



Law Reform Commission of Western Australia

REPORT

ON

REVIEW OF THE LAW OF CONTEMPT

PROJECT NO 93

June 2003

The Law Reform Commission of Western Australia

Commissioners

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To: **The Hon Jim McGinty MLA**
Attorney General

In accordance with the provisions of section 11(3)(b) of the *Law Reform Commission Act 1972*, I am pleased to present the Commission's Report on the Review of the Law of Contempt.

A handwritten signature in black ink, reading "R Simmonds". The signature is written in a cursive style with a large initial "R".

Professor Ralph Simmonds
Chairman

June 2003

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EXECUTIVE SUMMARY

Project No 93

The Law Reform Commission of Western Australia's reference for Project No 93 concerns the law relating to contempt or, as has been commented elsewhere, what 'is really the law of contempts'.¹ The terms of reference for this project address:

1. Contempt by publication;
2. Contempt in the face of the court; and
3. Contempt by disobedience to court orders.

This reference has been interpreted as applying only to contempt of court, although arguably the first term could extend to include contempt of Parliament.² Each of the three terms of reference has been the subject of a separate Discussion Paper³ on which the public and interested parties were invited to make submissions for consideration by the Commission.

In *Witham v Holloway*, the High Court categorised the law of contempts as follows:

In general terms, the distinction between civil and criminal contempt is that a civil contempt involves disobedience to a court order or breach of an undertaking in civil proceedings, whereas a criminal contempt is committed either when there is a contempt in the face of the court or there is an interference with the course of justice.⁴

A key distinction between civil and criminal contempt of court is who institutes proceedings for the contempt. Civil contempt consists of disobedience to an undertaking or court order made in the preparatory stages, during, or at the conclusion of civil litigation, and the party in whose favour the undertaking or order was given initiates contempt proceedings against the disobedient party. Criminal contempt also can include disobedience contempt in certain circumstances, as well as contempt by publication and in the face of the court and generally, but not necessarily, arises during criminal proceedings. Criminal contempt may be prosecuted by the Attorney General, the Director of Public Prosecutions (if it arises in the course of the prosecution of an indictable offence) or, in some circumstances, the presiding judicial officer.⁵ The usefulness of distinguishing between civil and criminal contempt has been questioned, not

1 David Lanham, 'Payments to Witnesses and Contempt of Court' [1975] *Criminal Law Review* 144.

2 See below, pp 12 & 116–17 for further discussion of contempt of Parliament.

3 Law Reform Commission of Western Australia, *Discussion Paper on Contempt in the Face of the Court*, Project No 93(I) (2001); Law Reform Commission of Western Australia, *Discussion Paper on Contempt by Publication*, Project No 93(II) (2002); Law Reform Commission of Western Australia, *Discussion Paper on Contempt by Disobedience to the Orders of the Court*, Project No 93(III) (2002).

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

5 Australian Law Reform Commission ('ALRC'), *Contempt*, Report No 35 (1987) [4].

only because a judicial officer hearing a civil matter may regard disobedience of an order as contempt warranting criminal proceedings, but also because securing compliance with any court order may be seen as a matter of general importance for the administration of justice.

The utility of retaining the distinction between civil and criminal contempts is examined in more detail in Part IV of this Report, but the above passage from *Witham v Holloway* is also significant because it draws attention to the more general offences of contempt by interference with the course of justice. Whilst the terms of reference for this Project may appear to be restrained by the characterisation of contempts as being in the face of the court, by publication, and by disobedience to orders of the court, the broader consideration of contempt by interference with the administration of justice is necessarily implied. This is reflected in submissions received on each of the Discussion Papers which have directed the Commission's attention to matters concerning the latter, more general area of contempt. The Commission has carefully considered these issues in light of submissions received and the results of its own research on the matter and has presented its conclusions in Part V of this Report.

The Report is presented in five parts: Part I addresses generic reforms relating to contempt that are not specific to any one of the particular terms of reference; Part II addresses contempt by publication; Part III deals with contempt in the face of the court; and Part IV examines contempt by disobedience in both its civil and criminal manifestations. Part V, as indicated above, addresses contempts by conduct constituting interference with the administration of justice. Throughout this Report the Commission has made a series of recommendations for reform which it believes will greatly enhance the administration of justice in Western Australia and provide certainty and clarity to the law of contempts.

ACKNOWLEDGEMENTS

The Commission gratefully acknowledges the work of Dr Jeannine Purdy in the preparation of this Report. The Commission also wishes to thank its editor, Tatum Hands; publication designer, Cheryl MacFarlane; and law clerks Diana Ding, Yuki Kobayashi and Carla Yazmadjian. The Commission thanks its Executive Officer, Heather Kay, for her work in coordinating this reference. The Commission also wishes to acknowledge the work of its immediate past Chairman, Wayne Martin QC, who was a member of the Commission for much of the reference and provided invaluable comments on the draft of this Report.

PART I

The Law of Contempts

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Contempt of Court

'Contempt of court' means an interference in the administration of justice and it is unfortunate that the offence should continue to be known by a name which suggests to the modern mind that its essence is a supposed affront to the dignity of the court. Nowadays when sympathy is readily accorded to anyone who defies constituted authority the very name of the offence predisposes many people in favour of the alleged offender. Yet the due administration of justice is something which all citizens, whether on the left or the right or in the centre, should be anxious to safeguard.¹

Contempt of court is said to have its origins in the medieval devolution of royal powers to the courts from a monarch who was believed to be divinely appointed and accountable only to God.² Be that as it may, it is clear from the earliest legal history that common law courts have assumed the power to coerce those who obstruct the administration of justice.³ This merger of prosecutorial and judicial functions has resulted in something of an anomaly which continues to influence much of the law in this area; from the peculiar kind of 'summary' jurisdiction by which contempt offences may be punished to such prosaic matters as the term 'contemnor', used for an alleged but also a convicted offender.

As indicated, the jurisdiction to punish for contempt has often been referred to as 'summary'.⁴ However, it is important to note that the summary procedures for contempt are not strictly comparable to the summary determination of other criminal offences before magistrates or justices under the *Justices Act 1902* (WA). Generally the 'summary' jurisdiction to punish contempt means not only that there is a relatively immediate determination of the charge but also, in instances of contempt in the face of the court, that the presiding judge has the power to proceed on his or her own motion and to decide on guilt and pronounce sentence or, in other instances, on motion to the Full Court of the Supreme Court. In either event, contempt is tried without summons or indictment, and without depositions or juries.⁵

It is important to recognise, however, that there has been significant judicial and legislative reform of the 'summary' jurisdiction to punish contempt, and that contempt offences are now subject to a range of different procedures for prosecution. Significantly, much of the conduct which historically may have constituted contempt of court at common law is now the subject of specific statutory offences in Western Australia,⁶ with many such offences found in Chapter XVI of the *Criminal Code*: 'Offences relating to the administration of justice'. These offences include corrupting or threatening jurors (s 123), corrupting or deceiving witnesses (ss 130 & 131), fabricating or destroying evidence (ss 129 & 132), preventing a witness from attending or producing evidence (s 133), obstructing, preventing, perverting or defeating the course

1 *Attorney General v Times Newspaper Ltd.* [1974] AC 273, 322 (Lord Cross of Chelsea).

2 Australian Law Reform Commission ('ALRC'), *Contempt*, Report No 35 (1987) [20].

3 D Eady and ATH Smith, *Arlidge, Eady & Smith on Contempt*, (London: Sweet & Maxwell, 2nd ed., 1999) [1-1].

4 *Ibid* [2-4].

5 *Ibid*. See also *Griffin* (1989) 88 Cr App R 63 (Mustill LJ).

6 See *Criminal Code* (WA) Ch XVI.

of justice, or conspiring (s 135) or attempting to do so (s 143). These offences apply to ‘judicial proceedings’—defined to include any proceeding had or taken in or before any court, tribunal, or person, in which evidence may be taken on oath (s 120)—and are prosecuted in the same way as other offences under the *Criminal Code*.

Anomalously in the Western Australian context, many of the contempt offences have remained common law offences (having no statutory basis and no maximum penalty) and a further discretion exists allowing punishment for contempt under the common law, even where a statutory equivalent is available. Section 7 of the *Criminal Code Act Compilation Act 1913* (WA) states that:

Nothing in this Act or in the 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 [sic] or omission.

Consistent with this retained authority the Supreme Court has jurisdiction—should its judicial officers choose to exercise it—to summarily punish a person for common law offences of contempt in the Supreme Court, as well as a residual summary jurisdiction in relation to contempts in lower courts. This residual summary jurisdiction is most frequently exercised in relation to ‘out of court contempts’, such as contempt by publication, for which the lower courts have no jurisdiction.⁷

The jurisdiction to punish for contempt in lower courts is purely statutory, and is generally limited to contempt by disobedience and offences that would, at common law, constitute a contempt in the face of the court. Significantly, the provisions, although not uniform, generally allow for lower courts to exercise a traditional form of ‘summary’ power to punish for contempts akin to those in the face of the court.

Reforming the law of contempts

The Commission is concerned to reform and rationalise the complex law of contempts and in particular to consider if, and in what circumstances, the anomalous processes which characterise the ‘summary’ jurisdiction to punish should be retained. The Report is concerned with balancing a broad range of interests. However, there are two fundamental interests that are of special note because they impose legal limitations on the legislative power to reform the law of contempt: the need for the courts to preserve the essential integrity of the judicial process, and the implied constitutional freedom of political communication. These are discussed below.

⁷ *Supreme Court Act 1935* (WA) s 16(1)(a); and see *Queen v Pismiris* (Unreported, Full Court of the Supreme Court of Western Australia, 18 November 1986).

Chapter III of the *Australian Constitution*

Where a court is exercising federal judicial power under Chapter III of the *Australian Constitution* (as most courts in Western Australia do from time to time) the power to punish for contempt of court will be necessarily implied in the grant of the judicial power itself.⁸ Given that the contempt powers inherent in the judicial power of the Commonwealth derive directly from the *Constitution*,⁹ it follows that Parliament cannot authorise what would otherwise constitute a serious contempt of court. This is not to say that any reform of the law of contempt would offend against Chapter III of the *Constitution*. It is possible that the content of the contempt jurisdiction implied by Chapter III is not necessarily fixed as at a certain date¹⁰ and also that the constitutional contempt power, being confined to that which is ‘necessary’,¹¹ would be narrower than contempt powers at common law.

At the very least any reform of the law of contempt must empower courts exercising federal jurisdiction to preserve the essential integrity of the judicial process and the independence of that process from the other arms of government.¹² Thus any contempt powers conferred on a court acting in the exercise of state jurisdiction may be invalid to the extent that they are incompatible with the exercise by that court of federal jurisdiction.¹³

After fuller consideration of this issue, however, the Commission is of the view that the inherent contempt jurisdiction of the Supreme Court is amenable to legislative reform by state laws. Any reservations based on the creation of the Supreme Court by Imperial action would appear to be inconsistent with the *Australia Acts*. Although not expressly considering the issue of the creation of a court through Imperial action, it also is of note that the Australian Law Reform Commission (‘ALRC’) concluded in its report on contempt that:

the power to legislate so as to modify or abolish contempt powers (whether or not such powers relate to conduct also covered by criminal offences) is not subject to any common law limitation deducible from the concept of the inherent jurisdiction of the courts.¹⁴

The inherent jurisdiction of the Supreme Court

The inherent contempt jurisdiction of the Supreme Court, consequent upon its characterisation as a superior court of record,¹⁵ was referred to in Discussion Paper 93(III) as a possible limit on the legislative power to reform the law of contempts.¹⁶ As shown in that Discussion Paper, the sources of power in contempt matters come from both the provisions of the *Supreme Court Act 1935* (WA) and from the Court’s earlier creation by the British Imperial Government. Section 6 of the *Supreme Court Act 1935* (WA)

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

9 *Ibid* [16] (Gleeson CJ & Gummow J with Hayne J agreeing); followed in *McGillivray v Piper* [2000] WASCA 245 (Unreported, 7 September 2000) [17], (Anderson J with Kennedy ACJ & Wallwork J agreeing).

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

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

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

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

14 ALRC, above n 2, [50].

15 Paul Seaman, *Civil Procedure in Western Australia*, Volume 1 (1990) [55.4.1].

16 *Discussion Paper on Contempt by Disobedience to the Orders of the Court*, Project No 93(III) (2002) 1–2.

continues, but does not create, the Supreme Court so it can reasonably be said that the inherent jurisdiction has an operation independent of the Act. If that inherent jurisdiction is also independent of the Western Australian Parliament it may result in a restriction on the capacity for legislative reform of the contempt jurisdiction which extends beyond that arising under Chapter III of the *Australian Constitution*, considered above. As indicated, that constitutionally protected inherent jurisdiction is likely to be narrower than the common law powers regarding contempt as it is confined to what is 'necessary'.

The constitutionally implied freedom of political communication

A further limitation on legislative power to reform the law of contempt operates in the opposite way to the inherent jurisdiction of courts exercising federal jurisdiction. The limitation arises from the freedom of political communication implied by the High Court of Australia as necessary to maintain the system of representative and responsible government provided for in ss 7 and 24 of the *Australian Constitution*.¹⁷ A similar implication might be drawn from the *Constitution Act 1889* (WA), and in particular s 73(2)(c).¹⁸

The implied freedom is a limitation on legislative and executive power. In order for a law affecting freedom of political communication to be valid it must, firstly, be enacted for an object that is compatible with the constitutionally prescribed system of representative and responsible government and, secondly, must be reasonably appropriate and adapted to achieving that object.¹⁹

The kinds of restrictions imposed upon the freedom of communication by the existing law of contempt have been held to be consistent with that constitutionally protected freedom. For example, in *Theophanous v Herald & Weekly Times Ltd*²⁰ Deane J, who formulated the widest scope of the implied freedom, observed:

[N]othing in this judgment should be understood as suggesting that the traditional powers of Parliament and superior courts to entertain proceedings for contempt are not justifiable in the public interest. In that regard, it is important to remember that...the justification of proceedings for contempt of court or parliament lies not in the protection of the reputation of the individual judge or parliamentarian but in the need to ensure that parliaments and courts are able effectively to discharge the functions, duties and powers entrusted to them by the people.²¹

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

17 See generally *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 561–62 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).

18 Ibid.

19 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 561–62 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).

20 (1994) 182 CLR 104.

21 Ibid 187 (Deane J). This passage has been adopted and applied by the Full Court of the Supreme Court in relation to the law of contempt of court in Western Australia: *Hamersley Iron Pty Ltd v Lovell* (1998) 19 WAR 316, 343 (Anderson J with Pidgeon J agreeing).

The Commission believes that its recommended reforms of the law of contempts neither impair the essential integrity of the judicial process as protected under Chapter III of the *Australian Constitution*, nor restrict freedom of political communication in a manner inconsistent with the implied constitutional freedom. Moreover, the Commission is of the view that its recommended reforms would enable ‘contempt’ to be more readily recognised as an integral part of ensuring due administration of justice for all citizens, irrespective of the name by which it is known.

In developing its recommendations with a view to ensuring that ‘contempt’ is recognised as an integral part of ensuring due administration of justice, the Commission has been greatly assisted by submissions received in response to its earlier Discussion Papers on the subject. As well, the Commission acknowledges the contribution of officers and representatives of the courts who kindly agreed to meet with the Commission to discuss proposed reforms.²²

Codification of the law of contempts

Clarity and certainty in the criminal law require that various and specific contempt offences be formulated, and the different interests at issue in different contempt offences justify procedural variations. However, it is the Commission’s view that the present level of complexity of the law in this area cannot be justified. There are multiple contempt of court offences: some common law, others statutorily based but differently defined depending on the particular court jurisdiction, and still other statutory offences which do not use the terminology of contempt but which criminalise the same conduct. There are also multiple procedures for prosecuting contempt offences, including a peculiar ‘summary’ process not available to other criminal prosecutions. There has further been uncertainty about the powers and jurisdiction of some courts to punish for contempt²³ and in other instances, where there is clarity of procedure, there has been criticism of its appropriateness.²⁴ For these reasons the Commission proposed the codification of the law of contempts. While some of the proposed reforms advanced in the Commission’s Discussion Papers on this Project have been contentious, there has been almost unanimous support in submissions received for those proposals relating to the codification and uniformity of the law of contempts.

Family law has been an important and difficult jurisdiction in relation to contempt, particularly disobedience contempt, and according to the ALRC, it is the jurisdiction in which the incidence of proceedings to enforce orders is highest.²⁵ Whilst family law is solely a Commonwealth responsibility in the

22 A list of individuals and organisations that commented upon the Discussion Papers by submission and a list of meetings with various stakeholders held by the Commission may be found in the Appendices section of this Report.

23 See *Queen v Pismiris* (Unreported, Full Court of the Supreme Court of WA, 18 November 1986); *Bennison* (1995) 78 A Crim R 406.

24 See *R v Lovelady; Ex parte Attorney General* [1982] WAR 65, 66–67 (Burt CJ); *R v Minshull; Ex parte Director of Public Prosecutions for Western Australia* (Unreported, Full Court of the Supreme Court of WA, 21 May 1997) 16–18 (Malcolm CJ); 2 (Franklyn J).

25 ALRC, above n 2, [585].

rest of Australia, Western Australia uniquely maintains its own discrete family law jurisdiction exercised by the Family Court of Western Australia under the *Family Court Act 1997* (WA). The Court's jurisdiction under this Act is exercised concurrently with its jurisdiction under the Commonwealth *Family Law Act 1975* (Cth).

As a matter of course, changes to the Commonwealth law motivate the Western Australian Parliament to introduce matching legislation ensuring that the law applicable to the Family Court of Western Australia remains consistent with the Commonwealth *Family Law Act 1975*. However, s 35 of the Commonwealth Act, which gives the Family Court the same powers as the High Court to deal with contempt of court, does not apply to an exercise of power by the Family Court of Western Australia and there is no equivalent section in the Western Australian legislation.

Although Western Australia passed legislation that largely mirrors the Commonwealth approach to contempt in all relevant family law matters in September 2002, the amendments did not directly address the absence of an equivalent to s 35 of the *Family Law Act 1975* (Cth). But unlike s 122AP of the *Family Law Act 1975* (Cth), which restricts the power to punish for a contempt of court which is not a contravention of a court order, to 'a court having jurisdiction under this Act', the equivalent provision in s 234(2) of the *Family Court Act 1997* (WA) states that 'a court may punish a person for contempt of that court', a provision which of itself would appear to imply the grant of jurisdiction. A similar divergence exists in the wording of s 112AD and Division 13A of Part VII the *Family Law Act 1975* (Cth) and s 226 of the *Family Court Act 1997* (WA).

The Family Court of Western Australia submitted that because of the recent amendment of its governing statutes and the need to coordinate reform with Commonwealth legislation, it was unlikely that this review would have an impact on that Court. It is significant that under the new and recently proclaimed legislative regime for the Family Court, although disobedience contempts are subject to a range of statutory provisions, other contempt offences are largely unregulated by statute and remain essentially offences which are defined by the common law. The Commission accepts that with the recent legislative reform in this area, it is not realistic to propose further reforms in relation to contempt in the Family Court, although it also notes that this will mean that a common law contempt jurisdiction will remain in Western Australia.

Recommendation 1

The law of contempt of court in Western Australia, other than as applicable under the *Family Court Act 1997* (WA), should be codified and the procedures for prosecution made uniform. Upon codification of the law of contempt, s 7 of the *Criminal Code Act Compilation Act 1913* (WA), which retains the authority of courts of record to punish a person summarily for the offence commonly known as 'contempt of court', should be repealed.

Consequences of abolishing the common law contempt jurisdiction

Care should be taken in implementing the recommended repeal of s 7 of the *Criminal Code Act Compilation Act 1913* (WA) to ensure that courts retain sufficient power to deal with contempts that amount to interference with the administration of justice. For example, an issue arises in relation to the power of a court to order the expulsion of persons disrupting or interfering in proceedings. As indicated in Part III, the Commission regards this power as a significant measure in addressing contempts in the face of the court. The ALRC has sourced this power as an inherent power of the courts arising from the common law contempt jurisdiction.²⁶ It also has legislative bases, including s 635A(2)(a) of the *Criminal Code*, allowing for an order to exclude persons from a courtroom if necessary for the proper administration of justice. There does not appear to be any equivalent legislative basis for civil courts to exercise a power to expel, in particular for the civil jurisdictions of the Supreme and District Courts, and this would need to be addressed should the recommendation to remove the common law contempt jurisdiction be adopted.

Sentencing for contempt

One intended consequence of the repeal of s 7 of the *Criminal Code Act Compilation Act 1913* (WA) would be the removal of those anomalous common law contempt offences which are without maximum penalty. However, this of itself would not bring contempt offences within the punishment regime applicable to other criminal offences. Section 3(3) of the *Sentencing Act 1995* (WA) provides:

This Act does not apply to or in respect of a person being punished –

- (a) by the Supreme Court or any other court for or as for contempt of court;
- (b) under section 63 of the *District Court of Western Australia Act 1969*, section 41 of the *Justices Act 1902* or section 156 of the *Local Courts Act 1904*; or
- (c) for contempt of a House of Parliament.

The *Sentence Administration Act 1995* (WA) directs that it must be read with the *Sentencing Act 1995* (WA)²⁷ and therefore, by implication, is also not applicable to those matters referred to in s 3(3) of the *Sentencing Act 1995* (WA).

The law in relation to sentencing for criminal offences has received much attention from the legislature in recent years. The *Sentencing Act 1995* (WA) and the *Sentence Administration Act 1995* (WA) expanded sentencing options available to the courts and have sought to prescribe with greater particularity matters to be taken into account in sentencing offenders. The effect of the non-applicability of these Acts to the power of superior courts to punish for contempt of court and the analogous powers in the District Court, Local Courts and Courts of Petty Sessions, is to prevent these courts, in relation to contempt, from using statute based sentencing options such as

²⁶ ALRC, above n 2, [74].

²⁷ *Sentence Administration Act 1995* (WA) s 3.

community-based orders, intensive supervision orders and suspended sentences. It also arguably precludes a person sentenced to a term of imprisonment for contempt from being granted eligibility for parole. Further, because the *Sentence Administration Act 1995* (WA) has been held not to apply to a person undergoing a sentence of imprisonment for contempt of court,²⁸ there is no access to programs such as work release and home detention.

There is no obvious reason for excluding the sentencing options available under the *Sentencing Act 1995* (WA) from courts sentencing offenders for contempt offences and almost all submissions on this issue supported increasing the range of sentencing options available for contempt offences. It is therefore recommended that the *Sentencing Act 1995* (WA) and *Sentence Administration Act 1995* (WA) be amended so as to apply to contempt of court offences.

Submissions from a justice of the Supreme Court and the judges of the District Court did raise concerns about contempt in the face of the court, in relation to the application of the statutory limit on terms of imprisonment under s 86 of the *Sentencing Act 1995* (WA) and also concerning the punishment of contempts which may be purged. A similar issue arises in relation to disobedience contempt, whereby an offender may be sentenced to prison until he or she complies with the order or undertaking the subject of proceedings. However, in the Commission's view, there is no apparent reason why the sentencing principle that imprisonment is to be available only as a last resort should not be equally applicable to contempt offences.

The regime in relation to commitment for contempt in the *Rules of the Supreme Court 1971* (WA) (although it prescribes no minimum term of imprisonment) is instructive in that it indicates an alternative which is consistent with the statutory prohibition against courts imposing sentences of less than three months, which is part of a broader and significant reform of the criminal justice system. Rule 9(1) of Order 55 provides:

Discharge

The Court may, on the application of any person committed to prison for contempt of court, discharge him, notwithstanding that the term for which he may have been ordered to be committed has not expired.

It is suggested that offenders should be sentenced on the basis of the contempt for which they are found guilty and not pending their compliance or apology. If the contempt is such that a sentence of more than three months is warranted, the offender should be committed to prison. If the contempt be of a kind which can be purged and the offender subsequently does so, all courts should have access to powers such as those referred to above to discharge the offender.

28 *McGillivray v Piper* [2000] WASCA 245 (Unreported, 7 September 2000) [29], (Anderson J with Kennedy ACJ & Wallwork J agreeing).

Recommendation 2

The *Sentencing Act 1995* (WA) and the *Sentence Administration Act 1995* (WA) should be amended so as to apply to contempt of court offences. However, there should be provision made for all courts to have power to discharge a person committed to prison for contempt of court prior to the expiration of the term of imprisonment.

There is currently a further option available for courts to remand an alleged offender to custody pending disposal of a charge of contempt in the face of the court. In *Morris v Crown Office*,²⁹ Lord Denning identified this power as a common law power to address contempt in the face of the court. The power to remand to custody for contempt is expressly conferred by Order 55 rule 3(3) of the *Rules of the Supreme Court*. In relation to the statutory equivalent offences of contempt in the face of the court, s 63 of the *District Court of Western Australia Act 1969* (WA) empowers a judicial officer to direct the apprehension of the alleged offender, s 156 of the *Local Courts Act 1904* (WA) empowers a magistrate to order a person detained in custody until the rising of the court, and s 41 of the *Justices Act 1902* (WA) provides for a person to ‘be taken into custody then and there...by order of the justices’. The exercise of this power, therefore, will not be affected by the recommended repeal of s 7 of the *Criminal Code Act Compilation Act 1913* (WA).

‘Contemnors’

Another issue concerning contempt of court generally—the practice of referring to defendants in contempt proceedings as ‘contemnors’—was brought to the Commission’s attention by submissions. The term had been used in the Commission’s Discussion Papers for this reference but, upon reflection, the Commission agrees with respondents that the term is not only somewhat archaic, but also fails to provide adequate distinction between a person charged and a person convicted for contempt. The contention of the ALRC, that the current procedure invokes a ‘presumption of guilt’,³⁰ also gains substance from the term ‘contemnor’ rather than ‘defendant’ as used in other proceedings. The Commission takes the view that the term is unduly prejudicial and not justified in modern times, especially if contempt is to be substantially incorporated into general criminal law in accordance with the overriding tenor of the Commission’s recommendations.

Recommendation 3

Reports of proceedings for contempt of court, and other relevant documentation relating to such proceedings, should refer to the defendant as the defendant and not the contemnor.

29 [1970] 2 QB 114, 125.

30 ALRC, above n 2, [110].

Contempt of Parliament

Before concluding this Part, some comments on contempt of Parliament appear warranted. As indicated, the terms of reference for this Project have been interpreted as applying only to contempt of court. Contempt of Parliament, however, not only shares its historic origins with contempt of court,³¹ but also exhibits some of the same characteristics which the Commission has found to be in need of reform in relation to contempt of court, in particular, those concerning matters of procedural fairness.

According to the ALRC, the laws as to contempt of Parliament and contempt of court are similar:

...in that they prohibit similar types of conduct and the institution empowered to impose punishment in each case is the institution at which, or at whose proceedings, the relevant conduct is aimed.³²

Because contempt of Parliament is as much a common law concept as those contempt of court offences which have not been subject to statutory regulation, it is not subject to maximum sentences, and the provisions of the *Sentencing Act 1995* (WA) and the *Sentence Administration Act 1995* (WA) do not apply.³³

Contempt of Parliament is 'prosecuted' by the Parliament of Western Australia under its Standing Orders³⁴ or, in the case of the unlawful publication by a Member of registered information concerning Members' financial interests, under s 19 of the *Members of Parliament (Financial Interests) Act 1992* (WA). Although a cursory review of Hansard does not reveal that anyone has been committed to prison in recent times for contempt, that sanction remains open to the Parliament should it see fit.³⁵ Parliament may also impose substantial fines for contempt, and in 1999 a fine of \$1,500 was imposed on a person for not producing documents to the Parliament under summons.³⁶

It is the Commission's view that the law relating to contempt of Parliament should be reviewed in light of the recommendations of this Report.

31 In the devolution of the powers of a divinely appointed monarch to the courts and parliament: *ibid*, [20], and see above, p 3.

32 ALRC, above n 2, [7].

33 See above, p 9.

34 See, for example, *The Standing Orders of the Legislative Council* (28 November 2002), Orders 57, 122–124, 133, 155.

35 See s 3 of the *Prisons Act 1981* (WA) which specifically includes in the definition of prisoner 'a person committed to prison for punishment, on remand, for trial, to be kept in strict custody, for...contempt of Parliament'.

36 Western Australia, *Hansard*, Legislative Council (24 June 1999) 9509–16.

PART II

Contempt By Publication

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Overview

The first term of reference in Project No 93 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.

The law of contempt by publication exists at the junction between a number of interests that are of great social, political and legal importance and so has been the subject of consideration by many law reform agencies. In investigating this area of law, the Commission has drawn upon research conducted by other law reform bodies, particularly that of the New South Wales Law Reform Commission ('NSWLRC') which released its excellent Discussion Paper on contempt by publication in 2000.¹ Like the NSWLRC's study, the focus here is on *sub judice* contempt by publication; that is, contempt by publication relating to matters pending or under judicial consideration.

Contempt by publication refers broadly to the offence of publishing material that may interfere with the administration of justice. In particular, the law of *sub judice* contempt by publication sets up a tension between the integrity of trial processes and the public availability of information relating to those proceedings. In Western Australia, it is an unusual offence in that, like the other common law contempt offences discussed in this Report, it exists outside the *Criminal Code* and has no maximum penalty. *Sub judice* contempt by publication has generally been prosecuted by the Director of Public Prosecutions ('DPP') and tried by the Full Court of the Supreme Court of Western Australia. Being without any right to elect trial by jury, it is one form of the peculiar 'summary' jurisdiction which applies only to contempt offences. Appeals lie to the High Court of Australia on the usual limited terms, that is, by special leave if an important question of public policy is involved.

