



**Law Reform Commission of Western Australia**

**DISCUSSION PAPER**

**ON**

**CONTEMPT BY PUBLICATION**

**PROJECT NO 93 (II)**

**March 2002**

## **The Law Reform Commission of Western Australia**

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## **Table of contents**

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	<u>Page No</u>
Executive summary	(i)
Acknowledgements	(vi)
Index to invitations to submit	(vii)
Introduction and overview	1
Why have a law of contempt by publication?	6
Conclusion	87

## Executive Summary

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The first term of reference in the Law Reform Commission ('the 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 by publication and whether the law pertaining thereto should be reformed and, if so, in what manner.

Contempt is committed when a person publishes information that has a tendency to prejudice court proceedings. Often this will be information that would not be admissible as evidence in the proceedings. Therefore the law of contempt by publication sets up a tension between the integrity of trial processes and the availability to the public of information relating to those proceedings.

The Commission believes that a number of aspects of the law of contempt by publication are worthy of consideration for reform. This discussion paper draws attention to them, and where indicated, invites submissions on those issues. Because of the highly consultative nature of this discussion paper the Commission has not, at this stage, formulated any concrete proposals for reform.

Contempt by publication has a rich history of consideration by law reform commissions, and it is not difficult to see why this should be so. The law of contempt by publication exists at the junction between a number of interests that are of great social, political and legal importance. Therefore considerable thought needs to be given to how contempt is to balance and reconcile these interests. In particular there is a serious issue as to which institutions, the courts or the media, are better placed to find the most desirable balance between the interests of freedom of expression and the right to a fair trial. As each group of institutions could be seen as having a vested interest in one of those interests, it is strongly arguable that a third party, the legislature, should step in and lay the ground rules. However, even if legislation were passed, there would still be a need for fine-tuning in individual cases. Therefore attention must be paid, in the drafting of legislation, to the relative power and discretion given to each group.

Many people feel that the law as it currently stands gives too much power to the judiciary at the expense of the media. The relative powerlessness of the media flows, in large part, from the status of contempt by publication as a common law offence. Contempt by publication is in many ways an anomalous offence, being the only remaining common law crime under Western Australian law. The Commission has a general policy in favour of bringing indictable offences under the *Criminal Code* and is therefore disposed, at the very least, to recommend reform in relation to this matter. This is because the seriousness of the offence warrants an indictable procedure, by contrast to the summary one traditionally used (see below).

One important implication of common law status is that there is no maximum penalty. The imposition of maximum penalties would flow as a matter of course from the Commission's recommended incorporation of contempt in the *Criminal Code* but it has its own merits independently of the Commission's policy. Theoretically the absence of maximum penalties means that an offender can be imprisoned indefinitely or fined a stratospheric amount. In practice, it means that the media and their employees have no way of measuring their exposure when making decisions that require a balancing of the relevant interests. This might have a 'chilling effect' as those making the decisions err on the side of caution, and too much information is kept from the public. Not surprisingly, the introduction of maximum penalties is widely regarded as the most urgent reform needed to the law of contempt by publication. Of course, even if there is agreement on the principle of maximum penalties, there is still a need to decide what those maximums should be. The issues just discussed raise also the more general question of how best to balance the competing needs for flexibility and certainty in the law of contempt.

Contempt by publication puts in the spotlight the relationships and differences between judges and juries. The law of contempt has tended to be based on assumptions that juries are quite easily influenced by publicity and that judges have great difficulty in counteracting the effects of publicity. These assumptions raise two important questions: first, are they empirically justifiable, and second, are they consistent with the approach taken in other areas of law?

After the absence of maximum penalties, two other aspects of the law are generally considered most urgently in need of reform. One is the basic legal test to determine whether material is in contempt. While the present law focuses on the tendency of material to prejudice proceedings, the relevant

interests might be better balanced by a test that required the prosecution to prove a certain threshold level of *risk* of such prejudice. This would clearly ease the burden on defendants and potential defendants. It would also raise the issue of whether to base the test on the level of risk of prejudice or on the level of prejudice being risked.

The other important issue for consideration is that of the mental element. Under the current law, the prosecution need prove only intent to publish the material; there is no need to show that the defendant even knew the relevant proceedings were on foot, let alone harbouring any intent or recklessness in relation to prejudicing them. This rule provides a high degree of protection to the administration of justice, but it also has the potential to punish where there is no moral blameworthiness and no deterrent effect is possible. Such a rule clearly risks bringing the law into disrepute. Once again, however, even if agreement can be reached on the desirability of introducing a mental element, it needs to be considered first exactly what the element should be and second whether such an element should work as an element of the offence or as a defence.

As contempt by publication comes into play only when proceedings are 'pending' there should be some clarity as to exactly how that period is defined. This raises issues as to both the commencement and the conclusion of the period, in relation to both criminal and civil proceedings. Many of the current difficulties media representatives face in relation to this aspect of contempt law could be addressed by the adoption of more effective means of providing information on proceedings that are planned.

There are clear arguments that reform is desirable in relation to the previous three aspects of contempt law: the absence of maximum penalties, the absence of a mental element and the absence of clarity as to the period during which publication is restricted. However, the Commission also recognises that any reform will be part of a package and these various aspects need to be considered together. It might be that major reforms on all three fronts would tip the scales too far in favour of the media. A balancing process is necessary. Such a process should also, of course, take into account the less important aspects discussed below.

The law currently recognises certain defences to contempt by publication, namely fair and accurate reporting, and publication in the course of discussion on a matter of public interest. The Commission has certain concerns about these matters, particularly the question of how 'public interest' is to be defined

for the purposes of the second-mentioned defence. There is a clear difference between 'public interest' in the sense of 'public curiosity' and 'public interest' in the sense of 'what the public needs to know'.

This paper raises a further possible defence of innocent distribution, that is, a defence relating to the defendant's lack of control over the content of a publication.

Particular issues arise in the application of contempt to publications about civil proceedings. Some have already been noted: the need for separate rules for determining when those proceedings are 'pending'. Because of the assumption described above, that judges are generally not influenced by prejudicial publicity, and the fact that most civil proceedings are tried by a judge sitting alone, such publications are more likely to fall foul of another branch of contempt law, that of 'prejudging' the proceedings. Stating what the outcome should be, irrespective of whether there is any perceptible risk of actual prejudice to the proceedings, is also an offence. There are strong arguments that it should not be, but on the other hand it is in this field that we see most clearly one of the concerns underlying all aspects of the law of contempt by publication, namely the undesirability of 'trial by media'. This phrase encapsulates some important concerns that are in need of further definition and clarification, especially if the prejudgment principle is to be retained.

In addition to the issue of maximum penalties, a number of questions surrounding punishment need to be considered. These include whether there should be different scales for corporate and individual defendants, whether imprisonment should be available at all and whether alternative sentences should be available. In addition, recent events in New South Wales have highlighted the need to consider whether there should be a power to order costs against a contemnor who has caused a trial to be aborted, and how such a power should articulate with the power to punish for contempt.

Finally there are some procedural issues on which the Commission invites submissions. Currently, contempt by publication is prosecuted summarily in the Full Court of the Supreme Court and there are no effective avenues for appeal. These problems might be addressed automatically by the transformation from common law to *Criminal Code* offence, but it is still worthwhile considering whether there are any grounds for treating contempt differently from any other offence. Similarly, it is worth considering the availability or otherwise of injunctions to restrain contempts and whether a departure from

the general rule of non-availability would be justified. Once again procedural issues need to be considered alongside others, as for instance in the event that sufficiently low maximum penalties were adopted a summary procedure might be considered appropriate.

## **Acknowledgements**

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## **Index to invitations to submit**

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The Commission invites submissions on the following issues raised in this discussion paper:

1. The comparison between the judiciary and the media as potential repositories of the power to balance the important public interests at stake with publishing on court proceedings. [p. 9]
2. How the interests of fair trials, the administration of justice, the avoidance of trial by media, freedom of discussion and open justice should be balanced in the law of contempt by publication. [p. 16]
3. What assumptions (if any) about juries and judges should underlie the law of contempt by publication. [p. 31]
4. The kinds of research that are possible and desirable on the actual effects of publicity about court proceedings. [p. 31]
5. The relative desirability of the concepts of tendency and risk as bases for liability for contempt by publication. [p. 33]
6. The best way of striking a balance between certainty and flexibility in the law of contempt by publication. [p. 34]
7. Whether the level of risk of prejudice or the level of prejudice being risked should be measured in order to determine liability for contempt by publication. [p. 35]
8. The desirability of introducing a mental element as a prerequisite to liability for contempt by publication. [p. 37]
9. Whether any mental element should be introduced in the form of a defence or as an element of the offence. [p. 40]
10. Whether any mental element should be framed in terms of intent, recklessness or knowledge. [p. 41]
11. The question of the facts to which any mental element should relate that forms the basis for liability for contempt by publication. [p. 42]
12. The question of when criminal proceedings should start to be considered 'pending' for the purposes of the law of contempt by publication. [p. 49]
13. The question of when criminal proceedings should be considered no longer pending for the purposes of the law of contempt by publication. [p. 49]

14. What measures could be taken to enhance certainty as to whether criminal proceedings are pending by providing better information to the media. [p. 51]
15. How the *sub judice* period should be defined in civil cases. [p. 52]
16. The most desirable combination of reform measures relating to the elements of contempt by publication, the defences to it, the way it is prosecuted and the penalties available. [p. 53]
17. Whether any changes to the current law on fair and accurate reporting are desirable. [p. 55]
18. What the position should be of a defendant who has made a prejudicial publication in the course of discussion on a matter of public interest. How 'public interest' should be defined for these purposes. [p. 57]
19. The desirable legal significance, if any, of a defendant's lack of control over the contents of a publication. [p. 59]
20. Whether the prejudgment principle should be retained as a basis for liability, and if so what if any changes should be made to render the law more certain and just. How 'trial by media' might be defined, and how the concerns it encapsulates can be built into the law of contempt by publication. [p. 64]
21. What changes, if any, should be made to the current practice of summary prosecution of contempt by publication. [p. 68]
22. What reforms, if any, are desirable relating to avenues for appeal in cases of contempt by publication. [p. 69]
23. Whether maximum penalties should be introduced for contempt by publication. [p. 73]
24. How any maximum penalties should be set. [p. 73]
25. Whether, and if so how, corporations should be treated differently from individuals when being sentenced for contempt by publication. [p. 74]
26. Whether, and if so on what conditions, imprisonment should continue to be available as a sentencing option in a case of contempt by publication. [p. 75]
27. Alternative sentencing options and their availability to those convicted of contempt by publication. [p. 75]
28. Which matters should be available to be pleaded in mitigation of sentence, and how they should be provided for. [p. 77]

29. The availability of injunctions in cases of contempt by publication. [p. 78]
30. The desirability in Western Australian law of a provision for convicted contempt defendants to pay the costs of any trial aborted as a result of the contempt. The most desirable procedure whereby such costs would be awarded. [p. 84]
31. The availability of, and system for granting and enforcing, suppression orders, particularly in light of any other changes to contempt law that might be deemed desirable. [p. 86]

## Introduction and overview

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### The current law on contempt by publication

Contempt by publication refers broadly to the offence of publishing material that has a tendency to interfere with the administration of justice. In Western Australia, it is an unusual offence in that it exists outside the *Criminal Code*.<sup>1</sup> As a common law offence, it has no maximum penalty. Contempt by publication is usually prosecuted by the Director of Public Prosecutions and is tried by the Full Court of the Supreme Court of Western Australia. Appeals lie to the High Court of Australia on the usual terms, that is, by special leave if an important question of public policy is involved.

Most cases of contempt by publication involve material that has a tendency to prejudice criminal proceedings being tried before a jury. Some cases involve the revelation of information that would not be admissible as evidence in court, for example a prior conviction. Some involve a simple statement of opinion as to the guilt or innocence of an accused. However, it is possible to be held in contempt for statements that place pressure on the parties to proceedings, including civil proceedings, and even for statements prejudging the outcome of proceedings to be tried by a judge alone.

There are two widely applied statements of the test for contempt by publication. The first comes from the High Court decision in *John Fairfax & Sons Pty Ltd v McRae*:

[T]his summary jurisdiction has always been regarded as one which is to be exercised with great caution and, in this particular class of case, to be exercised only if it be made quite clear to the court that the matter published has, as a matter of practical reality, a tendency to interfere with the due course of justice in a particular case.<sup>2</sup>

This has been applied in numerous recent Western Australian cases.<sup>3</sup> The second comes from a decision of the Supreme

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<sup>1</sup> See *Criminal Code Compilation Act 1913* (WA) s 7 ('Nothing in this Act or in the [Criminal] Code shall affect the authority of courts of record to punish a person summarily for the offence commonly known as "contempt of court"; but so that a person cannot be so punished, and also punished under the provisions of the Code for the same act or omission.') There is a number of offences under the *Criminal Code* that could also constitute contempt of court, for example attempting to pervert the court of justice: s 143. See generally Chapter XVI.

<sup>2</sup> (1954) 93 CLR 351, 370 (Dixon CJ and Fullagar, Kitto and Taylor JJ).

<sup>3</sup> See *R v Pearce* (1991) 2 WAR 395; *R v West Australian Newspapers Ltd; Ex parte Director of Public Prosecutions (WA)* (1996) 16 WAR 518, 533; *Nationwide News; Ex parte Director of Public Prosecutions (Cth)* (1997) 94 A Crim R 57, 62.

Court of NSW and may be seen as a refinement of the *McRae* test:

If the publication is of a character which might have an effect on the proceedings, it will have the necessary tendency, unless the possibility of interference is so remote or theoretical that the *de minimis* principle should be applied.<sup>4</sup>

There are limited defences to contempt by publication, including fair and accurate reporting of criminal proceedings<sup>5</sup> and publication in the public interest (the *Bread Manufacturers'* principle).<sup>6</sup>

There is some uncertainty as to exactly when proceedings are considered to be pending for the purposes of contempt by publication. The period of the actual trial is certainly covered, as is the period from the charging of the suspect to the commencement of the trial. There is some doubt, however, as to the period from arrest to the laying of a charge and also as to the period following a guilty verdict, while the accused retains rights of appeal and a re-trial remains a possibility.

For the remainder of this paper, unless there is a contrary indication, 'contempt' will be intended to refer to contempt by publication. Contempt by publication, or at least a certain subset of it, is often referred to as '*sub judice* contempt' because it occurs in the context of proceedings that are '[s]till being considered by a court of law'.<sup>7</sup> Occasionally this term is used interchangeably with 'contempt by publication'.

### **A complex balancing task**

The law of contempt by publication needs to be understood against the backdrop of media operations and media power. The vast majority of defendants in contempt proceedings are involved in the media; often they are media organisations themselves. Therefore the law needs to be developed in such a way as to take into account the imperatives under which such people and organisations work. In some ways those imperatives operate in tandem with, and are indeed synonymous with, important public and community interests. Cutting across this divide is the fact that those interests that the law of contempt seeks to protect are not always synonymous with even the important public and community interests served by the media. Therefore there is a complex

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4 *Attorney-General (NSW) v John Fairfax & Sons Ltd* (1980) 1 NSWLR 362, 368. See also *R v Thompson* [1989] WAR 219, 223; *R v Saxon* [1984] WAR 283, 292 (Kennedy J).

5 See New South Wales Law Reform Commission, *Contempt by Publication*, Discussion Paper No 43 (2000) 288.

6 The defence is so named after *Ex parte Bread Manufacturers Ltd; Re Truth and Sportsman Ltd* (1937) 37 SR (NSW) 242. The most authoritative exposition of the principle, however, is in *Hinch v Attorney-General (Vic)* (1987) 164 CLR 15.

7 The Hon Peter Nygh and Peter Butt (eds) *Butterworths Concise Australian Legal Dictionary* (1997) 379.

balancing task to be carried out between a number of different interests. The balancing required is often understood as one between the right to a fair trial and the right to free speech, but as this paper explains in some depth below, the interests that are present and therefore need to be accounted for also include public confidence in the judiciary, the general public interest in the integrity of the administration of justice, open justice, the protection of the public from offenders, the protection of the privacy of people involved in legal proceedings, private commercial interests of media organisations and their proprietors and public curiosity about the details of legal proceedings, to name a few.

### Previous attempts at reform

In the United Kingdom a *Contempt of Court Act* was passed in 1981, following the recommendations of a committee appointed in 1971 (the 'Phillimore Committee').<sup>8</sup> This Act also needs to be understood against the backdrop of a notorious case where the *Sunday Times* in Britain was enjoined from publishing an article on litigation arising out of use of the drug thalidomide during pregnancy and the shocking defects it caused in newborn babies, on the ground that the article prejudged the issues in the case.<sup>9</sup> The newspaper's appeal to the European Court of Human Rights was upheld, partly on the basis that British contempt law did not place sufficient weight on freedom of discussion.<sup>10</sup> There was therefore substantial pressure on the British government to reform the law of contempt. The Act had a broadly liberalising effect, though it did not escape criticism.<sup>11</sup>

The Canadian Law Reform Commission undertook a major review of contempt law in 1977. It produced a Working Paper in that year<sup>12</sup> and a report in 1982<sup>13</sup> recommending the codification of the law. A bill was introduced in 1984 but lapsed the same year and there has been no further legislative response to the report.<sup>14</sup>

The Irish Law Reform Commission reported on the law of contempt in 1994.<sup>15</sup> Its recommendations, while broadly liberalising, appear in some respects to have been less so than those of the other bodies mentioned here.

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8 See United Kingdom, Committee on Contempt of Court, *Report of the Committee on Contempt of Court* (HMSO, London, Cmnd 5794, 1974).

9 *Attorney-General v Times Newspapers Ltd* [1974] AC 273.

10 *Sunday Times v United Kingdom* (1979) 2 EHRR 245.

11 AM Tettenborn, 'The Contempt of Court Bill: Some Problems' (1981) 125 *Solicitors' Journal* 123.

12 Canada, Law Reform Commission, *Contempt of Court: Offences Against the Administration of Justice*, Working Paper No 20( 1977).

13 Canada, Law Reform Commission, *Contempt of Court*, Report No 17( 1982).

14 See New South Wales Law Reform Commission, above n 5.

15 See Ireland, Law Reform Commission, *Contempt of Court*, Consultation Paper( 1991); Report No 47( 1994).

The Australian Law Reform Commission reviewed contempt law between 1983 and 1987.<sup>16</sup> It also recommended codification and took a broadly liberalising approach. Some specific recommendations will be referred to in appropriate contexts below. A draft Bill was circulated for comment,<sup>17</sup> but never introduced into Parliament.

There have also been reviews of contempt law in various Australian states: in 1977 in South Australia,<sup>18</sup> in 1987 in Victoria<sup>19</sup> and two rounds in New South Wales, 1985-1986 (in the context of a review of the role of juries in criminal trials)<sup>20</sup> and 1998 to the present.<sup>21</sup>

**The recent New South Wales Law Reform Commission Discussion Paper (DP 43)**

The Commission took the view that it would be a misapplication of resources to proceed on this reference as if DP 43 did not exist. Owing to that paper's recency and comprehensive nature, to say nothing of the very considerable experience and expertise that are behind it, the present paper makes extensive reference to it. Although this paper is written in such a way as to stand on its own, its main functions are to address relevant differences between Western Australian and New South Wales law and procedure and, in some places, to raise different issues or perspectives that are not covered in DP 43. Therefore the best reading of this paper is one that takes place in conjunction with DP 43.

Like the other reviews of contempt law mentioned above, DP 43 favours liberalisation. Perhaps most significantly, it proposes a stricter test for what constitutes a contempt (Proposal 3). A publication would constitute a contempt only if it creates a *substantial* risk of prejudicing the fairness of legal proceedings. DP 43 is generally concerned with providing certainty in the law, and to that end proposes that contempt legislation provide 'an illustrative list of statements that may constitute *sub judice* contempt' (Proposal 4). It also proposes the introduction of a mental element to contempt, in the form of a defence of ignorance of 'a fact that caused the publication to breach the *sub judice* rule' combined with the taking of reasonable steps to ascertain such facts (Proposal 7). Another proposed defence centres on lack of control of the content of

16 Australian Law Reform Commission, *Contempt*, Report No 35( 1987).

17 *Crimes (Protection of the Administration of Justice) Bill 1993* (Cth).

18 South Australia, Criminal Law and Penal Methods Reform Committee of South Australian, *The Substantive Criminal Law*, Report No 4 (1977) paras 3.9-3.12.

19 Law Reform Commission of Victoria, *Comments on Australian Law Reform Commission Report on Contempt*, No 35 (unpublished, 1987).

20 New South Wales Law Reform Commission, *Criminal Procedure: The Jury in a Criminal Trial*, (Discussion Paper No 12 (1985) ch 7; Report No 48( 1986) ch 7.

21 New South Wales Law Reform Commission, above n 5.

the offending publication (Proposal 8). Clarification of the existing defence of discussion of a matter of public interest is also proposed (Proposal 19), along with the creation of a new defence that the publication 'was reasonably necessary or desirable to facilitate the arrest of a person, to protect the safety of a person or of the public, or to facilitate investigations into an alleged criminal offence' (Proposal 20). The New South Wales Law Reform Commission notes some need for clarification of the fair and accurate reporting principle, but does not propose any legislative reform.<sup>22</sup> DP 43 proposes clarification of the time frame for the application of the *sub judice* rule (Proposals 11-18). Not surprisingly, it proposes the establishment of maximum penalties for contempt (Proposal 27). Another proposal to assist in achieving fair outcomes in contempt cases is the maintenance by the Attorney General of a registry of such information (Proposal 26).

Further proposals relate to who may be liable for contempt (Proposal 2); the significance of a judge's decision whether or not to dismiss a jury following the impugned publication (Proposal 5); 'mere intent to interfere with the administration of justice' (Proposal 9); contempt by prejudging issues (Proposal 10); suppression orders (Proposal 21); access to court documents (Proposals 22 and 23); standing (Proposals 24 and 29); jurisdiction in appeals (Proposal 25); the availability of alternative sentencing options (Proposal 28); injunctions (Proposal 30) and the award of costs against contempt defendants (Proposals 32 and 33).

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22 New South Wales Law Reform Commission, above n 5, 293.

## **Why have a law of contempt by publication?**

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### **Considerations in favour of contempt law**

The law of contempt protects two very important interests: the right to a fair trial and the integrity of the administration of justice. Clearly these two interests overlap to a large extent, but they are still usefully considered as distinct.

