the case of trial under the *Justices Act 1902*, there would be an additional concern that protection of the superior courts' judicial processes would be entrusted to lower courts. This not only detracts from the autonomy of the superior courts; it also gives rise to the awkward

103 *Abalos v Australian Postal Commission* (1990) 171 CLR 167.

problem of superior court judges' reliability and credibility being determined by magistrates.¹⁰⁴

All factors considered, the Commission recommends that a new hybrid procedure be introduced which provides two alternative modes of trial:

1. Trial by a single member, or alternatively a panel of members, of the court; or
2. Trial by the presiding judicial officer.

Proposal 7

The existing procedures in relation to contempt in all courts should be replaced by a procedure, applicable in all courts, whereby contempt offences are to be tried:

1. by a single member, or alternatively a panel of members, of the court; or
2. by the presiding judicial officer.

A similar recommendation was made by the Australian Law Reform Commission,¹⁰⁵ with the proviso that the option of trial by the presiding judicial officer was to be available only with the consent of the contemnor, effectively leaving the mode of trial in the discretion of the contemnor.

The Commission does not support the Australian Law Reform Commission's recommendation on the basis that it fails to give sufficient weight to the need, when circumstances require, of an immediate, or at least proximate response to a contempt committed in the face of the court. The Commission considers that there should remain circumstances where a contempt committed in the face of the court can be met with a more expeditious response than would be achieved by referring the matter to a different member of the court. It may be important, for example, where proceedings are protracted or sensitive, for the court at the outset to impress upon other participants in the proceedings the gravity of particular conduct and the standards of propriety to be observed.

The Commission considers a summary procedure should remain available, either where the contemnor consents, or where the following conditions are satisfied:

1. The conduct the subject of the alleged contempt offence has occurred in the presence of the judicial officer; and
2. The judicial officer considers that the alleged contempt offence presents an immediate threat to the authority of the court or the integrity of the proceedings then in progress.

104 See ALRC, above n 6, [131].

105 See ALRC, above n 6, [130].

The requirement that the conduct occur in the presence of the judicial officer seeks to avoid controversy over the extent to which the conduct must take place in the presence of the judicial officer. Essentially, it is proposed that the summary procedure is to be confined to those cases which, on the narrowest view of the common law, would have been appropriate for determination in a summary way. The second condition to be satisfied also introduces a purposive element akin to the test proposed by Moffitt P in *Registrar, Court of Appeal v Collins*¹⁰⁶ referred to earlier.

Proposal 8

A contempt offence may be tried by the presiding judicial officer either where the contemnor consents to that procedure, or where the following conditions are satisfied:

1. The conduct the subject of the alleged contempt offence has occurred in the presence of the judicial officer; and
2. The judicial officer considers that the alleged contempt offence presents an immediate threat to the authority of the court or the integrity of the proceedings then in progress unless dealt with in a summary manner.

The Commission suggests that the procedure to be adopted in relation to the summary power be codified, as in Order 55 Rule 3 of the *Rules of the Supreme Court*. Codification should make explicit the need for the charge to be adequately particularised and for the right of the contemnor to be heard and to call witnesses.

Proposal 9

Where the court proceeds to determine a contempt offence summarily, the court shall:

1. inform the accused of the nature and particulars of the charge;
2. allow the accused a reasonable opportunity to be heard and to call witnesses and, if necessary grant an adjournment for that purpose;
3. after hearing the accused, determine the charge and give reasons for that determination; and
4. make an order for punishment or discharge of the accused.

As in the case of offences under the *Criminal Code* which are triable either on indictment or summarily,¹⁰⁷ there should be a graduated scale of penalties depending upon whether the contempt offence is tried summarily. Where summary procedure is adopted, the maximum fine and term of imprisonment should be reduced. By this measure it is intended that more

¹⁰⁶ *Registrar, Court of Appeal v Collins* [1982] 1 NSWLR 682.

¹⁰⁷ See eg *Criminal Code* (WA), s 409.

serious contempts would not be tried by the summary procedure. However it should not be thought that there is necessarily a correlation between a contempt which is 'serious' and one which calls for an immediate response. The test for whether the summary procedure should be adopted is, as mentioned above, more concerned with the immediacy of the threat to the integrity of proceedings in terms of time and place, and not its general seriousness.

Consistently with the current sentences available for contempt offences in courts of summary jurisdiction in Western Australia, it is suggested that appropriate maxima for summary conviction would be imprisonment of 12 months or a fine of \$5,000 or both.

