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CONTEMPT BY PUBLICATION

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APPENDICES

Terms of reference

On 14 July 1998, the Attorney General, the Honourable Jeff Shaw QC MLC, asked the Law Reform Commission to inquire into, and report on, whether the law and procedures relating to contempt by publication are adequate and appropriate including whether, and in what circumstances, a person against whom a charge of contempt is found proven should be liable to pay, in addition to any criminal penalty, the costs (of the government and of the parties) of a criminal trial aborted as a result of the contempt.

Participants

Pursuant to s 12A of the *Law Reform Commission Act 1967* (NSW) the Chairperson of the Commission constituted a Division for the purpose of conducting the reference. The members of the Division are:

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LIST OF PROPOSALS

PROPOSAL 1 (page 80)

Liability for sub judice contempt should be retained.

PROPOSAL 2 (page 103)

A person or organisation should be liable as a principal for the publication of material if that person or organisation was in a position to:

- **authorise the publication of the material;**
- **exercise a significant degree of control over the contents of the publication or that part in which the prejudicial material is contained; and**
- **supervise a system for ensuring that material was not published that would constitute a contempt of court.**

PROPOSAL 3 (page 133)

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 (other than a jury empanelled under s 7A of the *Defamation Act 1974* (NSW)), 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.

PROPOSAL 4 (page 141)

Legislation should set out the following as an illustrative list of statements that may constitute sub judice contempt if they also comply with the requirements set out in Proposal 3:

- **A statement that suggests, or from which it could reasonably be inferred, that the accused has a previous criminal conviction, has been previously charged for committing an offence and/or previously acquitted, or been otherwise involved in other criminal activity;**
- **A statement that suggests, or from which it could reasonably be inferred, that the accused has confessed to committing the crime in question;**
- **A statement that suggests, or from which it could reasonably be inferred, that the accused is guilty or innocent of the crime for which he or she is charged, or that the jury should convict or acquit the accused;**
- **A statement that could reasonably be regarded to incite sympathy or antipathy for the accused and/or to disparage the prosecution, or to make favourable or unfavourable references to the character or credibility of the accused or of a witness;**
- **A photograph, sketch or other likeness of the accused, or a physical description of the accused.**
- **The legislation should make it clear that this list is not exhaustive and that a statement may amount to a contempt even though it does not fall within one of the categories listed above.**

PROPOSAL 5 (page 156)

The fact that a trial judge has decided to dismiss, or has decided not to dismiss, a jury in a criminal trial following the publication of material concerning that trial should be admissible in the contempt proceedings as relevant to the issue of liability for sub

judice contempt in respect of that publication. It should not, however, be determinative of the question of liability.

PROPOSAL 6 (page 158)

Legislation should provide that a publication is not incapable of constituting a contempt by reason only that a previous publication has already given rise to a substantial risk of prejudice to the fairness of legal proceedings.

PROPOSAL 7 (page 181)

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.**

PROPOSAL 8 (page 183)

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 being published.

PROPOSAL 9 (page 195)

Legislation should make it clear that mere intent to interfere with the administration of judice does not constitute sub judice contempt, in the absence of a publication that creates a substantial risk of prejudice to the administration of justice.

PROPOSAL 10 (page 218)

Legislation should make it clear that liability for sub judice contempt cannot be founded simply on the basis that a publication prejudges issues at stake in proceedings.

PROPOSAL 11 (page 237)

Legislation should provide that the sub judice rule applies to a publication only if the proceedings are pending at the time of the publication.

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.

PROPOSAL 12 (page 237)

Legislation should provide that: (a) where the accused is not in New South Wales but is in another Australian jurisdiction, criminal proceedings become pending from the arrest of the accused in the other jurisdiction; and (b) where the accused is overseas, the criminal proceedings become pending from the making of the order for the extradition of the accused.

PROPOSAL 13 (page 242)

Legislation should provide that in the case of a publication which tends to impose improper pressure on parties to civil

proceedings, the proceedings become pending from the issue of a writ or summons. In the case of other forms of publications relating to civil proceedings, the proceedings should become pending from the time the matter is set down for hearing. This is subject to two provisos, both of which relate only to the restrictions on publication which the sub judice principle imposes out of concern to prevent influence on a jury. First, these restrictions should apply only from the time when it is known that a jury will be used in the proceedings. Secondly, they should not apply in cases where the jury is to be empanelled under s 7A of the *Defamation Act 1974* (NSW).