### **The right to a fair trial**

The first interest, the right to a fair trial, is framed as an individual right but, like other individual rights, it can never be completely separated from the general interest held by everyone in the community in knowing that everyone has the right. Most people will never be on trial, but that does not mean that the right to a fair trial doesn't matter to us; it is important to know that if ever we were on trial we could expect the process to be fair. The existence of grounds for such an expectation speaks deeply of the kind of society we live in.

The problem is that a lot of what we mean when we say a trial is fair is counter-intuitive to many people. While the most fundamental tenet of fairness towards accused persons, the presumption of innocence, is easily justifiable from a rational, analytical point of view, it must constantly do battle against what appears to be an inherent tendency of people to jump to conclusions. Coupled with the strong desire many people feel to find 'closure' in distressing situations by identifying a culprit, this tendency – the tendency to assume that a person charged with an offence is probably guilty of it – poses a strong challenge to the presumption of innocence. Therefore the presumption needs some special rules to bolster it. The law against contempt by publication is an example of such a rule.

The issue is further complicated by the involvement of the media. For a range of reasons, but mainly because of the desire to maximise audiences, media organisations are interested in playing to the psychological tendencies described above. Particularly in cases containing something of the scandalous or the sensational, it could be expected that a completely unregulated media market would make it impossible to empanel a jury of people whose views had not been shaped by matters that are irrelevant to the legal inquiry they need to undertake.

It is worth noting in this connection that one possible – indeed likely<sup>23</sup> – legal response to such a difficulty would be a permanent stay of the proceedings against the accused person. While many people might assume that the outcome of prejudicial publicity would be an unfair conviction (antithetical to the accused's interests) it might actually be that a guilty person goes free (antithetical to society's interests). This is another example of the phenomenon described above, where the interests of the individual and of society cannot necessarily be neatly separated.

### **The administration of justice**

The role of contempt law in protecting the right to a fair trial is that it punishes publication of information that would not be admissible at the trial. In so doing it protects the integrity of the trial itself and the rules that govern the way the trial is run.

Obvious examples of such rules include the rules of evidence. One particularly vulnerable rule is the inadmissibility of evidence as to prior bad acts: evidence that an accused has previously committed an offence is highly prejudicial but generally lacking in probative value as to guilt of the present offence. Therefore it is not admitted.

Clearly such a rule has an important function in supporting the presumption of innocence, and therefore in turn the right to a fair trial. However, it also supports the status of the law, and of legal processes, as rational and principled, and not given to emotional prejudices. In so far as contempt law protects the rules of evidence, therefore, it also protects that status. It is important to note that the status referred to is fundamental to the rule of law, and therefore to the legal system's legitimacy in a democracy.

Another indicator of the quality of our legal system is its capacity to even out power imbalances that exist outside the court room. Although it is by no means perfect from this point of view, the legal system does provide an even-handed procedure whereby parties have at least equal opportunities to test and challenge each other's evidence and arguments. Evidence and arguments introduced by means of the media, rather than by the parties themselves, are subject to no such opportunities, or at least to considerably more complicated opportunities or opportunities that come at a significant cost. By restricting the introduction of information by means other

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23 That is to say, likely in such an extreme case. The reported decisions, however, suggest that permanent stays are not granted lightly even where a person has been punished for contempt in prejudicing an accused's trial: see eg *R v Glennon* (1992) 173 CLR 592.

than the parties themselves, the law of contempt supports this aspect of the administration of justice.

More generally, our legal system is an adversarial one. There may be significant debate on whether this is desirable or not, but one basic truth is that it is important for its integrity that the legal system be what it claims to be. The unrestrained publication of information that neither party wants taken into account in proceedings between them would have great potential to lead the system towards an inquisitorial style and potentially work injustice to both parties. Not only that, it has the potential simply to make the law look silly and inconsistent, and therefore unworthy of public confidence.

### **'Trial by media'**

The above discussion provides a number of arguments against what is often called 'trial by media'. This somewhat imprecise phrase captures what lies at the heart of many people's fears about unrestrained publication of material relating to legal proceedings; it connotes some kind of usurpation of the [legitimate] role of courts and the propagation of unfair and possibly prejudiced views with resulting injustice to a possibly (indeed presumed) innocent accused.

However, even if it is possible in a climate of trial by media to ensure a fair trial by jury, as no doubt it is in many cases, there are still fundamental grounds for objection to the use of media power to take sides in *any* controversy – and let there be no mistake, the media are invariably interested in being the prosecutor. There are strong grounds for arguing that in the present day, where media are becoming all the more important in the lives of people and governmental power is being wound back and diluted, what we need is more, not fewer, ways of holding the media accountable in the way they exercise their undoubtedly awesome power. Bearing in mind, in particular, the distinct tendency of media representatives to claim freedoms on the basis of their function of *informing* the general population to allow them to make their democratic choices, there is something fundamentally distasteful about the prospect of media power being used in tendentious ways.

Of course, some information that it is a contempt to publish is objectively true – the existence of a prior conviction is a good example. Therefore the above arguments about abuse of media power do not hold. However, attention must always be paid to the need of the population to know that information, especially at any given time. Rarely is that need so great that it should override the important interests that support the existence of a law of contempt. Perhaps the more interesting

question is who should decide where the balance lies between the 'need' to know and the right to a fair trial combined with the general public interest in the integrity of the administration of justice. Should it be the media itself, or the judiciary?

In this connection, the training of the two professions and the institutional interests of the two groups need to be compared.

#### **Invitation to submit #1**

The Commission invites submissions on the comparison between the judiciary and the media as potential repositories of the power to balance the important public interests at stake with publishing on court proceedings.

Another concern with 'trial by media' that remains (even if court proceedings are shown to have been fair) is the privacy of the accused. We have no institutionalised protection for privacy interests in Australian law, at least not for the kind of privacy that is at stake in this kind of situation. Defamation sometimes protects this interest, but if so, it is only incidentally. The problem is that when a person is on trial, a media organisation is likely to be motivated to report, and might feel quite justified in reporting, information about that person that is not strictly relevant to the trial and that a person does not necessarily want widely known. Even assuming, once again, that the trial is ultimately fair, there is a remaining injustice in having the person's life publicly exposed beyond the level strictly necessary for the trial itself; it seems to be a further punishment beyond that for which the law provides and is especially offensive in a case where the accused has been (by hypothesis correctly) acquitted. It might be added that the interests of other participants, such as witnesses, might also be at stake. In so far as contempt law prevents such publications, it also therefore protects the privacy of accused people.

#### **Considerations to the contrary**

The main interests to which contempt law is inimical have already been mentioned: freedom of speech and the press and open justice. Once again, there is significant overlap between the two but they are nevertheless usefully considered separately.

#### **Freedom of discussion**

The term 'freedom of discussion' is used here to cover both freedom of speech generally and freedom of the press. It also distinguishes the interest under discussion from the 'freedom

of communication' that has recently found its way into Australian constitutional jurisprudence.<sup>24</sup> This is necessary because the interest is a broader one; the fact that particular communications are constitutionally protected does not mean that other interests, perhaps not so closely connected with the political process, should not be taken into account in the development of an area of law. Parliament and common law courts are quite free to address such interests in the process of reforming contempt law, and it is strongly arguable that they should. It remains true, of course, that they are *bound* to take the constitutionally-recognised interest into account.

Freedom of discussion is potentially justified by some combination of three salutary ends:

- self-realisation for the speaker;
- the pursuit of truth; and
- the enhancement of democracy.<sup>25</sup>

### Self-realisation

The first justification captures something readily recognisable to most people: it is an important part of human dignity to be allowed to speak one's mind. No-one, not even a democratically-elected government, should be allowed to tell people which ideas can and cannot be expressed. There is great power in such a notion.

However, self-realisation is also the most difficult of the three notions to rely on as a basis for an argument about limiting the law's reach. This is partly because it, in turn, relies heavily on a notion that speech is inherently harmless. This is a notion which must surely be regarded as largely discredited in this day and age. If freedom of discussion is just a sub-set of the general personal liberty to which many people feel they are entitled, it must be recognised that the law restricts people's actions in myriad ways and there is no basis for treating speech differently *just because it is speech*.<sup>26</sup> Certainly the onus is on the legal system to demonstrate that speech causes a harm that outweighs the speaker's interest in self-realisation. Debate over such matters, in various contexts including contempt, has been fairly vigorous in recent years,<sup>27</sup> and should be welcomed. However, it is a very different kind of

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24 See *Australian Capital Television v Commonwealth* (1992) 177 CLR 106; *Theophanous v Herald & Weekly Times* (1994) 182 CLR 104; *Stephens v West Australian Newspapers* (1994) 182 CLR 211; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

25 Eric Barendt, 'Freedom of Speech' (1985).

26 Frederick Schauer, 'Free Speech in a World of Private Power' in Tom Campbell and Wojciech Sadurski (eds), *Freedom of Communication* (1994), 13.

27 See eg Dennis Howitt, 'Pre-trial publicity: The Case for Reform' (1982) 2 *Current Psychological Reviews* 311.

debate from one that starts from the standpoint that speech is inherently harmless and/or inherently different from action.

These arguments apply with even greater force to discussion by the media. Journalists as individuals have no greater right to self-realisation than other people, so if there is a self-realisation interest in freedom of discussion for the media, it must have something to do with the interests of media organisations themselves. These interests are by definition commercial and monetary. In other words, the media's 'self-realisation' interest in its freedom is the interest in increased circulation or ratings and in resulting increases in profits. Here is an interest of an entirely different order from the starting point, the right of people to speak their mind, and it arguably has no place demanding special protection from the law. Profit-making activities must always be carried out within the confines of the law, and the law puts a lot of energy into protecting the interests of the vulnerable against the potential excesses of such activities. There is no reason that should change.

### **Pursuit of truth**

The second justification, the pursuit of truth, is based on what is often referred to in the United States of America as the 'marketplace of ideas'. Free discussion means a free market in which ideas can compete. Just as we can be confident that in a market of goods, people will tend to purchase the best ones, so we can be confident that in a market of ideas people will tend to believe the true ones. What is needed is the freest possible debate, or competition, between ideas.

This is a very appealing metaphor which captures a process that probably goes on, to salutary effect, in many contexts. However, it assumes that there is a 'truth' to be attained. It is therefore better suited to scientific discourses than to political ones. For these purposes, a trial may or may not be best thought of as the former kind of process: whether or not there is a truth to be discovered depends on the issues. Sometimes they are purely factual: either the accused pulled the trigger or she did not. Other times, however, there is no real objective truth because the issue is to do with someone's state of mind or motivation and often, as Jean-Paul Sartre famously demonstrated in the play, *Les Mains Sales*, we often do not know even *our own* motivations. Therefore it is impossible to know with absolute certainty the motivation of another person. There are numerous other types of issues that can arise in a trial that are really matters of interpretation and judgment, and where the truth justification for freedom of discussion therefore has no place.

Even where the issue in a trial is a purely factual one, for example whether the accused pulled the trigger or not, the law is not interested in an objective truth so much as a truth that can be proved beyond reasonable doubt (or, depending on the context, on the balance of probabilities) by a rational and fair procedure. Yet there are undoubtedly people who watch television and buy newspapers who are not satisfied with the legal system's truth: they want to know 'the' truth, and media organisations want to tell them. This, in essence, is the fundamental debate underlying freedom of discussion and contempt law: when, if ever, should people be forced to be satisfied with the legal truth and when should they be allowed access to 'the' truth?

The resolution of this debate surely lies in the distinction between interest and curiosity. There are situations where members of the public have an interest in accessing certain information, in the sense that it is *in their interests* to have such access and it would be *against their interests* not to have it. Discourses about freedom of discussion and contempt law, however, all too often confuse these situations with those where the public is interested in information in the sense of being *curious* about it. It is safe to assume that the latter category is considerably larger than the former. For this reason, it is the only interest the media need to worry about: curiosity is enough to cause people to buy newspapers. This is why it is important, when the phrase 'the public interest' is bandied about, to look closely at who is using it and what that person means by it. Media organisations are not necessarily the best judges of the public interest in the former sense, though clearly the judiciary is by no means perfect either. It is the challenge of the law to devise a means of resolving such debates that takes into account all interests to the extent strictly justified and no further. One thing is clear, however: mere curiosity on the part of the public could never justifiably override the interests discussed above that form the rationale for contempt law.

## **Democracy**

The third justification for freedom of discussion, the democratic justification, needs little explanation. It is abundantly clear that democracy cannot flourish where one group is able arbitrarily to suppress the voices of another. In some ways this is an ironic means of justifying a structure (for example, constitutional protection of freedom of discussion) which actually aims to limit the capacity of democratically elected bodies (ie parliament). However, this is why it needs to be remembered that the sophisticated kind of democracy to which we aspire in Australia is not simply majoritarianism writ large,

but incorporates values such as tolerance, respect for dissent and protection of minorities. Therefore it not only can, but should, impose some restrictions even on democratic institutions.

The relationship between freedom of discussion, as justified by democratic considerations, and contempt law is an interesting one. This is certainly one area where it is possible and indeed desirable to have regard to the positive law as it does provide some guidance.

Since 1992 Australian law has recognised a freedom of discussion on political matters, based on the democratic requirements of the Constitutions of the Commonwealth<sup>28</sup> and the states (or at least Western Australia).<sup>29</sup> This freedom is subject to appropriate restrictions that are adapted and proportionate to the protection of other legitimate interests,<sup>30</sup> and there does appear to be a consensus that such interests include the ones protected by contempt law.<sup>31</sup> However, it remains to be seen whether the particular details of contempt law would pass muster as appropriate and adapted to their protection. One consideration likely to prove significant is the High Court's recent declarations that the maintenance of public confidence in the judiciary constitutes a limit on both Commonwealth and state legislative power.<sup>32</sup> Just as the constitutional freedom of political communication has constituted a limit on the common law of defamation,<sup>33</sup> so either or both the political communication principle and/or the public confidence principle could constitute a limit on the common law of contempt.

Therefore it is possible in principle, and perhaps even likely in practice, that the two principles will come into direct conflict at some stage. For example, if a politician were prosecuted for an offence, the High Court might be called on to determine whether the public's interest in knowing 'the' truth overrode the politician's right to a fair trial, and this would take place against the backdrop of potential damage to public confidence in the court conducting the trial if 'trial by media' were allowed. One

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28 *Australian Capital Television v Commonwealth* (1992) 177 CLR 106.

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

30 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, ALR 112. The full description of the kind of interest that may override the freedom is 'a legitimate end the fulfilment of which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government and the procedure prescribed by s 128 for submitting a proposed amendment of the Constitution to the informed decision of the people'.

31 See eg, *John Fairfax Publications Pty Ltd v Doe* (1995) 37 NSWLR 81, 111 (Kirby P); *Attorney General v Time Inc Magazine Co Pty Ltd* (NSW, Court of Appeal, No 40331/94, 15 September 1994, unreported), 10 (Gleeson CJ).

32 *Grollo v Palmer* (1995) 184 CLR 348; *Kable v Director of Public Prosecutions (NSW)* (1996) 138 ALR 577; *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 138 ALR 220.

33 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

can only speculate as to how such a tension would be resolved, but presumably it would depend heavily on the particular facts of the case. This is because the starting point would be that the interests protected by contempt law (including, by hypothesis, public confidence in the judiciary) can constitute an exception to freedom of communication. The question would undoubtedly become one of the proportionality of some particular aspect of contempt law to the protection of some particular such interest in some particular context.

It is suggested that this is, in any event, the most desirable way to resolve the inherent tension between democratically-justified freedom of discussion and contempt law: on a case-by-case basis. There can be no objection to an attempt to build the concerns of democratic discussion into the substance of contempt law, to ensure that they are never overlooked in the resolution of particular cases. On the other hand, however, as long as there is an implied constitutional freedom of political communication, such an oversight is unlikely.

A final point is that the significance of democracy-based freedom of discussion to contempt law is by no means obvious outside a context where a trial involves some political figure or political issue. Certainly there is no problem with a broad definition of 'political issue' in this context; it is even arguable that all criminal prosecutions, being conducted by public officers against a backdrop of investigation by public officers, have the requisite degree of political flavour. However, it is equally arguable that this is not enough to treat an otherwise 'ordinary' criminal trial the same way as the clear case of the politician's trial posited above. Moreover, many of the concerns captured by the notion of involvement by public officials can be addressed under the rubric of 'open justice'.

### **Open justice**

Open justice, as noted above, overlaps with freedom of discussion, especially as justified by democratic considerations: this is because it is about accountability and legitimacy. In a democracy, the people own all public institutions and therefore, as a general proposition, they have a right to know and to question what is going on in those institutions.<sup>34</sup>

However, as discussion above also makes clear, such rights cannot be absolute in the case of courts. Various considerations militate against making courts directly

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<sup>34</sup> See Clive Walker, 'Fundamental Rights, Fair Trials and the New Audio-Visual Sector' (1996) 59 *Modern Law Review* 517, 517.

accountable in the way other public institutions are, notably the rule of law, the independence of the judiciary and the various counter-majoritarian values described above, as great reliance is placed on courts to protect them. Indeed, the very legitimacy of courts lies in their ability to apply the law without regard to what the community or some section of it might desire.

A number of the processes that contempt law protects require protection precisely because of this place courts occupy in the democratic order. Reference can be made to the example above of the tendency of prior convictions to suggest guilt, even though rationally they prove nothing. A community that knows of an accused's prior conviction may well be displeased to learn of that person's acquittal but that is not to say that the court has not done its job exactly as it should. Therefore care needs to be taken with the notion of open justice as the basis for any objection to contempt law. It is one thing to say that justice should be open, in the sense that it should not be secretive, but quite another thing to say that proceedings that lead to outcomes with which people generally agree are likely to deserve the name of 'justice'.

In this connection, it needs to be asked in particular whether the whole of society (or the whole readership of a particular newspaper, for example) needs to know every detail surrounding a trial before that trial can be considered 'open'. This is a particularly interesting question if it is recognised that much of the information of which contempt blocks publication is information that is not before the court. As the New South Wales Law Reform Commission has pointed out, contempt law already attends to the concerns of open justice to a large extent with its fair and accurate reporting defence.<sup>35</sup> It is another matter, of course, if information that is before the court is blocked; this, however, is usually a matter for the imposition of a suppression order and raises slightly different issues from the common law of contempt. Because of the close relationship between the issues, however, suppression orders are dealt with below.

Another interest closely aligned with open justice is the protection of the community from offenders. For example, consider the publication of a photograph of an accused person – or more realistically a person likely to be accused in the future, such as a prison escapee. The community is likely to feel, with some justification, entitled to know what the person looks like, especially if the person is known to be dangerous.

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35 New South Wales Law Reform Commission, above n 5, 38.

On the other hand, publication of a photograph might taint identification evidence in the person's eventual trial. (It will be noted that in this example the usual dynamic is reversed – contempt law is tending to favour the defence's interests rather than those of the prosecution, considering that the likely outcome of publication is greater difficulty in obtaining a conviction.) There is no evidence that contempt law to date has failed to negotiate this tension successfully, but there remains scope for difficult issues to arise surrounding the balance between the community's short term and long-term protection.

#### **Invitation to submit #2**

The Commission invites submissions on how the interests of fair trials, the administration of justice, the avoidance of trial by media, freedom of discussion and open justice should be balanced in the law of contempt by publication.

#### **The assumptions courts have traditionally made in developing in the law**

There are two related assumptions that underlie contempt law: the first is that jurors' views are susceptible to more or less permanent modification by publicity and the second is that the views of judges are not so susceptible.

The first assumption is subject to challenge on two fronts. First, empirical evidence does not necessarily bear it out. Second, the law itself does not necessarily operate on the same assumption when it comes to a decision whether or not to stay proceedings that have been affected by contemptuous publicity.

If the first assumption is incorrect, this might be seen as, if anything, strengthening the second: if jurors can stick to relevant considerations in spite of publicity then there is no reason to think that judges cannot. However, there are independent grounds on which to criticise the second assumption, namely that it needs to be considered whether there is merit to the argument that the second assumption is elitist and inherently suspect.<sup>36</sup>

#### **Jurors likely to be influenced by publicity**

To illustrate the operation of this assumption it is sufficient to refer to the facts of a sampling of cases where contempt has been found. It should be remembered that the basis of such a finding is that the publication in question has a real and definite tendency, as a matter of practical reality, to prejudice or embarrass particular legal proceedings.

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36 Howitt, above n 27, 313.

- In two fairly recent cases, one in Western Australia, high-profile figures have been held in contempt for stating during a trial that they believed the accused person was innocent;<sup>37</sup>
- In 1997 a newspaper was held in contempt in Western Australia for publishing, during a trial in which the defence relied on the accused's credibility as a witness, an article impugning the accused's honesty in an unrelated matter;<sup>38</sup>
- Also in 1997, a newspaper was held in contempt for publishing, during a Victorian trial, a short article containing disparaging comments on the evidence of one of the witnesses.<sup>39</sup>

It can be seen from these cases that the test is not as difficult to satisfy as it would be if the law assumed that jurors' views were somewhat resistant to the effects of publicity. The cases on declarations of innocence are difficult to reconcile with the fact that juries are bound to assume innocence in any event, and the other two cases involve material on which one might have expected juries to be confident they had information from their own experience that was at least as good and reliable as any they could gain from a newspaper. This does not mean that the decisions are wrong, simply that they are based on a fairly sceptical view of jury resistance to publicity.

### **Empirically demonstrable?**

Not unusually (which is not to say justifiably), the common law and the judges who have developed it have not appeared to feel any need to demonstrate the truth of this assumption. Moreover, the law has developed slowly over centuries, or at least decades, and there is room for doubt as to whether it has taken full account of matters such as changing levels of education and of critical consciousness in the population from which juries are selected. There is a very strong argument that institutions other than courts need to undertake the empirical work to test this assumption, for even if courts recognise the potential utility of the work they lack the resources and expertise to do it themselves.

There has been considerable research on the subject over a significant period of time. In 1982 Howitt reported his finding from a literature search: 'in general, evidence tends to suggest, when realistically viewed, that prejudicial information (defined variously) has no effect on the decision-making process.'<sup>40</sup>

37 *R v Pearce* (1991) 7 WAR 395; *Director of Public Prosecutions (Cth) v Wran* (1987) 7 NSWLR 616.

38 *Nationwide News Pty Ltd; Ex parte Director of Public Prosecutions (Cth)* (1997) 94 A Crim R 57.

39 *Attorney General of Victoria v Nationwide News* (Unreported, Supreme Court of Victoria, Gillard J, 22 December 1997) cited in Michael Chesterman, Janet Chan and Shelley Hampton, *Managing Prejudicial Publicity* (2001), 4.