Proposal 10

The maximum fine or term of imprisonment applicable to a contempt offence should be reduced in the case of a contempt offence tried by way of the summary procedure. Appropriate maxima for summary conviction would be imprisonment of 12 months or a fine of \$5,000 or both.

Consideration should be given to adopting a uniform procedure for dealing with cases where the conditions for the exercise of the summary power are not satisfied, or where it is considered that the penalty available for a summary conviction is inadequate. In such cases, the Commission suggests the alleged offence should be referred to the most senior member of the court (e.g. the Chief Justice, Chief Judge or Chief Magistrate) for referral to another member of the court for determination. Before the charge is referred, it is recommended that it be reduced to writing in the form of a complaint. In referring the matter for trial, the senior member of the court may, in a matter of sufficient importance, refer the alleged offence to a panel of three members of the court. In the case of the Full Court the offence should be referred to the Full Court differently constituted.

Proposal 11

Where the conditions for the exercise of the summary power are not satisfied, or where it is considered that the penalty available for a summary conviction is inadequate, the alleged offence should be reduced to writing and referred to the most senior member of the court. The charge should then be referred to another member of the court for determination.

Proposal 12

In referring the matter for trial, the senior member of the court may, in a matter of sufficient importance, refer the alleged offence to a panel of three members of the court. In the case of the Full Court the offence should be referred to the Full Court differently constituted.

SENTENCE

With the introduction of statutory contempt offences should come statutory maxima as to the level of fines and the term of imprisonment, subject to there being reduced penalties for summary convictions. While no particular maxima are recommended, it is noted that the penalties provided in the District Court of Western Australia (a term of imprisonment of five years or a fine of \$50,000 or both) appear the most appropriate. There is no apparent justification for differing penalties to apply in different courts. The Commission therefore suggests that sentences be uniform.

Proposal 13

Subject to reduced sentences applicable to summary conviction, there should be maximum penalties (both as to the level of fines and terms of imprisonment) applicable to contempt offences. The maximum sentences should be the same for all courts. For offences tried other than summarily, appropriate maxima would be imprisonment of five years or a fine of \$50,000 or both.

There is no justification for excluding the sentencing options available under the *Sentencing Act 1995* from courts sentencing offenders for contempt offences. It is therefore recommended that the *Sentencing Act 1995* and *Sentencing Administration Act 1995* be amended so as to apply the provisions of those Acts to contempt offences.

Proposal 14

The *Sentencing Act 1995* and *Sentencing Administration Act 1995* should be amended so as to apply the provisions of those Acts to contempt offences.

RIGHTS OF APPEAL

The existing provisions in relation to rights of appeal for contempt of court have developed in a piecemeal fashion and are generally regarded as unsatisfactory. Suggestions made in the past¹⁰⁸ that there should not be rights of appeal in relation to contempt in the face of the court should today be rejected. Particularly given the recommendation that the summary procedure be retained in certain circumstances, it is essential that there are comprehensive rights of appeal both in relation to conviction and sentence.

Proposal 15

The Commission recommends that there be comprehensive rights of appeal in relation to contempt offences both as to conviction and sentence.

108 *Keeley v Brooking* (1979) CLR 162 (Barwick CJ) quoted in *Cullen v The Queen* (Unreported, Supreme Court of Western Australia, Full Court, 25 September 1986, Library No. 6450, 9-10 (Burt CJ))

Existing appeal rights, such as there are, are not without anomalies. For example, a person who is convicted of wilfully interrupting a magistrate in the exercise of his or her criminal jurisdiction (i.e. in the Court of Petty Sessions) has a right of appeal to the Supreme Court.¹⁰⁹ A person convicted of the same offence before a magistrate in the exercise of his or her civil jurisdiction (i.e. in the Local Court) has a right of appeal to the District Court.¹¹⁰ In the interests of consistency, such anomalies should be specifically addressed and rectified. The Commission suggests that all appeals from convictions for contempt offences by magistrates or justices be determined in accordance with Part VIII of the *Justices Act 1902*. This will generally involve an appeal to a single judge of the Supreme Court with the possibility of a further appeal, by leave, to the Full Court.

Rights of appeal from the District Court or a single judge of the Supreme Court should be to the Court of Criminal Appeal.

Proposal 16

Appeals from contempt offence convictions by magistrates or justices should be determined in accordance with Part VIII of the *Justices Act 1902*.