PROPOSAL 14 (page 254)

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

PROPOSAL 15 (page 255)

Legislation should expressly provide that, subject to the proposed prohibition on publications concerning sentencing, criminal proceedings continue to be not pending for purposes of the sub judice rule: (a) during the period after the verdict (including after the sentence is handed down by the sentencing court) and before appeal proceedings are commenced; and
(b) if an appeal is lodged, while the case is pending appeal.

PROPOSAL 16 (page 255)

Legislation should provide that criminal proceedings which have been the subject of appeal proceedings become pending again

for the purposes of the sub judice rule only if an order for a new trial is made and only from the date the order is made.

PROPOSAL 17 (page 258)

Legislation should provide that civil proceedings cease to become pending for purposes of the sub judice rule when the proceedings are disposed of or abandoned or discontinued or withdrawn. The proceedings should become pending again only when and from the time a re-trial is ordered.

PROPOSAL 18 (page 259)

Legislation should provide that the same time limits for liability for sub judice contempt apply whether or not there was an actual intention to interfere with the administration of justice.

PROPOSAL 19 (page 283)

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.

PROPOSAL 20 (page 286)

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 reasonably necessary or desirable to facilitate the arrest of a person, to protect the safety of a person or of the public, or to facilitate investigations into an alleged criminal

offence. The burden of proving this should be on the defendant in contempt proceedings, to prove on the balance of probabilities.

PROPOSAL 21 (page 348)

Section 578 of the *Crimes Act 1900* (NSW) should be repealed. A new provision should be introduced in the *Evidence Act 1995* (NSW) which provides that any court, in any proceedings, has the power to suppress the publication of reports of any part of the proceedings (including documentary material), where such publication would create a *substantial risk* of prejudice to the administration of justice, either generally, or in relation to specific proceedings (including the proceedings in which the order is made). The power should apply in both civil and criminal proceedings and should extend to suppression of publication of evidence as well as material which would lead to the identification of parties and witnesses involved in proceedings before the court. As is presently the case under s 578 of the *Crimes Act 1900* (NSW), breach of an order should constitute a criminal offence. The new section should not replace the common law or existing statutory powers to restrict publication of court proceedings (other than s 578).

The legislation should also expressly provide that the media, together with others with a special interest in the matter, have standing to be heard by the court before the making of a suppression order, or to apply to the court for the variation or revocation of such an order. Any person or organisation heard by the court in relation to an order made, or not made, under the section should have a right of appeal against the court's decision. Persons or organisations that did not appear before the court in relation to the making of an order should only be able to appeal by leave of the appellate court. An appeal against a decision made under the section should be heard by the court which hears appeals against the final judgment of the court deciding the suppression order matter.

PROPOSAL 22 (page 354)

Legislation should provide for a general right of access to any document that is:

- **admitted into evidence in proceedings in open court;**
- **read out, or read out as to the relevant part, in open court; or**
- **a pleading relied on in a proceeding in open court.**

That right of access should be subject to any lawful order of the court restricting access to documents. The word "document" should be given the same meaning as provided for in the Dictionary to the *Evidence Act 1995* (NSW).

PROPOSAL 23 (page 354)

Legislation should provide for a general right to publish the contents of, or a fair and accurate summary of the contents of, a document referred to in Proposal 22. That right should be subject to any lawful order of the court prohibiting the publication of proceedings. The word "document" should have the same meaning as provided for in the Dictionary to the *Evidence Act 1995* (NSW).

PROPOSAL 24 (page 377)

The *Supreme Court Rules 1970* (NSW) Part 55 rule 11 should be amended to require that a private individual who applies to the court to commence proceedings for criminal contempt shall, prior to such application, notify the Attorney General and the parties to the proceedings (if any) allegedly involved.

PROPOSAL 25 (page 405)

The hearing and decision of an appeal from a conviction for criminal contempt should be assigned to the Court of Criminal Appeal.

PROPOSAL 26 (page 416)

The Attorney General should create and maintain a registry of court outcomes of criminal contempt proceedings. The information in the registry should be used only for sentencing purposes.

PROPOSAL 27 (page 427)

Legislation should provide appropriate upper limits on prison sentences and fines which may be imposed on persons convicted of criminal contempt.

PROPOSAL 28 (page 434)

Legislation should expressly provide that the various alternatives to and methods of serving a custodial sentence, including community service orders, good behaviour bonds, dismissal of charges and conditional discharge of the offender, deferral of sentencing, suspended sentences, periodic detention orders, home detention orders and parole, are available in criminal contempt proceedings.