40 Howitt, above n 27, 312.

A more recent, and jurisdictionally relevant, review of the literature was reported in the late Laurie Connell's 1994 appeal against conviction for conspiracy to pervert the course of justice. Professor Kevin Durkin gave expert evidence on the effect of the media on the minds of their consumers. His evidence is summarised in the report of the case.<sup>41</sup> It was, as would be expected of evidence for a criminally accused person, very much in favour of a high level of impact. The appeal court agreed with the judge who had reviewed the same evidence in relation to different proceedings. Seaman J had said that:

The large number of articles which Professor Durkin exhibits are based on a relatively smaller number of experiments and many of the researchers say that their results should be treated with caution and that fuller research is required. Commentators who have conducted no experiments of their own are often more confident about the conclusions to be drawn from the experiments than the psychologists who conducted the experiments.<sup>42</sup>

The court also drew attention to the fact that some articles contradicted Professor Durkin's overall thesis.<sup>43</sup>

More recently still, Chesterman, Chan and Hampton have reviewed a substantial amount of literature from Australia, New Zealand, the United States of America, Canada and the United Kingdom.<sup>44</sup> The authors note the range of research methodologies employed and the likely impact of jurisdiction-specific considerations on the findings.<sup>45</sup> It is not possible here to summarise the whole range of literature they discuss. It is sufficient to note that there had been only a handful of 'broad empirical investigations into the operation of criminal juries in Australia' and these had not 'addressed specifically the impact of prejudicial publicity.'<sup>46</sup> The authors go on to discuss certain narrowly-focused studies conducted for the purpose of producing evidence in particular litigation. Such studies are discussed below in the context of considering the relationship between contempt and the staying of proceedings the subject of contemptuous publications.

It is against this backdrop that Chesterman, Chan and Hampton conducted their recent major study of real-life juries

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41 *Connell v The Queen* (1994) 12 WAR 133, 152-3.

42 *R v Connell, Lucas & Carter (No 3)* (1993) 8 WAR 542, 554 (Seaman J).

43 *Connell v The Queen* (1994) 12 WAR 133, 154.

44 Chesterman et al, above n 39, 16-31.

45 *Ibid* 15.

46 *Ibid* 16.

in New South Wales.<sup>47</sup> Funded by the Australian Research Council, by the University of New South Wales and by the Justice Research Centre of the Law and Justice Foundation of New South Wales, which was in turn funded by John Fairfax Holdings Ltd, the study of 41 selected criminal trials was, '[a]s far as the researchers are aware,' the first application of a case study methodology to the topic of prejudicial publicity and juries.<sup>48</sup>

The sub-set of trials taking place in metropolitan Sydney approached about two-thirds of comparable trials in that area over the applicable time period, and was therefore a representative sample.<sup>49</sup> Interviews were conducted with 36% of jurors, 88% of judges, 100 per cent of prosecution counsel and 90% of defence counsel from the 41 trials to determine the level of jury recall of publicity and the incidence of influence on jurors' perceptions (though not necessarily on their verdicts). The study distinguished between 'specific' publicity 'which related specifically to the offence and/or the accused' (found in 38 cases) and "generic" publicity, that is, publicity relating to some general issue raised by the case' (found in 25 cases).<sup>50</sup>

The study found that although the level of jury recall varied depending on the stage of investigation being reported, publicity was discussed in the jury room in 53% of cases where there was some recall of publicity. Jury recall was more likely to be of broad themes in publicity than of precise details. The study states that '[t]here are reasons for believing that counsel and, to a lesser extent, trial judges tended to over-estimate the level of recall'.<sup>51</sup> However, the study found that:

By way of significant exception ... jurors were more likely to recall pre-trial publicity ... in three situations. These were when (a) it related to accused people who are independently well-known in the community; (b) it related to offences committed in the area where they live; or (c) they did not encounter it until after the trial began. Other familiar explanations for pre-trial publicity being recalled – for example, that it appeared unusually close to the start of the trial or was especially prominent – were also discernible.<sup>52</sup>

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47 Chesterman et al, above n 39.

48 *Ibid* xi.

49 *Ibid* xii.

50 *Ibid*.

51 *Ibid* xiv.

52 *Ibid*.

Of particular note, for present purposes, is a further finding that '[d]espite judicial instructions, one or more members of a jury were likely to follow the newspaper coverage of the trial itself.'<sup>53</sup>

On the second and perhaps more important issue, that of influence on jurors, the study found that only 4% to 7% of jurors thought that they or their fellow-jurors may have been influenced by any specific publicity that was recalled.<sup>54</sup> A slightly higher percentage believed there may have been influence by generic publicity. The judges and counsel tended to expect higher levels of influence than the jurors.

These beliefs and expectations were analysed against the backdrop of various objective considerations to do with the jury's deliberations, the opinions of others (including the researchers, who read the transcripts where possible) about the jury's performance and the exact nature and content of the publicity. In particular, the 'professional assessors' (ie judges and counsel) were asked to determine whether each of the 40 verdicts<sup>55</sup> was 'safe' or 'unsafe'. Thirty were considered 'safe' by all professional assessors, eight were considered 'possibly unsafe' because one professional assessor thought they were not supported by the evidence and two were considered 'unsafe' because two or more professional assessors had such doubts. In both of these trials the verdict 'was in line with the tenor of the surrounding publicity.'<sup>56</sup> The same goes for the eight 'possibly unsafe' verdicts. Twelve of the 30 'safe' verdicts were at odds with the tenor of the publicity.

Separate data are presented on the impact of publicity on the verdict. In three verdicts it 'seemed likely [to have been] determinative', including one each of the two 'unsafe' verdicts, the eight 'possibly unsafe' verdicts and the 30 'safe' verdicts. Publicity was considered 'possibly determinative' of seven verdicts, including the other 'unsafe' verdict, three of the 'possibly unsafe' verdicts and three of the 'safe' verdicts.

There was a total of 16 trials where it was believed likely or possible that publicity had influenced *individual jurors*, including two of the trials resulting in 'possibly unsafe' verdicts and five of the trials resulting in 'safe' verdicts.

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53 Ibid.

54 Ibid xv.

55 In one trial, no verdict was called for: *ibid* 103.

56 *Ibid* xvii.

That left 14 trials where publicity was considered 'unlikely to have had any influence on the verdict or on individual jurors'.<sup>57</sup>

The three principal qualitative findings are:

1. Jurors often believed that newspaper coverage of their trial was inaccurate and/or inadequate. ...
2. Juries were equally successful in identifying the relevant issues regardless of whether the publicity was negative or positive towards the accused. Also, the quantity of negative publicity did not seem to make a difference to the proportion of verdicts that were 'safe'.
3. ... In trials where the evidence was equivocal [that is, not strong in favour of guilt or clearly insufficient] ... there was greater reason to believe that publicity may have affected the verdict.<sup>58</sup>

One further finding is best set out in full:

In five trials, unbeknownst to counsel or the judge, some or all of the jury discovered that the accused had previously been convicted of or charged with an offence similar to that now faced. The juries dealt with or 'managed' this prejudicial information with varying degrees of success. For example, in one trial, where the verdict was 'possibly unsafe', this discovery apparently created prejudice in the minds of some of the jurors, resulting in conflict within the jury and a compromise verdict. In another, where the verdict was 'safe', one juror ensured that another, still undecided, was not told this information until the verdict was reached. In a third, where the verdict was also 'safe', the jury did not believe the informal source who provided the information, and apparently put it out of their minds.<sup>59</sup>

Further points worth noting are that in all five cases where the judge refused an application for a permanent stay on account of publicity, the verdict was 'safe' and that, when asked about 'the effectiveness ... of remedial measures and legal restrictions on publicity', '[o]verall, the responses of defence counsel displayed significantly less confidence in the current situation than those of the judges or of prosecution counsel'.<sup>60</sup>

While this study is a very useful addition to the literature, in that it is based on real-life experience of jury trials rather than on simulations, its strength is also a significant limitation. That is, everything that was studied happened within a context of restricted publishing as a direct result of contempt law. It needs to be considered how much of the publicity was actually

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57 *Ibid* xvii.  
 58 *Ibid* xvi.  
 59 *Ibid*.  
 60 *Ibid* xix.

contemptuous before an assessment can be made of the significance of the study for contempt law.

The study is unable to give significant details for reasons of confidentiality, but it does report that 'prosecutions for *sub judice* contempt were given official consideration in the context of eight of the trials<sup>61</sup> and there were six cases where publicity was strong enough that counsel applied for a stay or adjournment on that ground. Five of those applications were denied;<sup>62</sup> as noted above, the verdict was considered 'safe' in all five. On the whole, however, the study does very little to indicate how juries are likely to deal with *contemptuous* publicity. If there is any value in courts' decision-making process regarding what is contemptuous, and given the fact that that decision is based at least in part on the likelihood of influence on the jury, it could even be said that the results vindicate the law in so far as only a minority of verdicts were unsafe. There is simply no way of knowing the extent to which this is a result of other unsafe verdicts being *avoided as a direct result of the application and presence of contempt law*. In other words, it is impossible to know how many more unsafe verdicts there would be if it were not for contempt law.

On the other hand, it is conceivable for a range of reasons that contempt law does not really achieve what it sets out to achieve. One can assume neither that the absence of a conviction for contempt means that there was no contempt, nor that the threat of prosecution deters all contempt. It may be that not all cases a court would be willing to hold in contempt are even prosecuted. It may be that in some cases media organisations consciously trade off the potential punishment for contempt against an increase in profits, and therefore walk very close to the line that contempt law represents. They may even consciously cross it. If any of this was true in the case of the Chesterman study trials, the conclusion should be that some of the publicity *might* have been such as a court would have considered to have the relevant tendency, if only it had been asked. The study states only that '[n]one of the trials ... was in fact exposed to continuing publicity of [the] nature' that contempt law seeks to inhibit.<sup>63</sup> (that is, 'publicity that is strongly and overtly biased for or against the accused, either during the trial itself or during the months immediately preceding it.')<sup>64</sup> This is read as a slightly different (and more limited) thing from publicity that

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61 Ibid 138.

62 In the sixth, an adjournment was granted.

63 Chesterman et al, above n 39, 139.

64 Ibid.

would in fact be found to be in contempt. It is clear that in at least some cases 'the publicity ... revealed an inadmissible and seriously prejudicial item of information' and was therefore contemptuous in the sense being discussed here.

This certainty that the sample included some trials the subject of contemptuous publicity makes the findings that indicate a degree of resistance to publicity interesting. In this connection one might point to the number of cases where the verdict was contrary to the tenor of the publicity. It was only 12 of the 40 cases, but assuming that some of the publicity was contemptuous, it is impossible to rule out a degree of resistance even to that kind of publicity. Perhaps even more significant is the number of cases where publicity was considered not determinative of the outcome: this was 30, or 75% (four 'possibly unsafe', 26 'safe'). Again, on the assumption that some of the publicity was contemptuous, these figures do nothing to contradict the proposition that juries can resist the influence of such publicity. Somewhat frustratingly, but completely understandably, it cannot be stated any more strongly than that, because the study is unable to provide details as to safety or otherwise of verdicts, or of the influence of publicity, in cases affected by contemptuous publicity as distinct from other kinds of publicity.

On the other hand, there seems to be a strong tendency for non-'safe' verdicts to be in line with the publicity, even though the publicity was not necessarily considered determinative in those cases. Both of the 'unsafe' and all eight of the 'possibly unsafe' verdicts were in line with the publicity; publicity was considered likely to have been determinative of one of the unsafe verdicts (an acquittal) and possibly determinative of the other, likely to have been determinative of one 'possibly unsafe' verdict and possibly determinative of three 'possibly unsafe' verdicts. Of the 30 safe verdicts, one was considered likely to have been determined, and three were considered possibly determined, by the publicity. These figures are too small to make it sensible to think of them in terms of percentages, but it is difficult to overlook the apparently declining influence of publicity as verdicts become safer. Once again, in the absence of knowledge about which publicity was contemptuous and which was not, a firm conclusion is impossible, but it is also impossible to rule out the chance that where publicity – possibly contemptuous publicity – has an influence, it is more likely than not to lead to an incorrect verdict.

**Elitism?**

As noted above, Howitt has argued that it is elitist to take the view that judges and magistrates are inherently unlikely to be 'sullied by the influence of prejudicial information' whereas jurors are 'malleable and incapable of rejecting unacceptable evidence'.<sup>65</sup> While disavowing any 'value judgment' of the phenomenon he has identified, Howitt states:

Psychologically speaking, one would wish to reserve one's position on this, awaiting strong evidence either way; nevertheless it is a distinct possibility that the assumptions of these elitist positions are incorrect and that vulnerability and resistance are not differentially distributed with different strata of society.<sup>66</sup>

While there is much in Howitt's assertion to which legal decision-makers should give serious thought, he might be missing the point in so far as he treats the difference between judges and jurors as one between 'different strata of society' rather than one between people with different education, training and experience. Particularly in view of the ideas discussed above of law and legal processes relying on rationality for their legitimacy, it is not necessarily offensive to assume that a training in the law gives a person a better understanding of, greater acceptance of and greater likelihood of successfully applying legal precepts than that person would otherwise have. On the other hand, there is a potential problem with an assumption that a legal training is the *only* kind that can support the necessary mindset. Jurors tend to be treated as an homogenous and monolithic group, and this cannot necessarily be justified. Even those who lack legal training may or may not have some level of training that involves the same sorts of skills of dispassionate weighing of evidence.

In this connection it is worth bearing in mind that Howitt was writing in the United Kingdom in the early 1980s. It may be that in Australia in the early 21st century there are quite different grounds to challenge the law's traditional assumptions about jurors. In the absence of empirical work, however, these differences must of course remain a matter of speculation.

**Assumptions about juries when an accused applies for a stay**

It is well established that the fact a person has been convicted of contempt in relation to publicity about a trial is not in itself a ground for staying that trial. This difference is justified on the basis that the contempt conviction required only a *tendency* to interfere with the administration of justice; a stay requires an

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<sup>65</sup> Howitt, above n 27, 313.

<sup>66</sup> *Ibid.*

*actual* interference. Still, the distinction might be a little subtle for many people's liking. Someone taking a cynical view could see it as a matter of the law 'having its cake and eating it': the law is quite willing to 'bang someone up' for contempt, but remains unwilling to give up an opportunity to do the same to another person for another offence. Or it could be seen as a matter of the law guarding more jealously its own reputation than the freedom of individuals. Viewed from this perspective, contempt as an offence looks somewhat phantom-like: it requires no particular state of mind on the part of the accused and it requires no actual harm. An observer could be excused for thinking it was all a figment of judges' imagination. At the very least the difference raises a question as to whether contempt should require proof of harm, or actual interference, just as the vast majority of criminal offences do.

These are issues that should be seriously considered in the course of this review. Such consideration should bear in mind, however, the arguable potential for under-deterrence of contemptuous behaviour if defendants can take a calculated risk that no harm will ensue. If the law is serious about deterrence – that is, about preventing contempt rather than merely punishing it – it should take account of the sophistication and profit motive of the average defendant and the distinct likelihood that these will combine to counsel error on the side of publication unless there is a strict test that looks to the publicity itself, rather than to the effect it has had.<sup>67</sup>

In addition to the above concerns, the law does seem to have a different model of jurors' thought processes when it comes to deciding stay applications than it has when deciding whether contempt has been committed. In particular, judges dealing with stay applications generally place great faith in the ability of other remedial measures to counteract the adverse effects of publicity. Judges who are dealing with contempt charges, on the other hand, tend to make very little if any reference to the availability of measures such as admonitions to the jury as a way of overcoming the harmful effects of the publicity.

A recent high profile case – or rather pair of cases – illustrates the point nicely. In *Hinch v Attorney-General (Victoria)* the High Court affirmed the contempt conviction of Derryn Hinch, a radio presenter, in relation to comments he had made about the impending trial of one Father Michael Glennon on charges

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<sup>67</sup> For further convincing arguments supporting the status quo, see *R v Glennon* (1992) 173 CLR 592, 613 (Brennan J).

of child sexual abuse.<sup>68</sup> Both the Full Court and the High Court accepted the trial judge's statement in the following terms:

the broadcasts ... would have influenced most listeners to conclude that Father Glennon was a despicable man, a dissembling priest, who corrupted young people after using his pseudo-clerical position to gain their trust.

A strong feeling of hostility towards Father Glennon must, in my opinion, have been created. ...

These statements were all extremely prejudicial and improper and unfair considerations to put before witnesses and potential jurors. Our system of justice, as Mr. Hinch knew, would not have allowed them to be led in evidence and a jury which heard them would be discharged. ...

I am of the opinion that such statements ... will be likely to make a lasting impression upon the minds of those listening to the broadcasts, who are ordinary reasonable members of the community ... .<sup>69</sup>

The conviction depended on the conclusion not only that the accused's statements had the requisite tendency to prejudice the administration of justice but that they were not justified as part of an ongoing debate on a matter of public importance. The latter was found in response to the accused's attempt to rely on his motive of warning the public that Father Glennon, a convicted child sex offender, continued to have a leadership role in a youth organisation. The High Court pointed out, quite rightly, that it was not necessary to refer to the prior convictions, but rather it would have sufficed to warn the public of the charges then pending against Father Glennon. The overall picture to emerge from the judgments is one of the courts starting from a position that the fairness of Father Glennon's trial was very easily compromised.

The proceedings against Hinch and his eventual imprisonment were something of a *cause célèbre* and attracted widespread further publicity. Yet when Father Glennon appealed against his eventual conviction on the ground of an unfair trial, based on the publicity Hinch caused, he too had to fight all the way up to the High Court and was ultimately unsuccessful.<sup>70</sup>

Mason CJ and Toohey J specifically rejected the approach of one member of the Court of Criminal Appeal, Nathan J, in so far as it was based on the notion that 'the prior finding of contempt by Hinch is "*not compatible* with the conclusion that

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68 (1987) 164 CLR 15.

69 Quoted in *R v Glennon* (1992) 173 CLR 592, 596-7.

70 He appealed successfully to the Court of Criminal Appeal but the acquittal was overturned by a 4:3 majority of the High Court: *ibid* (Mason CJ, Brennan, Dawson and Toohey JJ; Deane, Gaudron and McHugh JJ dissenting).

a fair trial could follow” (emphasis added).<sup>71</sup> Their Honours were at pains to emphasise ‘the community’s right to expect that a person charged with an offence be brought to trial’,<sup>72</sup> ‘the means available to a trial judge to ensure a fair trial and ... the steps taken by the trial judge in the present case.’<sup>73</sup> Attention was also drawn to the fact that there had been only one ‘instance in the judicial history of this country of an accused’s conviction being quashed and a verdict of acquittal then entered on account of the potential prejudicial effect of pre-trial publicity.’<sup>74</sup>

Mason CJ and Toohey J asserted that ‘[t]he possibility that a juror might acquire irrelevant and prejudicial information is inherent in a criminal trial.’<sup>75</sup> This may well be the case, but if so it makes penalties for contempt by publication a little difficult to justify. Moreover, their Honours intimated strongly that the onus is on the accused to demonstrate ‘that prospective jurors did not respond honestly and accurately to questions put by the trial judge’ about their knowledge and potential prejudices.<sup>76</sup> Yet this is exactly what, in a contempt case, the law assumes will happen in the trial the subject of prejudicial publicity.

Brennan J (with whom Dawson J agreed) emphasised the need for ‘the law [to] place much reliance on the integrity and sense of duty of the jurors.’<sup>77</sup> At this stage the fairness of Father Glennon’s trial looks a lot more robust than it did when the court was considering *Hinch*:

Our system of protecting jurors from external influences may not be perfect, but a trial conducted with all the safeguards that the court can provide is a trial according to law and there is no miscarriage of justice in a conviction after such a trial.<sup>78</sup>

Brennan J quoted with approval the statement of Crockett J in refusing, in the Supreme Court of Victoria, the original application for a stay: ‘Unfairness occasioned by circumstances outside the court’s control does not make the trial a source of unfairness.’<sup>79</sup> It is very difficult, based on the above, to resist the conclusion that the court places a high

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71 Ibid 606.

72 Ibid 598 (Mason CJ and Toohey J), citing *Barton v The Queen* (1980) 147 CLR 75, 102; *Jago v District Court (NSW)* (1989) 168 CLR 23, 33; *Carver v Attorney-General (NSW)* (1987) 29 A Crim R 24, 32..

73 *R v Glennon* (1992) 173 CLR 592, 598 (Mason CJ and Toohey J).

74 Ibid; citing *Tuckiar v The Queen* (1934) 52 CLR 335.

75 *R v Glennon* (1992) 173 CLR 592, 603.

76 Ibid 602.

77 Ibid 614.

78 Ibid 615 (Brennan J).

79 Ibid.

degree of faith in courts' and juries' ability to achieve a fair trial in spite of prejudicial publicity. Indeed, his Honour said:

Of necessity, the law must place much reliance on the integrity and sense of the duty of the jurors. The experience of the courts is that the reliance is not misplaced.<sup>80</sup>

There remains, therefore, a significant question as to why the same faith is not apparent in the judgments in contempt cases. Not only is there little if any recognition that remedial measures such as warnings to juries can vitiate the effect of publicity, there is little if any discussion in the cases of such a possibility. In other words, counsel do not seem to raise such a possibility as an argument in favour of contempt defendants.

Another case, which might be even more familiar to local readers, and which dealt with issues surrounding the ability of a jury to resist publicity, is *Connell v The Queen*,<sup>81</sup> the appeal of the late Laurie Connell against his conviction on a conspiracy charge. The appeal ground relating to the notion of an unfair trial, based on widespread publicity that the trial judge had acknowledged to be prejudicial,<sup>82</sup> was unsuccessful. The appeal court described at length the actions taken by the trial judge to try to counter the effects of publicity<sup>83</sup> and concluded that the jury did indeed render a 'safe' verdict.

Although the decision did not raise the issue of inconsistent attitudes regarding jury resistance to publicity, because (as far as can be gauged from the decisions) there had been no conviction of contempt in relation to any of the publicity, it used very similar language to the *Glennon* decision in describing the relationship between juries and prejudicial publicity. Interestingly, the court referred extensively to apparently objective evidence that the jury was not affected by any predispositions about Mr Connell – for example, the fact that they took five days to deliberate and acquitted him on one charge.<sup>84</sup> The decision might not, therefore, be the same kind of act of faith that *Glennon* appears to be. At the same time it clearly starts from a predisposition towards trusting juries that is not necessarily apparent in Western Australian decisions about contempt.

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80 Ibid 614; referring to *R v Vaitos* (1981) 4 A Crim R 238; *R v Gallagher* (1987) 29 A Crim R 33, 41.