Considerable thought needs to be given to how the law of *sub judice* contempt is to balance and reconcile the right to a fair trial and freedom of expression, and much of this Part is concerned to canvass the various interests at issue in this area of law. 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 these interests. Perhaps unsurprisingly, submissions on this topic were primarily from media organisations and those involved in the administration of the law, although it is of note that there were none from the courts.² It appears that many people feel that the law as it currently stands gives too much power to the judiciary at the expense of the media, and this was certainly the view expressed in many of the submissions received from media organisations. However, as much as the media may feel its relative powerlessness before the courts, the media itself

1 New South Wales Law Reform Commission ("NSWLRC"), *Contempt by Publication*, Discussion Paper No 43 (2000). Subject to specific contrary comments in this Report and relevant differences in the law and procedure of this state, the Commission suggests that the proposals outlined in the NSWLRC's recent Discussion Paper should provide guidance to the implementation of its recommendations in Western Australia.

2 Although one District Court judge did respond to the contempt by publication Discussion Paper it raised issues concerning matters akin to scandalising the court. These issues are addressed in Part V.

exercises enormous power relative to the majority of parties involved in litigation. The Commission has recommended that Parliament, by legislation, is the appropriate institution for balancing the disparate issues in relation to contempt by publication, although the court's role as an arbiter on individual matters is retained. Attention must be paid, in drafting such legislation, to the specific powers and discretions to be given to the courts and the media.

Before moving to those specific matters, however, it is of note that *sub judice* contempt by publication also spotlights 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 the effects of publicity are difficult to counteract. 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? A key recommendation for reform is that the option of trial by jury should be available on the prosecution of contempt offences. As indicated in submissions, it is arguably jurors who are best placed to assess the potential impact of a publication upon jury deliberations.

Specific areas for reform discussed in this Part concern the basic legal test to determine whether published material is *sub judice* contempt. The present law focuses on the tendency of material to prejudice proceedings, which has been interpreted to apply to almost any publication which might have an effect on proceedings. It is recommended that the relevant interests would be better balanced by a test that required the prosecution to prove a certain threshold level of *risk* of such prejudice, as this is a more specific test.

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 harboured 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. It is recommended that it be a new defence to a charge of contempt by publication, that the defendant did not know a fact that caused the publication to breach the *sub judice* rule; and before the publication was made, the defendant took all reasonable steps to ascertain any fact that would cause the publication to breach the *sub judice* rule. The establishment of this new defence raises issues about the clarification of when a matter is *sub judice* and the Commission has recommended, with the support of submissions, that there should be more clarity as to exactly how that period is defined.

The law already recognises certain defences to *sub judice* contempt by publication namely, fair and accurate reporting, and publication in the course of discussion on a matter of public interest. The Commission has concerns about aspects of these defences, particularly the question how 'public interest' is to be defined. 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. Recommendations to clarify these defences are made together with a recommendation for the establishment of a new defence, that

of innocent distribution, which relates to the defendant's lack of control over the content of a publication.

As indicated previously, contempt is in many ways an anomalous offence, being the only remaining common law crime under Western Australian law. It is arguable that the powerlessness of the media relative to the courts flows, in large part, from the procedural matters arising from status of contempt by publication as a common law offence. Arguably the existing law has a 'chilling effect' as those making the decisions on what to publish generally appear to err on the side of caution, and keep information from the public. Bringing *sub judice* contempt by publication under the *Criminal Code*, as recommended by the Commission, would address the absence of any maximum sentence, the anomalous summary process by which contempt is often tried, and the absence of effective avenues for appeal. These reforms too were generally supported in submissions received.

The substantial procedural reform recommended, with significant support from submissions, would mean that the prosecution and punishment of contempt by publication offences are consistent with general criminal law and process. A major area of contention in relation to these matters, however, was whether imprisonment was ever an appropriate sanction for contempt by publication. Media organisations, understandably, were of the view that such a significant sanction could never be justified although the Commission remains persuaded that imprisonment may be appropriate in certain worst-case scenarios and should remain available.

***Sub judice* contempt by publication**

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. (Other publication based contempt offences, such as scandalising the court, are discussed in Part V.)

There are two widely applied statements of the test for *sub judice* 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.³

3 *John Fairfax & Sons Pty Ltd v McRae* (1954) 93 CLR 351, 370 (Dixon CJ, Fullagar, Kitto & Taylor JJ).

This test has been applied in numerous recent Western Australian cases.⁴ The second statement comes from a decision of the Supreme Court of New South Wales 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.⁵

There are limited defences to *sub judice* contempt by publication, including fair and accurate reporting of criminal proceedings⁶ and publication in the public interest (the *Bread Manufacturers'* principle).⁷

A complex balancing task

The law of contempt by publication should 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 must 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 the important public and community interests served by the media. Therefore there is a complex balancing task to be carried out between a number of different interests.

Considerations in favour of contempt law

The law of *sub judice* 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

While the most fundamental tenet of fairness extended to 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, 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.

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

4 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.

5 *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).

6 NSWLRC, above n 1, [9.1]–[9.7].

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

highly prejudicial but generally lacking in probative value as to guilt of the present offence. Therefore it is not admitted.

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 render 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 and that may well predispose them to accepting that an accused is guilty. The law against contempt by publication is therefore another example of a special rule to ensure that the presumption of innocence is effective.

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.

Clearly such a rule has an important function in supporting the presumption of innocence, and therefore 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. Insofar as contempt law protects the rules of evidence, therefore, it also protects that status.

Another indicator of the quality of our legal system is its capacity to equalise power imbalances that exist outside the courtroom. Although it is by no means perfect from the legal system does provide an even-handed procedure whereby parties have, at least, 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 (such as defamation actions which are outside of the financial reach of many people). By restricting the introduction of information by means other than the parties themselves, the law of contempt supports this aspect of the administration of justice.

'Trial by media'

The above discussion provides a number of arguments against what is often called 'trial by media'. Although this term was criticised by *The West Australian* as having no rational or realistic definition, it nonetheless evokes community concerns about the media propagation of unfair and possibly prejudiced views with resulting injustice to a possibly (indeed presumed) innocent accused. Another concern with 'trial by media' that remains, even if court proceedings are shown to have been fair, is the invasion of privacy of the accused and others involved in court proceedings. There is a remaining injustice in having one'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.

The Sunday Times submitted that the Discussion Paper seemed ‘overly concerned’ with ‘trial by media’ and objected to the implication that the media ‘are invariably interested in being the prosecutor’. The WA Journalists’ Association also objected to inclusion of ‘trial by media’ in the law of contempt by publication. The term ‘trial by media’ has been used in a recent judicial decision on contempt. Justice Wheeler in *Re Coroners Court of Western Australia; Ex Parte Porteous*⁸ said that the term refers to the capacity for published criticisms of court decisions to tend to suggest that the truth is easy to get at and that the court has failed to do so. However, *The West Australian* submitted that Justice Wheeler’s comments in that case indicate that the public policy concern that is raised in judicial discussion of ‘trial by media’ is not presently part of the law of contempt.

The Commission gave consideration to whether to recommend that ‘trial by media’ be made a specific contempt offence, or alternatively, be made a part of an underlying principle guiding judicial discretion in contempt by publication matters. However, particularly in view of the inherent vagueness of the term, the Commission was persuaded by submissions received on the issue that in neither sense is there any place for ‘trial by media’ in the law of contempt by publication.

Considerations to the contrary

Just as there are important interests which contempt law protects, there also are important interests to which contempt law is inimical, including freedom of speech and the press, and open justice.

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 from the constitutionally protected freedom of political communication referred to in Part I.⁹ 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.

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.¹⁰

Self-realisation captures something readily recognisable to most people: it is an important part of human dignity to be allowed to speak one’s mind. 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

8 *Re Coroners Court of Western Australia; Ex parte Porteous* [2002] WASCA 144, [76]–[77].

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

10 Eric Barendt, *Freedom of Speech* (1985).

notion that speech is inherently harmless, a notion which must surely now be regarded as largely discredited.

The arguments apply with even greater force to discussion by the media. 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. However, these interests are often commercial and as such are of an entirely different order from the starting point—the right of people to speak their mind. Arguably therefore, it has no place demanding special protection from the law on this ground.

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. What is desirable is the freest possible debate, or competition, between ideas.

This is a very appealing metaphor, but it assumes that there is a ‘truth’ to be attained. At times, however, there is no real objective truth to be found in a trial—particularly where the issue is to do with a person’s state of mind or motivation—and, 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.

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. 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?

Discourses about freedom of discussion and contempt law all too often confuse situations in which the public have an interest with those where the public is interested in information in the sense of being curious about it. However, one thing is clear: mere curiosity on the part of the public could never justifiably override the interests discussed above (such as a right to a fair trial) 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. It is perhaps ironic that this justification can be a limit on the power of democratically elected bodies, such as Parliament’s capacity to enact legislative reform, as referred to in Part I. However, the sophisticated democracy to which we aspire in Australia is not simply majoritarianism writ large, but a complex system of ‘checks and balances’ with various components, including the legal system and the media, performing vital functions. Therefore democracy not only can, but should, impose some restrictions, even on democratic institutions.

Open justice 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.¹¹

However, as the discussion above also makes clear, such rights cannot be absolute in the case of courts. Various considerations militate against making courts directly accountable in the way other public institutions are, notably the rule of law, the independence of the judiciary and various counter-majoritarian values such as tolerance, respect for dissent and protection of minorities. This is because great reliance is placed on courts to protect the values underlying these considerations. 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 the place courts occupy in the democratic order. For example, 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'. As the NSWLRC has pointed out, contempt law already attends to the concerns of open justice to a large extent with its fair and accurate reporting defence.¹² It is another matter, of course, if information that is before the court is blocked; however, this 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, with some justification, to feel entitled to know what the person looks like, especially if the person is known to be dangerous. On the other hand, publication of a photograph might taint identification evidence in the person's eventual trial. 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. The area of pre-trial publicity was identified as being of particular concern in submissions from *The West Australian* and *The Sunday Times*. This area is considered further below. However, the need to identify which institution is best placed to resolve the various competing interests involved in contempt issues should first be addressed.

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

Who should decide?

An accountability system needs to take into account both the reasons why the power is granted (or the salutary ends sought to be achieved by exercise of the power) and the sources of pressure to abuse that power. Because of direct involvement in the processes by which the power is exercised, neither the media nor the judiciary are in a position to engage objectively in the thorough and balanced analysis needed. In these circumstances the Commission considers that Parliament, through its legislative process, is the appropriate institution for balancing the disparate interests in relation to *sub judice* contempt by publication. It will, of course, remain the court's role to act as adjudicator on individual matters pursuant to legislation. The WA Journalists' Association accepted that the reasonable way to resolve the inherent tensions endemic to this area of law is by the courts on a case-by-case basis, according to laws set down by Parliament.

Recommendation 4

The balancing of the various interests at stake in contempt law should continue to be undertaken by the courts, but in accordance with legislation rather than the common law.

General principles of interpretation and application

In modern legislation, it is not unusual for Parliament to lay down some general principles by which the law is to be interpreted and applied. Such principles provide a useful balance between prescriptiveness and undue discretion.¹³ The WA Journalists' Association supported the proposal to formally entrench concerns—such as the importance of freedom of discussion—into the substance of a codified law of contempt by publication to ensure that they are not overlooked in the resolution of particular cases. However, the Commission is mindful of concerns raised by *The Sunday Times* about the potential for reform of this area to make it 'even more difficult to grapple with than it is now' and has attempted to make recommendations to bring greater clarity to this area. As a result, the Commission has decided against recommending any general principles by which the law on contempt by publication is to be interpreted and applied.

Assumptions about jurors and judges

There are two related assumptions that underlie *sub judice* 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.

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 at present 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.

¹² NSWLRC, above n 1, [2.17].

¹³ Other examples, in the field of media law, include the *Classification (Films, Literature and Computer Games) Act 1995* (Cth) s 11, the National Classification Code, and the *Broadcasting Services Act 1992* (Cth) s 3.

- 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;¹⁴
- 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;¹⁵
- 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.¹⁶

Empirically demonstrable?

Despite considerable research on the subject over a significant period of time, judges have rarely offered support for the truth of the assumption that jurors' views are susceptible to essentially permanent modification by publicity. Indeed, much of the research has indicated that 'in general, evidence tends to suggest, when realistically viewed, that prejudicial information (defined variously) has no effect on the decision-making process [of juries].'¹⁷

In 2001, Chesterman, Chan and Hampton released a substantive review of literature from Australia, New Zealand, the United States of America, Canada and the United Kingdom along with the results of a major study of real-life juries in New South Wales.¹⁸ The study was based on interviews conducted with 36% of jurors, 88% of judges, 100% of prosecution counsel and 90% of defence counsel from 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 three principal qualitative findings were that:

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'.¹⁹
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.²⁰

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

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

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

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

17 D Howitt, 'Pre-trial Publicity: The Case for Reform' (1982) 2 *Current Psychological Reviews* 311, 312.

18 Chesterman et al, above n 16, 16–31.

19 According to 'professional assessors', that is, judges and counsel.

20 Chesterman et al, above n 16, xvi.

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' [on review by independent assessors], 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.²¹

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 because the study was undertaken in the context of restricted publishing as a direct result of existing contempt law. There is simply no way of knowing the extent to which unsafe verdicts were *avoided as a direct result of the application and presence of contempt law*. In other words, it is impossible to know from this study how many more unsafe verdicts there would be if it were not for contempt law. Also in the absence of knowledge about which publicity was contemptuous and which was not, 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?

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'.²²

While there is much in Howitt's assertion to which legal decision-makers should give serious thought, he might be missing the point insofar as he fails to treat the difference between judges and jurors as one between people with different education, training and experience. 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. It is also the case, as submitted by Michael Gillooly, a Senior Lecturer in Law at the University of Western Australia, that judicial officers are required to provide reasons for their decisions, and therefore any potential prejudice arising from publicity may be subject to correction on appeal. Jurors, of course, do not give their reasons.

On the other hand, there is a potential problem with the assumption that legal training is the *only* kind of background that can support the necessary mindset. Jurors tend to be treated as a 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.

21 Ibid.

22 Howitt, above n 17, 313.

Assumptions about juries when an accused applies for a stay

It is well established that the fact that 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 is justified on the basis that a contempt conviction requires only a *tendency* to interfere with the administration of justice; whereas a stay requires *actual* interference. Still, this distinction may be a little too subtle for many people's liking. 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 by publication as an offence looks somewhat phantom-like: the accused need not intend the contempt and it requires no actual harm. 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.

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 publicity.²³

It is difficult to reconcile these different approaches 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. 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.

At the same time, if the law is serious about deterrence—that is, about preventing contempt rather than merely punishing it—it also 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.²⁴

Future research

The foregoing suggests that there is a need for more independent research using different methodologies to complement what has already been done, although it is noted that *The West Australian* opposed this proposal. *The West Australian* was of the view that further research was not warranted, stating that there was sufficient judicial authority and research to conclude that juries are not likely to remember the details soon after publications which may be considered adverse to the accused. In contrast, *The Sunday Times* submitted that it is 'imperative that comprehensive research' be conducted to determine the effect of pre-trial publicity on jurors, and particularly highlighted the issue of high-profile

23 See, eg, *R v Glennon* (1992) 173 CLR 592.

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

cases. The Commission acknowledges that recent Western Australian case law, referred to by both *The Sunday Times* and *The West Australian*, has indicated that the length of time between publication and trial was a significant factor in diminishing the impact of the publicity.²⁵

The West Australian further submitted that there should be a reversal of the onus of proof, so that a defendant would need to rebut a presumption that a properly instructed jury would be able to reach a fair verdict, in spite of 'prejudicial publicity'. The Commission is not persuaded that there already is sufficient evidence to reverse the onus of proof and believes that additional research is warranted. It is suggested that research into these issues 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, it is the Commission's view that, in determining whether a publication is capable of constituting contempt by prejudicing the fairness of a trial, courts should pay heed to the latest available evidence from independent research into the effects of publicity on jury deliberations to the extent such evidence is available. To assist the courts in this regard, the Commission believes that a unit should be established within the Department of Justice to monitor the results of future research, and/or initiate its own research on the impact of publicity on jury deliberations, and disseminate the information produced. It is desirable for a range of research to be undertaken, but in particular there should be research that separates contemptuous publicity from other publicity in order to gauge the accuracy of the legal system's assessments as to the impact of particular kinds of publicity.

Certainty *versus* flexibility

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. However, certainty can only ever be achieved at the expense of flexibility.

The Commission's Discussion Paper on this term of reference invited submissions as to the best way to strike a balance between certainty and flexibility in the law of contempt by publication, particularly in situations of a corporate defendant. The latter was highlighted because, although it is not uncommon for an editor or a journalist to be threatened with imprisonment for contempt, the typical contempt defendant is a wealthy and powerful media organisation. In this context, careful attention needs to be paid to the question whether the value of 'certainty' to extremely powerful commercial

²⁵ *The Queen v West Australian Newspapers Ltd; Ex parte Terence Patrick Keating on behalf of the Attorney General of Western Australia*, (Unreported, Full Court of the Supreme Court of Western Australia, Library No 970316, 19 June 1997).

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.

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 NSWLRC has proposed an alternative test framed in terms of ‘risk’ rather than tendency²⁶ and, as will be described later, confining it to a clearly defined *sub judice* period.

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.²⁷

The test proposed by the NSWLRC would relieve some of the burden on potential defendants when they are making their publication decisions. The concept of risk is intended to introduce a more concrete, and higher, threshold for the prosecution to cross, and to remind courts that they need to look to empirical evidence about the practical effect of publicity, rather than focussing on the publicity itself.

It is of note that *The West Australian* did not consider the recommended change to be helpful, regarding both the existing and the proposed test as confusing. The WA Journalists’ Association, however, did support the recommendation overall, citing the significance of the change for ‘legal thinkers’. The Association also argued convincingly that risk is easier for editors to assess as it relates to matters within their knowledge such as the size and demographic makeup of their readership or audience. Therefore it introduces an additional measure of certainty to the law, from the potential defendant’s point of view.

In relation to whether it also was desirable to make an additional amendment so that a standard measuring levels of prejudice was included in the proposed test *The West Australian*, rightly in the Commission’s view, cited legal authority that there is little chance that an acknowledged prejudice would ever be considered anything but serious, as it would otherwise be capable of being addressed through directions issued to the jury.²⁸

26 The concept of ‘risk’ is also employed in the United Kingdom, New Zealand and Canada: NSWLRC, above n 1, [4.12] and sources there cited.

27 Ibid [4.58] (Proposal 3).

28 *Johnson v The Queen* [2002] WASCA 78 (Unreported, 8 April 2002).

After consideration of all submissions on the matter the Commission believes that the NSWLRC's alternative test for contempt by publication, framed in terms of 'substantial risk' rather than tendency, should be adopted as the test for *sub judice* contempt by publication.

Recommendation 5

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.

Mental element

Perhaps the most controversial aspect of the existing contempt law relating to *sub judice* publication 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.²⁹ Indeed, you can be convicted of contempt even if you did not know, and had no way of knowing, that there were any proceedings to be affected.³⁰

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 should 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 have the opportunity to establish as a matter of exculpation that they did not have the requisite state of mind. It would even be possible to justify a very stringent mental element test, as long as it was a test framed in terms that potential defendants could readily understand. The form in which this mental element should be incorporated into the relevant legislation is discussed further below (see 'Defending contempt by publication').

Recommendation 6

Legislation should incorporate reference to a defendant's mental state, besides intention to publish, as relevant to liability for *sub judice* contempt by publication. (See Recommendation 11, below.)

²⁹ See NSWLRC, above n 1, 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).

³⁰ *R v Pearce* (1992) 7 WAR 395, 428–29 (Malcolm CJ); *R v Odhams Press Ltd; Ex parte Attorney General* [1957] 1 QB 73.

Sub judice time frames

Contempt by publication of the kind under discussion concerns the potential impact on proceedings that are ‘pending’ in the sense of being *sub judice*. As indicated previously, issues concerning pre-trial contempt were highlighted in submissions and the notoriously vague law as to what ‘pending’ means in this context was subject to criticism. A sensible starting point for resolving this issue is that the period should be defined in such a way as to:

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

When should the sub judice period begin in criminal proceedings?

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 a person is charged;
3. when a complaint, summons or warrant is issued against a 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 a complaint or summons is presented to a court.

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. The NSWLRC has recommended that:

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.³¹

The WA Journalists’ Association endorsed the NSWLRC’s proposal, stating that ‘it seems clear enough and appropriate’. However, *The West Australian* considered that ‘starting the contempt clock prior to charging can lead to ambiguity and confusion’ as well as an unreasonable restriction on freedom of discussion. But, the consequence of a matter becoming *sub judice* is not that there can be no discussion; rather, it is that any such discussion must be fair and accurate or in the public interest. This is appropriate once a person has been arrested, summonsed or charged.

The NSWLRC acknowledged the potential prejudice of publicity in ‘sensational cases’ even when proceedings are ‘imminent’ but not yet ‘pending’, but dismissed this difficulty with the observation that ‘it seems likely that the risk of such prejudice would generally be less than the risk

31 NSWLRC, above n 1, [7.39] (Proposal 11).

arising from publicity at a later stage.³² The NSWLRC also referred to the potential uncertainty problem for the media of a more inclusive definition for the time period, and suggested that this ‘would arguably impose too severe a restriction on freedom of discussion’.³³

The Discussion Paper on this term of reference had advanced the opinion that the NSWLRC’s proposal was not sufficient to protect the interests of a (likely) defendant in a high profile case. Rather than recommend the proposed proviso that ‘in high-profile cases the court has an overriding discretion to apply the law against defendants who appear to have taken advantage of the technical certainty of the law and published prejudicial material earlier’ the Commission is persuaded that the need for certainty countermands the need for such a proviso, not least because what constitutes a ‘high profile’ case may itself be directly influenced by the publicity at issue. Nonetheless, the Commission does acknowledge that the risk of prejudice even at the investigative stage may in some cases be unacceptable. It is the Commission’s view that, by recommending additional restrictions on the publication of identification evidence, sufficient protection will be afforded to all suspects prior to arrest. (See Recommendation 8, below.)

Recommendation 7

Subject to Recommendation 8, for the purposes of the offence proposed at Recommendation 5, legislation should provide that criminal proceedings become pending at the occurrence of any of these initial steps:

- (a) when a person is charged;
- (b) when a complaint, summons or warrant is issued against a person;
- (c) when an ex officio indictment is filed against a person;
- (d) when a person is arrested, with or without warrant; or
- (e) when a complaint or summons is presented to a court.

The publication of identification evidence

As indicated previously, *The West Australian* raised particular concerns about the difficult issue of the publication of photographs of an accused. At the same time, the need to restrict the publication of photographic material where identification might be contested was acknowledged. This issue was also highlighted by *The Sunday Times*, particularly in the context of prison escapees, and by the WA Journalists’ Association in the context of situations where a person assisting police is later charged.

It is conceded that Recommendation 7 may not address the specific issues which arise in relation to publication of a photograph of a suspect or an accused person. However, the ALRC did specifically address this issue, and recommended that there be a prohibition on the publication of a photograph, film, sketch or other likeness, or a description of physical attributes, where the following conditions are met:

32 Ibid [7.27].

33 Ibid. The NSWLRC further points out the very respectable tradition of law reform bodies favouring certainty: refer to sources there cited.

- the publication suggests that the relevant person is suspected of, or has been charged with a criminal offence;
- the publication might impair the reliability of any evidence of identification that might be adduced in the prosecution for the offence; and
- the publication cannot be justified on the basis that it may facilitate the arrest of the photographed person or investigation of the offence, or out of considerations of public safety.³⁴

The Commission concedes that the ALRC recommendation goes beyond the *sub judice* period proposed by the NSWLRC. However, in relation to the publication of identification evidence, the Commission is of the view that the matter requires separate consideration and that the adoption of the above recommendation would provide due protection to a suspect or accused person at the same time as giving adequate guidance to media organisations enabling them to minimise the risk of failing to act in accordance with the law.

Recommendation 8

In respect of publication of a photograph of a suspect or an accused person legislation should provide that there be a prohibition on the publication of a photograph, film, sketch or other likeness, or a description of physical attributes, where:

- (a) the publication suggests that the relevant person is suspected of, or has been charged with, a criminal offence;
- (b) the publication might impair the reliability of any evidence of identification that might be adduced in the prosecution for the offence; and
- (c) the publication cannot be justified on the basis that it may facilitate the arrest of the photographed person or investigation of the offence, or out of considerations of public safety.

The end of the sub judice period in criminal proceedings

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 a chance that it may 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. 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. Under the NSWLRC's proposal these considerations do not matter, because the *sub judice* period abates following conviction until such time as a re-trial is ordered. This proposal was endorsed by *The West Australian* and the WA Journalists' Association.

34 Australian Law Reform Commission ('ALRC'), *Contempt*, Report No 35 (1987) [395].

Recommendation 9

Legislation should provide that the period during which criminal proceedings are considered ‘pending’ for the purposes of the law of contempt by publication closes at the time of conviction or acquittal, until such time as a re-trial is ordered.

Enhancing availability of information about criminal proceedings

In its Discussion Paper on this term of reference, the Commission invited submissions on what measures could be taken to enhance the availability of information to the media about whether criminal proceedings were pending. Submissions from media organisations strongly supported easier access to relevant information in this regard.

The Commission considered the idea of an official database, to which media organisations could subscribe, to provide relevant details on proceedings pending within the state, and that reliance on such information could be reasonable for the purposes of the ignorance defence described in Recommendations 6 and 11. However, after full consideration of the matter, the Commission decided that such an initiative would necessitate significant public expenditure for little public gain. The Commission was also concerned that an official database could create a ‘window of opportunity’ for potentially prejudicial publicity between the event and the record appearing on the database. It was noted that this might be exacerbated in respect of proceedings pending in regional and remote areas of Western Australia where access to the relevant technology may be limited, or in circumstances where data entry is unforeseeably delayed.

The Commission notes that, whilst journalists will remain responsible for gathering reliable information about pending criminal proceedings from official sources, steps have been taken to enhance cooperation between legal institutions and the media. For example, most courts now employ media liaison officers who assist journalists in gaining access to court information. The Commission believes that courts and the executive government should be encouraged to consider the development or implementation of further administrative initiatives to address any residual uncertainty concerns relating to the *sub judice* time frame.

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 known by a limited number of people, the potential number of people with knowledge about some possibly intended civil proceedings is virtually limitless. Therefore a cut-off point for the beginning of the *sub judice* period at the time when originating process issues is easier to justify. In any event, civil proceedings are rarely tried by jury so the potential impact of publicity is generally considered to be lower given the assumption that judicial officers are less likely to be influenced by publicity, and the impact of the publication may be limited, for example, to its effect on witnesses or parties.

The Sunday Times expressed concern that defining ‘pending’ in the civil context as commencing at the time when originating process issues would lead to a plethora of writs seeking to stop publication thus potentially halting disclosure in the public interest. However, the Commission’s view is that contempt law is likely to be significantly at issue in relation to civil proceedings only if an aspect of contempt as ‘prejudging’ is retained and, as indicated below at Recommendation 15, the Commission’s view is that it should not be.

The only potential offence therefore would be one in which there was a substantial risk that the fairness of proceedings would be prejudiced in the circumstances outlined in Recommendation 5, above. (The Commission does not recommend adopting the NSWLRC’s proposal relating to a different *sub judice* commencement with reference to a contempt of exerting pressure on parties in civil litigation.³⁵) In addition to fair comment (Recommendation 12) and public interest (Recommendation 13) defences, such an offence would be open to a defence that the prejudice was the result of ignorance (Recommendations 6 and 11). Thus, in the rare case where a person makes a comment on a matter that incidentally bears upon civil proceedings of which that person had no knowledge, it would be reasonable not to make any inquiries in that regard.

The narrowness of the grounds for alleging contempt in relation to civil proceedings, in the Commission’s view, should result in few writs being issued to stop publication of the details of civil proceedings. In any event, it should be noted that, while the Commission’s proposal is to statutorily define the *sub judice* period for contempt by publication in civil matters as commencing when the originating process issues, this is no different to the current common law definition,³⁶ and so would appear unlikely to encourage an increase in the issue of writs seeking to halt publication.

In relation to the conclusion of ‘pending’ civil proceedings, the NSWLRC proposed that:

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.³⁷

The proposal echoes its criminal proceedings counterpart, in that it allows a window for discussion, unfettered by *sub judice* contempt laws, between disposition at trial and the ordering of a retrial.

35 NSWLRC, above n 1, [6.35].

36 Ibid [7.23].

37 Ibid [7.84] (Proposal 17).

Recommendation 10

Legislation should provide that civil proceedings become pending, for the purposes of the law of *sub judice* contempt by publication, when originating process issues and cease to be pending when the proceedings are disposed of, abandoned, discontinued or withdrawn. The proceedings should become pending again only when a re-trial is ordered.