PROPOSAL 29 (page 445)

Legislation should provide that a private individual who intends to apply for an injunction to stop an apprehended criminal contempt shall, prior to such application, notify the Attorney General and the parties to the proceedings (if any) allegedly involved.

PROPOSAL 30 (page 445)

Legislation should provide that the Director of Public Prosecutions may apply for an injunction to restrain the publication of material relating to criminal proceedings which would be in breach of the sub judice principle or which would be a repetition of such breach.

PROPOSAL 31 (page 482)

The *Costs in Criminal Cases Act 1967* (NSW) should be amended to enable the Supreme Court to make an order for costs against a publisher of material, in contempt of any court at which a criminal trial is held before a jury, if the publication causes the discontinuance of the trial.

PROPOSAL 32 (page 483)

The amending legislation should substantially be in the form set out in the *Costs in Criminal Cases Amendment Bill 1997* (NSW) but with the following modifications:

(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 *Costs in Criminal Cases Amendment Bill 1997* to "printed publication" and "radio, television or other electronic broadcast" be omitted. "Publication" for the purposes of the legislation should be defined to mean a "publication in respect of which a conviction for contempt has been entered".

(4) An order for compensation should be made only where a trial is discontinued "solely" because it has been affected by a contemptuous publication or broadcast.

(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 cost 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.

(8) In ordering a sum for compensation, the Court should be able to consider the amount of any fine ordered by the sentencing court to be paid by the contemnor.

(9) The accused should be able to apply for compensation for any emotional or physical injury directly arising from the discontinuance of proceedings. The same legislative maximum amount for compensation for emotional and physical injury as is prescribed in the Victims Compensation Act should be prescribed in the legislation.

(10) Where the Attorney General attaches or tenders a certificate setting out the costs that relate to the discontinued proceedings, the party against whom a costs order is to be made should be able to challenge the accuracy of the contents of the certificate.

PROPOSAL 33 (page 484)

In determining the amount of any fine to be imposed on a defendant found guilty of sub judice contempt, the sentencing court should be able to take into account, as a mitigating factor, the likelihood that an order for compensation will be made.

Part One

Liability for Sub Judice Contempt

1. Introduction

- Overview
- Background to the Commission's inquiry
- Definition of contempt by publication
- The Commission's focus on "sub judice" contempt
- Outline of the operation of sub judice contempt
- Previous reviews of the law of contempt by publication
- The Commission's approach to reform
- Improving the relationship between the courts and the media
- The structure of this paper
- The purpose of the proposals

OVERVIEW

1.1 This Discussion Paper is concerned with aspects of the form of criminal liability known as contempt of court. It looks chiefly at the law of contempt by publication, or, more precisely, at one aspect of contempt by publication which is commonly referred to as "sub judice" contempt. It also discusses two topics closely associated with sub judice contempt: namely, the powers of courts to restrict the reporting of legal proceedings and the rules determining whether media representatives or other members of the public should be entitled to have access to documents involved in proceedings. The purpose of the Paper is to discuss problems in these areas of law and to make proposals for reform. The Commission will rely on these proposals as a basis for consultation with the public, before making any final recommendations for legislative change.

1.2 The law of sub judice contempt, and the restrictions that it imposes on the publication of information, have particular importance for the media who are most likely to be affected by these restrictions, and by any reforms made to this area of the law. Also particularly affected will be people involved as parties in legal proceedings, especially those standing trial for a criminal offence, who have a special interest in ensuring that their trial proceeds without the possibility of interference and prejudice from media publicity.

BACKGROUND TO THE COMMISSION'S INQUIRY

1.3 The Commission's inquiry originated from the introduction into the New South Wales Parliament of the *Costs in Criminal Cases Amendment Bill 1997* ("the Bill").[1] It is important to outline the history of the Bill, and the controversy which followed its introduction, in order to understand the reasoning behind the structure and scope of this Discussion Paper.

1. Appendix A.

1.4 The Bill was introduced into Parliament on 14 May 1997.[2] It provided for the payment of compensation by the media for the expenses incurred when a criminal jury trial has been discontinued because of concern that the jury may have been prejudiced by media publicity. An additional requirement under the Bill was that the relevant publicity must have been held to infringe the sub judice rule.