81 (1994) 12 WAR 133.

82 Ibid 147 ('most potential jurors know of him and ... a high proportion regard him unfavourably. Many, perhaps the majority, presently have the view that he is guilty of the charges which he faces now.')

83 Ibid 154-8.

84 Ibid 158-9.

Both sides of the divide – the contempt side and the criminal appeal side – have an appealing logic to them. Yet they are difficult to reconcile because of their apparently different assumptions about factual matters, namely the likelihood of a court being able to provide a fair trial in spite of prejudicial publicity and, more specifically, the degree to which juror perceptions are affected by, and open to correction against, prejudicial publicity. Even Brennan J's compelling justification of the approach to criminal appeals<sup>85</sup> fails to explain why contempt law needs to be so strict. At the very least, more work needs to be done to establish the ability of trial courts and juries to resist the effects of prejudicial publicity, and ideally the law should arrive at some consistent position on the issue for both types of case.

### **Court responses to defendant-sponsored research**

Both in the Hinch/Glennon case and in the Connell trial, the defendants have arranged their own empirical studies into the impact of publicity.<sup>86</sup>

The survey carried out on behalf of Father Glennon interviewed 301 people and found:

that some 33 to 45 per cent of the adult population of Melbourne had heard of the respondent's case in some form or another. Significantly, however, no respondent to the survey volunteered knowledge of a previous *conviction* of the respondent.<sup>87</sup>

This latter observation led Mason CJ and Toohey J to conclude that the survey did not displace the presumption in favour of jury resistance to publicity discussed above. Furthermore, their Honours added:

Even if the poll had recorded that one or more respondents recalled a conviction, we would have difficulty in accepting that that provided a basis for concluding that prospective jurors concealed their knowledge of a conviction from the trial judge when he asked them a direct question about that knowledge.<sup>88</sup>

In other words, even a more specific survey could not have displaced the presumption in favour of jury integrity and the effectiveness of measures to avoid the potential impact of publicity. Quite simply, their Honours were confident that a jury without knowledge of the prior conviction could be empanelled.

<sup>85</sup> *R v Glennon* (1992) 173 CLR 592, 613 (Brennan J).

<sup>86</sup> See also *Bush v The Queen* (1993) 43 FCR 549; *Attorney-General for the State of New South Wales v John Fairfax Publications Pty Ltd* [1999] NSWSC 318, 9 April 1999, Barr J. These cases are discussed in Chesterman et al, above n 39, 16-17.

<sup>87</sup> *R v Glennon* (1992) 173 CLR 592, 602 (Mason CJ and Toohey J) (emphasis supplied).

<sup>88</sup> *Ibid.*

Needless to say, Mr Hinch had not been treated as entitled to the benefit of such a presumption.

In the *Connell* case, the trial judge who denied the application for a stay stated:

Surveys which have been conducted recently on his behalf show that most potential jurors know of him and that a high proportion regard him unfavourably. Many, perhaps the majority, presently have the view that he is guilty of the charges which he faces now.<sup>89</sup>

The appeal court held:

The survey results need to be treated with a great deal of caution because there was no detailed examination of the reasons or basis for the belief in the appellant's guilt of the charges against him.<sup>90</sup>

In any event, the results were clearly not seen as sufficiently compelling to outweigh the evidence that the jury fulfilled its proper function.

Chesterman, Chan and Hampton discuss two further cases. In *Bush v The Queen*,<sup>91</sup> a similar study to that used in *Connell* was 'tendered as evidence in an application by the defence to be permitted to challenge potential jurors "for cause"', but rejected by the court 'on methodological grounds'.<sup>92</sup> In *Attorney-General for the State of New South Wales v John Fairfax Publications Pty Ltd*<sup>93</sup> the defence commissioned a study 'to assess the capacity of 109 volunteer respondents to remember the content of the relevant newspaper articles, which had been shown to them 14 days earlier for the alleged purposes of research into the reading habits of newspaper readers'.<sup>94</sup> The defence claimed that the level of impact of the articles must have been very slight because of low recall by the respondents of the details, in particular the name of the Vietnamese man featured in them. Once again, methodological issues compromised the application of the study results in favour of the contempt defendant; the judge pointed out a number of salient differences between the conditions of the survey and the trial itself that would have increased the likelihood of specific recall by the jury.<sup>95</sup>

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89 Quoted in *Connell v The Queen (No 6)* (1994) 12 WAR 133, 147.

90 *Ibid* 152 (Malcolm CJ, Pidgeon and Nicholson JJ).

91 (1993) 43 FCR 549.

92 See Chesterman et al, above n 39, 16.

93 [1999] NSWSC 318, 9 April 1999, Barr J.

94 Chesterman et al, above n 39, 17-18; citing N Vidmar, *Analysis of the Potential Effects of Pretrial Publicity Regarding Regina v. Van la Duong*, Unpublished report (1999) prepared for Freehill, Hollingdale and Page, Solicitors; Ian Freckelton, 'Social Psychology, Survey Evidence and Prejudicial Publicity' (1999) 6 *Psychiatry, Psychology and Law* 215.

95 Chesterman et al, above n 39, 18-19.

**Invitation to submit #3**

The Commission invites submissions as to what assumptions (if any) about juries and judges should underlie the law of contempt by publication. In particular, should the law assume that judges are relatively less vulnerable to the effects of prejudicial publicity, and how vulnerable should juries be considered to be?

**Possible future research**

The foregoing tends to suggest that there is a need for more independent research using different methodologies to complement what has already been done. It is considered necessary for such research to be independent, rather than defendant-sponsored, for various reasons, not least of which is that it is unfair to place the burden on defendants of providing the necessary information to achieve the right balance on an important matter of public policy. Moreover there are inherent difficulties in achieving the requisite level of generality and objectivity to inform the development of the law as a whole in surveys that are about a particular case.

One possibility might be to conduct a simulation with people who have experience as jury members. This might bridge the gap between the simulation and case study methods used to date.

**Invitation to submit #4**

The Commission invites submissions as to the kinds of research that are possible and desirable on the actual effects of publicity about court proceedings.

**Objective quality of publication – tendency to interfere**

The current test of whether a statement is contemptuous or not is whether it has a real and definite tendency, as a matter of practical reality, to prejudice or embarrass particular legal proceedings.

This test has been criticised for being both too vague and too wide. The New South Wales Law Reform Commission has proposed an alternative test framed in terms of 'risk' rather than tendency:

A publication should constitute a contempt if it creates a substantial risk, according to the circumstances at the time of publication, that:

- (a) members, or potential members, of a jury ... or a witness or witnesses, or potential witness or witnesses, in legal proceedings could:

- (i) encounter the publication; and
  - (ii) recall the contents of the publication at the material time; and
- (b) by virtue of those facts, the fairness of the proceedings would be prejudiced.<sup>96</sup>

The concept of 'risk' is also employed in the United Kingdom, New Zealand and Canada.<sup>97</sup>

It is clear that the test proposed, being stricter, relieves some of the burden on potential defendants when they are making their publication decisions. It is argued that although the word 'tendency' connotes 'a degree of likelihood of possibility that a certain result will eventuate',<sup>98</sup> that degree is quite small. The courts have variously described this degree as 'not one of probability, but rather a "real possibility" of interference'<sup>99</sup> and 'more than a remote possibility'.<sup>100</sup> 'Substantial risk', on the other hand, 'would seem to require a higher degree of likelihood'.<sup>101</sup>

It may be debated whether the new test would make the law any more 'certain' for defendants than the current 'tendency' test. It may be that "tendency" is a rather vague and general notion<sup>102</sup> but it might also be questioned whether any apparent precision in the concept of 'risk' is somewhat illusory in this context. It is often possible to measure a risk with a degree of accuracy, but it is not suggested that that would be possible if risk were the test for contempt. It will still depend from whose perspective one looks at the situation surrounding the publication, how much knowledge and indeed wisdom and foresight one imputes to the average publisher, or perhaps the particular publisher, and so on. Two other considerations combine to challenge the quest for certainty: no matter what the test, it will be one to be applied objectively, and not on the basis of the defendant's assessment of the situation. Therefore it is inherently unpredictable from the defendant's point of view. Finally, and perhaps most fundamentally, the test expressed in words, and words are inherently capable of multiple meanings and particularly so considering they are of necessity left general so as to be applicable to a range of unknown situations. In short, there is no reason to presume that a risk-based test will provide any greater predictability for

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96 New South Wales Law Reform Commission, above n 5, 133.

97 Ibid 111 and sources there cited.

98 Ibid 112.

99 Ibid 113; citing *Attorney General (NSW) v John Fairfax and Sons Ltd* (1985) 6 NSWLR 695, 697-8 (Samuels JA).

100 New South Wales Law Reform Commission, above n 5, 113; citing *Victoria v Australian Building Construction Employees and Builders' Labourers Federation* (1982) 152 CLR 25, 56 (Gibbs CJ).

101 New South Wales Law Reform Commission, above n 5, 113.

102 Ibid 109.

defendants than a test based on tendency, reasonableness or any other matter that is for objective judgment after the fact (even if not, theoretically, with the benefit of hindsight).

**Invitation to submit #5**

The Commission invites submissions on the relative desirability of the concepts of tendency and risk as bases for liability for contempt by publication.

Another difficulty with certainty is that its significance for the desirability of a law is prone to overestimation. Clearly it is important for laws not to be so vague as to give people very little idea whether any particular action will fall foul of them. The tendency of such a law is to 'over-deter' – people become overly cautious of contravening it so their freedom is more heavily circumscribed than the law or, presumably, the policy underlying it requires. In contexts where the freedom affected is that of speech, this is sometimes called the 'chilling effect': insufficiently precise laws against 'harmful' speech activities tend also to 'chill' beneficial speech activities.

However, certainty can only ever be achieved at the expense of flexibility. This is something of a legal truism that needs little explanation. In this context, however, careful attention needs to be paid to the question whether the value of 'certainty' to extremely powerful commercial interests is measured in information available to the public or in dollars. In other words, the value of certainty in the law as a means of protecting individual liberty does not necessarily translate to the protection of commercial profits. Businesses make profits by taking risks. The worst that can happen to a media organisation as a result of a contempt conviction is a dent in its profits. There is, therefore, something inconsistent about a media business claiming an entitlement to certainty in the sense of the elimination of risks in contempt (or any other) law, at least as an absolute matter.

Clearly this argument is limited to corporate defendants and cannot extend to the not uncommon case of an editor or even journalist being threatened with imprisonment for contempt. In any event, to represent the claim of media organisations as one for absolute certainty in the law might be to set up a straw person; it is doubtful that any media organisation seriously wishes for such a degree of certainty. Flexibility can benefit defendants, too. Nor is it suggested that even the most

powerful organisation can justifiably be subject to a completely unpredictable and capricious law. These points are made simply to demonstrate the fact that it will always be a matter of achieving the best balance between certainty and flexibility, and that the nature of the typical contempt defendant – as a wealthy and powerful corporation – is an important matter to bear in mind in defining that balance. It is also arguable that there should be different standards for corporate and individual defendants to reflect these considerations.

#### Invitation to submit #6

The Commission invites submissions as to the best way of striking a balance between certainty and flexibility in the law of contempt by publication, particularly in situations of a corporate defendant.

A further matter worthy of consideration is that the test does not include any particular threshold level of prejudice that must be attained. Any prejudice at all would suffice, provided that the risk of it were sufficiently substantial. This accords with the recommendation of the Australian Law Reform Commission<sup>103</sup> and the United Kingdom legislation,<sup>104</sup> but the converse approach was favoured by the Phillimore Committee in the United Kingdom: any risk would suffice, provided it were of a sufficiently serious prejudice.<sup>105</sup> A similar approach is evident in the judgment of Mason CJ in *Hinch v Attorney General (Victoria)*.<sup>106</sup>

The choice of one approach or another depends on what one is trying to achieve with contempt law. Qualifying the *level of risk of prejudice* required looks to matters that might be assumed to be more in the knowledge of the person or organisation making the publication: the likelihood of the material being read or heard by members of a particular group at a particular time, for example. To focus on the *level of prejudice being risked*, on the other hand, might be seen as more of an attempt to balance the interests of the parties to the proceedings potentially affected. It therefore appears more solicitous of those interests, and potentially of the integrity of the proceedings themselves, but it relates to matters that are not necessarily within the knowledge of the typical contempt

103 Australian Law Reform Commission, above n 16, para 295.

104 *Contempt of Court Act 1981* (UK) s 2(2). The Irish Law Reform Commission endorsed this approach: Ireland, Law Reform Commission, above n 15, paras 19-20.

105 United Kingdom, Committee on Contempt of Court, above n 8, para 113.

106 (1987) 164 CLR 15, 28: see New South Wales Law Reform Commission above n 5, 115 (para 4.21).

defendant. The degree of prejudice surely depends on matters that cannot be known or even estimated at the time of publication including, but not limited to, the amount of time that elapses between the publication and the trial and the remedial measures the trial judge is able to put in place. Therefore, generally speaking, a substantial risk test is likely to find greater favour with contempt defendants than would a substantial prejudice test.

Two qualifications to the foregoing must be stated, however. First, there may be statements that *inherently* carry a risk of serious prejudice but not necessarily a serious risk of prejudice. An example might be a highly inflammatory publication in a forum unlikely to be seen by members of the jury pool. If there is any effect at all, it will be serious, but it is not very likely that there will be an effect. Such cases would probably be rare, but when they arise a defendant will prefer a serious risk test.

The second qualification is that contempt law has always been, and proposals for its reform invariably are, based on an assessment of the facts that are known at the time of the publication. Unless this were to change, it would be difficult to take potential remedial measures etc into account in assessing the degree of prejudice that is likely. Therefore it might be difficult in practice to give different meanings to the two types of test: the only way to measure the seriousness of the prejudice being risked would be to measure the risk itself.

#### Invitation to submit #7

The Commission invites submissions on whether the level of risk of prejudice or the level of prejudice being risked should be measured in order to determine liability for contempt by publication.

### Mental element

Perhaps the most controversial aspect of contempt law is that the only state of mind that it requires in a defendant is one of intent to publish the material in question. There is no need to show any particular state of mind in relation to the possible impact of the publication on the administration of justice.<sup>107</sup> Indeed, you can be convicted of contempt even if you did not know, and had no way of knowing, that there were any

<sup>107</sup> See New South Wales Law Reform Commission, above n 5, 164 and sources there cited. Issues relating to the defendant's state of mind and impact on the administration of justice are, however, clearly relevant to sentencing (as discussed below).

proceedings to be affected.<sup>108</sup> There can be no doubt that this is a very important issue to consider in the context of any review of contempt law.

The criticisms of this aspect of the law are quite obvious: it is fundamentally unfair to visit criminal sanctions on a person who had no kind of guilty intention relevant to the interests the law is seeking to protect. It could even be considered capricious, in which case it would be in conflict with certain tenets fundamental to the rule of law and therefore to the very legitimacy of the law. It is true that 'absolute liability'<sup>109</sup> offences exist in other areas of law, but they are rare, and when they exist they are typically in technical and/or regulatory areas where it is easy enough to abide by the rules. If contempt law is to retain the desirable balance of certainty and flexibility, there is a strong argument that a mental element relating to impact on the administration of justice be introduced. Indeed, the introduction of such a mental element could be crucial to the achievement of that balance: potential defendants will feel more confident about their actions and the avoidance of prosecution if they know that they will be able put their hand on their heart and say they did not have the requisite state of mind. This may be all the certainty that potential defendants need, as it makes liability turn on something that is peculiarly within their knowledge. It would even be possible to justify a very stringent mental element test, just as long as it were in fact a test that were framed in terms of something to which potential defendants could relate.

The potential unfairness of absolute liability and the inherent uncertainty of contempt law also raise significant issues from the point of view of freedom of discussion and all that it entails.<sup>110</sup> As explained above, uncertainty leads to a 'chilling effect'; so does the strictness entailed in the absence of a mental element. Just as the introduction of a new mental element could address the uncertainty problem, so it could also reduce the chilling effect.

The issues for the establishment of a mental element are twofold: should it be an element of the offence, so that the onus of proving it lies on the prosecution, or should its absence be a defence, so that the onus of disproving it lies on

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108 *R v Pearce* (1992) 7 WAR 395, 428-9 (Malcolm CJ); *R v Odhams Press Ltd; Ex parte Attorney General* [1957] 1 QB 73.

109 See New South Wales Law Reform Commission, above n 5, 167 ('absolute liability' means liability without any need to prove intention to commit the offence and is distinguished from 'strict liability' which is qualified by a defence relating to state of mind).

110 See New South Wales Law Reform Commission, above n 5, 171-2

the defence? and should it be pitched at the level of intention, recklessness or negligence, or some combination of the three?

Before turning to look at those issues individually, it is worth emphasising that the introduction of a mental element relating to the administration of justice would represent a reduction in the protection afforded to the administration of justice. Clearly this is inevitable if greater weight is to be placed on freedom of discussion and, as always, the question is one of balance. This must be considered in light of the potential for over deterrence or a 'chilling effect' if the law is too strict as well as the (arguably nonexistent) capacity for an offence of absolute liability to do any good at all in relation to completely unavoidable contempts. It seems that every rational pointer is fixed in the direction of liberalisation, but the importance of the administration of justice and the right to a fair trial should be a constant reminder that progression in that direction should be measured.

#### Invitation to submit #8

The Commission invites submissions on the desirability of introducing a mental element as a prerequisite to liability for contempt by publication, particularly in view of the potential diminution of protection for the administration of justice that would result from such an introduction.

### Onus of proof

The fundamental difference that results from a decision as to whether the requisite state of mind is an element of the offence or its absence is a defence is to do with the onus of proof. In the former case the onus will be on the prosecution; in the latter it will be on the defence.

The standard model in criminal law is for the onus to be on the prosecution; the guilty mind is an element of the offence. If the goal of introducing a new mental element is to bring contempt into line with the rest of criminal law, one might assume that it too would follow this pattern. However, there may be reasons to treat contempt differently.

These reasons are best explored in the context of the New South Wales Law Reform Commission's proposed defence, which strikes a sensible balance between the various interests at stake:

Legislation should provide that it is a defence to a charge of *sub judice* contempt, proven on the balance of probabilities, that the person or organisation charged with contempt:

- did not know a fact that caused the publication to breach the *sub judice* rule; and
- before the publication was made, took all reasonable steps to ascertain any fact that would cause the publication to breach the *sub judice* rule.<sup>111</sup>

As explained below, one of the desirable features of the proposed defence is that it is based on a concept of knowledge rather than intent or motive. The following discussion proceeds on the basis that this is how any new mental element would be framed. It also proceeds on the basis of three fundamental propositions about the placing of the onus of proof:

1. The party asserting a matter should have the onus of proving it. This generally means that the onus should be on the party seeking a change to the status quo – the plaintiff or the prosecution (though an important exception is the construct of a defence to what would otherwise be an offence or a tort).
2. The onus of proving a matter should be placed on the party that has better access to the relevant facts.
3. It is easier to prove a positive than a negative so, other things being equal, the onus should be on the party that would have to prove the existence of a state of affairs rather than a party that would have to prove its non-existence.

These three propositions may well be contradictory in some cases and there will always arise issues for judgment as to which should prevail. On the whole, though, the second and third propositions should be seen as providing potential grounds for an exception to the first, where there is a conflict.

Knowledge can be distinguished from intent or motive in that it is, in some sense, an objective fact, whereas intent and motive are often difficult for us to gauge in ourselves, let alone in other people. Proof of intent or motive must often be a matter of inference from people's behaviour; knowledge need not be. The usual model, whereby the onus of proof of the mental element is on the prosecution, is consistent with the second proposition above because neither party really has a better ability to infer from behaviour. Knowledge, however, is different. For the above reasons, it would be more difficult for the prosecution to prove that such a defendant *had* knowledge

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111 Ibid 181.

of all the facts that made the publication a contempt, because this type of fact is peculiarly in the knowledge of the defendant in a way that motive or intent is not. However, according to the third proposition, it would also be difficult for a defendant to prove, beyond reasonable doubt, that it *did not* know something. Therefore the proposed defence strikes a balance by placing the onus on the party that is in a better position to address the issue, but limiting that onus to the civil standard, or the balance of probabilities.

The same arguments apply with slightly less force to the second limb of the defence, because it is to do with the steps the defendant took, or in other words, its behaviour rather than the state of its mind. Presuming both sides have a common starting point, of steps that were open to the defendant, it might not be very much easier for the defendant to prove that it took a particular step than for the prosecution to prove that it did not. On the other hand, presuming that in many cases it will emerge that steps were taken but they were not as effective as the defendant might have hoped them to be, for example because inaccurate information was provided, it will be in both the defendant's interests and its power to prove the relevant facts. In view of the third proposition above, and especially in view of the civil standard of proof, the proposed defence certainly does not appear to work an injustice to defendants.

The New South Wales Law Reform Commission explains that its proposal is modelled on the recommendation of the Australian Law Reform Commission, except that it omits the latter recommendation's reference to the resources of the defendant in relation to the steps considered 'reasonable' for the defendant to have taken:

The [New South Wales Law Reform] Commission questions whether it is necessary or appropriate to single out resources in legislation as something requiring express mention.<sup>112</sup>

This is an issue that should be considered also in the context of this review. One would hope that as a matter of common sense any court applying such a defence would have regard to the resources available in any case where it had a bearing on reasonableness, but it might not hurt to spell it out in the legislation.

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112 Ibid 182.

**Invitation to submit #9**

The Commission invites submissions as to whether any mental element should be introduced in the form of a defence or as an element of the offence.

**Intention,  
recklessness and  
negligence**

No doubt most, if not all, potential defendants would prefer to have a defence based on intent; indeed they would prefer intent to be an element of the offence for the prosecution to prove. That is, they would escape liability unless the prosecution could prove beyond reasonable doubt that they intended to interfere with the administration of justice. This, it might be argued, should be the starting point because it is the usual model for a criminal offence.

However, contempt should be considered differently because it occurs against the backdrop of socially important power being exercised by large organisations that are not democratically accountable. As has been pointed out earlier, contempt law is one of the few means we have of making the media accountable for the way they exercise their power. It needs to be used carefully, and fine-tuned to the needs of the various interests at stake, but the starting point should not be one of assuming that contempt be constructed as an offence like any other. That is, the starting point should be one of assuming that contempt defendants have very special responsibilities.