Proposal 17

Appeals from contempt offence convictions by the District Court or by a single judge of the Supreme Court should be to the Court of Criminal Appeal.

109 *Justices Act 1902* (WA), s 184.

110 *Local Courts Act 1904* (WA), 107.

V. SUMMARY OF PROPOSALS

1. The existing laws relating to contempt in the face of the court, including the common law, should be replaced by a series of statutory offences, applying to all courts of civil and criminal jurisdiction in Western Australia.
2. The offences to replace the existing law of contempt in the face of the court shall provide the following:
 1. A person shall not wilfully insult the presiding judicial officer or officer of a court acting in the course of his or her official duties.
 2. A person shall not interrupt or disrupt proceedings to court without reasonable excuse.
 3. A person appearing as a witness before a court shall not refuse to be sworn or make an affirmation when so ordered by the court.
 4. A person appearing as a witness before a court shall not, subject to the laws relating to privilege, refuse to answer a question when so ordered by the court.
 5. Except where the recording is made for the purpose of a fair report of the proceedings and the court has not made an order to the contrary, a person shall not make a sound recording of proceedings in a court without the leave of the court
 6. Where a sound recording is made for the purposes of a fair report of proceedings in a court, a person shall not publish or broadcast the recording without the leave of the court.
 7. A person shall not, without the leave of the court, make, publish or broadcast a photograph or videotape recording of proceedings in a court.
3. Save where expressly provided in relation to specific offences, *mens rea* should not be a general requirement for contempt offences.
4. Refusal to reveal the sources of information upon which a publication is based shall not constitute the contempt offence of refusing to answer questions, unless disclosure is necessary in the interests of justice or national security or for the prevention of crime.
5. Where the presiding judge directs a witness to answer a question, there should be no additional element of relevance or necessity before a refusal to answer the question constitutes a contempt offence.
6. The contempt offences should be contained in a new Contempt of Court Act.
7. The existing procedures in relation to contempt in all courts should be replaced by a procedure, applicable in all courts, whereby contempt offences are to be tried:

1. by a single member, or alternatively a panel of members, of the court;
or
 2. by the presiding judicial officer.
8. A contempt offence may be tried by the presiding judicial officer either where the contemnor consents to that procedure, or where the following conditions are satisfied:
1. The conduct the subject of the alleged contempt offence has occurred in the presence of the judicial officer; and
 2. The judicial officer considers that the alleged contempt offence presents an immediate threat to the authority of the court or the integrity of the proceedings then in progress unless dealt with in a summary manner.
9. Where the court proceeds to determine a contempt offence summarily, the court shall:
1. inform the accused of the nature and particulars of the charge;
 2. allow the accused a reasonable opportunity to be heard and to call witnesses and, if necessary grant an adjournment for that purpose;
 3. after hearing the accused, determine the charge and give reasons for that determination; and
 4. make an order for punishment or discharge of the accused.
10. The maximum fine or term of imprisonment applicable to a contempt offence should be reduced in the case of a contempt offence tried by way of the summary procedure. Appropriate maxima for summary conviction would be imprisonment of 12 months or a fine of \$5,000 or both.
11. Where the conditions for the exercise of the summary power are not satisfied, or where it is considered that the penalty available for a summary conviction is inadequate, the alleged offence should be reduced to writing and referred to the most senior member of the court. The charge should then be referred to another member of the court for determination.
12. In referring the matter for trial, the senior member of the court may, in a matter of sufficient importance, refer the alleged offence to a panel of three members of the court. In the case of the Full Court the offence should be referred to the Full Court differently constituted.
13. Subject to reduced sentences applicable to summary conviction, there should be maximum penalties (both as to the level of fines and terms of imprisonment) applicable to contempt offences. The maximum sentences should be the same for all courts. For offences tried other than summarily, appropriate maxima would be imprisonment of five years or a fine of \$50,000 or both.
14. The *Sentencing Act 1995* and *Sentencing Administration Act 1995* should be amended so as to apply the provisions of those Acts to contempt offences.
15. The Commission recommends that there be comprehensive rights of appeal in relation to contempt offences both as to conviction and sentence.

16. Appeals from contempt offence convictions by magistrates or justices should be determined in accordance with Part VIII of the *Justices Act 1902*.
17. Appeals from contempt offence convictions by the District Court or by a single judge of the Supreme Court should be to the Court of Criminal Appeal.