1.5 The issue of compensation by the media for the expense of an aborted trial had been previously debated in New South Wales.[3] However, the introduction of the Bill was triggered by a specific case. That case concerned a well-known media personality, John Laws. Mr Laws had made a number of comments on radio about a criminal trial involving a man accused of murdering a young child. Mr Laws had referred to the accused as "absolute scum" and a murderer. The broadcast occurred on the second day of the accused's trial before a Sydney jury. As a consequence of Mr Laws' comments, the trial judge considered that it was necessary to stop the trial and discharge the jury.[4] Subsequently, both Mr Laws and the radio station were found guilty of contempt and ordered to pay substantial fines.

1.6 The Bill provided for compensation to be paid by the media to the State and to the accused in a situation such as that which arose in Mr Laws' case. That is, where a criminal trial had been discontinued because of media publicity, and a media organisation had been convicted of contempt as a result, the proprietors of the

2. See New South Wales, *Parliamentary Debates (Hansard)* Legislative Assembly, 14 May 1997 at 8571.
3. See *United Telecasters Sydney v Hardy* (1991) 23 NSWLR 323 at 346-347 (Samuels J); Attorneys General of New South Wales, Queensland and Victoria, *Reform of Defamation Law* (Discussion Paper, 1990) at para 12. See para 14.3.
4. See *R v Connolly* (NSW, Supreme Court, No 70036/95, Simpson J, 27 February 1996, unreported).

media organisation could be required to pay the costs of the trial. Potentially, these costs could be extremely high.[5]

1.7 The Bill sparked an outcry from representatives of the media, who denounced it as unfair and discriminatory.[6] The Bill also brought to light a degree of dissatisfaction with the law of contempt generally. Most particularly, the media expressed dissatisfaction with the level of uncertainty in the operation of the law, and the consequences this may have for them in trying to avoid liability and, if the Bill were passed, avoid paying the costs of a criminal trial.

1.8 The media urged the Government to conduct further public consultation before proceeding with the Bill.[7] Parliament took no further action in respect of the Bill in 1998, and it eventually lapsed when Parliament was prorogued in March 1999. In the meantime, the Attorney General, the Hon Jeff Shaw QC, MLC, requested on 14 July 1998, that the NSW Law Reform Commission conduct an inquiry into the law of contempt by publication, including the issue of recovering the costs of a criminal trial which has been discontinued because of a publication.

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5. The costs would consist largely of the legal costs of both the accused and the State, and the salaries of the judge and court staff involved in the conduct of the trial. For an estimate of the costs of a day in court, see Appendix B.
6. See, for example, Editorial, "Review necessary on contempt" *The Australian* (18 September 1997) at 12; A Bowne, "New verdict on contempt law" *The Australian Financial Review* (3 April 1998) at 24; E Whitton, "Time for justices to gavel themselves: should judges be held in contempt?" *The Australian* (3 December 1998) at 13; A Hubble, "Air of expectation" *The Daily Telegraph* (4 December 1997) at 40; R Ackland, "Contempt bill puts noose on free speech" *The Sydney Morning Herald* (19 September 1997) at 21.
7. See, for example, Federation of Australian Commercial Television Stations, *Submission 1* at para 2; J Walker, *Submission* (enclosing submission to the Attorney General) at 2; R Coleman, *Submission* (enclosing submission to the Attorney General) at 6; SBS Corporation, *Submission* (enclosing submission to the Attorney General) at 3.

DEFINITION OF CONTEMPT BY PUBLICATION

The law of contempt generally

1.9 The law of contempt aims to prevent interference with the administration of justice. It regulates a range of human activities which pose a risk of such interference, such as misbehaviour in the courtroom, disobedience of court orders, and interaction by outsiders with parties and witnesses in court proceedings. Traditionally, the law of contempt is divided into "civil" and "criminal" contempt.[8] Civil contempt is concerned with the enforcement of court orders and undertakings given to a court in civil proceedings. Criminal contempt is generally treated as a criminal offence, and attracts criminal sanctions, most typically the imposition of a fine or a term of imprisonment.[9] It is concerned with maintaining the authority and integrity of the court as a matter of public interest, and covers a range of situations, such as misbehaviour in the courtroom, and the publication of material that tends to interfere with legal proceedings.