Defending contempt by publication

While the Commission is of the view that there is no reason why the two existing defences—fair and accurate reporting of proceedings and discussion in the public interest (discussed below)—should not be retained and refined, the Commission recommends that new defences to *sub judice* offences of contempt by publication also be developed. 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 *sub judice* contempt and the way it is prosecuted including, at the very least, the introduction of a mental element relating to the likelihood of prejudice

**An ‘ignorance’
defence**

The incorporation of a reference to a defendant’s mental state, besides intention to publish, as relevant to liability for contempt by publication was referred to above, at Recommendation 6. The NSWLRC’s proposed ‘ignorance’ defence to a charge of *sub judice* contempt³⁸ strikes a balance by placing the onus on the party that is in a better position to address the issue of the defendant’s mental state—that is, the defendant—but limits that onus to the civil standard, the balance of probabilities. It also 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.³⁹

One of the desirable features of the proposed defence is that it is based on a concept of knowledge rather than intent or motive. 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 WA Journalists’ Association stated that the proposed defence appeared well grounded in fundamental legal principle and appeared sensible and fair.

38 Contempt by publication 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’: P Nygh and P Butt (eds) *Butterworths Concise Australian Legal Dictionary* (1997) 379. Occasionally this term is used interchangeably with ‘contempt by publication’.

39 NSWLRC, above n 1, [5.43] (Proposal 7).

In contrast, *The West Australian* was of the view that intent should be an element of the offence which the prosecution would need to prove. However, intent is not generally an element of statutory criminal offences in Western Australia as a consequence of the enactment of the *Criminal Code*. This issue is discussed further in Part III, but it is of note that generally, in relation to criminal offences in Western Australia, no mental element need be proven by the prosecution and the onus is on the defendant to raise defences such as accident, under Chapter V of the *Criminal Code*.

The West Australian also opposed the relevant standard of knowledge, as proposed by the NSWLRC, preferring a standard of intent. As indicated in the Discussion Paper it was thought that most, if not all, potential defendants would prefer to have a defence based on intent. Indeed most would prefer intent to be an element of the offence for the prosecution to prove; that is, as suggested by *The West Australian*, defendants would escape liability unless the prosecution could prove beyond reasonable doubt that they intended to interfere with the administration of justice.

Of course, contempt occurs against the backdrop of socially important power being exercised by large organisations that are not democratically accountable. And although *The West Australian* disagrees (citing defamation law, privacy codes, Australian Press Council standards, surveillance devices legislation and the statutory restrictions on publication discussed below), contempt law is one of the few means of making the media accountable for the way that they exercise their power. For example, defamation is a remedy for abuse of media power available in practice to very few people. In balancing media power, the starting point should be one of assuming that contempt defendants have special responsibilities.

The NSWLRC'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. Even with journalists and editors, who are also sometimes charged with contempt, the range of likely motives is likely to include laudable ones such as informing the public of important facts. In the typical contempt case the real question of culpability is whether the defendant was responsible or irresponsible with its knowledge and whether it paid sufficient attention to matters that were not within its knowledge.

Knowledge of what?

The NSWLRC'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 whatever other test distinguished contemptuous from other publications, and whether the proceedings potentially affected were at a crucial stage. The ALRC's recommended defence extended only to the latter issue, that is, the question of whether proceedings were pending.⁴⁰

40 See NSWLRC, above n 1, [5.40].

In the Commission’s opinion, legislation should not attempt to anticipate the range of facts that the law of contempt might consider relevant to a responsible decision whether or not to publish. This should be left up to the judge in each individual case. In principle, the facts on which a defendant can successfully base the defence referred to below should include those relevant to the availability or otherwise of another defence.

Recommendation 11

The mental element referred to in Recommendation 6 above should be in the form of a defence. Legislation should provide that it is a defence to a charge of *sub judice* contempt by publication that the person or organisation charged with contempt:

- (a) did not know a fact that caused the publication to breach the *sub judice* rule; and
- (b) before the publication was made, took all reasonable steps to ascertain any fact that would cause the publication to breach the *sub judice* rule.

The defendant should bear the burden of proof and the standard of proof should be on the balance of probabilities.

Fair and accurate reporting of proceedings

The defence of fair and accurate reporting 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.⁴¹ However, certainty can 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. It is of note, however, that certain information, such as that introduced in the absence of the jury, cannot be reported and there may be other examples of information, or ways of reporting information, that are presumptively prohibited.

While there has been debate about the merits of a ‘good faith’ defence,⁴² the debate echoes some ideas underlying the discussion above of the ‘ignorance’ defence: it may be arguable that a mental element based on knowledge is more suited to the context where defendants are frequently corporations 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. Moreover, a ‘fairness’ test ties contempt law to its goals in preventing prejudice; and the introduction of an ‘ignorance’ defence

41 Ibid [9.4].

42 United Kingdom Committee on Contempt of Court, see United Kingdom, Committee on Contempt of Court, *Report of the Committee on Contempt of Court* (HMSO, London, Cmnd 5794, 1974) [321]–[328], contra ALRC, above n 34, [322].

as outlined above can do all that is needed in terms of focusing on the defendant's state of mind.

The NSWLRC saw no need to introduce changes to the common law position allowing publications that are a fair and accurate report of proceedings in open court, but rather thought that these issues 'are best left for courts to clarify'. However, in light of the attempt to codify the law of contempt, it would seem odd not to include defences available at common law in statutory form, particularly given the status of Western Australia as a 'code' jurisdiction. It would be a simple enough matter to find a form of legislative words for including this defence in any legislation, particularly as the *Criminal Code* already deals with the issue of fair reporting of court proceedings, utilising the element of 'good faith'.

Section 354(3) of the *Criminal Code* states that it is lawful:

To publish in good faith, for the information of the public, a fair report of the public proceedings of any court of justice of the Commonwealth or a State or Territory of the Commonwealth, whether such proceedings are preliminary or interlocutory or final, or of the result of any such proceedings, unless, in the case of proceedings which are not final, the publication has been prohibited by the court, or unless the matter published is blasphemous or obscene.

The section continues:

A publication is said to be made in good faith, for the information of the public, if the person by whom it is made is not actuated in making it by ill-will to the person defamed, or by any other improper motive, and if the manner of the publication is such as is ordinarily and fairly used in the case of the publication of news.

Section 358 allocates the burden of proving or disproving 'good faith' as follows:

When any question arises whether a publication of defamatory matter was or was not made in good faith, and it appears that the publication was made under circumstances which would afford lawful excuse for the publication if it was made in good faith, the burden of proof of the absence of good faith lies upon the party alleging such absence.

The West Australian was of the view that the substance of s 354 did not require change. The WA Journalists' Association was also of the view that the present law on fair and accurate reporting was well understood.

It is of note, however, that the *Code* provisions on fair and accurate reporting are subject to the retention of the common law powers of courts of record to punish contempts under s 7 of the *Criminal Code Act Compilation Act 1913* (WA) and it would appear that the common law defence of fair and accurate reporting also remains available. It is of note, too, that the limitation of the definition of good faith in s 358 to matters of defamation also is consistent with the retained common law defence. If a new defence of fair and accurate reporting for the purposes of contempt by publication were to be adapted from the existing *Criminal Code* provisions, the common law defence of fair and accurate reporting would no longer apply in Western Australia.

Recommendation 12

A statutory defence of fair and accurate reporting for the purposes of contempt by publication in Western Australia should be enacted in the same terms as s 354 of the *Criminal Code*.

**In the public
interest – the
*Bread
Manufacturers’
defence***

The defence of discussion in the public interest for *sub judice* contempt 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.⁴³ According to the NSWLRC, 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.⁴⁴

It is clear that contemporary notions of freedom of discussion would support a considerably broader defence, although given the need to ensure that such discussion does not prejudice the fairness of a pending proceeding, the narrow nature of the defence remains legitimate.

The outer limits of the common law defence were tested more recently in the High Court decision *Hinch v Attorney General (Vic)*.⁴⁵ Although the particular defendant in that case—a radio announcer who revealed the prior convictions of a man charged with child sexual abuse—did not receive the benefit of the defence, the court ‘expanded the scope of the principle significantly.’⁴⁶ As the NSWLRC has pointed out, the outcome in *Hinch* means that we are left without any real indication as to where reference to particular proceedings *will not* be held to constitute contempt.⁴⁷

The NSWLRC proposed 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.

The defendant should bear the burden of proof and the standard of proof should be on the balance of probabilities.⁴⁸

43 *Ex parte Bread Manufacturers Ltd; Re Truth and Sportsman Ltd* (1937) SR (NSW) 242.

44 NSWLRC, above n 1, [8.6].

45 (1987) 164 CLR 15.

46 NSWLRC, above n 1, [8.8].

47 *Ibid* 269, referring to *Hinch v Attorney General (Victoria)* (1987) 164 CLR 15, 26 (Mason CJ).

48 NSWLRC, above n 1, [8.43] (Proposal 19).

This proposal usefully defines ‘public interest’ in such a way as to exclude ‘mere curiosity’, with the use of a concept of public importance. The WA Journalists’ Association endorsed this proposal. *The West Australian* raised concerns about the ‘subjectivity’ inherent to the second limb of the proposed defence and indicated its preference for a definition of ‘public interest’ based on s 24 of the *Surveillance Devices Act 1998* (WA). If however, other reforms are made, notably in the form of the introduction of an ‘ignorance’ defence, the Commission does not believe any broader defence relating to public interest than that proposed by the NSWLRC would be required.

It is of note that the *Criminal Code* of Western Australia already includes a number of provisions relating to the defence of ‘fair comment’ and the public interest, although given the retained common law jurisdiction under s 7 of the *Criminal Code Act Compilation Act 1913* (WA) these provisions are directed towards defences against a charge of criminal defamation. These provisions are substantially broader than the defence proposed by the NSWLRC, and include defences such as:

355. Protection: Fair comment

It is lawful —

...

- (4) To publish a fair comment respecting the merits of any case, civil or criminal, which has been decided by any court of justice, or respecting the conduct of any person as a judge, party, witness, counsel, solicitor, or officer of the court, in any such case, or respecting the character of any such person, so far as his character appears in that conduct;

...

356. Protection: Truth

It is lawful to publish defamatory matter if the matter is true, and if it is for the public benefit that the publication complained of should be made.

357. Qualified protection: Excuse

It is a lawful excuse for the publication of defamatory matter —

...

- (3) If the publication is made in good faith for the protection of the interests of the person making the publication, or of some other person, or for the public good;

...

- (8) If the publication is made in good faith in the course of, or for the purposes of, the discussion of some subject of public interest, the public discussion of which is for the public benefit, and if, so far as the defamatory matter consists of comment, the comment is fair.

For the purpose of this section, a publication is said to be made in good faith if the matter published is relevant to the matters the existence of which may excuse the publication in good faith of defamatory matter; if the manner and extent of the publication does not exceed what is reasonably sufficient for the occasion, and if the person by whom it is made is not actuated by ill-will to the person defamed, or by any other improper motive, and does not believe the defamatory matter to be untrue.

At first glance it may appear odd that the defences to a charge of criminal defamation on the basis of good faith publication should be so much broader than those relating to *sub judice* contempt by publication. However, it should be recalled that *sub judice* contempt applies only for a limited period while proceedings are pending and focuses on the capacity of a publication to prejudice the fairness of proceedings. In this context, considerations such as the truth of a publication or that the publication was a fair comment on the merits of a case, or the character of witnesses, judges or parties, should not be material. Such matters, however, would be highly relevant to publications outside the *sub judice* period, and the potential to adapt the existing defences from the *Criminal Code* provisions will be considered further in relation to other offences discussed in Part V.

Recommendation 13

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

- (a) the publication the subject of the charge was made in good faith in the course of continuing public discussion of a matter of public affairs (other than the trial itself), or otherwise of general public interest and importance; and
- (b) 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.

The defendant should bear the burden of proof and the standard of proof should be on the balance of probabilities.

Lack of control of the contents of the publication

The NSWLRC 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:

- (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.⁴⁹

49 NSWLRC, above n 1, [5.47] (Proposal 8).

The Sunday Times endorsed this proposal. The WA Journalists' Association also endorsed the proposal, in particular citing the potential for newsagents to be drawn into contempt issues without having any control over the content of published material. The Association further highlighted that in some instances reporters too may have little control over the content of a publication and although concerns about the potential for contempt may be raised, editors have ultimate control. The Association sought to have a (limited) defence of 'partial control' included in the proposed reform which, as formulated by the NSWLRC, refers only to 'no control over the content of the publication'. The Association sought confirmation that account should be taken of circumstances, such as whether a reporter was instructed by his or her employer to write the offending article, in determining liability and the appropriate sentence. However, after carefully considering the submission of the WA Journalists' Association, the Commission has decided not to adopt a limited defence of partial control. It is the Commission's view that such a defence could significantly reduce the efficacy of the proposed reforms and that proof of lack of control over a publication can be adequately accounted for by the courts in mitigation of penalty.

Recommendation 14

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

- (a) that it, as well as any person 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 and having taken all reasonable care, they did not know 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 being published.

The prejudgment principle

Even if *sub judice* contempt laws are primarily aimed at the protection of criminal juries from influence, one aspect of contempt law has its primary relevance in relation to civil proceedings: the rule against prejudging proceedings. 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. The potential for a very strong public interest in civil proceedings in this connection is demonstrated by the case that led to the *Sunday Times*' victory in the European Court of Human Rights and the resulting enactment of the UK contempt of court legislation.⁵⁰ Being probably the greatest *cause célèbre* of all time for

⁵⁰ The *Contempt of Court Act* was passed in 1981, following the recommendations of a committee appointed in 1971 (the 'Phillimore Committee'): see United Kingdom, Committee on Contempt of Court, above n 42. This Act should be

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.⁵¹

The NSWLRC has pointed out that the prejudgment principle contrasts with other *sub judice* contempt in that:

[t]he 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.⁵²

Rather, the prejudgment principle appears to be directed towards the avoidance of ‘trial by media’ in the sense referred to by Justice Wheeler in *Re Coroners Court of Western Australia; Ex parte Porteous*.⁵³ That is, it seems to have more in common with ‘scandalising’ contempt because it is aimed at protecting the overall authority of the court and maintaining public confidence in the judicial process.

The NSWLRC 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.⁵⁴

However, it might be questioned how many situations are likely to arise where serious and responsible discussion of *proceedings* would prejudice them. Of course an answer to this question may be found in the *Sunday Times* case referred to above. There the mere suggestion that the defendant drug company 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. 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.⁵⁵

The NSWLRC has proposed that the prejudgment principle be abolished as an independent ground of liability for contempt.⁵⁶ There are good grounds for this proposal, including the disproportionate impact on freedom of discussion

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: *Attorney General v Times Newspapers Ltd* [1974] AC 273. 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: *Sunday Times v United Kingdom* (1979) 2 EHRR 245. This resulted in substantial pressure on the British government to liberalise the law of contempt.

51 A second case involving civil proceedings, more recent and closer to home, concerns the then Chief Minister of the Northern Territory, Mr Denis Burke, who 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. Although the contempt in that case was not based on the ‘prejudgment principle’, the facts serve as another reminder that there can be significant power disparities between parties to civil litigation that might make one side vulnerable to the kind of pressure contempt law has always sought to address.

52 NSWLRC, above n 1, [6.38].

53 [2002] WASCA 144, [76]–[77].

54 NSWLRC, above n 1, [6.40].

55 Ibid [6.47].

56 Ibid [6.54] (Proposal 10).

when there is no actual or threatened damage to the proceedings in question and the vagueness and unpredictability of a concept like ‘prejudgment’.⁵⁷ The WA Journalists’ Association supported this proposal, stating that courts, like other public institutions, need to be accountable. In any event, as highlighted in submissions from *The West Australian*, it appears from *Re Coroners Court of Western Australia; Ex parte Porteous* that the prejudgment principle may not currently be applicable in this state.

Recommendation 15

Legislation should not provide for the offence of prejudgment of legal proceedings.

Procedural matters

In Western Australia, contempt of court by publication is often prosecuted by the DPP. The *Director of Public Prosecutions Act 1991* (WA) does not specifically state that the DPP has a power or function relating to contempt prosecutions, although 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’. However, the submission of the Solicitor General of Western Australia on this term of reference indicated that, contrary to the description of the power to prosecute contempt in the Discussion Paper, this is limited in that its exercise must be for ‘the purpose of performing the functions of Director’.⁵⁸ This limitation would appear to restrict the role of the DPP to prosecuting contempts arising in relation to indictable offences. On the other hand, the Act further provides that its ‘provisions...do not derogate from any function of the Attorney General’.⁵⁹ In other words, there remains a power in the Attorney General to prosecute for contempt which is not restricted to matters arising in relation to indictable offences and therefore can apply to inquests and other civil matters in addition to non-indictable offences. There is also a power at common law, which that Act does not seem to modify, for any person or the court acting on its own behalf to initiate proceedings.⁶⁰

Given the recommendation discussed below, that *sub judice* contempt by publication should be established as a crime under the *Criminal Code*, it follows that the offence, like other indictable offences, will be subject to prosecution (and appeal) by the DPP. The clarification of the roles of the DPP and the Attorney General in relation to the prosecution of contempt of court, however, is relevant in relation to other areas of contempt discussed in the remainder of this Report.

57 Ibid [6.54].

58 *Director of Public Prosecutions Act 1991* (WA) s 20(2)(a); *R v Pearce* (1992) 7 WAR 395, 409–10.

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

60 *R v Dunbabin; Ex parte Williams* (1935) 53 CLR 434.

Summary procedure

Contempt by publication is tried by the Full Court of the Supreme Court of Western Australia; the lower courts have no jurisdiction to punish ‘out of court’ contempts. Those proceedings, as elsewhere in Australia (and traditionally throughout the common law world), are summary in nature: they are not heard by a jury, but often have the distinctive features alluded to earlier, in Part I.⁶¹ On at least two occasions the Supreme Court of Western Australia has highlighted the need for reform of the summary procedures applicable in that Court, predominantly relating to the requirement for contempts other than those in the face of the court, such as those by publication, to be determined, summarily, by the Full Court.⁶²

Possibly the greatest criticism of contempt law is that it exposes defendants to unlimited penalties but without the safeguard of a jury. Is there any reason why contempt should be tried by a different procedure from other serious offences?

The argument generally advanced in support of summary trial for contempt is the need for a speedy trial in a contempt by publication case. This was the tentative view of the NSWLRC⁶³ and was endorsed by *The West Australian*. However, while there may be the need for a speedy *response* to a contempt, a speedy *trial* is a different thing altogether. Provided the relevant authorities act quickly to institute proceedings for contempt so that further similar publication is avoided, there are no convincing reasons why a trial for contempt by publication should be dealt with differently from other serious offences.

Sub judice contempt by publication should be an indictable offence under the *Criminal Code*. This accords with the Commission’s stated policy in its *Review of the Civil and Criminal Justice System in Western Australia* that all indictable offences ought to be included within the Code.⁶⁴ The WA Journalists’ Association endorsed the proposal to remove the summary jurisdiction in relation to contempt by publication. The Acting DPP highlighted the appropriateness of such matters being open to trial by jury, particularly because the question at issue will frequently involve consideration whether there is a substantial risk that a publication would become known to jurors and would thereby prejudice the fairness of a trial.

Recommendation 16

Sub judice contempt by publication should be established as an offence within the *Criminal Code*, with all the procedural consequences that entails. In particular, defendants should have the option to be tried by a jury.

61 The NSWLRC discusses at length the historical antecedents of this practice: NSWLRC, above n 1, [12.54]–[12.63].

62 See *R v Lovelady; Ex parte Attorney General* [1982] WAR 65, 66–67 (Burt CJ); *R v Minshull; Ex parte Director of Public Prosecutions for Western Australia* (Unreported, Supreme Court of Western Australia, Full Court, 21 May 1997, Library No 970255) 16–18 (Malcolm CJ) and 2 (Franklyn J).

63 NSWLRC, above n 1, [12.79].

64 Law Reform Commission of Western Australia, *Review of the Criminal and Civil Justice System in Western Australia*, Project No 92 (1999).

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 injunctive relief 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 reason why injunctions are rarely ordered in cases of contempt: the reasonably precise terms in which an injunction must be framed might lead to the erroneous conclusion that slightly different behaviour from that described in the injunction would be acceptable.⁶⁵ More generally, injunctions are available only in cases where other remedies prove inadequate⁶⁶ and there is nothing to suggest that remedies for contempt often prove inadequate. This might change if maximum penalties were introduced, as discussed below, but hopefully only in isolated cases. Although the Commission had proposed to recommend that the availability of this power be confirmed in legislation, on reflection the Commission does not believe that a recommendation is required in relation to this issue.

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.⁶⁷

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;
 - (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.⁶⁸

65 NSWLRC, above n 1, [13.58] quoting *P v Liverpool Daily Post and Echo Newspaper Plc* [1991] AC 370, 381–82 (Lord Donaldson MR).

66 Ibid.

67 See also *Criminal Code* (WA) s 635A(1). But contrast *Justices Act 1902* (WA) s 66 ('Preliminary hearings not open court').

68 See also *Justices Act 1902* (WA) s 101D (relating to preliminary hearings); *Criminal Code* (WA) s 635A(2).

This section focuses on one particular activity which may represent an exception to the principle of open justice: that of ordering the suppression of certain information outside the confines of the court. 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.⁶⁹ Therefore there can be no objection to the existence of a power as such; rather, the issue is how it is exercised.

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 of Western Australia Act 1969* (WA) 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.

Many submissions made a compelling case for reform of this aspect of the law. Interestingly, supporters of reform included both media organisations and those responsible for administering the law.

Recommendation 17

Legislation should provide for:

- (a) a standard formal procedure and set criteria for the granting of suppression orders across all state jurisdictions where media organisations have standing to make submissions, applications for a variation should circumstances alter, and have a right to appeal against the granting of an order;
- (b) the criteria for the grant of a suppression order, expressly excluding mere embarrassment or invasion of privacy of an interested party, but requiring that these factors be considered against the genuine public interest in the subject matter; and
- (c) the terms of the suppression order to be clear in relation to both content and duration.

The Department of Justice should investigate means of ensuring that suppression orders are published so that interested parties can make themselves aware of the existence and content of the order in those instances where the terms of the suppression order are not themselves subject to suppression.

⁶⁹ The NSWLRC provides a comprehensive list of situations where ‘qualifications to the principle of open justice’ may be justified: NSWLRC, above n 1, [10.7].

Legislative 'suppression orders'

There already exist statutory requirements which impose additional obligations upon publishers in relation to particularly sensitive issues, such as those relating to publication concerning sexual assaults or children. Although the general tenor of the recommended reforms to the law of contempt has been towards liberalisation, the Commission concurs with the submission of the Solicitor General of Western Australia, highlighting the need for the clarification or expansion of these requirements to ensure special interests are adequately protected.

There is an ambiguity in s 36C of the *Evidence Act 1906* (WA) relating to whether the statement that 'proof of [authorisation to publish material identifying a complainant in a sexual assault case] lies on the publisher or broadcaster' means that person or body is required to prove relevant matters to the satisfaction of a court before publication or only in the event that the publication is challenged. The Commission is of the view that the integrity of the procedure and the need to protect complainants' privacy in these cases are such that the additional burden of gaining court permission prior to publication is justified. It is expected that these cases will be rare, and will almost never involve any degree of urgency. It therefore recommends that those wishing to publish identifying material be required to gain the permission of the court in question.

Recommendation 18

Section 36C of the *Evidence Act 1906* (WA) should be amended to provide clearly that a publisher or broadcaster wishing to publish material that would identify the complainant in a sexual assault case must not only obtain the permission of the person concerned, as provided by s 36C(6), but must apply to the court for permission to publish in advance of the publication.

The Solicitor General of Western Australia also raised an issue concerning the *Children's Court of Western Australia Act 1988* (WA) which was illustrated by the broadcast of video footage, clearly identifying a child spraying graffiti on a railway carriage, in circumstances where the child's activities were the subject of proceedings in the Children's Court. However, because the broadcast itself made no reference to those proceedings, it was permissible.

The Commission agrees with the Solicitor General that this is an unsatisfactory state of affairs, and publishers should not be permitted to contravene the spirit of the legislation simply by refraining from referring to the proceedings. It therefore recommends that the prohibition should potentially apply to any publications, not only those which specifically refer to court proceedings. Moreover, publishers should be required to refrain from publishing identifying material where proceedings appear likely, as was clearly the case on the facts mentioned in the submission.

Recommendation 19

Section 35 of the *Children’s Court of Western Australia Act 1988* (WA) should be amended to provide clearly that it is an offence to publish material identifying children who appear to be engaged in the commission of activity which could lead them to be the subject of proceedings in the Children’s Court, irrespective of whether such proceedings have been commenced or whether the publication refers to any such proceedings.

Penalties

A fundamental criticism of contempt law, referred to previously, is that, being a common law offence, it carries unlimited penalties. Because the typical contempt by publication defendant is a corporation, the usual penalty is a fine. Even in the case of an individual defendant, at least in Western Australia, the Supreme Court has not shown itself to be particularly interested in prison as a sentencing option. However, there is no reason to think that imprisonment would not be ordered in an appropriate case.⁷⁰

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?

Maximum penalties

The Acting DPP submitted that in accordance with all offences under the *Criminal Code*, it was desirable that upper limits be specified for penalties for the offence of contempt by publication. *The West Australian* also supported the setting of upper limits. 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.

Setting the limit

Although the overall thrust of the Commission’s recommended reforms in this area is one of liberalisation, some of the proposals which were provided for comment do not go as far as prospective defendants might like. This applies particularly to the proposals in relation to setting the limit on maximum penalties. While the Commission readily accepts the proposition that maxima need to be set, it takes the view that other recommendations will lead to a situation where only quite egregious

70 See *Hinch v Attorney General (Victoria)* (1987) 164 CLR 15.

instances of misconduct will lead to convictions. Therefore, fairly stiff penalties need to be available.

Imprisonment

The availability of imprisonment exacerbates the problems that arise from the current 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. *The West Australian* and the WA Journalists' Association strongly opposed the retention of an imprisonment penalty, but both the ALRC and the NSWLRC believed that an imprisonment option should be retained with a maximum term specified and reserved for the most serious cases.⁷¹ Clearly it would be easier to justify the retention of imprisonment if an ignorance defence were introduced; that is, there should be some way of excusing those whose contempt could not reasonably be avoided, as has been proposed in Recommendation 11. In his submission, Michael Gillooly noted that maximum penalties in the *Criminal Code* for comparable offences relating to the administration of justice ranged from two to seven years imprisonment and that the UK legislation also had adopted a maximum of two years for the equivalent offence.

Recommendation 20

Imprisonment should continue to be available as a penalty on conviction for contempt by publication. The maximum term should be two years.

Individuals and corporations

In its Discussion Paper, the NSWLRC 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 pocket of the defendant, but as the NSWLRC points out, some media personalities have massive personal wealth.⁷² 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 s 40(5) of the *Sentencing Act 1995 (WA)* provides that a court can impose a penalty of up to five times the maximum pecuniary penalty on a corporate defendant.⁷³ 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.

71 ALRC, above n 34, [481]–[482]; NSWLRC, above n 1, 425–26.

72 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).

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

Recommendation 21

Similar to other criminal offences, s 40(5) of the *Sentencing Act 1995* (WA) should be applicable to offences of contempt by publication so that maximum penalties for contempt by publication formally distinguish between individuals and corporations.

Maximum fine

There are no fines set in the *Criminal Code* for comparable offences relating to the administration of justice. Under s 41(5) of the *Sentencing Act 1995* (WA) if a superior court were to sentence for any of these offences, it would be entitled to impose a fine of any amount. If sentenced by the Court of Petty Sessions the maximum fine is to be calculated on the basis of \$1,000 per month of imprisonment. The DPP indicated in a submission to this Commission relating to Part III, that where a fine is specified the general scheme under the *Criminal Code* is that one year's imprisonment is equated to \$4,000. There are some significant exceptions to this general scheme, one being the unauthorised broadcast of an accused's interview with police, being subject to a penalty of imprisonment for 12 months or to a fine of \$100,000 or both. In his submission, Michael Gillooly pointed out that fines of up to \$10 million are available under Part IV of the *Trade Practices Act 1974* (Cth), and argued that maxima need to be set with an eye to the worst case imaginable, rather than the worst case that has occurred to date. In light of Recommendation 21, and the capacity for the maximum to be increased by a factor of five in the instance of a corporate defendant and the following recommendation of a capacity to recover the costs for an aborted trial resulting from a publication, it is the Commission's view that a \$100,000 maximum is sufficient.

Recommendation 22

The maximum monetary penalty on conviction for contempt by publication should be \$100,000.

Alternative sentences

As recommended in Part I, there seems to be no reason in principle why alternative sentencing options should not be available in contempt by publication offences as for any other criminal 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 NSWLRC proposed that the full range of sentencing options be made available for such offences.⁷⁴

Penalties and costs

The issue of how to coordinate 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 when sentencing.

74 NSWLRC, above n 1, [13.48] (Proposal 28).

Costs for aborted trials

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.⁷⁵ The NSWLRC has estimated that the cost to the state of one day in the Supreme Court in a criminal jury trial is approximately \$6,000;⁷⁶ in the District Court it is around \$4,500⁷⁷ and in Local Courts it is closer to \$3,000.⁷⁸ These figures exclude the cost of Legal Aid, prosecutors, corrective services, the police service and so on. 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. However, the Commission notes that *The West Australian* was of the view that such a provision would be 'completely out of proportion with the very low incidence of breaches in this state'.