The New South Wales Law Reform Commission's proposed defence illustrates the usefulness of a concept of knowledge: in the case of the typical corporate defendant, this is an easier concept to work with than something to do with motive or intent. It will be a rare case where the motive or intent is anything other than the maintenance or increase of readership or audience share. In the typical contempt case the real question is whether the defendant was responsible or irresponsible with its knowledge and paid sufficient attention to the matters that were not within its knowledge. Even with journalists and editors, who are also sometimes charged with contempt, the range of likely motives is relatively narrow. Moreover it is likely to include laudable ones such as informing the public of important facts. For all these reasons, a mental element based on knowledge seems to fit best.

There is some scope for introducing a recklessness element to the defence, in the recklessness as to whether the relevant facts existed or not. Recklessness, however, is more like intent

in that it is something to be inferred from behaviour. Therefore one would normally expect the onus of proving it to lie on the prosecution and it might seem out of place in a defence of this kind.

Moreover, the proposed defence builds in a negligence-like element by looking at the reasonableness or otherwise of the defendant's steps to find out the relevant facts. Clearly a defendant who has been reckless will not be able to satisfy this part of the defence; by establishing a lower threshold of tolerance for defendant behaviour the defence effectively covers recklessness in any event.

There can surely be no objection to the negligence element, other than the potential for reasonable minds to differ on which steps are 'reasonable'. It is suggested that courts would be unlikely to impose a very high standard of reasonableness and that, as with other forms of professional negligence, any areas in which courts' views differed from those of a profession would be fairly clearly spelled out in due course.<sup>113</sup>

#### Invitation to submit #10

The Commission invites submissions as to whether any mental element should be framed in terms of intent, recklessness or knowledge.

#### Knowledge of what?

The New South Wales Law Reform Commission's proposed defence depends on proof that the defendant lacked knowledge of 'a fact that caused the publication to breach the *sub judice* rule'. The precise content of what a defendant has to prove depends, therefore, on other aspects of *sub judice* law, in particular whether the publication would breach the standard of 'tendency' or 'risk' or whatever other test distinguished contemptuous from other publications, and whether the proceedings potentially affected were at a crucial stage. (See below under 'Time frames'.)

The Australian Law Reform Commission's recommended defence extended only to the latter issue, that is, the question of whether proceedings were pending.<sup>114</sup> This is a potential compromise worth considering if extension to knowledge of matters relating to tendency and so on seems too great a liberalisation. There can be little doubt that in the majority of

<sup>113</sup> See eg *Rogers v Whittaker* (1992) 175 CLR 479 (duty of medical practitioners to warn patients even of slight risks associated with proposed treatment).

<sup>114</sup> See New South Wales Law Reform Commission, above n 5, 180.

cases where it was successfully invoked, this defence would turn on information of this kind rather than information relating to potential impact on proceedings known to be pending.

Two issues arise in relation to the matters of which a defendant would have to prove ignorance. The first issue is whether the defence extends to ignorance of information relevant to the availability of any *other* potential defence. A defendant might believe erroneously, that a defence is available, and simply not have the information that shows it is not. It is arguable that the proposal, being framed in terms of what 'caused the publication to breach the *sub judice* rule', does not cover a defendant who believed another defence was available, but whose belief turned out to be mistaken. This is because to excuse a publication under a defence does not prevent it from being a 'breach [of] the *sub judice* rule'. Therefore any defence should be carefully framed in order to protect a publisher who is liable only because of the failure of another defence that it reasonably thought was open to it at the time of publication.

The second issue relates to the means open to potential contempt defendants for gaining access to the information that the defence makes relevant. It is argued below that the legal system should take some responsibility for facilitating access to such information; clearly the test encapsulated in the defence should take into account any formal structures or processes that are introduced. Perhaps it should even refer to them by name in order to emphasise the expectation that they will be used. (Such a reference could also have the salutary effect of keeping pressure on future governments not to dismantle them.)

#### Invitation to submit #11

The Commission invites submissions on the question of the facts to which any mental element should relate that forms the basis for liability for contempt by publication.

#### Time frames

Contempt by publication concerns the potential impact on proceedings that are 'pending'. The law is notoriously vague as to exactly what this means, and it is therefore important for any review of contempt law to address the issue. Moreover, even if we take it that the law will be clarified, there is the issue as to exactly where the starting and end points of the 'pending' period should be fixed. A sensible starting point for resolving this issue is that the period should be defined in such a way as to:

1. maximise conformity to the goals of contempt law, namely protecting the right to a fair trial and the administration of justice; and
2. maximise the ease with which potential defendants can ascertain whether or not proceedings are within the period.

**Criminal proceedings** The New South Wales Law Reform Commission has proposed:

Criminal proceedings become pending from the occurrence of any of these initial steps of the proceedings: (a) arrest without warrant; (b) the issue of a summons to appear; or (c) the laying of the charge, including the laying of the information, the making of a complaint or the filing of an *ex officio* indictment.<sup>115</sup>

Some law reform recommendations have generally favoured a similar approach: the Phillimore Committee preferred the time of charge or the serving of a summons<sup>116</sup> and the Canadian Law Reform Commission favoured the time of the laying of an information or preferral of an indictment. However, the UK legislation fixes an earlier starting point by including arrest without warrant or the issue of a warrant for arrest.<sup>117</sup> The Australian Law Reform Commission and the Irish Law Reform Commission would have fixed the starting-point in a similar way.<sup>118</sup>

In relation to the end-point of the period, the New South Wales Law Reform Commission's proposal is as follows:

Legislation should provide that criminal trial proceedings cease to be 'pending' for the purposes of the *sub judice* rule: (a) by acquittal; (b) by any other verdict, finding, order or decision which puts an end to the proceedings; (c) by discontinuance of the proceedings or by operation of law. However, legislation should provide that publications expressing opinions as to the sentence to be passed on any specific convicted offender, whether at first instance or on appeal shall be prohibited, subject to any defence which is available in the legislation or at common law...<sup>119</sup>

The New South Wales Law Reform Commission specifically proposes that proceedings should not be considered as 'pending' between a verdict and the outcome of any appeal,

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115 *Ibid* 237.

116 United Kingdom, Committee on Contempt of Court, above n 8, para 123.

117 *Contempt of Court Act 1981* (UK), s 2(3), 2(4), Sch 1.

118 Australian Law Reform Commission, above n 16, para 297, 304-08; Irish Law Reform Commission, above n 15, recommendation 21.

119 New South Wales Law Reform Commission, above n 5, 254.

but should be considered pending again if a new trial is ordered following an appeal.<sup>120</sup>

Clearly the first step in considering these proposals from a Western Australian point of view is to compare our criminal procedures to ensure the applicability of all concepts.

### **Criminal procedure in Western Australia**

Under the *Justices Act 1902 (WA)*, two or more justices or one magistrate have the power to hear and determine matters where a person is liable to a penalty on summary conviction.<sup>121</sup> This includes, potentially, the trial by a magistrate of certain indictable offences under the *Criminal Code* relating to theft and fraud<sup>122</sup> and also of an indictable offence under section 23D (2) of the *Firearms Act 1973*, where the prosecutor can request a summary procedure. Unless otherwise provided, proceedings before justices are commenced by complaint,<sup>123</sup> following which the justices or magistrate might issue a warrant or a summons. If a warrant is intended, the complaint must be in writing or on oath;<sup>124</sup> otherwise it can be verbal.<sup>125</sup> Warrants are available for indictable offences,<sup>126</sup> or for a simple offence provided the complaint is on oath.<sup>127</sup>

Under the *Criminal Code*, it is lawful to arrest without warrant any person who is or is reasonably suspected to be in the course of committing an offence punishable with imprisonment<sup>128</sup> or any person offering stolen property for sale.<sup>129</sup> There are also certain arrest powers under the *Police Act 1892 (WA)*.<sup>130</sup> A judicial officer has the power to issue a warrant for the arrest of a person the subject of an *ex officio* indictment.<sup>131</sup> There is no requirement that an arrest be the subject of any public announcement.

An indictment is the document in which the charge against a person accused of an indictable offence is reduced to writing.<sup>132</sup> The document is to be signed and presented to the court by the Attorney General or some other person appointed

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120 Ibid 255.

121 *Justices Act 1902 (WA)* ss 20, 33.

122 Section 426 (2a) or (3).

123 *Justices Act 1902 (WA)* s 42.

124 *Justices Act 1902 (WA)* s 49.

125 *Justices Act 1902 (WA)* s 50.

126 *Justices Act 1902 (WA)* s 58.

127 *Justices Act 1902 (WA)* s 59.

128 *Criminal Code (WA)* s 564.

129 *Criminal Code (WA)* s 569.

130 Sections 49, 43.

131 *Criminal Code (WA)* s 580.

132 *Criminal Code (WA)* s 578.

in that behalf by the Governor.<sup>133</sup> It must contain certain information, including the place of trial.<sup>134</sup>

It is possible for a private individual to bring a criminal prosecution, but only with the leave of the Supreme Court.<sup>135</sup>

The usual procedure for an indictable offence is that a preliminary hearing is held first to test the sufficiency of the evidence. However, the accused has the right to waive a preliminary hearing<sup>136</sup> and it is of course possible that the accused will plead guilty at that stage. There is some limited scope for an accused to resile from such a plea, however.<sup>137</sup> Therefore the proceedings are not necessarily 'over' just because the accused had pleaded guilty.

Except as noted above, in the limited range of cases where the accused has an election to be tried summarily by a magistrate, indictable offences are tried in the District Court or, in the case of more serious offences, in the Supreme Court.

A person committed for trial for an indictable offence has the right to elect to be tried by a judge alone.<sup>138</sup> Otherwise it is assumed that trials will be by judge and jury.<sup>139</sup> This is potentially significant for contempt law because there are different assumptions, and potentially different rules, about the contemptuous nature of publications depending on whether the proceedings potentially affected are to be tried by a judge or a jury. The effect of these provisions is that it needs to be assumed that trials will be by jury, unless and until the accused makes an election otherwise at the time of committal.

Appeals against decisions or orders of magistrates are to the Supreme Court, by leave.<sup>140</sup> The refusal of a judge to grant leave is itself subject to appeal to the Full Court.<sup>141</sup> If leave is granted, the appeal will be heard by a single judge or by the Full Court, and a range of orders is open, including remittal for rehearing.<sup>142</sup> An appeal that is dismissed for want of prosecution can be reinstated.<sup>143</sup>

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133 *Criminal Code* (WA) s 578

134 *Criminal Code* (WA) s 582.

135 *Criminal Code* (WA) s 720.

136 *Justices Act 1902* (WA) s 101B(1).

137 *Criminal Code* (WA) s 618.

138 *Criminal Code* (WA) s 651A.

139 *Criminal Code* (WA) s 622.

140 *Justices Act 1902* (WA) Pt VIII.

141 *Justices Act 1902* (WA) s 189.

142 *Justices Act 1902* (WA) s 199.

143 *Justices Act 1902* (WA) s 206(1).

Following conviction of an indictable offence, a defendant has a right to appeal to the Court of Criminal Appeal, based on section 688 of the *Criminal Code*. The allowable grounds of appeal are not significant here; more significant is the fact that a convicted person has 21 days from the date of the verdict in which to appeal, but there is considerable scope for an extension of time to be granted.<sup>144</sup> Extensions of time are less likely in the case of a prosecution appeal, but this can be left to one side because appeals by the prosecution, by and large, cannot result in a retrial.<sup>145</sup> Also significant is that an appeal against sentence (by either party) cannot result in a retrial. A notice of abandonment (by the appellant) may be withdrawn in some circumstances.<sup>146</sup> There is limited power in the appeal court to receive evidence that was not given at the trial.<sup>147</sup>

Not every successful appeal against conviction results in a retrial. The appeal court has the power to quash the conviction and direct a verdict of acquittal<sup>148</sup> or substitute a verdict of guilty of an alternative offence.<sup>149</sup> It also has the power to dismiss an appeal as frivolous or vexatious. Another way an appeal can be terminated is by abandonment by the appellant;<sup>150</sup> here, a notice of abandonment can be withdrawn if it did not result from a deliberate and informed decision.<sup>151</sup>

Further appeals lie to the High Court by special leave on the very limited basis that a question of law of public importance is involved.<sup>152</sup> The outcome of such an appeal could be a retrial. Extensions of time are available.<sup>153</sup>

### When should the sub judice period begin?

The foregoing shows that broadly speaking there are five stages of criminal proceedings at which one could fix the commencement of the 'pending' period:

1. when it becomes known a person is suspected;
2. when an information is laid against that person;
3. when a summons or warrant is issued against the person;
4. when a person is arrested (note the last two could occur in either order, considering the possibility of arrest without warrant); or
5. when an indictment is presented to a court.

144 *Criminal Code* (WA) s 695; *Bartle v The Queen* (1991) 57 A Crim R 51 (CCA WA).

145 The exceptions are appeals against decisions allowing demurrers or staying or adjourning proceedings, against directed acquittal and against judgments given on pleas to the jurisdiction of the court: *Criminal Code* (WA) s 688(2).

146 *Johnson v The Queen* (1992) 57 A Crim R 290 (CCA WA); *R v Morey* (1993) 65 A Crim R 145 (CCA WA).

147 *Criminal Code* (WA) s 697(b).

148 *Criminal Code* (WA) s 689(2).

149 *Criminal Code* (WA) s 693(2).

150 *Criminal Practice Rules* (WA) O IX r 13..

151 *Criminal Practice Rules* (WA) O XIII, XIV.

152 *High Court Rules* (Cth) O 69A(1); *Collins v The Queen* (1975) 133 CLR 120; *Coulter v R* (1988) 164 CLR 350.

153 *Van der Meer v The Queen* (1988) 62 ALJR 656.

Clearly one important consideration, if the main concern is the potential impact of pre-trial publicity on a jury, is the likely time lapse between the commencement of the 'pending' period and the commencement of the trial. Often this is difficult to judge, but the later one fixes the commencement of the 'pending' period, the closer it will be to the trial and therefore the greater will be the likelihood of an impact on the jury.

Also relevant, surely, is the extent to which the case has captured public attention. For example, at the time of writing, the Northern Territory police are still hunting for the man responsible for the disappearance of British traveller Peter Falconio. Mr Falconio and his partner Joanne Lees have become household names throughout Australia since they were terrorised, and Mr Falconio abducted and possibly murdered, by a gunman who tricked them into stopping their car on an outback highway. Suppose that tomorrow it were announced in the press – likely with a large headline on the front page – that Joe Bloggs of Alice Springs, a convicted kidnapper, is wanted for questioning over the incident. Joe Bloggs might never even be arrested, let alone charged or, if he is, his trial may not take place for some time. Surely no-one can doubt, however, that even years from now it will be difficult to find a jury who cannot remember that Joe Bloggs has a prior conviction.<sup>154</sup> Yet, under the New South Wales Law Reform Commission's proposal, it would not be contempt to publish details of the prior conviction when he had not yet been arrested. The New South Wales Law Reform Commission acknowledges the potential prejudice of publicity in 'sensational cases' even when proceedings are 'imminent' but not yet 'pending', but dismisses this difficulty with the observation that 'it seems likely that the risk of such prejudice would generally be less than the risk arising from publicity at a later stage.'<sup>155</sup> With respect, this observation does not really address the difficulty; all it says is that there is an even greater difficulty at a later stage. In the example given above, it is hard to imagine *any* greater risk of prejudice than the one raised at the time the police identify a suspect; certainly this is an extreme example, and in many other examples there will be a greater risk closer to the time of trial. However, the issue is really whether there is a great enough risk at the time of publication, in view of other circumstances surrounding the publication.

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154 The Australian Law Reform Commission relied on a similar logic: see Australian Law Reform Commission, above n 16, para 304.

155 New South Wales Law Reform Commission, above n 5, 230.

The New South Wales Law Reform Commission goes on to refer to the potential uncertainty problem for the media of a more inclusive definition for the time period, and suggests that this 'would arguably impose too severe a restriction on freedom of discussion'.<sup>156</sup> This may be so, but it could also be argued that the kind of arbitrary cut-off points involved in the proposal provide certainty at a cost even to the media. For example, a publication after arrest would count as contemptuous even if it were given very little prominence and for some reason there was certainty that it would be some time before the trial.

While there is much to be said for certainty and clarity in the law, there is also something to be said for providing the right balance between certainty and flexibility through other aspects of the offence – for example the tendency/risk issue and the mental element – and leaving the onus on publishers to assess the risk of prejudice from a particular kind of publication at a particular time, weighing the elements mentioned above, namely:

- The degree of public attention being paid to the case;
- The prominence given, or proposed to be given, to the publication;
- The degree of inflammatoriness of the facts that make the publication prejudicial; and
- Any grounds there are for thinking a trial might come on quickly or might take some time.

It should not be too much to ask of a skilled and responsible editor or other media worker to make such an assessment. Any remaining problem of a chilling effect could be addressed through the construction of defences, especially relating to public interest (see below). Certainly there is an attraction to a strictly defined *sub judice* period when so much of the law remains vague and unsatisfactory, but there is real scope for a shift of the balance too far away from the interests of accused persons in a fair trial once those matters are addressed if an arbitrary *sub judice* period is introduced as well. Alternatively, as noted above, there is scope for an arbitrarily-defined period to be *over-inclusive* and thereby favour the interests of the accused at the expense of freedom of discussion.

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<sup>156</sup> Ibid. The Commission further points out the very respectable tradition of law reform bodies favouring certainty: *ibid* and sources there cited.

**Invitation to submit #12**

The Commission seeks submissions on the question of when criminal proceedings should start to be considered 'pending' for the purposes of the law of contempt by publication.

**The end of the sub  
judice period**

Determining where the *sub judice* period ends raises similar issues to those discussed above in relation to the commencement of the period. It might be relatively rare for a re-trial to be ordered on appeal, but if the trial has been a high-profile one and there is an outside chance that it will need to be repeated, the publication of prejudicial material following the verdict or during the appeal cannot fail to make a lasting impact on the future jury pool. It is difficult to imagine a situation where the public interest in the publication of information *at that particular time* would outweigh the appellant's right to a fair re-trial but once again, if that were the case it could be dealt with in the context of a defence to contempt.

A further difficulty with the setting of the end-point of the *sub judice* period is that the power to extend the time limitation for instituting an appeal and the power to revive an appeal after a notice of abandonment make it very difficult to say with any certainty when all appeal possibilities have been exhausted. Similarly, a defendant can resile from a plea of guilty before preliminary proceedings, meaning that even the guilty plea does not necessarily spell an end of the matters. Under the New South Wales Law Reform Commission's proposal these considerations do not matter, because the *sub judice* period abates following conviction, until such time as a re-trial is ordered. However, if this proposal were not adopted, for the reason discussed in the previous paragraph or any other reason, the quest for certainty would look rather forlorn. Either it should be abandoned altogether or other means of achieving it should be sought.

**Invitation to submit #13**

The Commission invites submissions on the question of when criminal proceedings should be considered no longer pending for the purposes of the law of contempt by publication.

**Measures to  
enhance the  
availability to the  
media of information  
about criminal  
proceedings**

Perhaps the fundamental problem is that it is simply too difficult to tailor a definition of the *sub judice* period to the aims of contempt law and the need it has to balance such a large number of interests, that is, unless the time of the publication is treated as only one circumstance to be considered in determining whether a publication is contemptuous. Because of the fundamental nature of this problem, it would be advisable to consider steps the judiciary and the executive government can take to address any residual uncertainty concerns. One means of doing so would be to make it easier for the media to gain access to the information they need to determine whether criminal proceedings are being considered, if so, what stage they are at and how long it is likely to take for the trial to come on. Much of the information that can make a difference is actually in the knowledge of the police (or possibly other investigating or prosecuting authorities), considering the controversial period is that before there has been any formal contact with a court or any overt police or prosecutorial action. There is a strong argument that if the authorities are not willing to work to make the information available, nobody should be liable for publishing material that would appear to carry a risk of prejudice were the information known.

There have been some useful advances in recent years in co-operation between legal institutions and the media. For example, most courts now have media liaison officers who assist journalists in gaining access to court information. There are grounds for optimism about the scope for co-operation of the kind being suggested here. Such co-operation would have a salutary effect from the point of view of certainty, and therefore of freedom of discussion, no matter what other measures are taken (or indeed not taken) to reform the law of contempt.

One possible model is an information bank – probably in the form of a database – at which media workers can inquire whether proceedings are being considered or taken against an individual. It would be a simple enough matter to provide the worker with a written report that could be relied on in support of an ignorance defence (see above), if the information in the database turned out to be insufficient or incorrect. The database could be funded partly on a user-pays basis, for example by a levy on media operations generally or by subscriptions. Some of the cost should be met by the state, however, considering one of the main aims of setting the system up is to protect the administration of justice, a matter in which the whole of society has an interest.

An alternative or possibly additional system would be one of empowering (or perhaps requiring) judges to certify, at various points especially during the post-conviction phase of proceedings, whether there remains a reasonable chance of further proceedings in the matter. For example, an appeal court receiving a notice of abandonment of an appeal could be required to assess the likelihood of revival; if that likelihood reaches a particular threshold, publicity should continue to be restrained and otherwise it should be free. This would take the burden off the media of assessing matters not particularly within their knowledge or expertise. Given the importance of free discussion about court processes, the slight burden on courts of making these decisions could be easily justified.

It would be more difficult to devise such a system to address the uncertainty arising out of the possibility of an extension of time for instituting an appeal. The only person likely to be able to assess whether an appeal out of time is at all likely is the defendant's own counsel and there might be confidentiality concerns if such a person provided that kind of information to media representatives. However it should be possible to carve out a legislative exception to the general confidentiality duty of lawyers, to assist media representatives to fulfil their responsibilities in determining the likelihood that a proposed publication will prejudice future proceedings.

#### **Invitation to submit #14**

The Commission invites submissions on what measures could be taken to enhance certainty as to whether criminal proceedings are pending by providing better information to the media.

### **Civil proceedings**

Very different issues arise in relation to determining the likelihood of impact on civil proceedings. Whereas criminal proceedings are almost always in the hands of public authorities, and therefore the relevant information is in a limited number of hands, the potential number of people with knowledge about some possibly intended civil proceedings is virtually limitless. Therefore a cut-off point for beginning of the *sub judice* period at the time when originating process issues is easier to justify.

Moreover, the issues at stake in civil proceedings are not as crucial to the parties, so the need to protect the right to a fair trial is not as pressing. In any event, civil proceedings are

rarely tried by jury so the potential impact of publicity is generally considered to be lower. Therefore the role of contempt law is narrower.