The New South Wales Parliament recently introduced the Costs in Criminal Cases Amendment Bill 1997. 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 Bill encountered stiff opposition from the media and lapsed in 1999.

However, the NSWLRC's Discussion Paper shows that the issue is still alive in that state. After some considerable deliberation on the matter, the NSWLRC proposed the passage of substantially similar legislation, with some variations.⁷⁹ The differences between the Costs in Criminal Cases Amendment Bill 1997 and the NSWLRC'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'.

75 See generally Michael Chesterman, 'Media Prejudice During a Criminal Jury Trial: Stop the Trial, Fine the Media, or Why Not Both?' (1999) 1 *University of Technology Sydney Law Review* 71.

76 NSWLRC, above n 1, Appendix B.

77 Ibid.

78 Ibid.

79 Ibid [14.88] (Proposals 31 & 32).

(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.

(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.⁸⁰

In determining whether similar reforms should be recommended for Western Australia, consideration has been given to changes recommended 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 was tightened up, for example, or a mental element relating to prejudice was 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. These costs include the legal costs and disbursements of the parties and the provision of legal services to the accused which include disbursements directly related to the aborted trial.

A further improvement might be to give the Supreme Court power to make an order for costs *at the same time as sentencing* the offender. That way it would be possible to ensure that too great a burden is not placed on the offender when both the penalty and the costs are taken into consideration.

In this regard, the existence in this state of the *Suitors' Fund Act 1964* (WA) needs to be noted. This Act provides for the establishment of a fund from which the costs of successful appeals may be partially met,⁸¹ 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.⁸² 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, any 'double dipping' arguments could be avoided, while building on the current arrangements for mitigating the harsh consequences that prejudicial publicity causes for some accused persons. Whether the fund should also be made available to prosecuting authorities could be considered as a separate issue.

This Commission, in its *Review of the Criminal and Civil Justice System* (Recommendation 344), expressed concern that the recovery of costs from the Suitors' Fund in many instances was too limited, being capped at only \$2,000. However, as also noted there, s 14 of the Act, relating to 'abortive proceedings and new trials', which would cover instances where the jury

80 Ibid [14.88] (Proposal 32).

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

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

becomes aware of prejudicial material, allowed recovery of unlimited costs associated with the original trial.⁸³

Recommendation 23

Legislation should provide for the sentencing court in a case of contempt by publication, where a trial has been aborted as the result of the contempt, to take into account the costs incurred as a result of the abortion of the trial and make an order for the payment of costs incurred as a result thereof, as part of the sentencing process, subject to any Suitor's Fund compensation.

Matters in mitigation

The NSWLRC has summarised particular matters which it proposes should be taken into account in fixing a fine for contempt by publication.⁸⁴ However, it is perhaps unwise to be overly prescriptive about these matters. Sentencing needs to be a flexible process where each defendant is at liberty to introduce matters that he or she thinks should be taken into account in considering the seriousness of the individual offence. The Commission notes that if Recommendation 2 is implemented this will import into the law of contempt the provisions of ss 6–8 of the *Sentencing Act 1995 (WA)* which legislate the broad principles relating to sentencing for any offence. Greater prescription is not warranted in the Commission's view.

Recommendation 24

On the implementation of Recommendation 2, the principles of sentencing found in the *Sentencing Act 1995 (WA)* will be applicable to those convicted of contempt by publication. Additional specific factors relevant to mitigation of sentence for offences of contempt by publication should not be prescribed.

Appeals

Currently, appeals relating to contempt by publication are available only against sentence and not against conviction. Because contempt by publication currently can be tried only before the Full Court of the Supreme Court, the only court available to hear an appeal is the same one (though potentially differently constituted) that heard the trial. It is unsatisfactory to have an appeal heard by an equal-sized group of judges at the same level of the judicial hierarchy, and this might mean that, realistically, the only appeal available is to the High Court. Justice Kirby expressed the view that a similar situation in New South Wales might have been in breach of international human rights standards.⁸⁵

83 Law Reform Commission of Western Australia, *Review of the Criminal and Civil Justice System in Western Australia*, Project No 92 (1999) 270.

84 NSWLRC, above n 1, [13.6].

Should Recommendation 16 be adopted, and contempt by publication be established as an offence within the *Criminal Code*, with all the procedural consequences that entails, those convicted and sentenced for contempt by publication would have the same rights of appeal as other offenders in the criminal justice system. Because the initial hearing would be conducted before a magistrate or judge and jury the issue of the adequacy of the appeal structure, as identified in Justice Kirby's comments, also would be addressed.

**The NSWLRC's DP
43 and other
issues concerning
contempt by
publication**

As indicated, in seeking to address the term of reference on contempt by publication this Commission has been guided, in particular, by the NSWLRC's Discussion Paper No 43. The main functions of this Report insofar as it relates to contempt by publication have been to address relevant differences between Western Australian and New South Wales law and procedure and, in some places, to raise issues or perspectives that are not covered by the NSWLRC's paper. Subject to comments in this Report and relevant differences in the law and procedure of this state, the NSWLRC's proposals are regarded by the Commission as a useful guide to any consequential or subsidiary issues which may arise in relation to enacting legislative reform of legislative of contempt by publication in Western Australia.

PART III

Contempt in the Face of the Court

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Overview

The second term of reference in Project No 93 is:

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

The aim of the proposals advanced by the Commission in its Discussion Paper on this term of reference was to codify and bring uniformity to the laws on contempt in the face of the court. In formulating its proposals the Commission was mindful of the significance of contempt laws in maintaining judicial control over court proceedings. Submissions in relation to this term of reference, as might be expected, were overwhelmingly from judicial officers. Save in relation to reform of the summary jurisdiction to punish contempts there was broad support for the Commission's proposals for reform.

Similar to other contempt offences, liability for contempt in the face of the court is currently based on the general concept of interference with the due administration of justice. Such a broad and potentially discretionary test can no longer be justified in light of contemporary demands to make the application of the law more certain and consistent. The Commission recommends that the existing general test be replaced by a series of specific statutory offences. While submissions on this term generally supported the move to statutory offences, concerns were raised that the proposed statutory offences were too narrow and did not address those interferences in the due administration of justice which did not strictly constitute contempt in the face of the court or by *sub judice* publication. If adopted, the recommendations in this Part would result in some broadening of the current criteria for determining 'contempt in the face of the court'.¹

Generally the mode of trial for contempt in the face of the court has been 'summary'. This means that the presiding judicial officer may initiate the prosecution, determine guilt and decide the appropriate punishment. Responses to the Discussion Paper revealed that judges and judicial officers at all levels regarded the powers to punish for contempts in the face of the court as crucial to their capacity to control proceedings in their own courts. At the same time, magistrates questioned the need to reform this area of law given the infrequency of its exercise. The Commission acknowledges that particular considerations arise in relation to contempt in the face of the court which justify a continued role for an appropriate summary procedure. Nevertheless the Commission recommends that, save in exceptional circumstances, far greater procedural safeguards should accompany charges for contempt in the face of the court.

Because contempt in the face of the court was traditionally a common law offence, sentencing powers were unlimited as to the term of imprisonment or size of fine. That position persists in a number of courts in Western Australia

¹ See 'Literally in the face of the court?' below, p 68; and Part V below, which deals with other interferences with the administration of justice.

today. The Commission recommends that the sentencing powers of courts in relation to contempt in the face of the court be better defined and, as addressed in Part I, become more consistent with the sentencing regime that applies to other criminal offences in this state. This reform was broadly supported in submissions. However, concerns were expressed by some that the application of statutory minimum prison terms would adversely affect the capacity of the court to sentence appropriately for contempts and, in particular, contempts which may be purged.

Finally, rights of appeal in relation to contempts in the face of the court have developed in a piecemeal and unsatisfactory way. In some instances there are no rights of appeal at all. It is recommended that comprehensive rights of appeal be enacted for persons convicted of, or sentenced for, contempt in the face of the court, and again the recommendations to rationalise and extend appeal rights generally were supported in submissions received.

What is contempt in the face of the court?

Contempt in the face of the court is a criminal offence, regardless of whether the contempt is committed in the course of civil or criminal proceedings. As a criminal offence, contempt in the face of the court exhibits some unusual characteristics. As indicated in Part I, it is significant that, with the single exception of contempt of court, the criminal law of Western Australia is entirely a creature of statute.² In Western Australia questions of intention in the criminal context, other than contempt have, since the enactment of the *Criminal Code* in 1913, been a matter of statutory interpretation. As a general rule, unless specifically identified in the statutory provision creating the offence, proof of a particular mental element or *mens rea* is not required. Where an accused person's state of mind forms the basis of a defence, such as accident or mistake, the issue is explicitly dealt with in Chapter V of the *Criminal Code*. The provisions of Chapter V apply to all statutory offences in the state.³

Many contempt offences are now incorporated in statutory form in the *Criminal Code*, or in the statutory provisions under which contempt is prosecuted in the lower courts. Nevertheless, the common law continues to play an important role in determining the limits of what constitutes contempt in the face of the court, and warrants examination.

In *Izuora v The Queen*⁴ the Privy Council observed that it 'is not possible to particularise the acts which can or cannot constitute contempt in the face of the court'.⁵ The essence of the test for whether conduct constitutes contempt in the face of the court at common law is broad: 'conduct, active or

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

3 *Criminal Code* (WA) s 36.

4 [1953] AC 327.

5 *Ibid* 336 (Lord Tucker).

inactive, amounting to an interference with or obstruction to, or tendency to interfere with or obstruct, the due administration of justice'.⁶

A wide and open-ended test, of course, has the apparent benefit of flexibility; it is able to meet unforeseen (or unforeseeable) circumstances and may be adjusted to suit contemporary values and attitudes to the judicial process. Nevertheless, codification of other areas of the law (including the general criminal law in Western Australia) has been achieved without adverse effect. There is no reason why the law of contempt should be more difficult to particularise and codify than any other offence. Indeed, codification of powers to deal with contempts committed in the face of the court has already been achieved in the lower courts in Western Australia without any apparent problems.

Codification would bring greater certainty to the identification of the basis for liability and clearer guidance to participants in judicial proceedings. It would not necessarily give rise to an unacceptable rigidity in the application of the law; offences prohibiting a person from 'interrupting' proceedings,⁷ for example, allow a measure of flexibility of application to particular circumstances. Submissions generally supported uniformity of offences across all levels of courts.

Recommendation 25

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

A submission from the President of the Equal Opportunity Tribunal raised the issue of the extension of the laws concerning 'contempt in the face of the court' to tribunals. As indicated in Part I, many of the offences related to the administration of justice in the *Criminal Code* already apply to 'judicial proceedings' which are defined as including tribunals 'in which evidence may be taken on oath'.⁸ Various offences similar to contempt also are included in specific tribunal legislation, although these often must be tried before a criminal court.⁹ While the issue of the law of contempt of tribunals arguably falls outside the terms of this reference, the Commission sees in principle no reason why the offences recommended in this Part should not be available at least to those state tribunals exercising functions of a judicial nature.¹⁰ However, the Commission does not support the extension to tribunals of judicial powers to punish or remand into custody for contempt and recommends that contempt of tribunal offences are prosecuted in the courts in the ordinary way. The Commission notes that the Government's new State

6 *Ex parte Bellanto; Re Prior* [1963] SR (NSW) 190, 202 (Herron ACJ, Sugerman and Ferguson JJ).

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

8 *Criminal Code* (WA) s 120.

9 See for example the *Equal Opportunity Act 1984* (WA).

10 Contrast the position at federal level, with the restriction on the exercise of the judicial functions of the Commonwealth under the *Constitution*: Australian Law Reform Commission ('ALRC'), *Contempt*, Report No 35 (1987) [58]. See also the discussion in D Eady and ATH Smith, *Arlidge, Eady & Smith on Contempt*, (2nd ed., 1999) [13-69]–[13-75].

Administrative Tribunal Bill 2003 (WA) also takes this approach and that whilst some summary offences akin to contempt are created under the Bill they are punishable by referral to an appropriate court.¹¹

What intent is required?

Replacing the common law with statutory offences provides an opportunity to clarify the question of what intent needs to be proven before the alleged offender can be found guilty. At present the answer will depend upon whether the liability for contempt arises pursuant to a statutory provision or to the common law.¹² While statutory provisions generally include a clear indication of the mental element, if any, which is required to be proven, the question of liability for contempt in the face of the court at common law is less clear. *Mens rea*, of course, generally applies to common law offences, but there is also authority,¹³ for the proposition that where conduct occurs in the face of the court that is deliberate (in the sense that it is not inadvertent) and objectively tends to lessen the authority of the court, it will constitute a contempt, notwithstanding that there is no intention to obstruct or interfere with the administration of justice.

It is recommended that the proposed contempt offences do not generally include any specific mental element. This differs from the recommendation of the ALRC.¹⁴ However, *mens rea* is generally not applicable to the criminal law in Western Australia, unlike non-Code states such as New South Wales. Indeed, Sir Samuel Griffith, upon whose work the *Criminal Code* is substantially based, expressly stated that the aim of the *Code* is that 'it is never necessary to have recourse to the old doctrine of *mens rea*'.¹⁵ Recourse to both the specific statutory provisions and Chapter V defences has been a scheme that has served the administration of justice in Western Australia well in the resolution of questions of intention in relation to offences other than common law contempt. The Commission acknowledges that this recommendation has not been followed in relation to its recommendations on contempt by publication; however, there are overriding considerations in that context which were addressed in Part II.

Recommendation 26

Generally the state of mind of the alleged offender should not be an element of contempt in the face of the court offences.

11 State Administrative Tribunal Bill 2003 (WA) Division 7. The Bill includes a clause giving the Supreme Court jurisdiction to deal, upon referral by the President, with contempt of the Tribunal as if it were contempt of the Supreme Court.

12 See, for example, *Lewis v Ogden* (1984) 153 CLR 682, 688 (Mason, Murphy, Wilson, Brennan & Dawson JJ); *Gliosca v Ninyett* (1992) 10 WAR 562, 566–67 (Murray J).

13 *Ex parte Tuckerman; Re Nash* [1970] 3 NSW 23. In *Nash* the applicants raised their arms in a clenched fist salute to a sitting magistrate. The action formed part of the applicants' ongoing political protests against the Vietnam War. In concluding the gestures constituted contempt in the face of the court, the New South Wales Court of Appeal observed:

[W]hatever in fact the gestures of the applicants were intended by them to represent, in our opinion, acts, words or other forms of behaviour which give rise to the appearance of defying the authority of a Court of law or which by intimidation, ridicule or otherwise tend to lessen the authority of the courts to administer the law and seek to apply even-handed justice between parties in a calm and orderly manner may be regarded as contempt of Court (at 28).

14 ALRC, above n 10, [116].

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

Should insult be contempt?

The first of the contempt offences recommended below, insulting the court, is defined in terms of whether the alleged offender has wilfully insulted the judge or an officer of the court in the course of their duties. The offence of contempt by insulting the court was not recommended in the ALRC's *Contempt* report, which proposed that the second recommended offence below, the interruption or disruption of the court, was sufficient.¹⁶ While not all insulting behaviour should be the subject of criminal prosecution, and often may be ignored by the court, there is no reason why it should not give rise to the potential for conviction. In a context where recent legislation has prohibited insulting behaviour towards public officers such as fisheries officers¹⁷ it is difficult to see why courts should not be afforded similar protection where the circumstances warrant it.

It is of note that this offence, unlike other recommended offences concerning contempt in the face of the court, contains a specific mental element, as reflected in the use of the expression 'wilfully'.¹⁸ A person would, therefore, only be guilty of this contempt offence where he or she has insulted an officer of the court with the intention of doing so. Contempt in the face of the court in this aspect is not reliant upon an objective test as it was elaborated in *Ex parte Tuckerman; Re Nash*¹⁹ and is, in that respect, narrower than the common law offence.

Submissions suggested that the offences proposed were not adequate to cover the range of conduct which may constitute contempt in the face of the court. It is accepted that not all conduct which judicial officers may find inappropriate or disrespectful will necessarily constitute the statutory contempt offences defined below. However, in the Commission's view conduct such as that referred to in *Ex parte Tuckerman; Re Nash* may adequately be addressed through alternative measures available to judicial officers, such as the power to expel and to issue warnings and reprimands. In other instances the conduct may attract criminal or civil liability should the judicial officer be threatened or suffer a personal injury or other damage, and without resort needing to be had to an offence relating to contempt of court.²⁰

Recommendation 27

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

- (a) A person shall not wilfully insult the presiding judicial officer or officer of a court acting in the course of his or her official duties.
- (b) A person shall not interrupt or disrupt proceedings of a court without reasonable excuse.

¹⁶ ALRC, above n 10, [114]–[115].

¹⁷ See *Fish Resources Management Act 1994* (WA) s 200(b).

¹⁸ The courts in Australia have consistently interpreted 'wilfully' to require an intention to deliberately interfere with, or obstruct, the judicial proceeding. See, for example, *Lewis v Ogden* (1984) 153 CLR 682, 688 (Mason, Murphy, Wilson, Brennan & Dawson JJ).

¹⁹ [1970] 3 NSWLR 23; see discussion above n 13.

²⁰ See ALRC, above n 10, [137]–[141]. For example, the alleged implied threat the subject of consideration in *Bennison* (1995) 78 A Crim R 406 may have possibly been appropriately prosecuted as an offence under the *Criminal Code* given that it did not constitute either an insult or interruption within the terms of the *Justices Act 1902* (WA).

Contempt and the privatisation of court functions

It is of note that under the *Criminal Code* it is a misdemeanour for a public officer employed 'as an officer of any court or tribunal, perversely and without lawful excuse' to omit or refuse to do any act which it is his duty to do by virtue of his or her employment.²¹ As raised in the submission of a stipendiary magistrate, there is a need for consideration to be given to the impact of private contracting of some court functions.

Recommendation 28

The provision in the *Criminal Code*, concerning the obligation of those employed in the courts to do their duty, should be amended so that it clearly is applicable to court officials who are employed on the basis of a private contract.

Contempt and recordings

Concerns were expressed in submissions that recordings, particularly in relation to sexual offences, may be used inappropriately and that closer regulation was warranted. Whilst acknowledging this, the Commission's view is that the proposed requirement that 'the recording is made for the purpose of a fair report of the proceedings' gives sufficient power to courts to ensure the *bona fides* of anyone making sound recordings in court. The Commission further agrees with the ALRC that statutory limitation on the uses to which a recording may be put is preferable to the creation of a 'privileged class' of those, such as journalists and authors, who may record proceedings without likelihood of challenge.²²

By contrast, it remains a significant area of controversy whether the use of photographic and video recording equipment has a beneficial or a detrimental effect on judicial proceedings. Accordingly, the use of photography and videotape would continue to remain within the discretion of the court. In formulating the recommended contempt offences in relation to sound and videotape recordings outlined below, the Commission has had regard to recommendations of the ALRC and NSWLRC.

Recommendation 29

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

- (a) Except where the recording is made for the purpose of a fair report of the proceedings and the court has not made an order to the contrary, a person shall not make a sound recording of proceedings in a court without the leave of the court.
- (b) Where a sound recording is made for the purposes of a fair report of proceedings in a court, a person shall not publish or broadcast the recording without the leave of the court.
- (c) A person shall not, without the leave of the court, make, publish or broadcast a photograph or videotape recording of proceedings in a court.

²¹ *Criminal Code* (WA) s 173.

²² ALRC, above n 10, [125].

Contempt and refusing to be sworn or to answer questions

The contempt offence of witnesses refusing to be sworn or affirmed and of refusing to answer questions on matters not subject to privilege and including a refusal to identify oneself, go to the fundamental capacity of the court to function. As such the Commission recommends that the contempt offences of refusing to be sworn or affirmed and of refusing to answer questions be retained.

Recommendation 30

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

- (a) A person appearing as a witness before a court shall not refuse to be sworn or make an affirmation when so ordered by the court.
- (b) A person appearing as a witness before a court shall not, subject to the laws relating to privilege, refuse to answer a question or to identify him or herself when so ordered by the court.

Although no submissions were received on this particular proposal, the Commission is conscious, as a result of previous references, that the offence of refusing to answer questions when required by the court is complicated in that it raises the controversial issue of the protection of confidential sources, particularly for journalists. The issue has received attention from this Commission in the past in Project No 53, *Privilege for Journalists*, the Final Report of which was published in 1980.²³ At that time the Commission did not support an absolute privilege but regarded a qualified statutory privilege as desirable, although it decided to await further judicial development in the area. In Project No 90, *Professional Privilege for Confidential Communications*, the Commission had the opportunity to consider this issue again, and recommended that the identity of journalists' sources could be withheld if the court allowed it after considering the public interest in maintaining confidentiality of sources.²⁴ In its *30th Anniversary Reform Implementation Report*, released in 2002, the Commission identified the implementation of the recommendations arising from Project No 53 and Project No 90 as being of medium and of high priority respectively.²⁵

The issue of the confidentiality of sources received attention, in the context of contempt of a Royal Commission, by the Supreme Court of Western Australia in 1997.²⁶ Since that time, no action has been taken to implement the Commission's recommendations in relation to this matter, and the current law is clear. In such a case there is no right to refuse to answer questions in relation to the source, regardless of any journalistic code of

23 Law Reform Commission of Western Australia, *Privilege for Journalists*, Project No 53 (1980).

24 Law Reform Commission of Western Australia, *Professional Privilege for Confidential Communications*, Project No 90 (1993).

25 Law Reform Commission of Western Australia, *30th Anniversary Reform Implementation Report* (2002).

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

ethics, and repeated refusal will amount to a contempt in the face of the court.²⁷

However, as reflected by the constitutional implication discussed in Part I, freedom of communication is regarded as an essential feature of representative democracy. For all the practical difficulties associated with concentrated and commercially oriented media ownership, discussed in Part II, freedom of the press is seen an integral part of that freedom of communication. In that context the European Court of Human Rights has observed:

Protection of journalistic sources is one of the basic conditions of press freedom... Without such protection sources may be deterred from assisting the press in informing the public on matters of public interest. As a result the vital public watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected. Having regard to the importance of the protection of journalistic sources for press freedom in a democratic society and the potentially chilling effect an order of source disclosure has on the exercise of that freedom, such a measure [must be] justified by an overriding requirement in the public interest.²⁸

In the United Kingdom the law relating to contempt by witnesses has been reformed by the insertion of a provision which in effect creates a new form of privilege available to journalists and publishers, but subject to the overriding dictates of the public interest. The reforms sought to strike a balance between the freedom of the press to disseminate information (especially at the behest of anonymous whistleblowers) and considerations which have traditionally led to the rule denying any confidentiality to such sources.²⁹ The United Kingdom provision among other things appropriately confines the protection to publications that engage the public interest referred to, namely, those of the public media.³⁰ The Commission recommends the adoption of a similar provision in Western Australia.

In introducing such a provision to the Western Australian context, it is important to note that traditionally the liability of a witness, and in particular a journalist, to be committed for contempt for refusing to answer questions has been subject to a requirement that the question asked of the witness was relevant and necessary to the proceedings in question.³¹ That requirement was to be determined at the end of the case and in light of all other relevant evidence.³² However, in light of the recommendation in favour of protecting journalistic sources, the Commission believes that there should be no

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

28 *Goodwin v UK* (1996) 22 EHRR 123, [39], cited in CJ Miller, *Contempt of Court* (3rd ed., 2000) [4.55].

29 *Contempt of Court Act 1981* (UK) s 10.

30 *Contempt of Court Act 1981* (UK) s 2(1) defines “publication” to include any speech, writing, [programme included in a service] or communication in whatever form, which is addressed to the public at large or any section of the public. For the purposes of s 10 dealing with refusal to disclose sources of information, “publication” has been held to include any publication preparatory to a publication as defined in s 2(1). See: *X Ltd v Morgan Grampian Ltd* [1990] 1 All ER 616; [1990] 2 All ER 1 (on appeal).

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

32 *Ibid.*

additional element of relevance or necessity before a refusal to answer a question which a witness is directed to answer constitutes a contempt offence. It is inconsistent with the maintenance of the authority of the court—and, therefore, the interests of justice—that a witness, when charged with contempt, should be in a position to ‘second guess’ the ruling of the trial judge as to whether a question is relevant and admissible.

Recommendation 31

Legislation should provide that:

- (a) refusal to reveal the sources of information upon which a publication is based shall not constitute the contempt offence of refusing to answer questions, unless disclosure is necessary in the interests of justice or national security or for the prevention of crime.
- (b) The question whether disclosure is necessary in the interests of justice or national security or for the prevention of crime, is to be determined in each case by the presiding judge.

For the purposes of this recommendation “publication” includes any speech, writing or other communication in whatever form, including a form preparatory to such publication, which is addressed to the public at large or any section of the public.

In examining the above recommendation on this issue, the Commission suggests that the Government also give consideration to implementing the broader recommendations made in the Commission’s report on *Professional Privilege for Confidential Communications*, referred to earlier.

A Contempt of Court Act?

If the common law offence of contempt in the face of the court is now to be incorporated into legislation, the issue arises of how this should be done. It is recognised that recommended contempt offences could be conveniently incorporated in Chapter XVI of the *Criminal Code* which contains offences relating to the administration of justice. It is also noted that the general approach of the Commission in its recent *Review of the Criminal and Civil Justice System*, was to recommend the rationalisation of criminal offences into two Acts.³³

In the Discussion Paper on this subject the Commission proposed that the unique features of contempt offences seemed to justify a separate contempt of court Act. However, after further consideration it appears that the incorporation of the contempt in the face of the court offences within the *Criminal Code* may be more consistent with the Commission’s recommended reform of this area; that is, to assimilate it more closely with general criminal law. Although, as discussed below, it is recommended that

33 Law Reform Commission of Western Australia, *Review of the Criminal and Civil Justice System in Western Australia*, Project No 92 (1999) Recommendations 14 and 15.

unique features of the prosecution of the statutory contempt offences continue, it is considered that these features too may be incorporated in the *Criminal Code*. The inclusion of these offences within the *Criminal Code* would address a concern, raised by magistrates, about the difficulty for regional justices of having access to and awareness of a multiplicity of legislation, and could be implemented pending the adoption of Recommendation 16 of the Commission's *Review of the Criminal and Civil Justice System*—that aspects concerning criminal procedure be removed from the *Code*.

Magistrates also emphasised the need for care to be taken in the 'codification' of contempt in the face of the court offences, indicating, for example, that s 41 of the *Justices Act 1902 (WA)* provides the Courts of Petty Sessions with the power to order the removal of a person from the court. (Similarly s 156 of the *Local Court Act 1904 (WA)* currently provides for a person to be held in custody until the rising of the court for interference or other misbehaviour in court.) As indicated in Part I, it is important that lesser powers than the power to punish, such as the power to expel, are not lost to courts as a result of the codification of contempt offences and procedure. The provisions of s 635A(2)(a) of the *Criminal Code* would appear to confirm the availability of such a power in any trial or criminal proceeding. However, like the ALRC,³⁴ the Commission recommends that the common law right of a judicial officer to expel persons from the courtroom in any proceeding should be explicitly confirmed.

Recommendation 32

- (a) All recommended contempt offences and specific contempt defences in this Report should be included in Chapter XVI of the *Criminal Code*.
- (b) A separate section in that same Chapter should identify those particular offences as being subject to an alternative prosecutorial process, which also should be outlined in the *Code*. (Refer to Recommendations 33–38, 49, 50 and 55(b) below)
- (c) The provision in s 635A(2)(a) of the *Criminal Code*, granting power to a presiding judicial officer to expel persons from the courtroom if satisfied that it is necessary for the proper administration of justice to do so, should be amended so that it is applicable in *any* court proceeding.

34 ALRC, above n 10, [137].

Literally ‘in the face of the court’?

Another uncertainty regarding the common law offence of contempt in the face of the court is the extent to which the relevant conduct must be committed in view of the presiding judicial officer (that is, ‘in the face of the court’). Again the authorities conflict on the question. The traditional view appears to have been that the contempt was only ‘in the face of the court’ where the judicial officer was able to personally observe all of the circumstances constituting the alleged contempt.³⁵ The scope of what occurs ‘in the face of the court’ has, however, been broadened by judicial decision. There is support now for the proposition that ‘the face of the court’ will extend to the courtroom, the passageways, the verandah and the steps leading to it, even if not witnessed by the presiding judicial officer.³⁶

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

If it is not to be reliant on the senses of the judge, what is the criterion to be adopted for ‘in the face of the court’? Is it a geographic notion to be fixed at the vestibule? Is it the liftwell? Is it the lobby? Is it the street outside the court? Is it the adjacent city block? ... For if the judge does not have to see, hear or otherwise sense the alleged contempt, it is necessary to be able to define the ‘geographic proximity’ that authorises him to exercise, by summary procedure, this exceptional power.³⁷

As can be seen from these remarks the precise identification of the extent of the ‘face of the court’ has implications for the procedure to be adopted for dealing with the alleged contempt. The importance of the relationship between the category of contempt and the procedure for its determination, in terms of whether a summary procedure is available, has led some judges to favour a purposive test of whether contempt occurs in the face of the court. For example in *Registrar, Court of Appeal v Collins*,³⁸ Moffitt P identified the purpose of the summary power to punish for contempt in the face of the court as the need to protect proceedings ‘then in progress or then imminent in that court’³⁹ and formulated the following test:

The elements of immediacy and necessity...require that before the power is exercised there must be such proximity in time and space between the conduct and the trial of the proceedings that the conduct provides the present confrontation to the trial then in progress. Each case will require consideration on its own facts.⁴⁰

The difficulty with this test is that, while there is merit in its flexibility, it lacks certainty in its application. It has, for that reason, been criticised by later authority.⁴¹ Similar concerns about the lack of clarity in the geographical

35 Blackstone, *Commentaries on the Law of England*, Book IV, quoted in *European Asian Bank AG v Wentworth* (1986) 5 NSWLR 445, 453 (Kirby P), but see P Seaman, *Civil Procedure: Western Australia* (1990) to the effect that the power ‘was never confined to what the judge saw with his or her own eyes but extended to any gross interference with the course of justice in a case which was about to be tried, or being tried’ (at [55.3.1]).

36 See *Ex parte Tubman; Re Lucas* [1970] 3 NSWLR 41.

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

38 [1982] 1 NSWLR 682.

39 Ibid 707 (Moffitt P).

40 Ibid 708 (Moffitt P).

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

scope of contempt in the face of the court offences were highlighted in submissions from the District Court and the Stipendiary Magistrates.

The offences that this Commission proposes in Recommendation 27—concerning the wilful insulting of judicial and court officers, and the interruption or disruption of the proceedings of a court—contain no element as to the ‘location’ of the offence. The offences as formulated will depend on the determination of whether the insult was wilful and the official was ‘acting in the course of his or her official duties’ at the time, or if actions (wherever taking place) interrupted or disrupted court proceedings. The Commission’s view is that location should not be a relevant consideration in determining whether a contempt has been committed. As the cases indicate, however, a judicial officer’s personal observation of an alleged contempt and the immediacy with which it must be dealt with are relevant considerations in determining the appropriate procedure for its prosecution. This matter therefore is dealt with in the following section on procedural reform.

Procedure

As previously indicated, the various procedures for dealing with contempt vary depending upon the nature of the contempt, whether the particular offence is based in common law or statute (and sometimes it may be either), and the level and kind of court in which the alleged offence was committed. Submissions generally supported the proposal to create a uniform procedure for contempt in the face of the court, applicable in all courts.

Recommendation 33

The existing procedures in relation to contempt in the face of the court should be replaced by a uniform procedure, applicable in all courts, by which contempt in the face of the court offences are to be tried.

Should a summary procedure be retained?

The fact that, historically, contempt in the face of the court was constituted by conduct actually occurring in the presence of the presiding judicial officer influenced the procedure adopted for determining whether a contempt had been committed. The alleged offender was tried by the presiding judicial officer closely upon the commission of the offence and upon the judicial officer’s own perception of the relevant conduct. The charge need not have been reduced to writing. Witnesses other than the judicial officer may not necessarily have been called. In such circumstances any extension of the offence to conduct beyond the observation of the presiding judicial officer would give rise to problems of proof and procedure.

It is often the case that where a person is alleged to be in contempt of court during proceedings, it is the judicial officer who initiates the charge of contempt. Taking into account all these procedural aspects it is clear that a number of different roles, such as prosecutor, witness, judge and jury—traditionally separated in the criminal process—may be performed by the same person where contempt in the face of the court is concerned. It is the

absence of traditional safeguards of impartiality and independence in the process that has been the subject of trenchant criticism in the past.

It is also the case that judicial authority in recent times has to an extent already tempered the summary nature of the procedure. The High Court has stressed that it is a jurisdiction which is to be used sparingly and only in serious cases.⁴² The courts have also sought to preserve certain minimum standards of fairness. In *Coward v Stapleton*⁴³ for example, the High Court observed:

[I]t is a well-recognised principle of law that no person ought to be punished for contempt of court unless the specific charge against him be distinctly stated and an opportunity of answering it given to him: *In re Pollard*; *R v Forster*; *Ex parte Isaacs*. The gist of the accusation must be made clear to the person charged, though it is not always necessary to formulate the charge in a series of specific allegations: *Chang Hang Kiu v Piggott*. The charge having been made sufficiently explicit, the person accused must then be allowed a reasonable opportunity of being heard in his own defence, that is to say a reasonable opportunity of placing before the court any explanation or amplification of his evidence, and any submissions of fact or law, which he may wish the court to consider as bearing either upon the charge itself or upon the question of punishment.⁴⁴

There also has been significant codification of the procedure, even where contempts committed at common law are concerned. For example, Order 55 of the *Rules of the Supreme Court 1971 (WA)* largely mirrors the position reached by the course of judicial decisions.

It is of note, too, that under Order 55 most contempt powers in the Supreme Court are to be exercised summarily by the Full Court,⁴⁵ rather than by the presiding judge. The only circumstances in which an order for committal may be made by a single judge is where the contempt 'is committed in the face of the Court or in the hearing of the Court, or consists in the disobedience to a judgment or order of the Court or a breach of an undertaking to the Court'.⁴⁶ It is questionable whether the presiding judge retains the power to refer the matter to another member of the court. However, it is suggested that such a residual power may be accommodated within the rule.⁴⁷

The various statutory offences in relation to the District Court and lower courts also refer to an immediate summary process which may be regarded as incorporating the principles in *Coward v Stapleton*.⁴⁸ However, it would

42 *Lewis v Judge Ogden* (1984) 153 CLR 682, 693.

43 (1953) 90 CLR 573.

44 *Ibid* 579–80. Procedural safeguards of this kind have recently been reiterated in the High Court: See *Lewis v Ogden* (1984) 153 CLR 682, 693; *MacGroarty v Clauson* (1989) 167 CLR 251, 255–56; and the Supreme Court of Western Australia: *Gliosca v Ninyett* (1992) 10 WAR 562, 567–68 (Murray J). An additional safeguard would appear to be a power, at common law at least, for the presiding judge to refer the matter to another member of the court: see ALRC, above n 10, [84].

45 *Rules of the Supreme Court 1971 (WA)*, Order 55 rule 2(1). This requirement that has been criticised by the Full Court itself on a number of occasions: *R v Lovelady*; *Ex parte Attorney General* [1982] WAR 65, 66 (Burt CJ); *R v Minshull*; *Ex parte Director of Public Prosecutions for Western Australia* (Unreported, Full Court of the Supreme Court of Western Australia, Library No 970255, 21 May 1997), 16–17 (Malcolm CJ).

46 *Rules of the Supreme Court 1971 (WA)*, Order 55 rule 2(3).

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

48 (1953) 90 CLR 573: indeed, as much is explicit in *Gliosca v Ninyett* (1992) 10 WAR 562, 567–68 (Murray J).

appear to be the unavoidable construction that the alleged statutory contempt in the courts is to be dealt with in all cases by the presiding judicial officer.

Even with judicial reform and codification the summary procedure for dealing with contempt continues to exhibit an absence of the usual safeguards that apply to criminal offences generally. Critics have identified those safeguards, and their apparent absence in the case of contempt in the face of the court, as:⁴⁹

(a) The Presumption of Innocence

It has been suggested that the power of the presiding judicial officer to institute proceedings where it appears to him or her that a contempt has been committed and also to determine liability reverses the presumption of innocence. The ALRC went so far as to suggest that the current procedure involves a 'presumption of guilt'.⁵⁰

(b) The Rule against Bias

Judicial officers determining liability for a contempt committed in their courtroom (particularly insulting judicial officers themselves) gives rise to a reasonable apprehension of bias on the part of the judicial officer.

(c) The Right to a Fair Hearing

The ability of the presiding judicial officer to rely upon his or her own perceptions, without provision for cross-examination as to those perceptions has been said to cause concern both as to whether natural justice is afforded to the alleged offender and generally as to the adequacy of such perceptions as a basis for determining criminal guilt.

Each of these criticisms has merit, and together they provide a sufficient justification for reform of the existing procedure. Moreover, the issue is not purely academic; for example, a judge of the District Court of Western Australia recently imprisoned a person for 18 months for assaulting the accused in a criminal trial in the presence of that judge. Only 10 days elapsed between the commission of the contempt and the imposition of the sentence.⁵¹

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

Similarly, criticism directed at the reliance by the presiding judicial officer upon the demeanour of the alleged offender fails to give sufficient regard to

49 See ALRC, above n 10, [110] and [112].

50 ALRC, above n 10, [110].

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

the importance placed upon judicial assessments of demeanour in other areas of the law. The natural advantage a trial judge has seeing and hearing witnesses at first hand, for example, is one of the main reasons appeal courts are reluctant to interfere with findings of fact by a lower court, particularly when the findings depend on the credibility of witnesses.⁵²

The ALRC recommended that the summary process by the presiding judicial officer be retained,⁵³ but with the proviso that the option was to be available only with the consent of the alleged offender. The Commission does not support the ALRC's recommendation on the basis that it fails to give sufficient weight to the need, when circumstances require, of an immediate or at least proximate response to a contempt committed in the face of the court; although an option for the alleged offender to consent to a summary procedure also is recommended. It is of note that contempt by publication, as discussed in Part II, does not raise the same need for a speedy trial.

There was significant opposition by judicial officers at all levels to the proposal that contempt in the face of the court be tried before anyone other than the presiding judicial officer. Some of these submissions drew attention to a suggested increasing element of disrespect for judicial authority in the courts. The Commission is of the view, however, that decline in public respect for the courts should be addressed more appropriately than through the retention of the current summary power to criminalise such conduct.

Codification of the summary procedure

The Commission recommends that the procedure to be adopted in relation to the summary power discussed be fully codified, as in Order 55 rule 3 of the *Rules of the Supreme Court 1971 (WA)*. Codification should make explicit the need for the charge to be adequately particularised and for the right of the alleged offender to be heard and to call witnesses. The need for a formalised process, and in particular one which allowed for procedural fairness in informing the accused of the nature and detail of the charge, was endorsed by comments by various magistrates at their meeting with this Commission.

The Commission is of the view that trial before the presiding judicial officer should be retained only as an exceptional procedure. Essentially, it is recommended that the summary procedure involving the judicial officer directly witnessing the alleged contempt should be confined to those cases which, on the narrowest view of the common law, would have been appropriate for determination in a summary way, that is, if the conduct occurred in the actual presence of the judicial officer. The second condition to be satisfied, concerning the immediacy of the threat, also introduces a purposive element akin to the test proposed by Moffitt P in *Registrar, Court of Appeal v Collins*⁵⁴ referred to earlier. This condition is consistent with the concern expressed by magistrates that a capacity be retained by judicial officers to deal quickly with matters that needed to be dealt with quickly.

Other recommended reforms—to codify procedure, limit sentence and strengthen appeal procedures, discussed elsewhere—should also ameliorate

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

53 ALRC, above n 10, [130].

54 [1982] 1 NSWLR 682.

some of the concerns surrounding the summary process for dealing with contempt in the face of the court.

The Law Society suggested in its submission that Recommendation 34(b) be amended to specify that the judicial officer's opinion be based on reasonable grounds. However, after due consideration, the Commission concluded that such an amendment may lead to unwarranted litigation and has not included the suggested qualification.

Recommendation 34

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

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

The Law Society also submitted that given the potential seriousness of a contempt conviction, allowance should be made for an adjournment to be granted so that the accused has a reasonable opportunity to seek legal advice. It is of note that, although the District Court judges indicated opposition to the proposal for any reduction to the summary jurisdiction to punish contempt in the face of the court, one judge also highlighted the significance of an accused being legally represented in such summary procedures. The Commission endorses the Law Society's suggestion. However, the Commission is not thereby recommending the imposition of any obligation on the court to ensure that legal representation for an accused will be available.

Recommendation 35

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

- (a) inform the accused of the nature and particulars of the charge;
- (b) allow the accused a reasonable opportunity to seek legal advice, to be heard and to call witnesses and, if necessary, grant an adjournment for any of those purposes;
- (c) after hearing the accused, determine the charge and give reasons for that determination; and
- (d) make an order for punishment or discharge of the accused.

Codification of the procedure in other circumstances

The Commission also recommends a uniform procedure for dealing with cases where the conditions for the exercise of the summary power by the presiding judicial officer are not satisfied. A number of submissions opposed the proposal that panels generally should try alleged contempt in the face of the court offences. Magistrates, for example, pointed out that a bench or panel of judicial officers was unknown in that jurisdiction and would cause particular difficulties in rural and remote regions. The Commission agrees with these submissions, although a panel of judicial officers should be made an option if the senior member is of the view that the contempt is of sufficient significance.

The Law Society suggested that the proposal be amended to make clear that, should this alternative process be adopted, the alleged offender will be provided with a copy of the written allegation, and the Commission agrees.

Recommendation 36

Where the conditions for the exercise of the summary power by the presiding judicial officer are not satisfied, the alleged offence should be reduced to writing, provided to the alleged offender and referred to the most senior member of the court, other than the judicial officer involved. The charge should then be referred to another member of the court for determination.

Recommendation 37

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

The proposal in the Discussion Paper that contempt in the face of the court be referred for trial to a different judicial officer was contentious. Submissions from judicial officers highlighted the procedural difficulties if a judicial officer was required to give evidence in proceedings and to be subject to cross-examination, potentially concerning their own conduct. Such procedures may do little to consolidate the authority of the court and may also be open to exploitation by disaffected defendants and other witnesses.

The ALRC considered the issue of the ‘presiding judge as witness’ in its contempt reference.⁵⁵ Options of calling judges as witnesses with the leave of the court, or of judges submitting affidavits and being cross-examined on the affidavit, were discussed in that report but the ALRC decided that there was no need to make a formal recommendation on the matter.

In submissions received by this Commission on the subject, the District Court highlighted the process for the prosecution of perjury charges. In those matters the presiding judicial officer or member is immune from providing

55 ALRC, above n 10, [136].

evidence and the transcript of proceedings and other witnesses are relied upon to make out the prosecution case. This procedure is similar to the prosecution of contempt-like offences in respect of Royal Commissions and many tribunals. Magistrates, however, indicated that in some circumstances, such as contempts by gesture, the transcript would not be adequate; moreover, in jurisdictions such as the Small Claims Tribunal, no transcript of proceedings is available. Although magistrates suggested that a statutory provision be enacted to allow the judicial officer to record the proceedings, the Commission has not adopted this suggestion. It was considered sufficient for court officials other than judicial officers or other witnesses to provide evidence of any alleged contempt that is not apparent from or recorded in a transcript. The judicial officer should also retain the option to give evidence should he or she choose to do so.

Recommendation 38

If a contempt in the face of the court is not dealt with summarily by the presiding judicial officer, the judicial officer should be immune from giving evidence unless he or she chooses to do so. However, the transcript of the hearing and other evidence, if any, should be admissible and other witnesses compellable.

Penalties

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

It is a power to fine or imprison, to give an immediate sentence or postpone it, to commit to prison pending his consideration of the sentence, to bind over to be of good behaviour and keep the peace,⁵⁶ and to bind over to come up for judgment if called upon.

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

Sentencing powers for contempt at common law are largely preserved in both the Supreme Court of Western Australia, which may impose a term of imprisonment or a fine or both,⁵⁷ and the Family Court of Western Australia, which may also suspend punishment and order the giving of security for good behaviour.⁵⁸

In the courts where punishment of contempt is dealt with by statutory offences, maximum fines and terms of imprisonment are prescribed. The District Court may impose a term of imprisonment of five years or a fine of

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

57 *Rules of the Supreme Court 1971* (WA) Order 55 rule 7.

58 *Family Court Act 1997* (WA) s 234(b)–(c).

\$50,000 or both.⁵⁹ In the Local Courts and Courts of Petty Sessions, the penalties are 12 months imprisonment or a fine of \$5,000 or both.⁶⁰

The Commission had proposed in its earlier Discussion Paper that, with the introduction of statutory contempt offences, statutory maxima as to the level of fines and the term of imprisonment should be set. Similarly to offences under the *Criminal Code* which are triable either on indictment or summarily,⁶¹ and where a summary procedure is adopted, it was suggested that summary processes for contempt should involve reduced maxima. However, as highlighted in the submission of a member of the Supreme Court, the nature of the ‘summary’ processes involved in determining a contempt charge and the summary processes under the *Justices Act 1902* (WA) are significantly disparate. In particular, given the circumstances in which the peculiar ‘summary’ processes for trying contempt charges will apply, reduced penalties cannot be justified.

There also is no apparent justification for different penalties to apply in different courts, and the Commission therefore recommends that sentences be uniform across jurisdictions. It is suggested that the maximum penalties for contempt provided in the District Court of Western Australia (a term of imprisonment of five years or a fine of \$50,000 or both) appear the most appropriate for this purpose. Pursuant to s 40(5) of the *Sentencing Act 1995* (WA), this would result in a maximum fine of \$250,000 for corporations.

The DPP supported the proposed maximum term of imprisonment but considered that the maximum fine was inadequate in light of a \$50,000 fine imposed on a serious but unintentional contempt in New South Wales.⁶² The DPP suggested that no maximum fine should be specified. However, the Commission considers that there is sufficient scope to address serious intentional contempts through imprisonment in those rare cases where the maximum fine recommended is considered inadequate.

Recommendation 39

There should be maximum penalties (both as to the level of fines and terms of imprisonment) applicable to contempt offences. The maximum sentences should be the same for all courts and appropriate maxima would be imprisonment of five years or a fine of \$50,000 or both.

District Court judges raised the issue of whether a contempt resulting in the need to abort a trial should be subject to an additional penalty. As indicated in Part II, aborting a trial can be extremely disruptive or costly for many of those involved in the trial process, including judicial officers, jury members, witnesses and, often, the accused.

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

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

61 See eg *Criminal Code* (WA) s 409.

62 *Attorney General for the State of New South Wales v Radio 2UE Sydney Pty Ltd* (Unreported, Supreme Court of New South Wales, Court of Appeal, Library No BC9800596, 11 March 1998).

Recommendation 40

Similarly to Recommendation 23 above, legislation also should provide for the sentencing court, in a case of contempt in the face of the court where a trial has been aborted as the result of the contempt, to take into account the costs incurred as a result of the abortion of the trial and make an order for the payment of costs incurred as a result thereof, as part of the sentencing process.

Rights of appeal

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

As indicated in Part II, the rights of appeal against convictions for contempt are less than comprehensive. The existing provisions have developed in a piecemeal fashion and are generally regarded as unsatisfactory. Suggestions made in the past⁶³ that there should not be rights of appeal in relation to contempt in the face of the court should today be rejected. Particularly given the recommendation that the summary procedure be retained in certain circumstances, it is essential that there are comprehensive rights of appeal both in relation to conviction and sentence. It is of note that, as also discussed in Part II, unless there are legislative amendments, the role of the DPP will be limited to appeals arising in relation to indictable offences, while the Attorney General would appear to retain the discretion to lodge or respond to any appeals involving contempt in the face of the court.

Recommendation 41

There should be comprehensive rights of appeal in relation to contempt in the face of the court offences, both as to conviction and as to sentence.

In the case of contempt committed in the face of the Supreme Court, or the analogous offence in the District Court, the alleged offender is likely to be without any effective rights of appeal. This is because the rights of appeal in criminal cases from those courts are provided for by s 688 of the *Criminal Code* which, as was indicated in Part II, only applies where a person is 'convicted on indictment'.⁶⁴ A finding of guilt of criminal contempt may be a criminal conviction but it is not 'on indictment'.⁶⁵ As a result, an appeal to the Court of Criminal Appeal from such a conviction is incompetent.

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

64 *Criminal Code* (WA) s 688.

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

The right to appeal to the High Court in relation to contempt in the face of the court committed in the Supreme Court is conferred by s 73 of the *Australian Constitution*.⁶⁶ Given the restriction on rights of appeal from contempt convictions generally in the Supreme Court, an appeal to the High Court may be the only remedy available. In this regard the ability effectively to appeal to the High Court is, of course, subject to the requirements of the grant of special leave under s 35(2) of the *Judiciary Act 1903* (Cth).

In the case of the District Court the inherent supervisory jurisdiction of the Supreme Court is preserved so that, in certain circumstances, the Supreme Court may issue a writ of *certiorari* or prohibition directed to a District Court judge.⁶⁷ Such a basis for review, however, would be restricted to jurisdictional error and error of law on the face of the record:⁶⁸ a poor substitute for comprehensive appellate rights.

Recommendation 42

Appeals from contempt in the face of the court offence convictions and sentences by the District Court, or by a single judge of the Supreme Court should be to the Court of Criminal Appeal.

Under the *Justices Act 1902* (WA) an appeal lies by leave of the Supreme Court from a 'decision of justices'.⁶⁹ 'Decision' is defined broadly in the *Justices Act 1902* (WA) and includes a conviction analogous to contempt under s 41. Indeed, there are reported instances of appeal rights being exercised in relation to such convictions.⁷⁰ The position in the Local Courts is less clear, as rights of appeal under the *Local Courts Act 1904* (WA) are based on whether there is a 'judgment',⁷¹ an expression not ordinarily importing concepts such as criminal convictions. Nevertheless, given the broad definition of 'judgment' in s 3 the *Local Courts Act 1904* (WA)⁷² it is likely that a person convicted under s 156 of that Act would have a right of appeal to the District Court. As highlighted by the magistrates' submission, however, these differences between the criminal and civil jurisdictions cannot be justified. With the amalgamation of the two jurisdictions into the new Magistrates' Court, there is even more reason to rationalise the processes.

In the interests of consistency, the anomalies described should be specifically addressed and rectified. The Commission recommends that all appeals from convictions and sentences for contempt offences by magistrates or justices be determined in accordance with Part VIII of the *Justices Act 1902* (WA) which generally involves an appeal to a single judge

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

67 See *District Court of Western Australia Act 1969* (WA) ss 80–83.

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

69 *Justices Act 1902* (WA) s 184.

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

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

72 'Judgment includes a judgment, order, or other decision or determination of a magistrate': see *Local Courts Act 1904* (WA) s 3.

of the Supreme Court with the possibility of a further appeal, by leave, to the Full Court.

Recommendation 43

Appeals from contempt in the face of the court convictions and sentences by magistrates or justices should all be determined in accordance with Part VIII of the *Justices Act 1902* (WA).

PART IV

Contempt By Disobedience

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Overview

The third, and final, term of reference in Project No 93 is:

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

‘Disobedience contempt’ is contempt by disobedience to judgments and other orders of the court including undertakings given by a party to the court, which at law have the same effect as court orders. It arises in both civil and criminal contexts, where a person (usually, but not always, a party to proceedings in a court) does not obey a court order. Orders are made at all stages of court proceedings, not just at the conclusion. Disobedience contempt is in issue where an order is made for discovery of documents, where deadlines are not met in the case management process, where witnesses do not obey orders to come to court and where witnesses disobey orders made in court, including orders to answer questions. Publishing material the courts have ordered not to be published also constitutes disobedience contempt.

Civil contempt proceedings allow a plaintiff (the party in whose favour an order or undertaking was made) to seek enforcement by obtaining an order for imprisonment of the defendant until he or she complies with the order, or for punishment, in the form of fines and/or imprisonment. There is also a wide range of statutory enforcement provisions relating to the enforcement of orders in civil proceedings that exist in addition to civil contempt.

Criminal disobedience contempt proceedings may be brought by the presiding judicial officer, the DPP if it is related to the prosecution of an indictable offence, or the Attorney General. While non-compliance with orders or undertakings in criminal proceedings is always treated as a criminal contempt; it is of note that there is a wide range of circumstances in which non-compliance arising in civil proceedings also is criminal contempt, for example, any wilful disobedience (known as flagrant or contumelious contempt), disobedience by a solicitor or other officer of the court, and disobedience of any order made concerning a ward of court.

It is of note that failure to comply with orders such as those relating to discovery and other case management procedures appears to be rarely prosecuted, unless it involves deliberate contempt, even if it involves non-compliance by a solicitor. This is likely to be the result of the ready availability of remedies such as costs orders for delays in case management processes, in addition to the difficulty in establishing a disobedience contempt of court given the high standard of proof which is required.

The key issues for the Commission in respect of this term of reference stem from the historical development of the law of disobedience contempt. The anomalies generated by such development have left this area of the

law out of step, to a considerable extent, with reforming trends towards consistency and certainty in the application of the law.

This area of contempt law has again seen support in submissions for codification and uniformity of procedures; and, like those relating to other areas of contempt, submissions were generally supportive of the greater integration of disobedience contempt into the general principles of criminal law, including the applicability of the *Sentencing Act 1995* (WA).

A significant question raised by submissions, however, has been whether the traditional distinctions between civil and criminal disobedience and between enforcement and punitive proceedings should be retained. Acknowledging the severity of the potential measures available against the defendant in all contempt proceedings (whether for civil or criminal contempt by disobedience, or for enforcement or punitive purposes), trends in case law have been towards the incorporation of criminal law procedural safeguards into the law of 'civil contempt'. The courts have also highlighted the broader public interest in securing compliance with any order or undertaking made in the course of legal proceedings. Submissions on this area were divided, but the concern was expressed in a number which opposed 'amalgamation' on the basis that this may detract from the capacity of plaintiffs to pursue their legitimate interest in securing an order or undertaking made in their favour.

The Commission is of the view that, generally, the penalties available for disobedience contempt are sufficiently serious, and the broader public interest in securing compliance is such, that the prosecution of any such offence as criminal, and by public officers, is appropriate. The Commission therefore recommends that civil contempt be abolished. However, the Commission also acknowledges the legitimate and particular interests of plaintiffs as well as the very wide range of orders and undertakings to which contempt proceedings may be subject. The Commission has recommended that a criminal offence for disobedience contempt be enacted, which may be prosecuted by the plaintiff with leave of the court in which the contempt occurred, but for which no term of imprisonment is available upon conviction. The Commission also recommends that another, indictable, offence be enacted which includes an element of wilful contempt and for which imprisonment is available, but which is to be prosecuted according to general criminal processes upon indictment, including the option of a jury trial.

The above, however, is subject to an additional recommendation: that those matters which relate to case management processes be exempt from disobedience contempt proceedings. As indicated, it appears that the use of the disobedience contempt jurisdiction to address case management delays is rarely encountered at present. It is also the Commission's view that other available remedies are far more appropriate, as means of addressing delays in complying with case management orders, than criminal prosecution.

In light of the strong opposition to the summary nature of contempt proceedings in submissions received on the other terms of this reference,

it is surprising that there was more, although not unanimous, support for that summary jurisdiction in submissions on disobedience contempt. Again the interests of the plaintiff in securing speedy resolution to the impasse resulting from disobedience contempts was highlighted. Acknowledging these interests, the Commission recommends the retention of a limited summary jurisdiction for the determination of disobedience contempt proceedings. The judicial officer/s before whom the alleged contempt arose, however, should have no capacity to initiate proceedings nor to determine the alleged offence. It is recommended that proceedings for the lesser disobedience contempt offence identified above should be prosecuted by public officers or, with the leave of the presiding judicial officer, by the plaintiff, before another judicial officer of the same court in accordance with those procedures recommended in relation to contempt in the face of the court. The peculiar contempt summary jurisdiction should not be available for the prosecution of the indictable disobedience contempt offence.

A ‘civil’ contempt?

Disobedience contempt has developed differently to other branches of the law of contempt, not least because it includes both civil and criminal jurisdictions. Disobedience contempt was classified as a ‘civil’ matter in civil proceedings, and the proceeding to address the disobedience was brought by the plaintiff. Exceptions to this were cases involving wilful or contumacious defiance, breaches by solicitors and other officers of the court and in certain other instances (including orders respecting a ward of court¹), all of which were classified as criminal contempt. The basis for the distinction appears to reflect the duties owed by officers of the court, and in the case of wards, the need for their protection. Contempt in criminal proceedings is always treated as a criminal matter.² As indicated, however, failure to comply with orders such as those relating to discovery and other case management procedures appears to be rarely prosecuted as disobedience contempt, unless it involves deliberate contempt, even if it involves non-compliance by a solicitor.

The civil classification reflected the party-to-party nature of civil litigation, the interest of the plaintiff in enforcing an order made in his or her favour and the fact that the plaintiff in disobedience contempt proceedings sought enforcement for private benefit rather than punishment for breach of the public interest. Significantly, civil disobedience contempt proceedings traditionally allowed the plaintiff to seek *enforcement*, including by an order for imprisonment of the defendant until he or she complied with the order. This is somewhat akin to the power of court officials to order those found guilty of other forms of contempt to be committed to prison until a contempt was purged. The traditional emphasis on enforcement proceedings has declined, however, and *punishment* has increasingly been imposed in relation to civil contempts.³ The ALRC stated that the increasing focus on

1 *Witham v Holloway* (1995) 183 CLR 525, 530.

2 *Connell v The Queen [No 5]* (1993) 10 WAR 424.

3 Australian Law Reform Commission (‘ALRC’), *Contempt*, Report No 35 (1987) [494].

the public interest in having court orders and undertakings enforced has resulted in purely punitive sanctions being imposed in civil contempt cases.⁴ Subsequently, the High Court questioned the validity of distinguishing enforcement and punishment proceedings stating that, in relation to disobedience contempt, these areas had become ‘inextricably intermixed’.⁵

Distinctions between civil and criminal contempt and between enforcement and punitive proceedings are discussed below. However, a preliminary point to be noted when discussing reform of disobedience contempt is that orders which may potentially be the subject of disobedience contempt are made at all stages of court proceedings, not just at the conclusion. A failure to comply with an order for discovery of documents, where deadlines are not met in the case management process, where witnesses do not obey orders to come to court, and where witnesses disobey orders made in court, including orders to answer questions, may all be the subject of disobedience contempt proceedings. Publishing material the courts have ordered not to be published also constitutes disobedience contempt, whether a party to the original proceedings is responsible for the publication or not.