Contempt law is likely to be felt in relation to civil proceedings only if an aspect of contempt as 'prejudging' is retained. In such a case it is almost inconceivable that any issue about the contempt defendant's knowledge of the existence of proceedings would arise, because if there were no knowledge there would be nothing to prejudge. However, there might be a rare case in which a person makes a comment on some matter that incidentally has a bearing on civil proceedings which that person did not know were on foot. Many such cases could be dealt with by an ignorance defence: if there was no reason to suspect proceedings were being considered or were on foot, it would be reasonable not to make any inquiries in that regard.

The New South Wales Law Reform Commission proposed:

Legislation should provide that civil proceedings cease to become pending for purposes of the *sub judice* period when the proceedings are disposed of or abandoned or discontinued or withdrawn. The proceedings should become pending again only when a re-trial is ordered.<sup>157</sup>

The proposal echoes the one about criminal proceedings, in that it allows a window for unfettered discussion between disposition at trial and the ordering of a retrial. The same logical difficulties apply to this as to the criminal proposal, but because of the different circumstances here, notably the qualitative difference in the issues at stake for the parties and the difficulty of setting up any kind of systematic means of making available information about likely future developments, the opening of that window might be more justified here.

#### **Invitation to submit #15**

The Commission invites submissions on the issue of how the *sub judice* period should be defined in civil cases.

## **Defences**

A new defence has already been proposed, relating to knowledge of relevant facts and the taking of reasonable steps to gain such knowledge. There is no reason why the two existing defences, fair and accurate reporting of proceedings and discussion in the public interest, should not be retained and refined. Finally, consideration will be given to a defence

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<sup>157</sup> Ibid 258.

centring on the defendant's claim to have lacked control of the content of a publication.

As always it should be borne in mind that the following discussion is predicated on a presumption that there are to be significant changes to the elements of contempt and the way it is prosecuted, including, at the very least, the introduction of a mental element in some form relating to the likelihood of prejudice.

#### Invitation to submit #16

The Commission invites submissions as to the most desirable *combination* of reform measures relating to the elements of contempt by publication, the defences to it, the way it is prosecuted and the penalties available.

#### Fair and accurate reporting of proceedings

As noted above, this defence plays a significant part in serving the interests of open justice. Because it contains an element of 'fairness' it also, of necessity, is subject to a degree of uncertainty.<sup>158</sup> On the other hand, because it is limited to a particular and well-defined physical context – that is, the proceedings themselves – it entails a good deal less uncertainty than aspects of contempt law that centre on some possibly hypothetical future trial.

Further certainty can also be provided by the availability of suppression orders (see below). To some people it might seem sensible to introduce a *negative* contempt law in relation to the reporting of proceedings: anything can be reported as long as it is not the subject of a suppression order. While such a system would provide as much certainty as anybody could possibly want, it would be a radical break with the current system and unlikely to find favour with either courts or lawyers. Moreover, as discussed below, it is desirable to retain some responsibility for media workers to understand and support the overall aims of contempt law.

One rule with a clear connection to those aims is that information introduced into court in the absence of the jury cannot be reported. There should be no need for a suppression order each time such information is introduced. There may be other examples of information, or ways of reporting information, that are presumptively prohibited.

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158 Ibid 290.

It is difficult to imagine how the uncertainty arising from potential disagreement over ‘fairness’ can be avoided. Certainly it would be unwise to remove the ‘fairness’ element in view of the increasing tendency of ‘news’ reporting to include tendentious and opinion-based matter, and the numerous techniques media workers have for putting a ‘spin’ on facts. While technically accurate, such reports raise a significant danger of being misleading. As in so many other areas being dealt with here, there is a strong case for relying on – in the sense of requiring – the good judgment and responsibility of media workers themselves. Where the media claim certain freedoms based on the public significance of their activities, an expectation that they exercise judgment and responsibility should surely follow.

The Phillimore Committee recommended that the defence be narrowed by the introduction of an element of ‘good faith’,<sup>159</sup> and such an element was duly introduced in the *Contempt of Court Act 1981* (UK),<sup>160</sup> though it is not clear ‘whether it is to operate as a defence or an element of the offence of contempt.’<sup>161</sup> The concept of good faith did not find favour with the Australian Law Reform Commission, which said that:

Such a requirement calls for an examination of the motive or purpose underlying a publication and ... this is a difficult and unsatisfactory inquiry in relation to publications representing the collective effort of a team of people within a media organisation.<sup>162</sup>

This observation echoes some ideas underlying the discussion above of the ‘ignorance’ defence: a mental element based on knowledge is more suited to this context than one based on intent or motive. It is strongly arguable that the concerns a good faith requirement would seek to capture can be sufficiently addressed by considering the objective nature of the publication, for example, whether it is ‘fair’ or whether it puts too much of a ‘spin’ on events at the proceedings. In other words, a report published in ‘bad faith’ is unlikely *not* to be ‘unfair’. Moreover, a ‘fairness’ test ties contempt law to its goals in preventing prejudice and the introduction of an ‘ignorance’ defence as outlined above can do all that is needed in terms of focusing on the defendant’s state of mind.

The New South Wales Law Reform Commission saw no need to introduce any changes to the common law position, but

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159 United Kingdom Committee on Contempt of Court, above n 8, para 321-8.

160 Section 4.

161 New South Wales Law Reform Commission, above n 5, 293.

162 Australian Law Reform Commission, above n 16, para 322.

rather thought that these issues 'are best left for courts to clarify'. However, if a Contempt of Court Act were introduced it would seem odd not to include any defences available at common law. It would be a simple enough matter to find a form of legislative words for including this defence in any legislation.

#### Invitation to submit #17

The Commission invites submissions on whether any changes to the current law on fair and accurate reporting are desirable.

#### Discussion in the public interest (the Bread Manufacturers' defence)

This defence was originally conceived as a way of protecting those who wished to publish a contribution to an ongoing debate on a matter of public interest that incidentally had a bearing on particular legal proceedings.<sup>163</sup> The defence 'appeared to be quite narrow and inflexible. ... The publications were prompted by the general public discussion, rather than by particular legal proceedings, and did not refer specifically to particular proceedings.'<sup>164</sup> It is clear that contemporary notions of freedom of discussion would support a considerably broader defence.

The outer limits of the defence were tested more recently in the High Court decision of *Hinch v Attorney General (Vic)*.<sup>165</sup> Although the particular defendant in that case, a radio announcer who revealed the prior convictions of a man being charged with child sexual abuse, did not receive the benefit of the defence, the court 'expanded the scope of the principle significantly.'<sup>166</sup> For one thing, it was held that a publication could have the protection of the defence even though it was prompted by, and referred to, particular proceedings. Nor is there a requirement that prejudice to those proceedings be incidental. Rather the court is required to balance the public interest in the administration of justice against that in free discussion of matters of public interest in order to determine whether a contempt has been committed. It appears that a court engaged in such a balancing exercise will still be interested in the question of reference to particular legal proceedings, at least from the point of view of determining the degree of tendency to cause prejudice. That is, a publication

<sup>163</sup> *Ex parte Bread Manufacturers Ltd; Re Truth and Sportsman Ltd* (1937) SR (NSW) 242.

<sup>164</sup> New South Wales Law Reform Commission, above n 5, 264.

<sup>165</sup> (1987) 164 CLR 15.

<sup>166</sup> New South Wales Law Reform Commission, above n 5, 265.

that makes such reference is surely far more likely to cause prejudice than one which does not, other things being equal.

*Hinch* also makes it clear that a court will have regard to exactly what is being said about the proceedings: in this case the revelation of a prior conviction was very difficult to justify, even in the context of ongoing public concern about paedophilia. In particular, Mr Hinch could have alerted the public to the incongruity of the man's continuing involvement in a youth group simply by revealing the then current charges. The outcome in the case is therefore hardly surprising, but unfortunately it also means, as the New South Wales Law Reform Commission has pointed out, that we are left without any real indication as to where reference to particular proceedings *will not* be held to constitute a contempt. The New South Wales Law Reform Commission comments:

Chief Justice Mason did refer to public discussion of a major constitutional crisis or an imminent threat of nuclear disaster .... These would seem to be quite extreme examples, and ones which (hopefully) would not arise very often. They are not particularly helpful, therefore, in indicating when the public interest principle will protect a publication which refers to matters of a less extreme nature nor [sic] to proceedings.<sup>167</sup>

Perhaps, however, the rarity of the examples is exactly what Mason CJ intended. Perhaps his Honour should be read as strongly hinting that it will be only in a very rare case of specific reference to proceedings that the defence will succeed. However, it may still have significant life in cases where there is no such reference. As we find that more and more important issues of public interest are being fought out in the courts, it should be expected that such cases will become more frequent.

The New South Wales Law Reform Commission goes on to propose reform in the following terms:

Legislation should provide for a defence to a charge of *sub judice* contempt on the basis that:

- the publication the subject of the charge was made in good faith in the course of a continuing public discussion of a matter of public affairs (other than the trial itself), or otherwise of general public interest and importance; and
- the discussion would have been significantly impaired if the statement creating a substantial risk of prejudice to the relevant trial had not been published at the time when it was published.

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<sup>167</sup> Ibid 269; referring to *Hinch v Attorney General (Victoria)* (1987) 164 CLR 15, 26 (Mason CJ).

The defendant should bear the burden of proof and the standard of proof should be on the balance of probabilities.<sup>168</sup>

The Australian Law Reform Commission recommended a similar fairly narrow defence and explained that its

main reason for recommending this much narrower principle is that it does not believe that the dressing-up of material in the form of a 'public interest' discussion should serve, virtually automatically, or even on a 'balancing of interests' basis, to exonerate prejudice which results from careless failure on the part of the media to make themselves aware of current trials, let alone prejudice of a trial whose existence is known to them.<sup>169</sup>

The New South Wales Law Reform Commission endorsed this explanation.<sup>170</sup>

The New South Wales proposal usefully defines 'public interest' in such a way as to exclude 'mere curiosity', with the use of a concept of 'public ... importance'. It also seems to accord with Wilson J's eminently justifiable assertion in *Hinch* that in these cases the courts start with the scales tilted in favour of protecting the due administration of justice.<sup>171</sup> If other reforms are made, notably in the form of the introduction of an 'ignorance' defence, it is hard to imagine why any broader defence relating to public interest would be required.

#### Invitation to submit #18

The Commission invites submissions on the question of what the position should be of a defendant who has made a prejudicial publication in the course of discussion on a matter of public interest. In particular, the Commission invites submissions on how 'public interest' should be defined for these purposes.

#### Lack of control of the contents of the publication

The New South Wales Law Reform Commission has proposed an 'innocent distribution' defence to assist those who have no control over the content of the publications in which they participate:

Legislation should provide that it is a defence to a charge of *sub judice* contempt if the accused can show, on the balance of probabilities:

168 New South Wales Law Reform Commission, above n 5, 283.  
 169 Australian Law Reform Commission, above n 16, para 332.  
 170 New South Wales Law Reform Commission, above n 5, 280.  
 171 *Hinch v Attorney General (Victoria)* (1987) 164 CLR 15, 41.

- (a) that it, as well as any person for whose conduct in the matter it is responsible, had no control of the content of the publication which contains the offending material; and
- (b) either:
  - (i) at the time of the publication, they did not know (having taken all reasonable care) that it contained such matter and had no reason to suspect that it was likely to do so; or
  - (ii) they became aware of such material before publication and on becoming so aware, took such steps as were reasonably available to them to endeavour to prevent the material from becoming published.<sup>172</sup>

The defence would protect distributors of print, broadcast (including radio talkback) and electronic (Internet) material<sup>173</sup> as well as people '[through whose facilities] the offending material was published'.<sup>174</sup> It still places certain responsibilities on these people, including the responsibility of proving the elements of the defence, but it does recognise the reality that in many situations people in these categories simply cannot prevent a contempt and are more or less forced to participate in it. It would be hoped that the existence of such a defence would translate in practice to proceedings becoming very rare against people in these categories.

In relation to Internet service providers and content hosts, it has been argued that they are probably already protected by the *Broadcasting Services Act 1992* (Cth) Schedule 5 section 91.<sup>175</sup> The New South Wales Law Reform Commission suggests, with great justification, that if this is the situation it should be changed to make such persons and organisations responsible for contempts committed via the services they provide, of which they have knowledge and which they have not taken reasonable steps to prevent.<sup>176</sup> Legislation to that effect could raise an issue under section 109 of the *Constitution*, in that it might appear to be inconsistent with the Commonwealth legislation just mentioned. Steps would have to be taken to prevent this, involving presumably a request to the Commonwealth that it amend its law to remove the inconsistency. This could be done easily enough.

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172 New South Wales Law Reform Commission, above n 5, 183.

173 *Ibid* 184-8.

174 *Ibid* 184.

175 Julie Eisenberg, 'Safely Out of Sight: the Impact of the New Online Content Legislation on Defamation Law' (2000) 6 *University of New South Wales Law Journal Forum* 23.

176 New South Wales Law Reform Commission, above n 5, 188.

**Invitation to submit #19**

The Commission invites submissions on the question of the desirable legal significance, if any, of a defendant's lack of control over the contents of a publication.

**Civil proceedings**

Civil proceedings are discussed relatively briefly in this paper because they generally do not raise as much public excitement and therefore the pressures on the media to test the limits of prejudice are not as great. Perhaps more importantly, it is unusual for civil proceedings to be tried by jury, so if it is accepted that the dangers of prejudicing a judge with publicity are considerably less than those of prejudicing a jury, it must also be concluded that civil proceedings are generally of considerably less interest for contempt law.

On the other hand, two examples illustrate the remaining potential for a very strong public interest in civil proceedings in this connection, and the resulting need to keep them in mind when considering contempt law.

The first is, of course, the *Distillers* case that led to the *Sunday Times*' victory in the European Court of Human Rights and the resulting enactment of the UK legislation.<sup>177</sup> Being probably the greatest *cause célèbre* of all time for contempt law, it can hardly allow us to forget that contempt is not just about prejudicing juries, but about placing pressure on parties and generally prejudging legal proceedings. In other words, 'trial by media' is undesirable wherever it occurs, and not just in relation to criminal proceedings. This is not to say that the *Sunday Times* article fitted that description, but the facts of the case certainly remind us of that danger.

The second case is more recent and closer to home. The then Chief Minister of the Northern Territory, Mr Denis Burke, was convicted of contempt for statements he made regarding pending proceedings where the Northern Aboriginal and Islander Legal Service was seeking to challenge on constitutional grounds the appointment of the Territory's Chief Magistrate. Mr Burke referred to the proceedings as a waste of taxpayers' money and this was held to constitute pressure on the Service to drop them. The facts of this case serve as another reminder that civil proceedings can have a very significant public interest dimension, especially when they are

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177 See earlier discussion of *Distillers*, thalidomide etc.

in the field of public law, and that there can be significant power disparities between parties that might make one side vulnerable to the kind of pressure contempt law has always sought to address. In short the public interest in the due administration of justice can be very acute in the civil as well as the criminal area.

In addition to the risk of influence on judges and parties, there are dangers associated with the potential influence of publicity on witnesses, both on their testimony<sup>178</sup> and on their willingness to testify.<sup>179</sup> On the former issue, the Australian Law Reform Commission usefully pointed out that:

Many of the restrictions imposed on publications in order to protect a jury – for example, the prohibition on published denigration of an accused person - are directed also to preventing distortion of testimony.<sup>180</sup>

In other words, many of the concerns that arise specifically out of civil proceedings are already addressed by the more general contempt laws. What this means in practice is that even if contempt laws are primarily aimed at the protection of criminal juries from influence, they should be worded that way as they do have that broader application. If they are worded so as to apply to material that risks prejudice to the administration of justice, they would certainly be read as extending, in an appropriate case, to a risk of influence on a judge, a party or a witness. Therefore even the rule against pressure on parties or witnesses could be subsumed under the general law of contempt by publication as a sub-category of the rule against prejudicing proceedings. (Such pressure, where it does not occur by publication, would presumably amount to a breach of the *Criminal Code*.)<sup>181</sup> The public importance of the proceedings would be one of many matters to be taken into account in assessing the defendant's liability for contempt, especially under the public interest defence.

On the other hand, there is one aspect of contempt law that has its primary relevance in relation to civil proceedings and this will be addressed here. The rule against prejudging proceedings has its primary relevance here, because in the case of a criminal trial any prejudgment will almost certainly be held prejudicial. Prejudgment without prejudice is really only likely to happen in a civil case.

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178 See Australian Law Reform Commission, above n 16, para 387.

179 Ibid para 390.

180 Ibid para 387.

181 For example, under s 143 (attempting to pervert justice).

**The prejudgment principle**

The New South Wales Law Reform Commission has pointed out that the prejudgment principle is not a sub-category of, but rather contrasts with, *sub judice* contempt generally:

the prejudgment principle is not concerned with the potential influence of a publication on the court hearing the case in question. It seems that the principle may be applied to find guilt for contempt even though the publication does not have a tendency to influence participants in the proceedings.<sup>182</sup>

Rather, the prejudgment principle seems to be directed towards the avoidance of 'trial by media'. It seems to have more in common with 'scandalising' contempt in that it is aimed at protecting the overall authority of the court, in the sense of public perceptions of its legitimacy and its ability to perform its constitutional functions – in a word, public confidence in the court. It might also in some cases protect the system against a future possibility of potential litigants being discouraged by the spectacle of a current litigant being pilloried in the press. In this connection it is worth recalling the discussion above about the general privacy interests of those involved in legal proceedings, especially considering that roughly half of those participants are under some sort of coercion. Litigation is unpleasant enough without seeing one's cause tried in parallel by a sensation-seeking and unaccountable media. There is no natural justice in trial by media; nor is there any appeal against a conviction.

On the other hand, the New South Wales Law Reform Commission takes the view that:

The restrictions imposed by the prejudgment principle may have particular importance to investigative journalism, and even, perhaps, academic and scientific publications.<sup>183</sup>

If this is correct, the problem is not in the quelling of sensational media coverage but in the gagging of serious reporting and discussion, possibly even outside the realms of what we normally think of as 'the media'. This is potentially a matter of great concern.

However, it might be questioned how many situations are likely to arise where serious and responsible discussion of proceedings would prejudice them. Of course one easy answer to this question is: '*Sunday Times*'. There the mere suggestion that Distillers should offer more money to the victims of thalidomide in settlement of the negligence claim against it was held to be a prejudgment of the negligence issue.

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<sup>182</sup> New South Wales Law Reform Commission, above n 5, 211.

<sup>183</sup> *Ibid* 212.

One of the reasons it is difficult to say much about the prejudgment principle in Australia is that it has never been used to form the basis for a contempt conviction in this country.<sup>184</sup> One implication of this fact, of course, is that we could hope that the same result would not be achieved here as was achieved in the *Sunday Times* case. The same result certainly cannot be assumed, simply because we are in a different place and time, but also because the decision was arguably fundamentally wrong in its assessment of the facts.

It is not proposed to go into the precise terms of the article here, but surely it is arguable that it was a misguided interpretation that led the court to conclude that the suggestion about the settlement offer (the newspaper's express intention in publishing the article was to bring pressure to bear on thalidomide's manufacturer to make a better offer of compensation), entailed a charge of negligence. As settlements usually involve no admission of liability, surely it is possible to talk about how much a defendant should offer in settlement without making any assertion, express or implied, about negligence.

Alternatively, it could be argued that to the extent that the *Sunday Times* article implied the company had been negligent (an extent on which no comment is made here), when that had not been found by a court, it was not particularly responsible journalism but rather an instance of the use of media power to take sides in a public and legal debate. Investigative journalism no doubt benefits from the fire in the belly of a journalist who has a passionate commitment to some cause, but that does not mean that tendentious reporting deserves the name of journalism. (Once again, these comments are being made without wishing to imply anything about the merits of the *Sunday Times* article.) Investigative journalism has great potential for producing social benefits by revealing information, but like any other kind of power it can be abused. Its application to the end of supporting some pet cause of the journalist is an example of such abuse. In other words, the 'investigative' label is not a guarantee of quality or responsibility.

The New South Wales Law Reform Commission has proposed that the prejudgment principle be abolished as an independent ground of liability for contempt.<sup>185</sup> There are good grounds for this proposal, including the disproportionate impact on

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184 Ibid 215.

185 Ibid 218.

freedom of discussion when there is no actual or threatened damage to the proceedings in question and the vagueness and unpredictability of a concept like 'prejudgment'.<sup>186</sup> However, it might be asked whether there would be some wisdom in retaining a general catch-all provision or principle relating to 'trial by media'. This could capture the notions of abuse of media power that have been alluded to above, as well as closing off a loophole that can leave public confidence in the courts and/or the privacy interests of interests subordinated to the quest for greater readerships and audiences. It would be hoped and expected that the application of such a provision would be rare. However, its very existence would serve as a reminder to everyone, including the media, that anyone who makes a living out of freedom of discussion has important responsibilities in relation to countervailing interests.

If such a head of liability were to be introduced, it should revolve around the notion of abuse of press freedom. This would have the salutary impact of keeping press freedom firmly in the court's mind when weighing up the various interests at stake. A potentially useful model can be found in a different context in *Chappell v TCN Nine* where Hunt J of the Supreme Court of New South Wales granted an interlocutory injunction against the broadcast of a program containing imputations Greg Chappell considered defamatory of him.<sup>187</sup> The defendant, Channel Nine, argued that it would have a defence based on the public interest in the subject-matter of the program, namely, the irresponsibility of the *Truth* newspaper in publishing, inter alia, particular allegations about Mr Chappell's sex life. Hunt J held that that subject matter could be adequately addressed without giving a further airing to the allegations, and issued the injunction. His Honour's judgment provides a useful example of how a judge can scrutinise a media organisation's claim that legal action would compromise its freedom; this is exactly the kind of scrutiny that would be involved where a court needed to decide whether an organisation was engaged in responsible journalism or an abuse of press freedom in the form of trial by media. The *Chappell* case demonstrates that such an inquiry need not be framed in such a way as to leave a free rein to judges to make subjective and therefore unpredictable decisions. Rather the inquiry can be rational and objectively aimed at picking up abuses of press freedom to increase ratings or readership with

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<sup>186</sup> Ibid 217.

<sup>187</sup> *Chappell v TCN Nine Pty Ltd* (1988) 14 NSWLR 153; [1988] Aust Torts Reports 67, 763 (80 – 187).

gossip and sensationalism. On such a test, the outcome of that part of Hunt J's decision was entirely predictable.

Another example of how the test might work can be provided by the facts of the *Sunday Times* case. If the newspaper had known that the article would be scrutinised from the point of view of whether the public interest point (the inadequacy of the settlement offer) necessitated a charge of negligence, it would have been easy enough to conclude that there was no such necessity and to write the article carefully so as to exclude any such charge.