At the same time, not all court orders will be enforced on breach:

- The threshold requirement is that the order is clear and unambiguous in its terms.⁶
- Many court orders can be enforced without requiring performance by the defendant. For example, an order to pay money can be enforced by charging orders over land and other property⁷ independently of the cooperation of the defendant. In other instances substituted performance can be ordered, such as where the sheriff signs a deed of conveyance under the *Transfer of Land Act 1893* (WA) to give good title to a purchaser.⁸ The Supreme Court is also empowered to order another person, at the cost of the defendant, to meet an order⁹ (for example, an order of mandamus or a mandatory injunction).
- Enforcement by way of contempt proceedings is seen as a last resort and should be available only where alternative measures do not suffice.¹⁰ The rationale for this is that enforcement of that kind not only relies upon the ‘summary’ contempt jurisdiction¹¹ but also calls upon exceptional powers which include those requiring a person to do something which only he or she can do, such as

4 Ibid.

5 *Witham v Holloway* (1995) 183 CLR 525, 534 (Brennan, Deane, Toohey & Gaudron JJ), quoting Salmon LJ in *Jennison v Baker* [1972] 2 QB 52, 64.

6 *Australian Consolidated Press Ltd v Morgan* (1965) 112 CLR 483; *R&I Bank of Western Australia Ltd v Anchorage Investments Pty Ltd* (1993) 10 WAR 59, 60.

7 As under the *Supreme Court Act 1935* (WA) Part VII.

8 *Supreme Court Act 1935* (WA) s 121.

9 *Supreme Court Act 1935* (WA) s 140.

10 D Eady and ATH Smith, *Arlidge, Eady & Smith on Contempt*, (2nd ed., 1999) [12-15].

11 See above, Part I, p 3–4 and Part III pp 70–73 ‘Should a summary procedure be retained’.

delivering up property only he or she is able to produce,¹² calling off a strike, or making a payment out of secret funds. It is of note that interlocutory orders are typically subject to different considerations because they are made during the course of proceedings when it would be reasonable to expect that the parties have an interest in keeping the matter on foot. Thus, non-compliance with an order made in the course of proceedings is generally determined at that point.¹³

- In certain circumstances, the courts have a residual discretion not to enforce an order.¹⁴

It appears likely that the infrequency of disobedience contempt prosecutions for non-compliance with discovery and other case management orders relates to the factor highlighted above: enforcement by way of contempt proceedings is seen as a last resort and should be available only where alternative measures do not suffice. Non-compliance with case management orders presently can result in additional costs being awarded against the recalcitrant party. If the non-compliance is the result of inaction by a solicitor or other officer of the court, then the judicial officer may require that the represented party attend the court so that he or she is aware of the reasons for additional costs orders or of any adverse comments by the judicial officer. Such measures are likely to be viewed as sufficient to address non-compliance with case management orders.

The law relating to disobedience contempt including enforcement and punishment can be found, in part, in the statutes conferring jurisdiction on the state courts, and these are set out in some detail below (see 'Current powers and procedures'). The capacity to enforce a court order is generally provided for, but the capacity to punish for the contempt of disobeying a court order is not as accessible. It is found only partially in statutes; the balance must be found by researching the common law, an often difficult exercise for a non-lawyer. As highlighted previously, in contrast to the certainty of the *Criminal Code* and other statutory laws that impose a penalty or threat of imprisonment, another significant issue relating to common law penalties is that these can be substantial and are not limited.

As in other areas of the law of contempt, the multiplicity of procedures and the ambiguity associated with common law offences for disobedience contempt are problematic. Reform of the current powers and procedures is considered below. As noted previously, the difficulty and complexity are compounded in the context of disobedience contempt by there being proceedings to enforce as well as to punish, together with the existing availability of civil and criminal proceedings. This is considered further below under the heading: 'The merging of civil and criminal proceedings'.

12 *Re Barrel Enterprises* [1972] 3 All ER 631 (shares); *Enfield London Borough Council v Mahoney* [1983] 2 All ER 901 (historical artefact).

13 BC Cairns, *Australian Civil Procedure* (4th ed., 1996) 511–13.

14 See, eg, Order 46 rule 6 and Order 47 rule 13 of the *Rules of the Supreme Court 1971* (WA).

Current powers and procedures

Similarly to other aspects of the 'law of contempts', contempt by disobedience can be characterised by a wide range of statutory and common law powers and procedures. Again, these powers and procedures vary according to the level of court. An outline of the existing law relating to contempt by disobedience follows. (The issue of the summary nature of the contempt jurisdiction is dealt with subsequently.)

Supreme Court

There are a number of sources of the powers of the Supreme Court of Western Australia to punish contempts of court. As mentioned in Part I, s 6 of the *Supreme Court Act 1935 (WA)* continues, but does not create, the Supreme Court so it can reasonably be said that the inherent jurisdiction, including the inherent jurisdiction to determine and punish contempt of court, has an operation independent of the Act. Section 7(1) of the *Supreme Court Act 1935 (WA)* also constitutes that Court as a superior court of record, and, under the common law, superior courts of record have the power to summarily enforce their orders by way of contempt proceedings, as well as act in respect of contempts of any lower courts in the same jurisdiction.¹⁵ This jurisdiction includes the power to imprison a defendant, impose fines to secure obedience and, if necessary, to punish¹⁶ and seize assets until there has been compliance with an order. The *Supreme Court Act 1935 (WA)* further gives the Court 'such and the like jurisdiction, powers and authority within Western Australia'¹⁷ as the English courts of Queens Bench, Common Pleas and Exchequer, as well as specific power in relation to equity and appeals. As referred to in Part I, the jurisdiction of the Supreme Court, as a court of record, to punish common law contempts is expressly preserved by s 7 of the *Criminal Code Act Compilation Act 1913 (WA)*.

Part VII of the *Supreme Court Act 1935 (WA)* provides for the enforcement of judgments and other orders, not defined as being limited to the judgments and orders of the Supreme Court. The provisions deal separately with orders for the payment of money, possession of land, delivery of property, and to do or refrain from doing an act. The powers include the power to order the seizure of property, the charging of property, the execution of sale documents, the imprisonment of the defendant, and the sequestration of the defendant's assets. Enforcement proceedings under Part VII do not specify who can bring the action, although in some instances limits are imposed by the *Rules of the Supreme Court 1971 (WA)*.¹⁸

15 *Connell v The Queen (No 6)* (1994) 12 WAR 133; ALRC, above n 3, [498].

16 *Witham v Holloway* (1995) 183 CLR 525, 530.

17 *Supreme Court Act 1935 (WA)* s 16.

18 See *Supreme Court Act 1935 (WA)* s 130 and *Rules of the Supreme Court 1971 (WA)* Order 62A.

District Court

The District Court is constituted as a court of record under s 8 of the *District Court of Western Australia Act 1969* (WA). However, that section also states that the Court has ‘the criminal and civil jurisdiction conferred on it by this Act’. Section 56 grants the District Court the powers to enforce a judgment in the civil jurisdiction ‘as though it were a judgment of the Supreme Court’.¹⁹ The Court or a judge can compel obedience to, and punish disobedience of, any civil judgment, being the same power as the Supreme Court or any judge may exercise.²⁰ Section 56 of the *District Court of Western Australia Act 1969* (WA) reflects the provisions governing civil enforcement in the Supreme Court and makes no separate provision.

Section 42 of the *District Court of Western Australia Act 1969* (WA) limits the criminal jurisdiction and powers of the District Court to those of the Supreme Court in respect to indictable offences, the maximum term of imprisonment for which is not imprisonment for life or strict security life imprisonment. Other than statutory provisions such as those relating to contempt in the face of the court, the power of the District Court to punish for criminal (as opposed to civil) contempt is therefore limited where the contempt is committed in connection with criminal proceedings.²¹

Local Courts

Unlike the Supreme and District Courts, which determine criminal and civil matters, Local Courts generally exercise only a civil jurisdiction, although, as indicated below, they also have considerable powers, including the power to fine or commit a person to imprisonment, for the statutory equivalent of disobedience contempt. Part VIII of the *Local Courts Act 1904* (WA) provides for the enforcement of judgments, including execution against land and goods, arrest of the defendant and taking security over debts. Disobedience of an injunction or other order (other than the payment of money) is punishable under s 155 by a fine of up to \$5,000 or imprisonment for up to 12 months. Under s 68, orders for discovery may be enforced²² in the same way as in the Supreme Court and the magistrate can order arrest ‘whenever he deems it necessary to do so for the purposes of s 68’.²³ Payment of fines or penalties is enforced in the same way as under the *Justices Act 1902* (WA).²⁴

Section 120 of the *Local Courts Act 1904* (WA) allows for an action on a judgment to be brought in the Supreme Court, but does not specify that standing be limited to the plaintiff. A warrant for execution for the payment of money can only be brought by the plaintiff.²⁵

19 *District Court of Western Australia Act 1969* (WA) s 56.

20 *District Court of Western Australia Act 1969* (WA) s 62.

21 *Connell v The Queen (No 6)* (1994) 12 WAR 133.

22 *Local Courts Act 1904* (WA) s 68.

23 *Local Court Rules 1961* (WA) Order 27 rule 2.

24 *Local Courts Act 1904* (WA) s 157.

25 *Local Courts Act 1904* (WA) s 121.

Section 130 empowers a magistrate to imprison a defendant who fails to meet a money order that he or she has the means to pay. There is no provision specifying who has standing to bring an enforcement proceeding. There is no express requirement that this application be brought by the plaintiff.

In the case of a failure to pay money where the defendant has the means to pay, the proceedings are brought on summons before a magistrate.²⁶ The magistrate can take evidence of the means to pay as he or she sees fit, including the summoning and examining of witnesses. Where a person disobeys an injunction or other order, other than for the payment of money, the power to deal with disobedience contempt can be delegated to a clerk.²⁷ Submissions highlighted that it was a significant protection that any order of confinement made by a clerk needed to be confirmed by a magistrate.²⁸

Where a person is in custody under any order made under ss 68 or 155 of the *Local Courts Act 1904 (WA)*, an application for discharge from custody supported by an affidavit showing cause and on notice to the plaintiff may be made.²⁹

Court of Petty Sessions

Courts of Petty Sessions have jurisdiction to determine criminal matters where the offence is punishable by summary conviction. There is also jurisdiction where the offence, act or omission is not treason, felony, a crime or misdemeanour. Non-compliance in this jurisdiction is concerned with orders made in the context of criminal prosecutions. There is no express provision dealing with disobedience contempt; however, as with the Local Courts, disobedience contempt may be dealt with by a magistrate as enforcement proceedings, with imprisonment as an option.³⁰ A magistrate may also issue a warrant, other than for breach of an order requiring the payment of money.³¹ The *Justices Act 1902 (WA)* provides for a specific administrative enforcement of money orders, so that money due becomes recoverable as a judgment debt.³²

Family Court of Western Australia

Family law in Western Australia is governed by both the *Family Law Act 1975 (Cth)* and the *Family Court Act 1997 (WA)*. Western Australia maintains its own discrete family law jurisdiction exercised by the Family Court of Western Australia. The Western Australian Parliament has power to legislate with respect to family law matters not involving a marriage, regarding *ex nuptial* children for example. As indicated in Part I, changes to the Commonwealth law generally motivate the Western Australian Parliament to introduce matching legislation ensuring that the law applicable to *ex nuptial* children and *de facto* relationships remains consistent with the *Family Law Act 1975 (Cth)*.

26 *Local Court Rules 1961 (WA)* Order 26.

27 *Local Courts Act 1904 (WA)* s 130.

28 *Local Courts Act 1904 (WA)* s 130(7).

29 *Local Court Rules 1961 (WA)* Order 27 rule 3.

30 *Justices Act 1902 (WA)* ss 154A, 155 & 159.

31 *Justices Act 1902 (WA)* s 159.

32 *Justices Act 1902 (WA)* s155.

Section 35 of the *Family Law Act 1975* (Cth) gives the Family Court the same powers as the High Court to deal with contempt of court, and disobedience contempt is dealt with in three streams:

- Section 112AP of the *Family Law Act 1975* (Cth) treats contempt involving wilful or contumacious³³ defiance as a criminal matter.
- Disobedience or breach of orders relating to children, such as where they will reside, who is to have contact with them and on what basis, is dealt with under Division 13A of Part VII of the *Family Law Act 1975* (Cth) which imports the sanctions provided for in the parenting compliance regime. These sanctions vary according to whether it is a first, second or subsequent breach of a parenting order.
- Breach of orders other than those relating to children is covered by s 112AD of the *Family Law Act 1975* (Cth). (The often contentious area of child support is dealt with separately by the Child Support Registrar.)

Enforcement proceedings seeking compliance with the Court's orders, such as for the sale of property or the payment of money, can be brought by the plaintiff and in some cases by a third party.³⁴

Recent reforms

The Commonwealth approach to disobedience contempt was introduced as a result of extensive consultation. The provisions do not, however, apply to an exercise of power by the Family Court of Western Australia as it is not a Family Court of the Commonwealth, having been created as the Family Court of Western Australia under state, not Commonwealth legislation.

As indicated in Part I, in September 2002 Western Australia passed legislation that largely mirrors the Commonwealth approach to contempt in all relevant family law matters. This has since been proclaimed.³⁵

As foreshadowed in the Discussion Paper on this term of reference, given the recent legislative action in this area, the Commission does not intend to comment on this issue in relation to the Family Court or to propose further issues for reform.³⁶ As indicated in Part I, the recommended reforms in this Report are not intended to apply to contempt under the *Family Court Act 1997* (WA).

33 'Contumacious' means insubordinate, stubbornly or wilfully disobedient, especially to an order of the court: JB Sykes (ed) *The Australian Concise Oxford Dictionary of Current English* (7th ed, 1987).

34 CCH, *Australian Family Law & Practice*, [55.110].

35 *Family Court Amendment Act 2002* (WA).

36 Law Reform Commission of Western Australia, *Contempt by Disobedience to the Orders of the Court*, Discussion Paper, Project No 93(III) (2002) 19.

Codification

As can be seen, the existing law of disobedience contempt is piecemeal and complex. Similar to other reviews of the law of contempt, the ALRC has recommended codification of the law of contempt, including disobedience contempt.³⁷ As indicated elsewhere in this Report, the benefits of providing a statutory basis for disobedience contempt, in the Commission's view, include the capacity to provide for a consistent approach. Other benefits include certainty of sanction and the removal of those anomalous contempt offences that stand outside the general codification of criminal law in Western Australia. Like those received in relation to the other terms of reference for this Project, responses to the Discussion Paper on contempt by disobedience were strongly supportive of codification.

Recommendation 44

The existing laws relating to civil and criminal contempt by disobedience, including common law offences, should be replaced by statutory provisions which are applicable to disobedience contempt in all civil and criminal courts in Western Australia.

Recommendation 45

The existing procedures in relation to disobedience contempt in all courts should be replaced by uniform procedures whereby disobedience contempt matters are to be determined.

The merging of civil and criminal disobedience contempts

The competing need to have access to substantial penalties to ensure enforcement for a plaintiff and the balancing requirement to provide a fair hearing for a defendant at risk of those penalties persists as a difficulty in the treatment of disobedience contempt as a civil matter. The High Court in *Witham v Holloway* considered the distinction between civil and criminal contempt to be artificial and suggested that all proceedings for contempt should realistically be seen as criminal.³⁸ Support for this suggestion may be found in the following:

³⁷ ALRC, above n 3, Recommendations 64 and 78. See also United Kingdom, Committee on Contempt of Court, *Report of the Committee on Contempt of Court* (HMSO, London, Cmnd 5794, 1974), Recommendations 34 & 39 [172] ('the Phillimore Committee').

³⁸ *Witham v Holloway* (1995) 183 CLR 525, 534.

(a) Standard of proof

Currently all charges of contempt must be proved to the criminal standard of beyond reasonable doubt, although civil contempt by disobedience continues to be recognised.

(b) Standard of service

The standard of service in criminal matters requires personal service on the defendant. This standard is also required in Western Australia in civil contempt proceedings.³⁹

(c) Particularising the charge

The notice of motion must specify the contempt of which the defendant is alleged to be guilty.⁴⁰ This means that the defendant is entitled to know exactly what he or she is said to have done or omitted to have done to constitute contempt of court⁴¹ in order to defend him or herself.

(d) Power of arrest

In *Kaleen Holdings Pty Ltd v Patek*,⁴² Ipp J held that the arrest of a person to answer a charge of contempt of court is not of the same character as the execution of an ordinary civil process. This case concerned a ‘civil’ (non-contumacious) contempt. The basis for this ruling was the public interest in the exercise of the contempt power.⁴³

Other distinctions

In *Witham v Holloway*⁴⁴ McHugh J identified a number of distinctions between civil and criminal contempt which no longer apply, including standing to bring an action, waiver, unlimited imprisonment, the power to fine and standard of proof. The tendency to break down distinctions reflects recognition of the public interest in having court orders obeyed. The distinctions that do remain include clarity as to the right to appeal⁴⁵ and the right to administer interrogatories.

It is clear from the above that in many respects those areas which traditionally constituted ‘civil’ contempt have increasingly come to be treated as if they were criminal offences. However, one area in which the traditional civil status of contempt by disobedience remains significant is the issue of who can bring an action for enforcement or punishment for disobedience contempt. This remains of particular concern in the context of protecting individual litigants’ personal interests in ensuring compliance with a court order in their favour, and is fundamentally linked to the current civil status of disobedience contempt proceedings.

39 *Supreme Court Act 1935* (WA) s 135; *The Swan Brewery Co Pty Ltd v Newman* (1998) WASC 271.

40 *Rules of the Supreme Court 1971* (WA) Order 55 rule 5.

41 P Seaman, *Civil Procedure in Western Australia*, Vol 1 (1990) [55.5].

42 (1989) 2 WAR 31.

43 *Ibid* 35.

44 (1995) 183 CLR 525, 539–41.

45 Discussed below; also see Seaman, above n 41, [55.1.4].

Who should bring an action for disobedience contempt?

Disobedience contempt evolved as a branch of the civil law on the basis that it was primarily concerned with the rights of the successful party against another private litigant. Consistent with this principle, standing to enforce was traditionally conferred on the successful party.⁴⁶ However, in its 1987 report on contempt the ALRC observed that the position as to who had standing to bring proceedings in the civil context was no longer clear.⁴⁷ Reference was made to *Matthews v Seamen's Union of Australia*⁴⁸ in which the majority of the Commonwealth Industrial Court held that a member of the public had standing to take proceedings to punish an alleged disobedience of an order being 'of a criminal nature', but not to bring an application to enforce the order. In *Witham v Holloway* the High Court stated that *any* non-compliance necessarily constituted an interference with the administration of justice, traditionally recognised as the basis for criminal contempt offences.⁴⁹ Notwithstanding the comments of the High Court regarding the wider public interest in securing the vindication of judicial authority in civil disobedience contempt proceedings,⁵⁰ there are no reported cases where this has been done in Western Australia at the instance of someone not a party.

The current law of contempt by disobedience in Western Australia generally does not expressly exclude parties from bringing an action for enforcement or punishment. However, persons other than the plaintiff would be required to establish sufficient interest to support standing if they sought to bring such an action. In relation to actions seeking to punish the defendant, as indicated previously, only in the Local Court and Court of Petty Sessions jurisdictions are there express statutory provisions dealing with this issue. Reliance on the general contempt jurisdiction is required in the Supreme and District Courts, although, as noted earlier, the District Court jurisdiction in relation to criminal contempt by disobedience is not available to punish orders arising in civil proceedings.

Supporting the maintenance of the distinction between civil and criminal contempt is the need to recognise the interests of the plaintiff in securing compliance, and the necessary erosion of those interests by according fuller rights to the defendant. The opposing argument focuses upon the nature of the sanctions the plaintiff may call in aid, including fines and imprisonment, and the anomaly that the defendant is deprived of full criminal procedure in a context where the sanctions may be greater than under most criminal trials.

The Commission's view is that civil actions to enforce or punish disobedience contempt should not be retained, and that all disobedience contempts should be treated like other contempts, as criminal offences. In adopting this approach the Commission finds the reasoning of the High Court in *Witham v Holloway* persuasive; that is, both the nature of the sanctions available in enforcement proceedings, and the public interest in

46 Such as under s 132 of the *Supreme Court Act 1935* (WA) which entitles 'the person prosecuting such judgment or order' to seek leave to issue a writ of sequestration.

47 ALRC, above n 3, [503].

48 (1957) 1 FLR 185, 194.

49 *Witham v Holloway* (1995) 183 CLR 525, 533 (Brennan, Deane, Toohey & Gaudron JJ).

50 *Ibid.*

securing compliance with any court orders or undertakings to the court, justify proceedings to enforce compliance or to punish non-compliance being brought as criminal matters. This reform was supported in the Law Society's submission, which endorsed the reasons given by the High Court in *Witham v Holloway* and cited the current distinction as illogical and impractical. It also was partially supported in the submission of the District Court, with the exception of specific rules which relate to civil orders such as discovery, which the Court submitted 'could truly be called civil' and which it was submitted should be amenable to enforcement procedures by a plaintiff.

In response to the concerns expressed in submissions that litigants had a legitimate interest in having court orders or undertakings complied with, the Commission notes that a party who is adversely affected by the disobedience would not be excluded from any role or remedy if the area were to become solely criminal. Should official bodies not prosecute such an offence, there is scope under the *Criminal Code* for private prosecutions of criminal offences.⁵¹ This matter is discussed further below (see 'Standing').

A significant consequence identified and endorsed by the District Court, should the recommendation to prosecute all disobedience contempts as criminal be adopted, is the potential availability of court ordered reparation, being restitution or compensation for victims of crime.⁵² However, elsewhere the appropriateness to the contempt jurisdiction of restitutionary remedies has been questioned,⁵³ including in the submission of the Law Society. While the consequence of having reparation available may constitute a significant reform of the traditional functions of the contempt jurisdiction, it is consistent with the overall intention of bringing the laws of contempt within the criminal law. Furthermore, there is no obvious reason why those who suffer as a result of disobedience contempt should not be entitled to seek reparation on the same basis as other victims of crime.

Recommendation 46

The civil jurisdiction of contempt by disobedience should be abolished. Actions in relation to contempt by disobedience should be by way of criminal prosecution only.

Non-compliance with case management orders

As indicated previously, at present it appears that remedies such as additional or 'wasted' costs orders are regarded as sufficient to enforce compliance with case management orders in many instances. The increasing focus on the punitive aspects of the civil contempt jurisdiction and the merging with the criminal standard of proof provide additional reason to question the appropriateness of retaining the disobedience

51 See *Criminal Code* s 720; however, leave of the Supreme Court must be obtained.

52 *Sentencing Act 1995* (WA) Part 16.

53 Eady & Smith, above n 10, [3-72]–[3-73].

contempt jurisdiction as a means of addressing non-compliance with case management orders, such as discovery.

The Commission made a number of recommendations in its *Review of the Criminal and Civil Justice System* to improve accountability of legal officers to their clients in circumstances of non-compliance with case management orders.⁵⁴ Such recommendations included amending Order 66 rule 5 of the *Rules of the Supreme Court*, which currently grants the Court power in certain circumstances to disallow solicitors from charging their client, to reimburse their client, or to indemnify any party, so that it also would be applicable to employed solicitors and barristers. It was further recommended that the *Legal Practitioners Act 1983 (WA)* be amended to require solicitors to inform their clients of costs orders and the reasons for the making of those orders. The implementation of those recommendations would provide further reason for the abolition of the disobedience contempt jurisdiction to non-compliance with case management orders.

Although the District Court in its submission on this term of reference supported the retention of a civil contempt jurisdiction, this was because of concerns that criminal prosecution would otherwise be applicable to what the Court described as 'enforcement procedures that could truly be called civil', later citing the example of disobedience of orders for discovery. The Commission agrees that it is not appropriate for such non-compliance with case management orders to be dealt with as criminal contempt. However, the Commission believes that the answer does not lie in the retention of a civil contempt jurisdiction, which has increasingly come to resemble criminal prosecution.

Recommendation 47

Non-compliance with case management orders should be exempt from disobedience contempt proceedings.

Procedure

The proposed abolition of civil contempt has obvious repercussions. Issues discussed below address how criminal contempt by disobedience should be defined, particularly in relation to any requisite mental element; standing to prosecute; waiver; and third parties. The most significant repercussion identified in submissions was the question of how to preserve the interests of the parties in whose favour the disobeyed order or undertaking was made. The suggested reform of procedure for the prosecution of disobedience contempt outlined below has been devised to accommodate the interests of those parties.

⁵⁴ Law Reform Commission of Western Australia, *Review of the Criminal and Civil Justice System in Western Australia*, Project 92 (1999) Recommendations 147–51.

The mental element

In the past, unless the defendant acted flagrantly or ‘contumaciously’—that is, in open defiance to an order of the court—the contempt was generally treated as a civil and not a criminal matter.⁵⁵ Prosecution as a civil contempt did not necessarily mean that the sanction was lighter; indeed, in some instances it could be more severe.

Presently the law provides that intent is not a necessary element in proceedings for criminal contempt.⁵⁶ What is required is the establishment of a deliberate act by the defendant which the court is persuaded beyond a reasonable doubt is in clear breach of the order made. The intent required is therefore limited to a wilful or deliberate act and no longer requires any element of defiance, such as where the defendant destroys an object the subject of a court order, or refuses to hand over an object known to be in his or her possession. The intention to breach the order and a belief on the part of the defendant that his or her conduct was not in breach of the order is irrelevant.⁵⁷ However, intention does remain relevant to the question of penalty.⁵⁸ For example, in *Resolute Ltd v Warnes*⁵⁹ absence of intent was reflected in the suspension of an otherwise applicable prison sentence.

The question arises whether proof of intent should be an element of disobedience contempt. In considering this question the Phillimore Committee concluded that the nature of the intent of the defendant in breaching the order could be adequately reflected in the penalty the court imposes.⁶⁰

The ALRC recommended that the plaintiff seeking punitive sanctions should have the onus of establishing that the defendant wilfully intended to disobey the order or made no reasonable attempt to comply with it.⁶¹ Punitive sanctions should not be imposed where the defendant satisfies the court that the disobedience was due to a failure, based on reasonable grounds, to understand the nature of the obligation imposed by the order.⁶² However, the ALRC did not consider this recommendation to be relevant to the availability of enforcement orders, because the plaintiff is entitled to the benefit of the order. Thus where the defendant either intended to disobey the order or made no reasonable attempt to obey it, the court should be able to order enforcement whether or not the defendant realised he or she was in breach.⁶³

Although to some extent it may be accepted that the ALRC’s recommendations, being premised upon the continuation of civil disobedience contempt, have been overtaken by the decision of the High Court in *Witham v Holloway*, the distinction between intentional and

55 Except in the specific situations (such as non-molestation orders) described by the High Court in *Witham v Holloway* (1995) 183 CLR 525, 530.

56 *R v Pearce* (1991) 7 WAR 395; *R v WA Newspapers Ltd*; *Ex parte Director of Public Prosecutions (WA)* (1996) 16 WAR 518; *The Swan Brewery Co Pty Ltd v Newman* [1998] WASC 271 (Unreported, 2 September 1998).

57 *The Swan Brewery Co Pty Ltd v Newman* [1998] WASC 271 (Unreported, 2 September 1998).

58 *Resolute Ltd v Warnes* [2001] WASC 4 (Unreported, Full Court, 17 January 2001) [3].

59 *Ibid.*

60 United Kingdom, Committee on Contempt of Court, above n 36, [19]–[20].

61 ALRC, above n 3, Recommendation 67.

62 *Ibid.*

63 *Ibid* [525].

unintentional disobedience remained important in submissions received. Such a distinction is of particular significance in relation to disobedience contempt relating to orders to pay monies. In its submission on this term of reference, the Financial Counsellors' Resource Project of Western Australia highlighted the inappropriateness of the current amalgamation of punishment for contempt of court and the means by which a plaintiff can enforce a civil judgment, in particular a judgment debt, under s 130 of the *Local Courts Act 1904* (WA). The submission highlights the incongruity of imprisoning debtors for the failure to pay a debt and the present Government's determination to reduce the rate of imprisonment, especially where the disobedience was not wilful or truculent.

It is of note that in its 1995 report on the *Enforcement of Judgments of Local Courts*,⁶⁴ this Commission recommended that the courts' power to punish a judgment debtor for contempt should be limited to circumstances where the debtor had the means to pay but wilfully and persistently defaulted. The Commission also recommended the abolition of imprisonment for failure to pay civil debts. Although legislation was subsequently drafted to address these and other recommendations, the process stalled in 2000 and the law in relation to the enforcement of civil debts remains unchanged. In the *30th Anniversary Reform Implementation Report* the Commission identified the need for legislative reform in this area as being of high priority.⁶⁵

Drawing on the kind of division referred to by the ALRC, this Commission recommends that two offences be enacted in relation to disobedience contempt.

Recommendation 48

Two criminal offences for disobedience contempt should be enacted:

- (a) an indictable offence, defined to include an element that the defendant wilfully disobeyed the order or undertaking, and subject to defences available under Part V of the *Criminal Code* as well as a defence that the disobedience was due to a failure, based on reasonable grounds, to understand the nature of the obligation imposed by the order. Imprisonment, amongst other sanctions, should be available upon conviction; and
- (b) a lesser offence, not involving an element of wilful disobedience, and subject only to defences available under Part V of the *Criminal Code*. No sanction of imprisonment should be available upon conviction for this offence.

64 Law Reform Commission of Western Australia, *Enforcement of Judgments of Local Courts*, Project No 16(II) (1995).

65 Law Reform Commission of Western Australia, *30th Anniversary Reform Implementation Report* (2002) 64–65.

Summary procedures

Actions for disobedience contempt in the Supreme and District Courts, other than in respect of execution of judgments, are brought summarily on motion to a single judge.⁶⁶ The intent is to provide for a speedy resolution of the issues.⁶⁷ In the Local Courts, disobedience contempt is dealt with by the magistrate making the order. In the case of a failure to pay money where the defendant has the means to pay, the proceedings are brought on summons before the magistrate.⁶⁸ Where a person disobeys an injunction or order other than for the payment of money, Order 27 of the *Local Court Rules 1961* (WA) provides for the defendant to be summonsed as for a simple offence under the *Justices Act 1902* (WA). In the Courts of Petty Sessions, the *Justices Act 1902* (WA) specifically allows for ‘the justices who made the order, or another justice’ to issue a warrant of commitment if the defendant contravenes an order other than an order requiring the payment of money or an order under Part VII.⁶⁹ If orders requiring the payment of money, other than fines, are not satisfied within 28 days, the money may be recovered as a judgment debt.⁷⁰

There are a number of criticisms which arise in relation to the summary contempt jurisdiction, and these have been addressed earlier in this Report. Of particular significance in relation to the use of the summary procedure is that there is no provision for trial by jury. This is of particular concern in relation to the trial of the common law contempt offences where no maximum penalty is prescribed. Such jurisdiction can also limit the defendant’s opportunity to know and test the nature of the evidence the plaintiff is to rely on, as it is not subject to the same procedural safeguards as other criminal proceedings.

There is another significant issue as to what is the appropriate role for the judicial officers who made the order which is the subject of the contempt proceedings. The first question to arise is whether it is appropriate for the courts, and in particular the same judicial officers, to adjudicate on alleged contempt of their own orders. This is particularly significant when, as indicated previously, the clarity of an order may be at issue in any disobedience contempt proceeding. In addressing this concern, the ALRC drew a distinction between the different purposes of disobedience contempt: enforcement on the one hand and punishment on the other. It recommended the introduction of enforcement legislation as civil proceedings at the suit of the plaintiff within a summary jurisdiction and the inclusion in the criminal law of offences involving a flagrant challenge to the authority of the court, dealt with in the same way as any other criminal offence.⁷¹

In *R v Lovelady; Ex parte Attorney General*⁷² Burt CJ considered that there was no reason for the summary procedure to be used where contempts

66 *Rules of the Supreme Court 1971* (WA) Order 55. The *Rules* indicate that an allegation of disobedience contempt does not need to be heard by the Full Court.

67 For example, *Castlecroy Pty Ltd v Newvintage Nominees Pty Ltd* [2002] WASC 2 (Unreported, 14 January 2002).

68 *Local Court Rules 1961* (WA) Order 26.

69 *Justices Act 1902* (WA) s 159.

70 *Justices Act 1902* (WA) s 155.

71 ALRC, above n 3, [527]–[529].

72 [1982] WAR 65, 66.

were not in the face of the court and had no impact on current proceedings. However, in *R v Minshull*⁷³ Malcolm CJ stated that the summary procedure was appropriate for proceedings in respect of disobedience of court orders or undertakings. The latter position was highlighted in a submission from the Supreme Court on this term of reference, which emphasised the speedy resolution of issues resulting from such a jurisdiction and consequent savings, particularly in the context of seeking enforcement of an order. The submission advanced the view that the summary jurisdiction should be retained provided sufficient safeguards were in place (such as the right of appeal and appropriate procedural protections giving the defendant a full opportunity to be heard, informed of the evidence, and given the opportunity to cross-examine witnesses). Regarding concerns about bias, the submission indicated that these could be addressed through the usual rules relating to bias of judicial officers, or by a rule precluding the same judicial officer who made the relevant order from hearing the contempt application; although the latter would be less efficient in terms of the use of judicial resources and may lead to protracted proceedings. The submission agreed with the ALRC that there was no reason why criminal disobedience contempt should not be dealt with in the same way as any other indictable offence, triable summarily before a judge or magistrate.

In its submissions, the District Court supported the summary jurisdiction, but suggested that it be exercised only by superior courts, analogously to breach of bail applications. Legal Aid Western Australia supported the availability of a summary jurisdiction, but only in terms of the civil prosecution of disobedience contempt by a plaintiff, on the basis of the need to minimise delays for plaintiffs in seeking the enforcement of orders. The Law Society, however, was of the view that the summary jurisdiction should be limited to only certain circumstances involving contempt in the face of the court.

Again the interests of the plaintiff in relation to disobedience contempt remain a significant factor in considering reform. The Commission recommends that a summary jurisdiction, to the extent that the matter be determined in the same court as the original order or undertaking was made, should be retained for the lesser offence referred to in Recommendation 54, that is where there is no element of wilful disobedience and imprisonment is not an available sanction. Although submissions highlighted the benefits (knowledge of the circumstances and the lesser expenditure of judicial resources) in retaining the same judicial officer for the prosecution of disobedience contempt charge as made the original order, the Commission is of the view that these benefits are not of sufficient weight to override the importance of the actuality and appearance of judicial neutrality in the determination of an application. As a result the Commission recommends that this jurisdiction should be similar to that discussed in relation to contempt in the face of the court, when the conditions for the exercise of the summary power by the presiding judicial officer are not satisfied. (See Recommendations 36–38.)

73 *R v Minshull; Ex parte Director of Public Prosecutions for Western Australia* (Unreported, Full Court of the Supreme Court of Western Australia, Malcolm CJ, Kennedy and Franklyn JJ, Library No 970255A, 21 May 1997) 17.

The indictable offence, involving wilful disobedience and with imprisonment as a possible sanction, should be dealt with on the same basis as other indictable offences.

Recommendation 49

- (a) The summary jurisdiction for disobedience contempt should be retained only for the lesser offence referred to in Recommendation 48, although there should be a prohibition against the same judicial officer hearing the disobedience contempt matter as made the original order or as was presiding when the undertaking was made.
- (b) The jurisdiction should be subject to the same codified procedure as applies in face of the court contempt prosecutions when the conditions for the exercise of the summary power by the presiding judicial officer are not satisfied. (See Recommendations 36–38 above.)
- (c) The recommended indictable offence for disobedience contempt should be determined according to the rules for indictable offences.

Standing

It has been recommended that the civil jurisdiction for the prosecution of disobedience contempt be abolished and that disobedience contempt become a solely criminal jurisdiction. The issue then arises as to who should be entitled to bring such a prosecution. As the basis for this recommended reform was the public interest in securing compliance with any court order or undertaking, an obvious response would be that such offences should be prosecuted in the same manner as other equivalent criminal offences. As such, no reform of the issue of standing would be required given the existing power of the DPP to bring a prosecution for any indictable offence and for any other disobedience contempt relating to the prosecution of an indictable offence; and given too the equivalent power of the Attorney General, in addition to his or her standing to initiate disobedience contempt proceedings in all other contexts, including disobedience in civil matters.⁷⁴

As referred to previously, the recommendation that the civil jurisdiction for disobedience contempt be abolished does not preclude the possibility for private individuals or other interested parties—in particular parties for whose benefit an order or undertaking was made—bringing an action to enforce that order or undertaking.⁷⁵ Section 720 of the *Criminal Code* provides for private prosecutions of indictable offences. However, the Supreme Court must grant leave for such a prosecution to proceed. While

74 See above Part II, p 44.

75 Submissions from the Supreme Court and Legal Aid Western Australia sought the continued recognition of the right of a plaintiff to bring enforcement proceedings, although Legal Aid was opposed to plaintiffs being able to bring punitive proceedings.

this process has the potential to provide recognition of the legitimate interests of litigants in such a matter, it is unlikely to be a practical option for a party seeking to initiate disobedience contempt proceedings (for a breach of an order for discovery in the Local Court, for example) particularly because, as indicated in Recommendation 48, the recommended indictable offence requires the prosecutor to prove wilful disobedience.

In order to provide for recognition of the significant private interest in securing compliance with a court order or undertaking (as highlighted in submissions), it is recommended that parties seeking to bring a private prosecution in relation to the lesser offence proposed in Recommendation 48 should be able to apply to the presiding judicial officer of the court in which an order or undertaking was made to initiate a criminal prosecution, should such a prosecution not be pursued by officials.

A further issue arises in terms of the traditional 'standing' of the presiding judicial officer to initiate proceedings for disobedience contempt as a result of the summary contempt jurisdiction. As indicated in Part III, there are substantial concerns arising from the courts adopting this dual role of prosecutor and adjudicator. It is significant that in none of the submissions received was there any support for the presiding judicial officer having standing to initiate proceedings for disobedience contempt. In particular the submissions from the Supreme Court and the District Court sought only to retain the right of plaintiffs to initiate proceedings in civil matters, while both agreed that criminal prosecutions should be left to the DPP, the Attorney General, or other prosecutor. Although this Commission is recommending the abolition of civil disobedience contempt, it is expected that the measure discussed by which the plaintiff can seek leave to initiate criminal prosecution is sufficient to protect their interests.

Recommendation 50

In addition to s 720 of the *Criminal Code*, which provides for the private prosecution of indictable offences, the power of the Director of Public Prosecutions to bring proceedings for disobedience contempt as an indictable offence or relating to the prosecution of indictable offences, and the power of the Attorney General to bring proceedings for any disobedience contempt relating to either criminal or civil proceedings, there also should be provision made for a plaintiff to apply to the presiding judge for leave to initiate proceedings for the lesser offence of disobedience contempt within the summary jurisdiction of that court.

Waiver

Traditionally the plaintiff in civil proceedings could waive enforcement of an order and that would dispose of the matter for all purposes.⁷⁶ This followed from the civil nature of the proceedings. No account was taken of the wider public interest in ensuring obedience to orders of the court.⁷⁷ Waiver was not, of course, available for criminal contempt.

In *Witham v Holloway* the majority observed that notwithstanding that proceedings may be brought by an individual, a ‘penal or disciplinary jurisdiction’ may be called into play and be exercised even when the parties have settled their differences and do not wish to proceed further.⁷⁸ In other words, waiver no longer determines the matter beyond the specific interests of the plaintiff. The notion of waiver in cases of disobedience contempt was found to be unsatisfactory because of the need to accommodate the broader public interest in the maintenance of the rule of law. McHugh J, in particular, pointed out the anomaly of allowing waiver in cases of civil, but not criminal, contempt.⁷⁹

In light of the Commission’s recommendation that disobedience contempt should be a purely criminal jurisdiction given the broader public interest in compliance with all court orders and undertakings, it follows that the doctrine of waiver would no longer apply. As in other criminal prosecutions, ‘waiver’ by the plaintiff would remain a consideration in sentencing.

Third parties

A person other than the defendant may be liable in disobedience contempt proceedings. This is usually a person who aids or abets the defendant in disobeying the court order. Traditionally all accessories (other than the defendant) were subject to ‘criminal’ as opposed to ‘civil’ contempt proceedings,⁸⁰ which could mean that different procedural rules applied for the hearing of the same allegation of disobedience contempt against the defendant and against a person who assisted in the contempt. The rationale was that the involvement of a person other than the plaintiff was clearly to undermine the administration of justice, taking it outside the civil party-to-party arena.⁸¹

There is also a category of case where a third party effectively nullifies the terms of an order, without necessarily involving the defendant. This occurred in the *Spycatcher*⁸² cases, where the effect of an order restraining further publication of confidential papers was nullified by their publication in a newspaper. In this case the English Court of Appeal held that those who deliberately interfere with the administration of justice by undermining judicial orders may be guilty of contempt, even though not directly bound by the court’s order.

The current law provides that unless the requisite mental element is present, a party who aids and abets non-compliance is not liable to

76 *Attorney General v Times Newspapers Ltd* [1974] 1 AC 273, 308 (Lord Diplock).

77 As discussed in *Witham v Holloway* (1995) 183 CLR 525.

78 *Ibid* 533.

79 *Ibid* 549.

80 *Attorney General v Times Newspapers Ltd* [1992] 1 AC 191; Seaman, above n 41, [55.4.26].

81 Eady and Smith, above n 10, [12-15].

82 *Attorney General v Newspaper Publishing PLC* [1988] Ch 333.

sanction. The ALRC endorsed the current law requiring a party to have knowingly aided or abetted the non-compliance.⁸³ The ALRC recommended that:

- the defendant must be liable to sanctions and the person assisting must have had actual knowledge both of the terms of the order and that the relevant conduct constituted disobedience;
- coercive sanctions generally should not apply to a person who aids or abets, other than in the case of officers of a corporation who are excepted due to their controlling role in a corporation's contempt.⁸⁴

It is arguable, however, that the requirement of 'actual' knowledge may excuse a deliberate failure to gain the knowledge, and possibly also excuse the independent 'disobeyer' (the *Spycatcher* scenario, for example) who should be within the reach of the courts if the object is to ensure that the rule of law is upheld.

Submissions on this issue were divided, with some, such as those from the District Court and Legal Aid Western Australia, stating that liability of persons other than the principal offender should be determined on the basis of Chapter II of the *Criminal Code*: 'Parties to Offences'. The Law Society, however, supported the ALRC proposals, although the Law Society also highlighted the need to also include those who 'close their eyes' so as not to have actual knowledge.

While reliance upon the general *Code* provisions relating to parties to offences would not be problematic in terms of the recommended indictable offence (as it includes an element of wilful disobedience), the recommended lesser offence is more problematic. This is because no element of wilfulness is incorporated into such an offence, which, if applicable to third parties, could potentially result in a liability for disobedience contempt even though the third party had no actual knowledge or reasonable basis for knowing of the court order or undertaking.

Recommendation 51

The recommended lesser offence in Recommendation 48 should not be applicable to parties other than those subject to a court order or undertaking, who are alleged to have breached the order or undertaking or aided and abetted the same.

Legislation should further provide that it is a defence for a third party charged with the indictable offence of disobedience contempt, to be proven on the balance of probabilities, that the person or organisation charged:

- (a) did not know of the relevant court order or undertaking; and
- (b) did not seek to avoid acquiring such knowledge.

83 ALRC, above n 3, [536].

84 Ibid.

Penalties

Supreme and District Courts

The penalties for disobedience contempt in the Supreme and District Courts derive both from the statutes establishing the respective courts and, in the case of the Supreme Court, as part of its inherent jurisdiction as a superior court of record.⁸⁵ The *Supreme Court Act 1935* (WA) provides for the charging and seizure of property to meet an order for the payment of a sum of money.⁸⁶ It may also be enforced by a writ of sequestration or, in certain circumstances, by the arrest or imprisonment of the defendant. Imprisonment is limited to a maximum of one year. Orders for the recovery of land and other property may be enforced by a writ of delivery⁸⁷ or in certain circumstances by a writ of attachment or a writ of sequestration. There is no limit on the period of imprisonment in these cases.

An order requiring a person to do or abstain from doing any act other than the payment of money can be enforced by a writ of attachment or by committal.⁸⁸ There is no time limit on the period of imprisonment. A mandatory injunction or mandamus can also be enforced by the court ordering someone else to perform the act, or abstain from doing the act, at the cost of the defendant.

Order 55 rule 7 of the *Rules of the Supreme Court 1971* (WA) provides for imprisonment and the imposition of fines; Order 55 rule 8 allows an order for arrest to be suspended and for a person to be released prior to the expiry of the term of imprisonment. At common law the court has the capacity to impose a fine for non-performance,⁸⁹ including an accruing fine until performance,⁹⁰ that is, a daily fine until the defendant complies with the order.

There is also the capacity at common law to seize assets, take over the running of a business (sequestration) and imprison the defendant indefinitely. Under Order 55 rule 7(3) of the *Rules of the Supreme Court 1971* (WA) sequestration is limited to a corporation.

Local Courts

Under the *Local Courts Act 1904* (WA) a magistrate may imprison for up to 12 months or impose a fine of up to \$5,000 in punishment for breach of an order to do an act other than pay money.⁹¹ In the case of an order to pay money the magistrate may order seizure of the defendant's property.⁹² Imprisonment for non-payment of money, which is limited to six weeks, is not in substitution for the requirement for payment.⁹³

85 Seaman, above n 41, [55.4.1].

86 *Supreme Court Act 1935* (WA) s 117.

87 *Supreme Court Act 1935* (WA) s 131.

88 *Supreme Court Act 1935* (WA) s 135.

89 *Witham v Holloway* (1995) 183 CLR 525, 541–42.

90 *Mudginberri Station Pty Ltd v Australasian Meat Industry Employees Union* (1986) 12 FLR 10.

91 *Local Courts Act 1904* (WA) s 155.

92 *Local Courts Act 1904* (WA) Part VIII.

93 *Local Courts Act 1904* (WA) s 130.

Courts of Petty Sessions

As indicated previously, there is power to enforce orders under the *Justices Act 1902 (WA)*⁹⁴ which includes a power of imprisonment. A magistrate also may issue a warrant, other than for breach of an order requiring the payment of money.⁹⁵ No maximum term is specified. The *Justices Act 1902 (WA)* provides for administrative enforcement of money orders, so that money due becomes recoverable as a judgment debt.⁹⁶

Unlimited sentences

A significant departure from the principles of modern criminal law in Western Australia, referred to earlier, is that because disobedience contempt has remained in some instances a common law offence, there are no limitations as to the amount of the fine imposed and no maximum term of imprisonment.

Moreover, because of the enforcement jurisdiction associated with disobedience contempts, accruing fines (fines imposed on a daily basis until an order is complied with) have been imposed in Australia in the context of an industrial dispute, to coerce compliance with a court order.⁹⁷ In *Mudginberri Station Pty Ltd v Australasian Meat Industry Employees' Union*⁹⁸ the fine was set at a lump sum of \$10,000 and a further fine of \$2,000 for each day the breach continued. The advantage of imposing an accruing fine is that it provides a strong incentive for compliance; the disadvantage is that the fine can climb quickly to a level either beyond the capacity to pay or out of proportion to the culpability of the conduct constituting breach. Taking the fine beyond the reach of the defendant may destroy a business or other organisation, with significant consequences for innocent parties such as employees.

The ALRC supported the concept of an accruing fine to enforce obedience because it may lessen the need to resort to coercive imprisonment.⁹⁹ In the case of imprisonment, the ALRC considered open-ended imprisonment should be abolished.¹⁰⁰ It recognised that the law would lose some flexibility, but this could be countered by retaining a right to order earlier discharge on compliance for coercive penalties. In the case of imprisonment imposed to punish—as distinct from to enforce—the ALRC saw no basis for open-ended sentences.¹⁰¹ It considered that there was no reason why a punitive sentence for disobedience contempt should differ from a sentence for a criminal offence.¹⁰²

Submissions received on this issue, including those of the District Court and Legal Aid Western Australia, were opposed to unlimited sentences. The Commission agrees that unlimited sentences are not warranted and supports the approach of the ALRC, as also endorsed by the Law Society, that if a fixed term of imprisonment is ordered, the court should retain a

94 *Justices Act 1902 (WA)* ss 154A, 155 & 159.

95 *Justices Act 1902 (WA)* s 159.

96 *Justices Act 1902 (WA)* s 155.

97 *Mudginberri Station Pty Ltd v Australasian Meat Industry Employees' Union* (1986) 12 FLR 10.

98 *Ibid.*

99 ALRC, above n 3, [551].

100 *Ibid* [538]–[547].

101 *Ibid* [546].

102 *Ibid.*

power of early discharge upon ultimate compliance, if such occurs during the term of imprisonment. This latter issue has been addressed by Recommendation 2, above.

There is some difficulty in recommending maximum penalties in relation to disobedience offences because of the existing absence of maxima and also because no proposal or submissions were made on this issue. The suggested maximum for the indictable offence below is based on that applicable to contempt in the face of the court. In relation to the lesser offence, account was taken of the current maximum fine under the Local Court provisions, but this was increased due to the loss of any jurisdiction by all courts to imprison on conviction for such an offence.

Recommendation 52

There should be maximum penalties applicable to disobedience contempt offences.

- (a) A suggested appropriate maximum sentence for the indictable offence of disobedience contempt in Recommendation 48, irrespective of the court in which it occurred, is imprisonment of five years or a fine of \$50,000 or both.
- (b) A suggested appropriate maximum for the lesser offence in Recommendation 48 is \$10,000, with no imprisonment available.

Sentencing options

At present, sentencing options for disobedience contempt, like other areas of contempt, do not include the broader range of penalties provided by the *Sentencing Act 1995 (WA)*¹⁰³ and the *Sentence Administration Act 1995 (WA)*.¹⁰⁴ Flexible sentencing options such as home detention, which are now part of modern criminal law, are not available. The ALRC supported the introduction of alternative sanctions in preference to custodial sentences in recognition of the trend towards a more flexible approach.¹⁰⁵ Where the issue of the availability of sentencing options was addressed in submissions received on this term of reference and on sanctions for contempt more generally these have consistently supported such a reform, and this has been addressed by Recommendation 2, above.

Uniformity in sentencing

It is of note that there are a wide range of other enforcement measures that have been available to the courts in addressing disobedience contempt and these should continue to be available, for both the indictable and lesser offences recommended, in particular as these provide alternatives enabling the court to secure compliance with an order. It has been a common theme in many submissions that there should be codification and uniformity in contempt matters, including disobedience contempt penalties.

103 *McGillivray v Piper* [2000] WASCA 245 (Unreported, 7 September 2000).

104 *Ibid.*

105 ALRC, above n 3, [552].

In particular the Supreme Court submitted that it was important that lower courts be able to deal with contempts with the same sanctions as other courts, stating that otherwise the authority of those courts may be diminished. Similarly the District Court was of the view that the determining factor should be the seriousness of the breach and this would be reflected by the jurisdiction to deal with such an offence.

A concern arises regarding the current role that a clerk–delegate in the Local Courts may take in a process that can lead to imprisonment and seizure of assets. As indicated above, some protection is currently built into the process by requiring the magistrate to confirm the order of commitment made by the clerk–delegate.¹⁰⁶ However, it is of note that the power to imprison for disobedience contempt would no longer be available to the Local Courts if the Commission’s recommendations are implemented. Should uniformity of sanctions be implemented across all courts, it may be appropriate that further consideration be given to what sanctions may be imposed by a clerk–delegate. Whatever the outcome of such deliberation, it is the Commission’s view that all sanctions imposed by a clerk–delegate should be subject to confirmation by a magistrate.

Recommendation 53

It is recommended that an additional part be inserted in the *Sentencing Act 1995* (WA) elaborating those additional enforcement remedies/sanctions such as attachment, sequestration and seizure which are available to address non-compliance with orders and undertakings and these should be available to all courts, although consideration should be given to which of these may be imposed by a clerk–delegate subject to confirmation by a magistrate.

Right to be heard

Does the defendant by his or her own behaviour disqualify himself or herself from the usual privileges accorded litigants? The law historically denied a defendant in civil litigation the right to be heard while still disobeying the order, except in relation the contempt application itself. This ‘rule’ also prohibits the defendant from bringing proceedings in the same cause.¹⁰⁷ The present position seems to be that the court has a flexible discretion¹⁰⁸ to enable a defendant to be heard or to bring proceedings, such as an appeal, in the same cause. Is it appropriate that a defendant be denied such privileges? On one view, the withholding of the right to be heard can be a powerful coercive measure available to the courts to encourage or compel compliance with court orders. The alternative view is that the right to be heard is a fundamental protection to defendants that should not be lost in any circumstances.

106 *Local Court Rules 1961* (WA) Order 26, rule 2.

107 Seaman, above n 41, [55.1.8] & [55.7.4].

108 *Ibid.*

Submissions on this issue were received from Legal Aid Western Australia and the Law Society and both strongly opposed the preclusion of a person in contempt from having a right to be heard. The Law Society stated that such a power ‘smacks of the imperialism of a by-gone era best forgotten’ and, in fact, it appears the sanction derived from canon law.¹⁰⁹ In the Commission’s view it is difficult to justify such an onerous penalty for disobedience contempt relative to other criminal offences, for which, no matter what the defendant is alleged to have done or has been found guilty of, the right to be heard remains paramount.

Recommendation 54

The discretion to deny the right to be heard by a party to civil litigation who has been convicted of disobedience contempt should be abolished.

Appeal rights

Similar to other areas of contempt, a right of appeal against a finding of disobedience contempt is not necessarily available to all defendants. In the case of an order made during civil proceedings, the right of appeal depends on whether the order is final or interlocutory. If it is interlocutory, leave to appeal will be required. A right of appeal exists where the order is regarded as of a civil nature, and it is a final order. The *Local Courts Act 1904* (WA) requires there to be a judgment to confer a right of appeal.¹¹⁰ Section 3, however, defines judgment widely, and would include decisions made in enforcement proceedings.

The law has been described as unclear with respect to the right of appeal in a criminal context.¹¹¹ Section 688 of the *Criminal Code* requires a conviction on indictment to enable an appeal to be brought under the *Criminal Code*. There is no indictment for proceedings under Order 55 of the *Rules of the Supreme Court 1971* (WA). While ss 80 to 83 of the *District Court of Western Australia Act 1969* (WA) preserve the inherent supervisory jurisdiction of the Supreme Court, the capacity for review is substantially less than on appeal.

The *Justices Act 1902* (WA) provides for appeal with the leave of the Supreme Court from a ‘decision of justices’.¹¹² ‘Decision’ is defined to include a conviction or finding, any other final determination of a proceeding, and a sentence imposed or order made consequent on any such conviction finding, dismissal or determination.¹¹³ A finding of disobedience would therefore give a right of appeal.

109 Eady and Smith, above n 10, [12-61]

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

111 Seaman, above n 41, [55.5.3].

112 *Justices Act 1902* (WA) s 184.

113 *Justices Act 1902* (WA) s 4.

The *Australian Constitution* provides rights to appeal to the High Court for a contempt conviction in the Supreme Court,¹¹⁴ subject to the requirement for special leave.¹¹⁵

A further issue arises where the defendant is found not to have disobeyed an order. The plaintiff has a right of appeal in a civil context, but it may be excluded if a criminal matter.¹¹⁶ This is based on the principle that a defendant who has been acquitted cannot face a further trial of the complaint. The point was raised in *Witham v Holloway* in respect of the *Criminal Appeal Act 1912* (NSW). There the majority considered that although the proceedings were essentially criminal in nature this did not equate them with the trial of a criminal charge, and that there were clear procedural differences, the most obvious being the absence of a trial by jury. The High Court saw no basis for importing the rule limiting a rehearing into the law of contempt.¹¹⁷ However, a plaintiff could lose the right to appeal an unfavourable decision if the civil/criminal distinction is removed for all purposes and all disobedience contempts are classified as criminal as has been recommended by this Commission, unless there are specific legislative provisions to the contrary.

The basis of the recommended reform is that the public interest in securing compliance with court orders and undertakings is such that it is appropriate for disobedience to be prosecuted criminally. The legitimate interest of parties to litigation in securing compliance with court orders or undertakings has been acknowledged in the recommendations concerning the initiating of criminal proceedings relating to disobedience contempt. It is the Commission's view, that there is no sufficient basis upon which it could be maintained that there should be more extensive appeal rights for the prosecutor than are available in other criminal prosecutions.

At the same time, however, it is important to ensure that legislative provision is made for the same right of appeal from conviction and sentence in the summary jurisdiction for disobedience contempt offences as for other criminal offences.

Recommendation 55

- (a) The right of appeal for those convicted and sentenced of the indictable offence of disobedience contempt should be the same as that available to others convicted and sentenced upon indictment.
- (b) The rights of appeal provided in Recommendations 41–43 in relation to contempt in the face of the court convictions and sentences should be available in relation to the lesser disobedience contempt offence.

114 *Australian Constitution* s 73.

115 *Judiciary Act 1903* (Cth) s 35(2).

116 *Thompson v Mastertouch TV Service Pty Ltd* (1978) 19 ALR 547; *Davern v Messel* (1984) 155 CLR 21.

117 *Witham v Holloway* (1995) 183 CLR 525, 534 (Brennan, Deane, Toohey & Gaudron JJ).

PART V

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Overview

As indicated in the Executive Summary to this Report, whilst the terms of reference for this Project refer explicitly to contempts in the face of the court, by publication and by disobedience, the broader consideration of contempt by interference with the administration of justice is necessarily implied. Although the Commission did not release a discrete paper on the topic, submissions received in response to the Discussion Papers directed the Commission's attention to certain issues regarding the latter, more general, area of contempt law and these matters are addressed in this Part. In particular, submissions highlighted issues relating to the general contempt known as 'scandalising the court' and also, as raised in a detailed submission from the State Coroner, the disrepute to the legal system arising from large witness payments.