#### Invitation to submit #20

The Commission invites submissions on whether the prejudgment principle should be retained as a basis for liability, and if so what, if any, changes should be made to render the law more certain and just. The Commission also invites submissions on how 'trial by media' might be defined, and how the concerns it encapsulates can be built into the law of contempt by publication.

#### Procedural matters

Contempt is prosecuted in Western Australia by the Director of Public Prosecutions (DPP). While the *Director of Public Prosecutions Act 1991* (WA) does not specifically state that the DPP has a power or function relating to contempt prosecutions, it does provide that the DPP 'may ... exercise any power, authority or discretion relating to the investigation and prosecution of offences that is vested in the Attorney General whether by a written law or otherwise'.<sup>188</sup> As contempt prosecutions were traditionally carried out by Attorneys General, this provision seems to provide ample authority for the practice.<sup>189</sup> On the other hand, the Act further provides that its 'provisions ... do not derogate from any function of the Attorney General'.<sup>190</sup> In other words, there remains a residual power in the Attorney General to prosecute for contempt. This arrangement has the salutary effect of providing an alternative prosecutor in the not unlikely event that either the Attorney General's or the DPP's perceived impartiality is compromised.<sup>191</sup> There is also a power at common law, which the Act does not seem to modify, for any person or the court acting on its own behalf to initiate proceedings.<sup>192</sup>

188 *Director of Public Prosecutions Act 1991* (WA) s 20(2)(a).

189 See *R v Pearce* (1992) 7 WAR 395, 409-10.

190 *Director of Public Prosecutions Act 1991* (WA) s 20(3).

191 See New South Wales Law Reform Commission, above n 5, 367.

192 *R v Dunbabin; ex parte Williams* (1935) 53 CLR 434.

Contempt is tried by the Full Court of the Supreme Court of Western Australia. Those proceedings, as elsewhere in Australia and traditionally throughout the common law world, are summary in nature: they are not heard with a jury.<sup>193</sup> Appeals are governed by section 688(1a)(b) of the *Criminal Code*:

A person convicted on indictment or convicted by a court of summary jurisdiction and committed for sentence may appeal to the Court of Criminal Appeal —

...

(b) with the leave of the Court of Criminal Appeal, against any other sentence passed upon him, unless the sentence is one fixed by law.<sup>194</sup>

Thus it appears that the only appeal available to a person convicted of contempt is against sentence. This is because the provisions for appeals against conviction under the *Criminal Code* are expressed to apply only in cases of conviction on indictment.<sup>195</sup> Appeals against summary convictions are provided for under the *Justices Act* which applies only to convictions in lower courts.<sup>196</sup> Not surprisingly, considering the anomalous nature of the offence (being outside the provisions of the *Criminal Code*),<sup>197</sup> contempt defendants seem to 'fall through the cracks' somewhat. The prosecution, by contrast, has various grounds of appeal, not limited to sentence<sup>198</sup> (though in practice the applicability of the grounds other than inadequacy of sentence is likely to be very limited).

A further anomaly is that the right of appeal is to the Court of Criminal Appeal, which is defined as the Full Court or in other words the same court that has heard the trial.<sup>199</sup> It might be possible to constitute a different and possibly larger panel of Supreme Court judges to hear an appeal in a contempt case.

In rare cases, special leave to appeal to the High Court may be granted under section 35A of the *Judiciary Act 1903* (Cth). As discussed above, special leave is granted only on very narrow grounds.

### **Matters worthy of review**

Two matters stand out as in urgent need of consideration. One is the application of summary procedure to contempt prosecutions. The other is the arrangements (or rather lack thereof) for appeals against conviction.

<sup>193</sup> The New South Wales Law Reform Commission discusses at length the historical antecedents of this practice: New South Wales Law Reform Commission, above n 5, 386-94.

<sup>194</sup> *Criminal Code* (WA) s 688(1a)(b).

<sup>195</sup> *Criminal Code* (WA) s 688(1).

<sup>196</sup> *Justices Act 1902* (WA) ss 184, 186.

<sup>197</sup> *Criminal Code Compilation Act 1913* (WA) s 7.

<sup>198</sup> *Criminal Code* (WA) s 688(2).

<sup>199</sup> *Criminal Code* (WA) s 687.

Before those two matters are addressed, it is worth mentioning that the New South Wales Law Reform Commission saw no need to propose any reforms in relation to the other matters, namely the concurrent powers of the DPP, the Attorney General, the courts themselves and private individuals to initiate proceedings.<sup>200</sup> As proceedings are conducted in the Common Law Division of the Supreme Court of New South Wales, not all the same issues arise as to appeals in that State. The New South Wales Law Reform Commission did, however, express agreement with Justice Kirby in a 1993 case that the previous arrangement, of holding trials in the Court of Appeal, might have been inconsistent with the International Covenant on Civil and Political Rights in that a right of appeal only to the High Court by special leave is not sufficient.<sup>201</sup>

### Summary procedure

As with many other areas under consideration in this paper, the extent of the need to address this issue depends on what reforms are instituted in relation to other issues. For example, a summary procedure could be justified if a reasonably low limit were placed on penalties for contempt. Possibly the greatest criticism of contempt law as we know it is that it exposes defendants to unlimited penalties but without the community safeguard of a jury. As this is a two-pronged criticism, it could be effectively addressed by attacking either of the prongs. However, on the assumption that even if maximum penalties are introduced, they will still be reasonably high, there will remain a need to consider whether there is any reason why contempt should be tried by a different procedure from other serious offences.

The three justifications commonly advanced are that contempt requires a speedy response, that jury trials are generally unsatisfactory<sup>202</sup> and that summarily is simply how it has always been done.<sup>203</sup> The first deserves serious consideration. The second is not in itself a reason for treating contempt differently from any other offence, and indeed there are strong arguments that a jury is at least as desirable in a contempt case as in any other.<sup>204</sup> The third, if indeed it is a cogent argument, is certainly not one which should influence a law reform commission, for to accept it would be to question the very reason for the commission's existence!

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200 New South Wales Law Reform Commission, above n 5, 367 (Attorney General and DPP), 380 (the courts), 374 (private individuals). It did however propose a requirement that any individual seeking to commence proceedings notify the Attorney General: 377.

201 Ibid 385, citing *Young v Registrar, Court of Appeal* (1993) 32 NSWLR 262.

202 See eg Ireland, Law Reform Commission, above n 15, 417-18.

203 Ibid 399-400.

204 Ibid 396-9.

There are a range of ways to deal with the apparent anomaly of summary proceedings for contempt. The Phillimore Committee's preferred approach was simply to use the power to prosecute for contempt sparingly, in situations where there was some urgency or other reason to justify the use of summary procedure.<sup>205</sup> This recommendation relies on the observation, apparently translatable to Western Australia, that many contempts also constitute other offences such as perverting the course of justice.<sup>206</sup> Proceedings for contempt, therefore, are not always necessary to prosecute undesirable behaviour. If this approach were followed, some means should be found of limiting the discretion of prosecuting authorities to reflect the policy. This might not be an easy matter.

The Australian Law Reform Commission, on the other hand, recommended the introduction of an option to try a case by jury, if either the prosecution or the defence preferred.<sup>207</sup> The Canadian Law Reform Commission recommended the rather puzzling course of making contempt an indictable offence but still giving exclusive jurisdiction to a court sitting without a jury.<sup>208</sup> The Irish Law Reform Commission recommended no change at all.<sup>209</sup>

The Phillimore Committee, the Canadian Law Reform Commission and the Irish Law Reform Commission all appear to have been influenced by some notion that a speedy response is more important in contempt than in other cases. The New South Wales Law Reform Commission, on the other hand, is not so sure. It pointed out that a swift response may well be necessary to deal with contempt in the face of the court, and it is certainly desirable to bring the possibly contemptuous nature of a publication to the attention of the publisher as soon as possible in order to maximise opportunities to withdraw publication and thereby minimise the damage it can do. However, there are very good reasons for not holding the actual proceedings for contempt until after the conclusion of the related proceedings:

the media publicity attaching to the contempt proceedings would add to the possibility of unfair prejudice in the criminal trial.<sup>210</sup>

This argument alone is enough to put paid to any notion of a need for a speedy trial in a contempt case. A speedy *response*

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<sup>205</sup> United Kingdom, Committee on Contempt of Court, above n 8, para 21.

<sup>206</sup> See *Criminal Code* (WA) Ch XVI.

<sup>207</sup> Australian Law Reform Commission, above n 16, para 476.

<sup>208</sup> Canada, Law Reform Commission, above n 12, 32.

<sup>209</sup> Ireland, Law Reform Commission, above n 15, 417-19.

<sup>210</sup> New South Wales Law Reform Commission, above n 5, 395.

to a contempt may well be called for; a speedy *trial* is a different thing altogether.

Therefore there are no convincing reasons why contempt should be dealt with differently from other serious offences. Serious consideration should be given to reforms at least allowing a contempt defendant to opt for a trial by jury.

There are a number of ways this could be done, for example by making contempt an indictable offence under the *Criminal Code*, or by simply providing in a Contempt of Court Act that a particular procedure is to be followed. The former would best accord with this Commission's stated policy from the report on Civil and Criminal Justice that all indictable offences ought to be included within the Code.<sup>211</sup>

#### Invitation to submit #21

The Commission invites submissions as to what changes, if any, should be made to the current practice of summary prosecution of contempt by publication.

## Appeals

As explained above, appeals are available only against sentence and not against conviction, because the grounds for appeal against conviction in the *Criminal Code* apply only to indictable offences and the grounds for appeal against the conviction in the *Justices Act* apply only to appeals against decision of justices. As contempt is not indictable and is not tried by justices it is not covered. There can be no justification for not allowing for appeal against conviction for such a serious offence.

The difficulty with appeals in Western Australia could be very easily addressed with legislative action of one of three kinds:

- to extend the appeal rights under the *Justices Act* to contempt, even though it is not heard by justices;
- to extend the appeal rights in indictable cases under the *Criminal Code* to contempt; or
- to pass a Contempt of Court Act providing specifically for grounds of appeal and so on.

The first would seem a little odd: why would a *Justices Act* contain a provision about a kind of matter not heard by

<sup>211</sup> Western Australian Law Reform Commission, Review of the Criminal and Civil Justice System in Western Australia, Final Report Project 92 (1999) .

justices? The second might also seem strange in the event that contempt is not made an indictable offence and/or it is kept outside the purview of the *Criminal Code*. Therefore the third option seems the most sensible. Whatever else happens, it is likely that contempt will continue to be treated as *sui generis* in at least some sense, so there would be sense in keeping appeal rights *sui generis* as well. For example there may be a case for having different appeal grounds available depending on whether a jury is used or not.

The other difficulty results from the fact that the only court available to hear an appeal is the same one (though potentially differently constituted) that heard the trial. As it borders on the nonsensical to have an appeal heard by an equal-sized group of judges at the same level of the judicial hierarchy, this might mean that, realistically, the only appeal available is to the High Court. As noted above, Justice Kirby held that a similar situation in New South Wales might have been in breach of international human rights standards. The New South Wales Law Reform Commission thought that the problem had been effectively addressed by giving jurisdiction to the Common Law Division of the Supreme Court, or otherwise to a judge sitting alone. If a jury trial option were to be introduced, there is no reason why a similar reform should not be made in Western Australia.

#### Invitation to submit #22

The Commission invites submissions as to what reforms, if any, are desirable relating to avenues for appeal in cases of contempt by publication.

#### Penalties and remedies

Another fundamental criticism of contempt law is that, being a common law offence, it carries unlimited penalties. Because the typical contempt defendant is a corporation, the usual penalty is a fine. Even in the case of an individual defendant, at least in Western Australia, the court has not shown itself to be particularly interested in the prison option. However, there is no reason to think that imprisonment would not be ordered in an appropriate case. There is at least one recent high-profile example of imprisonment in Australia, namely that of Derryn Hinch.

#### Recent penalties imposed

Some recent cases can give an idea of the level of penalties imposed in Western Australia.

In *Resolute Ltd v Warnes*<sup>212</sup> the contemnor had been involved in civil litigation and in connection with that litigation he had made certain threats to publish information contrary to the interests of the other party. The comments the contemnor had made were variously referred to by the Court as 'unfair, scurrilous and abusive', 'extreme' and 'intemperate and improper'.<sup>213</sup> He received two sentences of three months' imprisonment, suspended for two years.

In *R v 6IX Southern Cross Radio Pty Ltd; Ex parte Director of Public Prosecutions (WA)*<sup>214</sup> a 17-year-old girl had been accused of crimes of violence against her father. During a *voir dire* the court considered the admissibility of evidence given at the preliminary hearing as to some statements by way of admissions the girl had made in video-recorded interviews. The defendant radio station broadcast the details of that evidence on the morning of 14 September 1998, while the *voir dire* was still going on. A jury had been empanelled but excused for the day because of the *voir dire*. The evidence about the statements on the video tapes was ruled inadmissible. Malcolm CJ, with whom Pidgeon and Murray JJ agreed, said:

In my opinion, any reasonably experienced journalist would be aware that on the eve of a trial it would be extremely risky to publish extracts of evidence given at committal proceedings.<sup>215</sup>

The story was filed by a casual journalist who had sourced the story from a file kept at the radio station, containing a report of the preliminary hearing. The editor responsible for the broadcast assumed she had sourced it either from someone who had been at the court or from newspaper reports of the current proceedings. He therefore assumed it was a fair and accurate report of those proceedings. Malcolm CJ said:

[I]n all of the circumstances this was not a particularly serious example of contempt of court by a media organisation. The facts that there has been a recognition, albeit somewhat belated, of the gravamen [sic] [gravity] of the offence and that remedial steps have been taken, coupled with an apology, are major factors of mitigation.

This broadcast was not of a permanent kind in print. Nor did it have the same visual impact as a broadcast by way of television. These are also circumstances which it is

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212 [2001] WASCA 4 (Kennedy, Ipp and Miller JJ).

213 *Ibid* 3.

214 (Unreported, Supreme Court of Western Australia – Full Court, Malcolm CJ, Pidgeon and Murray JJ, 22 October 1999).

215 *Ibid* 4.

appropriate to take into account in determining what punishment ought to be imposed for the contempt. In all the circumstances I am of the opinion that a fine of \$2 500 would be an appropriate punishment.<sup>216</sup>

In *Director of Public Prosecutions for Western Australia v Rural Press Regional Media (WA) Pty Ltd*<sup>217</sup> a man had been charged with various child sexual abuse offences. Three days later the defendant published on page three of *The Bunbury Mail* an article with the headline: 'Gaoled Sex Offender in Court Again'. The article disclosed that the man was serving a three-year term of imprisonment for similar offences. This happened while the editor of the newspaper was on holiday. Ipp J, with whom Wallwork and Steytler JJ agreed, explained that the manager in control of the newspaper 'did not have the experience or knowledge to determine whether the article constituted a contempt of court or not.'<sup>218</sup> The young journalist who wrote the article and on whom the manager relied, although 'properly trained', 'also did not appreciate the consequences of publishing the article. In the end, the system broke down'.<sup>219</sup> The publisher was fined \$1 000.

In *R v Nationwide News Pty Ltd; Ex parte The Commonwealth Director of Public Prosecutions*,<sup>220</sup> the defendant published in *The Australian* newspaper an article impugning the honesty of Alan Bond on the day on which Mr Bond's trial of offences involving dishonesty was due to commence. The jury had already been sworn in. Kennedy, Ipp and White JJ discussed the fact that the same contemnor had been fined \$10 000 for a similar contempt relating to the trial of Laurie Connell a few years previously. On the other hand, the Connell case was the only other occasion on which the publisher had been held guilty in this State of contempt arising out of that particular newspaper. Their Honours fined the publisher \$10 000 once again, commenting:

The circulation of *The Australian* newspaper in Western Australia at the material time was approximately 14,200. On the day of the publication, hoardings published throughout the metropolitan area of Perth drew attention to the article. The purpose of the hoarding was to emphasise the newsworthiness of the article in an attempt to promote sales of the newspaper. This was a factor to be taken into account in assessing the criminality involved.<sup>221</sup>

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216 Ibid 8.

217 (Unreported, Supreme Court of Western Australia – Full Court, Ipp, Wallwork and Steytler JJ, 5 August 1998).

218 Ibid 2 (Ipp J).

219 Ibid.

220 (Unreported, Supreme Court of Western Australia – Full Court, Kennedy, Ipp and White JJ, 25 September 1997).

221 Ibid 3.

In *R v Pearce*<sup>222</sup> the first contemnor was a minister of the Crown who was interviewed outside the court in which he had just given evidence in the trial of an employee who was facing a stealing charge. He said that he did not think the employee had done anything wrong. The second contemnor was the producer and news editor responsible for the publication of the statement on the evening news. In relation to the first contemnor, Malcolm CJ (with whom Pidgeon and Rowland JJ agreed) said:

[I]n circumstances where there has been no intention to interfere with the administration of justice or to prejudice a trial and, having regard to special circumstances such as the timing of publication and the likelihood of the matter coming to the attention of the jury, any effect on the jury is likely to be slight, it is within the discretion of the court not to impose any punishment as such.<sup>223</sup>

No punishment was imposed on either contemnor.<sup>224</sup> In relation to the second contemnor, his Honour commented on the fact that '[t]he case involved a matter of judgment regarding what could constitute a fair and accurate report.'<sup>225</sup>

## Issues

The following issues arise for consideration in relation to penalties for contempt:

- should there be maximum penalties, and if so what should they be?
- should there be different scales for corporate and individual defendants?
- should imprisonment be available?
- should alternative sentences, such as community service, be available?
- what should be the relationship between penalties and costs, if a power to award these were to be introduced?
- what considerations should be taken into account in mitigation of penalty?

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222 (1992) 7 WAR 395.

223 *Ibid* 431.

224 *Ibid* 431, 432.

225 *Ibid* 432.

**Maximum penalties**

There can be no doubt that it would be desirable to set a maximum penalty for contempt. Unlimited penalties look anomalous in a society which prides itself on the respect with which its citizens are treated. The Australian Law Reform Commission, while noting the capacity of unlimited penalties to prevent media organisations from engaging in a cost-benefit analysis when tempted to publish contemptuous material, recommended that an upper limit be imposed.<sup>226</sup> The New South Wales Law Reform Commission agreed.<sup>227</sup> On the other hand, the *Contempt of Court Act 1981* (UK) contains no upper limit.

**Invitation to submit #23**

The Commission invites submissions as to whether maximum penalties should be introduced for contempt by publication.

**Setting the limit**

As for where to set the limit, there are three approaches worth considering. One is to look at what the maximum penalties actually imposed for contempt have been, and to establish that as the legal maximum.<sup>228</sup> The second approach is to set a pecuniary limit comparable to those imposed for other corporate crimes. For example the *Trade Practices Act 1974* (Cth) sets \$200,000 as the upper limit for most offences.<sup>229</sup> The third approach is to set a limit that is comparable to those imposed for other offences relating to the administration of justice. For example the maximum penalty for attempting to pervert the course of justice under section 143 of the *Criminal Code* is seven years' imprisonment.

**Invitation to submit #24**

The Commission invites submissions as to how any maximum penalties should be set.

**Individuals and corporations**

The New South Wales Law Reform Commission invited submissions on the issue of differential scales for individual and corporate defendants. Differential scales may be a rough way of enhancing deterrence by tailoring the penalty to the hip

226 Australian Law Reform Commission, above n 16, para 482.

227 New South Wales Law Reform Commission, above n 5, 418.

228 In New South Wales, this would be \$200,000: *ibid* 418.

229 *Ibid* 419.

pocket of the defendant, but as the New South Wales Law Reform Commission points out some media personalities have massive personal wealth.<sup>230</sup> Such wealth might even dwarf the resources of some small media organisations. This would suggest that any attempt to tailor penalties to hip pockets should allow finer tuning than that which is possible on the basis of assumptions about corporations and individuals. On the other hand, there is ample precedent for imposing differential scales on natural and corporate persons: for example the *Crimes Act 1914* (Cth) provides that a court can impose a penalty of up to five times the maximum pecuniary penalty on a corporate defendant.<sup>231</sup> There is also an argument that corporations are accorded particular privileges in society and should therefore be required to pay more when in the exercise of those privileges they commit a wrongdoing.

#### Invitation to submit #25

The Commission invites submissions as to whether, and if so how, corporations should be treated differently from individuals when being sentenced for contempt by publication.

## Imprisonment

The availability of imprisonment exacerbates the problems that arise from the availability of unlimited penalties, so at the very least it can be said that if imprisonment is to be retained, the introduction of maximum penalties becomes crucial. Both the Australian and the New South Wales Law Reform Commissions believed that an imprisonment option should be retained but with a maximum term specified and reserved for the most serious cases.<sup>232</sup> Clearly it would be easier to justify the retention of imprisonment if an ignorance defence were introduced; that is, some way of excusing those whose contempt could not reasonably be avoided.

230 The Commission refers in particular to the comments of Meagher JA in supporting the imposition of the same fine on John Laws as on his employer radio station: *Attorney General (NSW) v Radio 2UE Sydney Pty Ltd* (Unreported, New South Wales Court of Appeal, 11 March 1998).

231 *Crimes Act 1914* (Cth) s 4B(3).

232 Australian Law Reform Commission, above n 16, para 481-2; New South Wales Law Reform Commission, above n 5, 425-6.

**Invitation to submit #26**

The Commission invites submissions as to whether, and if so on what conditions, imprisonment should continue to be available as a sentencing option in a case of contempt by publication.

**Alternative sentencing options**

There seems to be no reason in principle why alternative sentencing options should not be available in contempt cases as in any other offence. No doubt their application would be rare, but this is not a reason in itself for contempt to be treated differently from other offences. The *Sentencing Act 1995 (WA)* which introduces alternative sentencing options in this State 'does not apply to or in respect of a person being punished ... by the Supreme Court or any other court for or as for contempt of court'.<sup>233</sup> Nor are the alternative options under the *Sentence Administration Act 1995 (WA)*, for example home detention orders, available to those convicted of contempt.<sup>234</sup> The New South Wales Law Reform Commission proposed that the full range of sentencing options be made available.<sup>235</sup>

Indeed, it would be worth considering the general situation of exemption of contempt from the provisions of the *Sentencing Act*. This might no longer be justified once contempt were reformed in the kinds of ways being discussed in this paper.<sup>236</sup>

**Invitation to submit #27**

The Commission invites submissions on the issue of alternative sentencing options and their availability to those convicted of contempt by publication.

**Penalties and costs**

The issue of how to co-ordinate penalties with any costs regime is considered in detail below. Briefly, consideration should be given to providing for both proceedings to be carried out together, so that the amount of costs paid (which will not necessarily be commensurate with the degree of blameworthiness of the defendant) can be taken into account for sentencing.