Interference with the administration of justice

This Report has emphasised the complexity and diversity of the law of contempts. This remains the case in Western Australia even though a large number of common law contempt offences, such as those relating to the failure to carry out duties as a court officer or reprisals against jurors or witnesses, also appear in the *Criminal Code*, and the contempt jurisdiction of courts other than the Supreme Court are significantly subjected to statutory regulation.

The complexity and diversity of the law of contempts are a result, at least in part, of the common law status of traditional contempt offences, and in particular the breadth of the common law definitions. For example, as discussed in Part III, the Privy Council observed that it 'is not possible to particularise the acts which can or cannot constitute contempt in the face of the court',¹ and the New South Wales Supreme Court observed that such a contempt was constituted by:

conduct, active or inactive, amounting to an interference with or obstruction to, or tendency to interfere with or obstruct, the due administration of justice'.²

It is undoubtedly the case that limiting the jurisdiction of the courts in terms of contempt in the face of the court as recommended in Part III will reduce the flexibility of the courts to meet unforeseen (or unforeseeable) circumstances and to adjust the law to suit contemporary values and attitudes to the judicial process. There is a great degree of flexibility, however, in the recommended offences, arising from the use of terms such as 'insulting' or 'disrupting'.

In any event, as noted in Part III, codification of other areas of the law (including the general criminal law in Western Australia) has been achieved

1 *Izuora v The Queen* [1953] AC 327, 336 (Lord Tucker).

2 *Ex parte Bellanto; Re Prior* [1963] SR (NSW) 190, 202 (Herron ACJ, Sugerman & Ferguson JJ).

without adverse effect. Codification of powers to deal with contempts committed in the face of the court has already been achieved in the lower courts in Western Australia without any apparent problems. Furthermore the recommendations of the Commission, to the extent that these remove the existing nexus between offences such as insulting judicial officers or disrupting judicial proceedings and the occurrence in the vicinity of the court, also considerably extend the range of those offences. It remains the case that the Supreme Court nonetheless currently retains a limited residual jurisdiction over contempt in the lower courts, as well as the common law contempt jurisdiction preserved by s 7 of the *Criminal Code Act Compilation Act 1913* (WA), both of which would be lost if the recommendations of the Commission are implemented. The loss of the existing degree of flexibility in the formulation of contempt offences is an intended consequence of the recommended reforms. The Commission is of the view that greater certainty in the identification of the basis for liability and clearer guidance to participants in judicial proceedings are desirable objectives.

Scandalising the court

Scandalising the court is an aspect of contempt by publication, but it is distinct from the concerns relating to *sub judice* contempt, which was the subject of the Commission's Discussion Paper and of Part II of this Report. Whereas *sub judice* contempt is concerned with the capacity of a publication to prejudice the possibility for a fair trial in a particular instance, the offence of scandalising the court is concerned with undermining the authority of the courts and generally arises from allegations directed at a particular judge or bench of judges, criticising their decisions. It may also apply to criticisms of a court, the judiciary as a whole, court officials, or a jury.³

The High Court of Australia stated in 1983:

The authority of the law rests on public confidence, and it is important for the stability of society that the confidence of the public should not be shaken by baseless attacks on the integrity or impartiality of courts or judges.⁴

Although subsequent comments by Lord Diplock of the English Appeal Court described scandalising the court as 'virtually obsolescent',⁵ a High Court decision in 1992⁶ has been described as recognising 'that the principles relating to contempt by scandalising are far from a dead letter'.⁷

Courts in Australia have convicted defendants of scandalising offences for a range of comments. These have included comments that the High Court had 'knocked holes in the Federal Laws'; comments by a high profile union leader claiming that the actions of his rank and file had influenced the Federal Court; attacks on a judge for having passed sentences believed to be too lenient; comments by protestors inaccurately claiming a man was

3 Australian Law Reform Commission ('ALRC'), *Contempt*, Report No 35 (1987) [410].

4 *Gallagher v Durack* (1983) 57 ALJR 191, 234 in D Eady and ATH Smith, *Arlidge, Eady & Smith on Contempt*, (2nd ed., 1999) [5-206].

5 *Secretary of State for Defence v Guardian Newspapers Ltd* [1985] AC 339, 347 in Eady and Smith, above n 4, [205].

6 *Nationwide News Proprietary Ltd v Wills* (1992) 177 CLR 1 in Eady and Smith, above n 4, [5-266].

7 Eady and Smith, *ibid*.

‘jailed for two years only because he had wanted to see his children’.⁸ Aspects of scandalising offences have therefore included abuse, allegations of corruption or partiality, or susceptibility to outside pressure groups.

The ALRC has noted that statutory offences of ‘wilfully insulting’ judicial officers have tended to be limited by being required to have occurred in the vicinity of the court.⁹ As indicated earlier, the Commission has recommended that such a limitation should no longer be applicable.¹⁰ While this would go some way to replacing the offence of ‘scandalising the court’, it would not appear to do so altogether. For instance, s 60 of the Commonwealth *Royal Commission Act 1902*, specifically defines the offence of contempt to include ‘writing or speech [using] words false and defamatory of a Royal Commission’, and, as noted in the submission of a member of the Supreme Court, false and defamatory comments may not necessarily be seen as ‘insulting’. The inadequacy of an offence defined only as ‘insult’ may be particularly at issue in terms of criticisms of decisions made in an official capacity, as was highlighted in the submission of a District Court Judge.

Although the NSWLRC’s Discussion Paper on *Contempt by Publication* focussed primarily on *sub judice* contempt,¹¹ it did highlight a recent Victorian Supreme Court decision relevant to this issue. The decision held that a publication was contemptuous because it had a tendency or was objectively likely to undermine public confidence in the administration of justice by giving rise to a serious risk that the court (constituted by a single judge) would appear not to have been free from any extraneous influence.¹² Although it would appear that the decision was subsequently overturned,¹³ it nonetheless adds weight to the submission of the Law Society that this area of law remains unsettled. It also supports the Law Society’s submission that further consideration should be given to the competing public interests in the protection of the reputation of courts and of court officials and the right to make comment on the judicial arm of government as may be warranted.

In its 1987 report on contempt, the ALRC considered the abolition of the offence of scandalising the court, and the proposal received significant support in submissions to that Commission. However, noting at the time of its review, that no common law country had abolished the offence, the ALRC concluded that the retention of a limited and statutorily based offence was justified.¹⁴

One of the key issues concerning the merits of scandalising the court offences is whether judicial officers should be subject to ‘special treatment’

8 *R v Dunbadin, ex parte Williams* (1935) 53 CLR 434; *Gallagher v Durack* (1983) 57 ALJR 191; *Ex parte the Attorney-General: Re Truth and Sportsman Ltd* (1961) SRNSW 484; *Fitzgibbon v Barker* (1992) 111 FLR 191; in Eady and Smith, above n 4, [5-263]–[5-265].

9 ALRC, above n 3.

10 See above, p 79–80, (‘Literally in the face of the court?’).

11 New South Wales Law Reform Commission (‘NSWLRC’), *Contempt by Publication*, Discussion Paper No 43 (2000) [1.12].

12 *R v The Herald & Weekly Times Ltd* [1999] VSC 432; *R v The Herald & Weekly Times Ltd (No 2)* [2000] VSC 35, as cited in NSWLRC, *ibid* [4.54].

13 *Herald and Weekly Times Limited & Ors v Attorney General for the State of Victoria* [2001] VSCA 152 (Unreported, 7 September 2001).

14 ALRC, above n 3, [457].

in terms of being subject to public criticism. The Commission notes the submission of the WA Journalists' Association that:

In modern times, courts, like most public institutions, have been prepared to be accountable. This has brought with it a preparedness for community criticism. The notions of scandalising [the court] are archaic and need abolishing.

It is significant, however, that members of Parliament are accorded specific protection from criticism under the *Criminal Code*:

361. Defamation of members of Parliament by strangers

Any person who, not being a member of either House of Parliament, unlawfully publishes any false or scandalous defamatory matter touching the conduct of any member or members of either House of Parliament as such member or members, is guilty of a misdemeanour, and is liable to imprisonment for 2 years, and to a fine of \$1 000.

There is no apparent reason why members of Parliament should be entitled to greater protection than judicial officers in relation to allegations concerning the conduct of their official duties.

The Commission is of the view that the limited offence concerning 'scandalising' contempt recommended by the ALRC is appropriate. That is, it should be an indictable offence to publish an allegation imputing misconduct to a judge or magistrate in circumstances where the publication is likely to cause serious harm to the reputation of the judge or magistrate in his or her official capacity. The publisher as well as the person who made the allegation should be liable if he or she knew or reasonably ought to have known that the allegation would be published in the manner in which the publication actually occurred.¹⁵

Consistently with traditional scandalising the court offences there should also be clear defences protecting the interests of fair comment and freedom of communication. It is suggested that defences based on those detailed in ss 351–356 of the *Criminal Code* and relating to criminal defamation, should form the basis of the defences to this offence. Those defences include parliamentary privilege, reports of official inquiries and reports in the public interest, truth and good faith.

Recommendation 56

The codification of the law of contempt should include an indictable offence of publishing an allegation imputing misconduct to a judicial officer in circumstances where the publication is likely to cause serious harm to the reputation of the judicial officer in his or her official capacity.

Recommendation 57

There should be defences available to the offence in Recommendation 56 modelled on sections 351–356 of the *Criminal Code*.

It is further suggested that consideration be given to amending s 361 of the *Criminal Code* so that the terms of the offence of defaming members of Parliament reflects those applicable to judicial officers, and that it also be subject to the same defences. The existing maximum sentence upon conviction for an offence under s 361, being the same as that applicable to conviction for criminal defamation, appears appropriate for conviction upon the suggested offences.

Bringing the administration of justice into disrepute

An underlying concern highlighted in this Report has been the need to retain public confidence in the administration of justice. The balancing of the various interests at issue, including freedom of communication, acknowledges that a court's capacity to answer serious allegations about its conduct may do more to ensure public confidence in the administration of justice than the criminal prosecution of such comment or criticism. At the same time, imposing limits on what may be published, both while a trial is pending and subsequently, can be justified if the publication is prejudicial to a fair trial or is not truthful, fair or made in good faith.

Conduct other than the publication of comment or criticism also is capable of bringing the administration of justice into disrepute. The State Coroner made a detailed submission and met with the Commission in relation to such conduct. The Coroner was concerned with a recent inquest during the course of which it was revealed that witnesses received unusually high payments, ostensibly to persuade the witness to give truthful evidence. While the *Criminal Code* addresses concerns arising in circumstances where witnesses are offered property or benefits for the procurement of false testimony, there are no provisions where the truth or falsity of the testimony is not at issue. The Coroner was of the view that such conduct could nonetheless constitute a contempt of court because of its capacity to undermine confidence in the testimony of witnesses in receipt of payment, particularly where payments were made by instalments prior to or during litigation.

The Coroner suggested that one means of addressing the potential contempt arising from large payments to witnesses would be to enact provisions in the *Evidence Act 1906* (WA) requiring the disclosure of all such payments which fall outside the normal provisions. The disclosure of such payments to opposing parties would reduce the potential for inappropriate pressure to be placed on witnesses and also enable the opposing party to fully examine the witness in relation to the payments and their impact. The Coroner further highlighted the need for legal professionals to be aware of their obligations in relation to such disclosure, and suggested that these be made clear in professional ethics. Further consideration would also need to be given to the issue of how such matters could be proved if the relevant correspondence was subject to legal professional privilege.

As indicated, the Commission gave consideration to whether a general offence concerning interference in the administration of justice should be formulated as a means to address matters such as that highlighted by the Coroner. However, a proposal for such a general offence would not be consistent with the recommended reforms in this Report, which are intended to allow for greater certainty as to the identification of the basis for liability and clearer guidance to participants in judicial proceedings. It is of note too, that although there is authority that some payments to witnesses to tell the truth could amount to contempt of court,¹⁶ this was not pursued by the Attorney General or Supreme Court in the case referred to by the Coroner. It may be that the lack of any clear precedent in relation to such an offence in this country was a consideration in not pursuing the matter further.

The Commission is of the view that it is preferable to address the concerns raised by the Coroner through specific legislative reform and endorses his suggestions in relation to disclosure requirements and ethical rules.

Recommendation 58

- (a) The *Evidence Act 1906* (WA) should be amended to provide for a requirement of disclosure of all payments made to witnesses in legal proceedings.
- (b) The legal profession should review its ethical rules and ensure that practitioners understand their obligations in relation to disclosure requirements.

Conclusion

The intent of this Project has been to rationalise and codify the law of contempts. Discussion Papers were issued in relation to a number of specific areas of contempt law and there was generally very strong support for the rationalisation and codification of contempt laws in submissions on all terms of reference. To give effect to this general reform, it has been recommended that s 7 of the *Criminal Code Act Compilation Act 1913* (WA) which retains a common law jurisdiction to punish for contempt of court be repealed, that a series of specific statutory contempt offences be enacted, and certain other legislative reforms made, and that the procedures for prosecuting contempt be rationalised and clarified.

¹⁶ D Lanham, 'Payments to Witnesses and Contempt of Court' [1975] *Criminal Law Review* 144.

Appendices

APPENDICES

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Summary of Recommendations

1. The law of contempt of court in Western Australia, other than as applicable under the *Family Court Act 1997* (WA), should be codified and the procedures for prosecution made uniform. Upon codification of the law of contempt, s 7 of the *Criminal Code Act Compilation Act 1913* (WA), which retains the authority of courts of record to punish a person summarily for the offence commonly known as 'contempt of court', should be repealed. [page 8]
2. The *Sentencing Act 1995* (WA) and the *Sentence Administration Act 1995* (WA) should be amended so as to apply to contempt of court offences. However, there should be provision made for all courts to have power to discharge a person committed to prison for contempt of court prior to the expiration of the term of imprisonment. [page 11]
3. Reports of proceedings for contempt of court, and other relevant documentation relating to such proceedings, should refer to the defendant as the defendant and not the contemnor. [page 11]
4. The balancing of the various interests at stake in contempt law should continue to be undertaken by the courts, but in accordance with legislation rather than the common law. [page 23]
5. 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. [page 29]
6. Legislation should incorporate reference to a defendant's mental state, besides intention to publish, as relevant to liability for *sub judice* contempt by publication. (See Recommendation 11, below.) [page 29]
7. Subject to Recommendation 8, for the purposes of the offence proposed at Recommendation 5, legislation should provide that criminal proceedings become pending at the occurrence of any of these initial steps:
 - (a) when a person is charged;
 - (b) when a complaint, summons or warrant is issued against a person;
 - (c) when an ex officio indictment is filed against a person;
 - (d) when a person is arrested, with or without warrant; or
 - (e) when a complaint or summons is presented to a court. [page 31]

8. In respect of publication of a photograph of a suspect or an accused person legislation should provide that there be a prohibition on the publication of a photograph, film, sketch or other likeness, or a description of physical attributes, where:
 - (a) the publication suggests that the relevant person is suspected of, or has been charged with, a criminal offence;
 - (b) the publication might impair the reliability of any evidence of identification that might be adduced in the prosecution for the offence; and
 - (c) the publication cannot be justified on the basis that it may facilitate the arrest of the photographed person or investigation of the offence, or out of considerations of public safety. [page 32]
9. Legislation should provide that the period during which criminal proceedings are considered 'pending' for the purposes of the law of contempt by publication closes at the time of conviction or acquittal, until such time as a re-trial is ordered. [page 33]
10. Legislation should provide that civil proceedings become pending, for the purposes of the law of *sub judice* contempt by publication, when originating process issues and cease to be pending when the proceedings are disposed of, abandoned, discontinued or withdrawn. The proceedings should become pending again only when a re-trial is ordered. [page 35]
11. The mental element referred to in Recommendation 6 above should be in the form of a defence. Legislation should provide that it is a defence to a charge of *sub judice* contempt by publication that the person or organisation charged with contempt:
 - (a) did not know a fact that caused the publication to breach the *sub judice* rule; and
 - (b) before the publication was made, took all reasonable steps to ascertain any fact that would cause the publication to breach the *sub judice* rule.
 - (c) The defendant should bear the burden of proof and the standard of proof should be on the balance of probabilities. [page 37]
12. A statutory defence of fair and accurate reporting for the purposes of contempt by publication in Western Australia should be enacted in the same terms as s 354 of the *Criminal Code*. [page 39]

13. Legislation should provide for a defence to a charge of *sub judice* contempt by publication on the basis that:
 - (a) the publication the subject of the charge was made in good faith in the course of continuing public discussion of a matter of public affairs (other than the trial itself), or otherwise of general public interest and importance; and
 - (b) 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.
 - (c) The defendant should bear the burden of proof and the standard of proof should be on the balance of probabilities. [page 41]

14. Legislation should provide that it is a defence to a charge of *sub judice* contempt by publication if the defendant can show, on the balance of probabilities:
 - (a) that it, as well as any person 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 and having taken all reasonable care, they did not know 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 being published. [page 42]

15. Legislation should not provide for the offence of prejudgment of legal proceedings. [page 44]

16. *Sub judice* contempt by publication should be established as an offence within the *Criminal Code*, with all the procedural consequences that entails. In particular, defendants should have the option to be tried by a jury. [page 45]

17. Legislation should provide for:
- (a) a standard formal procedure and set criteria for the granting of suppression orders across all state jurisdictions where media organisations have standing to make submissions, applications for a variation should circumstances alter, and have a right to appeal against the granting of an order;
 - (b) the criteria for the grant of a suppression order, expressly excluding mere embarrassment or invasion of privacy of an interested party, but requiring that these factors be considered against the genuine public interest in the subject matter; and
 - (c) the terms of the suppression order to be clear in relation to both content and duration.

The Department of Justice should investigate means of ensuring that suppression orders are published so that interested parties can make themselves aware of the existence and content of the order in those instances where the terms of the suppression order are not themselves subject to suppression. [page 47]

18. Section 36C of the *Evidence Act 1906 (WA)* should be amended to provide clearly that a publisher or broadcaster wishing to publish material that would identify the complainant in a sexual assault case must not only obtain the permission of the person concerned, as provided by s 36C(6), but must apply to the court for permission to publish in advance of the publication. [page 48]
19. Section 35 of the *Children's Court of Western Australia Act 1988 (WA)* should be amended to provide clearly that it is an offence to publish material identifying children who appear to be engaged in the commission of activity which could lead them to be the subject of proceedings in the Children's Court, irrespective of whether such proceedings have been commenced or whether the publication refers to any such proceedings. [page 49]
20. Imprisonment should continue to be available as a penalty on conviction for contempt by publication. The maximum term should be two years. [page 50]
21. Similar to other criminal offences, s 40(5) of the *Sentencing Act 1995 (WA)* should be applicable to offences of contempt by publication so that maximum penalties for contempt by publication formally distinguish between individuals and corporations. [page 51]
22. The maximum monetary penalty on conviction for contempt by publication should be \$100,000. [page 51]

23. Legislation should provide for the sentencing court in a case of contempt by publication, where a trial has been aborted as the result of the contempt, to take into account the costs incurred as a result of the abortion of the trial and make an order for the payment of costs incurred as a result thereof, as part of the sentencing process, subject to any Suitor's Fund compensation. [page 54]
24. On the implementation of Recommendation 2, the principles of sentencing found in the *Sentencing Act 1995 (WA)* will be applicable to those convicted of contempt by publication. Additional specific factors relevant to mitigation of sentence for offences of contempt by publication should not be prescribed. [page 54]
25. The existing offences relating to contempt in the face of the court, including the common law offences, should be replaced by a series of statutory offences, applying to all courts of civil and criminal jurisdiction in Western Australia. [page 61]
26. Generally the state of mind of the alleged offender should not be an element of contempt in the face of the court offences. [page 62]
27. The offences to replace the existing law of contempt in the face of the court should provide the following:
- (a) A person shall not wilfully insult the presiding judicial officer or officer of a court acting in the course of his or her official duties.
 - (b) A person shall not interrupt or disrupt proceedings of a court without reasonable excuse. [page 63]
28. The provision in the *Criminal Code*, concerning the obligation of those employed in the courts to do their duty, should be amended so that it clearly is applicable to court officials who are employed on the basis of a private contract. [page 64]
29. The offences to replace the existing law of contempt in the face of the court should provide the following:
- (a) Except where the recording is made for the purpose of a fair report of the proceedings and the court has not made an order to the contrary, a person shall not make a sound recording of proceedings in a court without the leave of the court.
 - (b) Where a sound recording is made for the purposes of a fair report of proceedings in a court, a person shall not publish or broadcast the recording without the leave of the court.
 - (c) A person shall not, without the leave of the court, make, publish or broadcast a photograph or videotape recording of proceedings in a court. [page 64]

30. The offences to replace the existing law of contempt in the face of the court should provide the following:
- (a) A person appearing as a witness before a court shall not refuse to be sworn or make an affirmation when so ordered by the court.
 - (b) A person appearing as a witness before a court shall not, subject to the laws relating to privilege, refuse to answer a question or to identify him or herself when so ordered by the court. [page 65]
31. Legislation should provide that:
- (a) refusal to reveal the sources of information upon which a publication is based shall not constitute the contempt offence of refusing to answer questions, unless disclosure is necessary in the interests of justice or national security or for the prevention of crime.
 - (b) the question whether disclosure is necessary in the interests of justice or national security or for the prevention of crime, is to be determined in each case by the presiding judge.
- For the purposes of this recommendation “publication” includes any speech, writing or other communication in whatever form, including a form preparatory to such publication, which is addressed to the public at large or any section of the public. [page 67]
32. (a) All recommended contempt offences and specific contempt defences in this Report should be included in Chapter XVI of the *Criminal Code*.
- (b) A separate section in that same Chapter should identify those particular offences as being subject to an alternative prosecutorial process, which also should be outlined in the *Code*. (Refer to Recommendations 33–38, 49, 50 and 55(b), below.)
- (c) The provision in s 635A(2)(a) of the *Criminal Code*, granting power to a presiding judicial officer to expel persons from the courtroom if satisfied that it is necessary for the proper administration of justice to do so, should be amended so that it is applicable in *any* court proceeding. [page 68]
33. The existing procedures in relation to contempt in the face of the court should be replaced by a uniform procedure, applicable in all courts, by which contempt in the face of the court offences are to be tried. [page 70]

34. A contempt offence may be tried by the presiding judicial officer either where the alleged offender consents to that procedure, or where the following conditions are satisfied:
- (a) The conduct the subject of the alleged contempt offence has occurred in the presence of the judicial officer; and
 - (b) The judicial officer considers that the alleged contempt presents an immediate threat to the authority of the court or the integrity of the proceedings then in progress unless dealt with in a summary manner. [page 74]
35. Where the court proceeds to determine a contempt offence summarily, the court shall:
- (a) inform the accused of the nature and particulars of the charge;
 - (b) allow the accused a reasonable opportunity to seek legal advice, to be heard and to call witnesses and, if necessary, grant an adjournment for any of those purposes;
 - (c) after hearing the accused, determine the charge and give reasons for that determination; and
 - (d) make an order for punishment or discharge of the accused. [page 74]
36. Where the conditions for the exercise of the summary power by the presiding judicial officer are not satisfied, the alleged offence should be reduced to writing, provided to the alleged offender and referred to the most senior member of the court, other than the judicial officer involved. The charge should then be referred to another member of the court for determination. [page 75]
37. In referring the matter for trial, the senior member of the court may, in a matter of sufficient importance, refer the alleged offence to a panel of three members of the court. In the case of the Full Court the offence should be referred to the Full Court differently constituted. [page 75]
38. If a contempt in the face of the court is not dealt with summarily by the presiding judicial officer, the judicial officer should be immune from giving evidence unless he or she chooses to do so. However, the transcript of the hearing and other evidence, if any, should be admissible and other witnesses compellable. [page 76]
39. There should be maximum penalties (both as to the level of fines and terms of imprisonment) applicable to contempt offences. The maximum sentences should be the same for all courts and appropriate maxima would be imprisonment of five years or a fine of \$50,000 or both. [page 77]

40. Similarly to Recommendation 23 above, legislation also should provide for the sentencing court, in a case of contempt in the face of the court where a trial has been aborted as the result of the contempt, to take into account the costs incurred as a result of the abortion of the trial and make an order for the payment of costs incurred as a result thereof, as part of the sentencing process. [page 78]
41. There should be comprehensive rights of appeal in relation to contempt in the face of the court offences, both as to conviction and as to sentence. [page 78]
42. Appeals from contempt in the face of the court offence convictions and sentences by the District Court, or by a single judge of the Supreme Court should be to the Court of Criminal Appeal. [page 79]
43. Appeals from contempt in the face of the court convictions and sentences by magistrates or justices should all be determined in accordance with Part VIII of the *Justices Act 1902* (WA). [page 80]
44. The existing laws relating to civil and criminal contempt by disobedience, including common law offences, should be replaced by statutory provisions which are applicable to disobedience contempt in all civil and criminal courts in Western Australia. [page 92]
45. The existing procedures in relation to disobedience contempt in all courts should be replaced by uniform procedures whereby disobedience contempt matters are to be determined. [page 92]
46. The civil jurisdiction of contempt by disobedience should be abolished. Actions in relation to contempt by disobedience should be by way of criminal prosecution only. [page 95]
47. Non-compliance with case management orders should be exempt from disobedience contempt proceedings. [page 96]
48. Two criminal offences for disobedience contempt should be enacted:
 - (a) an indictable offence, defined to include an element that the defendant wilfully disobeyed the order or undertaking, and subject to defences available under Part V of the *Criminal Code* as well as a defence that the disobedience was due to a failure, based on reasonable grounds, to understand the nature of the obligation imposed by the order. Imprisonment, amongst other sanctions, should be available upon conviction; and
 - (b) a lesser offence, not involving an element of wilful disobedience, and subject only to defences available under Part V of the *Criminal Code*. No sanction of imprisonment should be available upon conviction for this offence. [page 98]

49. (a) The summary jurisdiction for disobedience contempt should be retained only for the lesser offence referred to in Recommendation 48, although there should be a prohibition against the same judicial officer hearing the disobedience contempt matter as made the original order or as was presiding when the undertaking was made.
- (b) The jurisdiction should be subject to the same codified procedure as applies in face of the court contempt prosecutions when the conditions for the exercise of the summary power by the presiding judicial officer are not satisfied. (See Recommendations 36–38 above.)
- (c) The recommended indictable offence for disobedience contempt should be determined according to the rules for indictable offences.
- [page 101]

50. In addition to s 720 of the *Criminal Code*, which provides for the private prosecution of indictable offences, the power of the Director of Public Prosecutions to bring proceedings for disobedience contempt as an indictable offence or relating to the prosecution of indictable offences, and the power of the Attorney General to bring proceedings for any disobedience contempt relating to either criminal or civil proceedings, there also should be provision made for a plaintiff to apply to the presiding judge for leave to initiate proceedings for the lesser offence of disobedience contempt within the summary jurisdiction of that court.
- [page 102]

51. The recommended lesser offence in Recommendation 48 should not be applicable to parties other than those subject to a court order or undertaking, who are alleged to have breached the order or undertaking or aided and abetted the same.

Legislation should further provide that it is a defence for a third party charged with the indictable offence of disobedience contempt, to be proven on the balance of probabilities, that the person or organisation charged:

- (a) did not know of the relevant court order or undertaking; and
- (b) did not seek to avoid acquiring such knowledge.
- [page 104]

52. There should be maximum penalties applicable to disobedience contempt offences.
- (a) A suggested appropriate maximum sentence for the indictable offence of disobedience contempt in Recommendation 48, irrespective of the court in which it occurred, is imprisonment of five years or a fine of \$50,000 or both.
- (b) A suggested appropriate maximum for the lesser offence in Recommendation 48 is \$10,000, with no imprisonment available.
- [page 107]

53. It is recommended that an additional part be inserted in the *Sentencing Act 1995* (WA) elaborating those additional enforcement remedies/sanctions such as attachment, sequestration and seizure which are available to address non-compliance with orders and undertakings and these should be available to all courts, although consideration should be given to which of these may be imposed by a clerk-delegate subject to confirmation by a magistrate. [page 108]
54. The discretion to deny the right to be heard by a party to civil litigation who has been convicted of disobedience contempt should be abolished.[page 109]
55. (a) The right of appeal for those convicted and sentenced of the indictable offence of disobedience contempt should be the same as that available to others convicted and sentenced upon indictment.
- (b) The rights of appeal provided in Recommendations 41–43 in relation to contempt in the face of the court convictions and sentences should be available in relation to the lesser disobedience contempt offence. [page 110]
56. The codification of the law of contempt should include an indictable offence of publishing an allegation imputing misconduct to a judicial officer in circumstances where the publication is likely to cause serious harm to the reputation of the judicial officer in his or her official capacity. [page 116]
57. There should be defences available to the offence in Recommendation 56 modelled on sections 351–356 of the *Criminal Code*. [page 117]
58. (a) The *Evidence Act 1906* (WA) should be amended to provide for a requirement of disclosure of all payments made to witnesses in legal proceedings.
- (b) The legal profession should review its ethical rules and ensure that practitioners understand their obligations in relation to disclosure requirements. [page 118]

SUBMISSIONS

The following individuals and organisations contributed to Project No 93 by making submissions upon earlier Discussion Papers:

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