<sup>233</sup> *Sentencing Act 1995 (WA)* s 3(3)(a).

<sup>234</sup> See *McGillivray v Piper* [2000] WASCA 245.

<sup>235</sup> New South Wales Law Reform Commission, above n 5, 434.

<sup>236</sup> See Western Australian Law Reform Commission, *Contempt in the Face of the Court*, Discussion Paper Project 93(1) (August 2001) Proposal 14.

**Matters in mitigation** The New South Wales Law Reform Commission has summarised the matters taken into account in fixing a fine for contempt:

- *Purpose of punishment* – namely specific and general deterrence;<sup>237</sup>
- *Intention* – or more particularly absence thereof;<sup>238</sup>
- *Effects of the prejudicial publication* – for example whether the jury was discharged or not;<sup>239</sup>
- *Existence of a system to prevent prejudicial publications* – including the adoption of, or improvements to, such a system following the event;<sup>240</sup>
- *Legal advice* – this seems to go to both state of mind, or intent to flout the law, and the existence of a system for prevention of breaches;<sup>241</sup>
- *Size of the business and financial circumstances of the defendant*;<sup>242</sup>
- *Plea of guilty*;<sup>243</sup>
- *Apology*;<sup>244</sup> and
- *Prior record*.<sup>245</sup>

There is room for debate as to whether a defendant's state of mind should continue to be a matter for pleading in mitigation of sentence if it becomes a ground of defence to the charge. Should a defendant who has not been able to show ignorance of relevant facts, which really means absence of intent to prejudice proceedings, and who has been held to have created a substantial risk of prejudice, really be able to plead lack of intent in mitigation of sentence?

On the other hand there may be cases where a defendant really believed a defence was open, but after careful extensive argument and careful consideration a court has determined it was not. It is easy to imagine such cases arising in relation to the public interest defence, where important considerations are likely to be finely balanced. As noted above, *R v Pearce* was held to be such a case in relation to the fair and accurate reporting defence, which is part of the reason why no penalty was imposed.

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237 New South Wales Law Reform Commission, above n 5, 410.

238 *Ibid.*

239 *Ibid* 411.

240 *Ibid.*

241 *Ibid* 412.

242 *Ibid* 412-3.

243 *Ibid* 413.

244 *Ibid* 413.

245 *Ibid* 414.

Perhaps it is not wise to be overly prescriptive about these matters. Sentencing needs to be a flexible process where each defendant is at liberty to introduce matters which he or she thinks should be taken into account in considering the seriousness of the individual offence. It might be sufficient to hope and expect that judges could give due recognition to the state of the substantive law in the process.

#### Invitation to submit #28

The Commission invites submissions on the question of which matters should be available to be pleaded in mitigation of sentence, and how they should be provided for.

#### Other remedies: injunctions

Clearly an injunction can only be a remedy against a threatened contempt. It cannot remove the ill effects of a contempt that has already occurred. However, in an appropriate case it can be a very effective remedy.

Courts are generally reluctant to exercise their jurisdiction to grant an injunction to restrain the commission of a criminal offence. There is a particular reason why injunctions are rarely ordered in cases of contempt: the reasonably precise terms in which an injunction has to be framed might lead to the erroneous conclusion that slightly different behaviour from that described in the injunction would be acceptable.<sup>246</sup> More generally, injunctions are available only in cases where other remedies prove inadequate,<sup>247</sup> and there is nothing to suggest that remedies for contempt often prove inadequate. This might change if maximum penalties were introduced, but hopefully only in isolated cases.

The New South Wales Law Reform Commission saw no need to change the position with respect to the availability of injunctions to restrain contempt, other than to introduce a provision:

[T]hat a private individual who intends to apply for an injunction to stop an apprehended criminal contempt shall, prior to such application, notify the Attorney General and the parties to the proceedings (if any) allegedly involved.<sup>248</sup>

<sup>246</sup> New South Wales Law Reform Commission, above n 5, 439, quoting *P v Liverpool Daily Post and Echo Newspaper Plc* [1991] AC 370, 381-2 (Lord Donaldson MR).

<sup>247</sup> *Ibid.*

<sup>248</sup> *Ibid* 445. The Commission also proposed the conferral of power on the DPP to apply for an injunction: *ibid.* However, due to the differences between the NSW and WA *DPP Acts*, there is no need for such a change in WA: the DPP already has all powers the Attorney General has, which include the power to apply for an injunction to restrain a contempt: *Director of Public Prosecutions Act 1991* (WA) s 20(2)(a).

The primary goal of this proposal is to support co-ordination of effort and avoid waste of resources.<sup>249</sup> Since it does seem desirable that individuals retain the ability to apply for an injunction to restrain contempt, this appears to be a sensible provision.

#### Invitation to submit #29

The Commission invites submissions on the availability of injunctions in cases of contempt by publication.

### Costs for aborted trials

In 1999 Professor Michael Chesterman, one of the commissioners on both the Australian and the New South Wales Law Reform Commissions' contempt references, published an article entitled: 'Media Prejudice During a Criminal Jury Trial: Stop the Trial, Fine the Media, or Why Not Both?'<sup>250</sup> This provocative title neatly draws attention to the difficult issue of what to do about the fact that contempt costs money. It has been noted that not every contempt results in a mistrial, but when one does the financial damage can easily run into the tens and even hundreds of thousands of dollars. The New South Wales Law Reform Commission has estimated that the cost to the State of one day in the Supreme Court in a criminal jury trial is about \$6,000;<sup>251</sup> in the District Court it is about \$4,500<sup>252</sup> and in Local Courts it is close to \$3,000.<sup>253</sup> These figures exclude the cost of legal aid, prosecutors, corrective services, the police service and so on. The daily cost of a public defender is estimated at \$845.<sup>254</sup> It would probably be expected that the equivalent costs in Western Australia would be lower, but even if (as seems unlikely, considering most of the costs are made up of salaries) the Western Australian equivalents are as little as half it would not take long to run up a 'bill' in the tens of thousands. There is something fundamentally appealing about requiring the organisation that brought about the need for a retrial to foot that bill.

### The New South Wales Bill

This is exactly what the New South Wales parliament recently sought to achieve with the Costs in Criminal Cases Amendment Bill 1997. The Bill encountered stiff opposition from the media and lapsed in 1999. However, the New South

249 Ibid 444.

250 (1999) 1 *University of Technology Sydney Law Review* 71.

251 New South Wales Law Reform Commission, above n 5, 502-03.

252 Ibid 504-05.

253 Ibid 506.

254 Ibid 507.

Wales Law Reform Commission's Discussion Paper shows that the issue is still alive and well in that State. After considerable discussion, it proposes the passage of substantially similar legislation, with some variations.<sup>255</sup>

The Bill was directed only against media organisations. It empowered the Supreme Court, on application by the Attorney General and following civil proceedings, to make an order for costs against a media organisation against which contempt had been proven (whether or not there had been a conviction) where that contempt was the sole or main reason for discontinuance of a criminal trial before a jury. The costs for which the defendant would have to provide indemnity were those of the parties and of the State as well as any of a class that might be prescribed by regulation. The Bill provided that the Attorney General could certify the costs involved for each party, whereupon the court could order payment of an equal or lesser amount. The organisation would have three years to pay.

### **The Suitors' Fund Act 1964 (WA)**

Before the Bill is analysed, the existence in this State of the *Suitors' Fund Act 1964* needs to be noted. This Act provides for the establishment of a fund from which the costs of successful appeals may be partially met,<sup>256</sup> and from which to assist parties to proceedings where a trial is aborted and a retrial is required owing to, inter alia, the publication of prejudicial material.<sup>257</sup>

In any event, the existence of the Suitors' Fund needs to be borne in mind throughout the following discussion. First, consideration needs to be given to the question whether the scheme obviates, to any extent, the need for legislation on costs for aborted trials. A criminal defendant, for example, whose trial is aborted because of prejudicial publicity already has a safety net. However the costs of prosecuting authorities remain completely open for addressing under new legislation of the kind being debated in New South Wales because the assistance being described extends only to the accused in criminal proceedings. Secondly, if costs legislation were introduced, it would be important to amend the *Suitors' Fund Act* to ensure that accused persons in such cases could not be doubly compensated.

Overall there is a need to consider the question of whether the costs in question should fall on a public fund such as the

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255 Ibid 482-3.

256 *Suitors' Fund Act 1964* (WA) s 10.

257 *Suitors' Fund Act 1964* (WA) s 14.

Suitors' Fund or on the person or organisation that has caused the trial to be aborted. There is also a related issue as to whether contempt fines should go into such a dedicated fund, irrespective of how the parties are compensated.

**Arguments in favour of the availability of costs**

The provisions of the NSW Bill clearly enhance the deterrent effect of contempt law; they are also in keeping with the 'general trend in the criminal justice system toward recognising loss suffered by victims and making offenders accountable in a practical way for the consequences of their actions.'<sup>258</sup> On the other hand, there is not necessarily a case for enhanced deterrence; if anything there is a case that contempt law as we know it over-deters because of its vagueness and the absence of a mental element relating to the risk of prejudice. And even if there were a case for enhancing deterrence, there is no reason why it has to be achieved with another layer of proceedings and with the payment of sums that do not necessarily relate directly to the degree of wrongfulness of the defendant's conduct. A technical or minor contempt could cause enormous losses if one of the parties happens to have expensive legal representation, or if the trial happens to have been going on for some time. The enhancement of deterrence is far better achieved by increasing penalties.

As for the involvement of 'victims', this general movement does not seem to have as much poignancy when the major victim is the state, nor, for that matter, where the offender is a large corporation that is likely at some level to see the odd offence as simply a cost of doing business. Having to face one's victim might enhance the prospects of contrition, but in the contempt field the only people likely to feel contrition are the individual editors and journalists, and no matter what the legislation says – even if it allows proceedings against them – it is extremely unlikely that they, as distinct from their employer, will be pursued for anything but a fraction of the costs of an aborted trial.

**Arguments against the availability of costs**

Against the recovery of costs from contemnors the New South Wales Law Reform Commission lists the following arguments:

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<sup>258</sup> New South Wales Law Reform Commission, above n 5, 455.

- *Double punishment*<sup>259</sup> – this could be overcome by a mechanism of discounting the criminal penalty against the amount of costs ordered to be paid. In principle this is an excellent idea, but it might be difficult in practice.<sup>260</sup>
- *Unnecessary legislation*<sup>261</sup> – it was submitted to the New South Wales Law Reform Commission that ‘the incidence of trials which are aborted because of media publicity is very low and that it is therefore not warranted to introduce a scheme to recover costs’.<sup>262</sup> The New South Wales Law Reform Commission rightly pointed out that ‘the fact that a legislative power may only rarely need to be invoked does not in itself provide good reason why the power should not exist at all.’<sup>263</sup>
- *No element of fault*<sup>264</sup> – the New South Wales Law Reform Commission rightly points out that it has proposed that an element of fault be introduced via its ‘ignorance’ defence, which could go a long way towards addressing this concern.<sup>265</sup> It also proposes that the liability to pay costs arises only when there has been a *conviction* of contempt (the 1997 Bill required only that a charge be proven).
- *Exercise of the discretion to abort a trial*<sup>266</sup> – there appears to be a natural justice problem where the decision on which a defendant’s liability turns – the decision to abort the trial – is not one in which the defendant is able to participate. The New South Wales Law Reform Commission says that ‘[t]he possibility that the costs of an aborted trial will be recovered from a media organisation is not a factor which can properly be taken into account in the exercise of the discretion to discharge’.<sup>267</sup> This does not mean, however, that a media organisation with a stake in the decision should not be heard on the issues that are relevant to the decision.
- *Restriction on freedom of discussion*<sup>268</sup> – the New South Wales Law Reform Commission accepted that this legislation was likely to have a ‘chilling effect’ with the result that ‘freedom of discussion about our legal system would be greatly inhibited, which in turn would be detrimental to the efficient work for our democratic

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259 Ibid 458-61.

260 Ibid 460-1.

261 Ibid 461-2.

262 Ibid 461.

263 Ibid 462.

264 Ibid 463-5.

265 Ibid 465.

266 Ibid 466-7.

267 Ibid 467.

268 Ibid 468-9.

society.<sup>269</sup> However the New South Wales Law Reform Commission sees this as a matter of how the legislation is framed, rather than whether to have legislation at all. 'For example, there could be a statutory cap on the total amount of money that may be ordered by way of compensation, and/or legislation could expressly take into account the financial resources of the defendant.'<sup>270</sup> The New South Wales Law Reform Commission also points out that other reforms to contempt law could alleviate the chilling effect by making convictions more difficult to obtain in the first place.<sup>271</sup> One further significant matter in this regard is the New South Wales Law Reform

Commission's proposal that salaries of judicial officers and other court staff be excluded from the costs to be paid, because they are an ongoing cost to the State no matter whether a trial is aborted or not.<sup>272</sup> This would surely dramatically decrease the amounts involved.

- *Inconsistency with other jurisdictions*<sup>273</sup> – the New South Wales Law Reform Commission points out that the fact a trial has been aborted can be taken into account in aggravation of sentence in all Australian jurisdictions. Generally it is difficult to see why 'inconsistency' in itself should be regarded as an argument against the introduction of the legislation. It is inherent in the existence of legal jurisdictions that they will have different laws, and not at all unusual that there be unique laws.

### **The New South Wales Law Reform Commission's proposal**

The differences between the Costs in Criminal Cases Amendment 1997 Bill and the New South Wales Law Reform Commission's proposal are as follows:

- (1) The application of the legislation should not be restricted to media organisations.
- (2) An order for compensation should only be made where there has been a conviction for contempt.
- (3) Reference in the [Bill] to 'printed publication' and 'radio, television or other electronic broadcast' be omitted. 'Publication' for the purposes of the legislation should be defined to mean a 'publication in respect of which a conviction for contempt has been entered'.
- (4) An order for compensation should be made only where a trial is discontinued 'solely' because it has been affected by a contemptuous publication or broadcast.

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269 Ibid 468.

270 Ibid 469.

271 Ibid.

272 Ibid 473.

273 Ibid 469-70.

(5) The Court should have a discretion to order an amount which is 'just and equitable in all the circumstances'.

(6) The costs in respect of which an order may be made should exclude the costs to the State of the remuneration of judicial and other court staff and any other ongoing State expenses not directly referable to the aborted trial.

(7) The 'legal costs' of the parties and the provision of 'legal services' to the accused should include disbursements directly related to the aborted trial.<sup>274</sup>

### Issues for Western Australia

All of these issues are worth considering for Western Australia. As always, such an exercise should take into account any changes introduced to make contempt law more liberal from the point of view of defendants. Measures that would be difficult to justify in the current state of contempt law might appear much more reasonable once the test for prejudicial publications were tightened up, for example, or a mental element relating to prejudice were introduced. Costs would be ordered only in cases where there was no reasonable doubt the defendant had done something wrong; the same might not be true under the current state of contempt law.

A further improvement might be to give the Supreme Court power to make an order for costs *at the same time as sentencing* the contemnor. That way it would be possible to ensure that too great a burden is not placed on the contemnor when both the penalty and the costs are taken into consideration. The New South Wales Law Reform Commission was at pains to point out that penalty and costs are two different things,<sup>275</sup> but realistically both are bound to be seen in the same way by the defendant and therefore serve the same function, even if the functions intended are different. It would be worthwhile to give further consideration to the question whether there would be any insurmountable obstacles to simply building a costs phase into all contempt prosecutions where a trial has been aborted.

Another reason for bringing the criminal proceedings and the application for costs together is that many people might wonder why the money paid to the state by way of penalty cannot be applied to defray the costs to the state arising out of the contempt. The legal reasoning to justify the state of affairs under the Bill might have been a little too abstruse for the average person to understand; consideration of penalty and costs together, as a global matter, could at least be seen to be taking into account the apparent windfall to the state that the contempt penalty represents.

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<sup>274</sup> Ibid 483.

<sup>275</sup> Ibid 460, 463.

A similar effect could be achieved by requiring contempt fines to be paid into the Suitors' Fund (or perhaps a dedicated sub-fund), for disbursement to the 'victims' of contempt by publication (see above). This would avoid any 'double punishment' arguments that might remain, while building on the current arrangements for mitigating the harsh consequences that prejudicial publicity causes for some accused persons. Whether the fund were also to be made available to prosecuting authorities could be considered as a separate issue.

#### Invitation to submit #30

The Commission invites submissions on the desirability in Western Australian law of a provision for convicted contempt defendants to pay the costs of any trial aborted as a result of the contempt. Also the Commission invites submissions on the most desirable procedure whereby such costs would be awarded.

#### Suppression orders

The general presumption in Western Australia, as elsewhere in the common law world, is that courts are open to the public and that their proceedings can be fairly and accurately reported. The presumption is sometimes supported by legislation. For example, the *Justices Act 1902* (WA) provides:

s 65.(1) Unless expressly provided otherwise, the court-room or place of hearing where justices sit to hear and determine any complaint is an open and public court to which all persons may have access so far as is practicable.<sup>276</sup>

However, the presumption is subject to important exceptions, in relation to particular types of courts, particular types of proceedings and, on occasion, individual proceedings where for whatever reason justice demands it. Section 65 goes on to provide:

- (2) If satisfied that it is necessary for the proper administration of justice to do so, justices may —
- (a) order any or all persons or any class of persons to be excluded from the court-room or place of hearing during the whole or any part of the trial or other criminal proceeding;
  - (b) make an order prohibiting the publication outside the court-room or place of hearing of the whole or any part of the evidence or proceedings;

<sup>276</sup> See also *Criminal Code* (WA) s 635A(1). But contrast *Justices Act 1902* (WA) s 66 (preliminary hearings not to be open court).

- (c) make an order prohibiting the publication outside the court-room or place of hearing of the whole or any part of the evidence or proceedings except in accordance with directions by the justices.<sup>277</sup>

This section focuses on one particular activity of courts which wish to make an exception to the principle of open justice: that of ordering the suppression of information available inside the court. In short, this operates like an exception to the fair and accurate reporting defence, except that it is more like a series of very specific, notified exceptions that are limited to particular, identified factual contexts. There is no problem with 'certainty' with suppression orders, unless an order itself is vaguely expressed. If there is a problem, it is to do with the grounds on which orders are made, for surely no-one can doubt that it is possible to envisage an appropriate case where the power should exist to make an order. Clear cases are where it is necessary to suppress the name of a witness for that person's protection, or where the subject matter of the litigation is secret (for example a trade secret) and therefore prone to destruction if subject to publication in the mass media.<sup>278</sup> Therefore there can be no objection to the existence of a power as such. The issue, rather, is how it is exercised.

There is a common law power to make a suppression order, but there is also some doubt as to whether an order relying on that power can bind anyone who is not present at the trial. It has been argued that if a suppression order could bind the whole world the power to make it would be legislative in character and therefore inappropriate for a court to hold.<sup>279</sup> This argument could, of course, extend to an order relying on *any* source of power (except that, generally speaking, state legislatures have a power to confer legislative power on their courts, unless that conferral is 'incompatible' with the exercise of judicial power).<sup>280</sup> It might also be noted, by anyone who is realistic about the fact that common law judges make law, that some 'legislative' power in judges is a time-honoured tradition in our legal system. On the other hand, there may be a case that something as detailed and factually specific as a suppression order is inappropriate for a court to address to the whole of society. This matter does not need to be pursued at length, however, because the particular type of order being

<sup>277</sup> See also *Justices Act 1902* (WA) s 101D (relating to preliminary hearings); *Criminal Code* (WA) s 635A(2).

<sup>278</sup> The New South Wales Law Reform Commission provides a comprehensive list of situations where 'qualifications to the principle of open justice' may be justified: New South Wales Law Reform Commission, above n 5, 301.

<sup>279</sup> New South Wales Law Reform Commission, above n 5, 309, quoting *John Fairfax & Sons v Police Tribunal (NSW)* 1986 5 NSWLR 465, 477 (McHugh J)

<sup>280</sup> *Grollo v Palmer* (1995) 184 CLR 348; *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1; *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.

considered here assumes that a person gained access to the information by being in court.

In the absence of evidence about how the powers to order suppression of publication operate in practice it is difficult to assess their impact on the various interests the law needs to balance. None of the suggestions for reform put forward in this paper really affects the need to have a power to make suppression orders, or the form that power should take. As long as there is a fair and accurate reporting defence, there is a need to be able to carve out exceptions to it in appropriate cases, as mentioned above. Apart from that, all that can be said in the abstract is that suppression orders should be limited to situations where the interest in personal safety, or privacy, or a fair trial, or whatever interest is at stake, overrides the public interest in open justice and freedom of discussion. It might be worthwhile to spell this out in legislation if it appears that the balancing exercise does not go on in this way.

One issue that does need to be considered in the context of the overall rationality and fairness of contempt law is the lack of any right to appeal from a suppression order made in the course of a criminal trial in either the District or the Supreme Court. This is because the rights of appeal in respect of such proceedings are defined by the *Criminal Code*, which confers such rights only on conviction and, in limited circumstances, on acquittal. There is also some doubt as to whether any of the prerogative writs lie in respect of a decision to grant a suppression order, because of the statutory provisions of the *District Court Act* and the inability of a court to issue a prerogative writ against itself. This appears anomalous and unjustifiable, and would be even more so if other laws relating to communications about court proceedings were reviewed to remove anomalies.

The same can be said of the issue as to sanctions for breach of a suppression order: they should be kept in line with those for contempt, and should therefore be addressed in the context of any review of sanctions for contempt.

**Invitation to submit #31**

The Commission invites submissions on the availability of, and system for granting and enforcing, suppression orders, particularly in light of any other changes to contempt law that might be deemed desirable.

## **Conclusion**

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The law of contempt by publication contains a number of problems that call out for reform. However, any reform package needs to incorporate a careful balancing of a number of important interests including those in fair trials, the integrity of the administration of justice, the avoidance of trial by media, freedom of discussion and open justice. It is widely believed that a number of features of the current law load it too heavily in favour of the first three interests, and against the last two. The most salient features in this regard are the lack of any real mental element; the unlimited penalties and the traditional use of summary procedures. Also the law has been held to be vague and unpredictable, providing insufficient certainty to the media operations that are its principal targets.

Because of the number of features that are ripe for reform, it would be very easy to tip the scales too far away from the interest in fair trials and the administration of justice by addressing all those features without keeping an eye on the cumulative effect of the reforms. Therefore, one thing that is very clear from the discussion in this paper is that any reform of the law of contempt needs to be considered in a holistic way.