Meaning of "contempt by publication"

1.10 The law may prohibit publications if they fall into any one or more of the following five categories:

- ☐ they have a tendency to influence the conduct of particular pending legal proceedings, or prejudge the issues at stake in

8. See generally, C J Miller, *Contempt of Court* (Clarendon Press, Oxford, 1989) at 2-11; G Borrie, *Borrie & Lowe's The Law of Contempt* (3rd edition, Butterworths, 1996) at 3-4; *Laws of Australia* (Law Book Company, Sydney, 1998) title 10.11, ch 2 at para 4 and 8-11; D Butler and S Rodrick, *Australian Media Law* (LBC Information Services, Sydney, 1999) at para 5.10-5.15. The High Court has criticised the distinction between criminal and civil contempt on the basis that it is arbitrary and illusory, but the distinction still operates: see *Witham v Holloway* (1995) 183 CLR 525 at 534 (Brennan, Deane, Toohey and Gaudron JJ).
9. See Chapter 13.

particular pending proceedings – those which breach the sub judice rule;

- ☐ they denigrate judges or courts so as to undermine public confidence in the administration of justice – those which "scandalise the court";
- ☐ they reveal the deliberations of juries;
- ☐ they include reports of court proceedings in breach of a restriction on reporting; or
- ☐ they disclose information that has been restricted by an injunction and the person making the disclosure, though not bound by the injunction, knows the terms of the injunction and that the publication will frustrate its purpose.

1.11 The restrictions imposed by contempt law on publications may be generally termed the law of "contempt by publication".[10] This category of contempt law forms part of the law of criminal contempt.

THE COMMISSION'S FOCUS ON "SUB JUDICE" CONTEMPT

1.12 This Discussion Paper is primarily concerned with the first aspect of contempt by publication outlined above, that is, the restrictions imposed on publications that have a tendency to influence the conduct of particular legal proceedings or that prejudge the issues at stake in those proceedings. This aspect of the law of contempt by publication is commonly referred to as the "sub judice" rule. The phrase "sub judice" means "under or before a judge or court". The effect of the sub judice rule is to prohibit the publication of certain information about a case which is currently

10. This term was used by the ALRC to describe these areas of contempt law: see Australian Law Reform Commission, *Contempt* (Report 35, 1987), especially ch 5. See also, *Laws of Australia* (Law Book Company, Sydney, 1998) title 10.11, ch 2 at para 42.

being heard or is pending hearing in a court, including a coroner's court.[11]

1.13 A typical example of a publication which may be prohibited by the law of contempt is a newspaper article revealing the criminal record of a person who is currently standing trial for a criminal offence. If a person or organisation publishes such information, that person or organisation is likely to breach the sub judice rule and so be found guilty of contempt (referred to in this Paper as "sub judice contempt").

1.14 The Commission proposes to confine its review primarily to sub judice contempt for the following reasons. As mentioned, our inquiry originated from the controversy arising from the *Costs in Criminal Cases Amendment Bill 1997*. That Bill was concerned with the recovery of the costs of a criminal trial which is discontinued because of media publicity. A criminal trial may be discontinued because of media publicity on the basis that the publicity has prejudiced the jury, or possibly witnesses, to such an extent that the trial will not be fair. Publicity which has this effect generally falls into the category of sub judice contempt.

1.15 As noted in para 1.7, media response to the Bill also disclosed dissatisfaction with the law of sub judice contempt generally. In order to address the issues arising from the Bill fully, therefore, it is desirable first to examine the general law and procedures governing liability for sub judice contempt, on which the application of the Bill, if enacted, would depend. Since a primary purpose of referring a review of contempt law to the Commission was to examine and consult on the Bill and the issue of compensation by the media, the Commission considers it appropriate to confine its review to those matters which will have a direct impact on the question of compensation. Those matters relate to the operation of the sub judice rule.

11. *Civil Aviation Authority v Australian Broadcasting Corp* (1995) 39 NSWLR 540.

1.16 As an ancillary matter, this Paper also considers aspects of the reporting of court proceedings, in particular, the power to impose suppression orders to restrict the reporting of proceedings, and the right of access to documents. As these issues relate to the principle of open access to justice, a discussion of sub judice contempt therefore also entails consideration of that principle and matters affecting it.

OUTLINE OF THE OPERATION OF SUB JUDICE CONTEMPT

Aims and assumptions of sub judice contempt

1.17 The aim of the sub judice rule is to prevent publication of material which may cause prejudice to particular proceedings. The rule assumes that participants in legal proceedings, especially jurors and also, potentially, witnesses, are susceptible to influence by certain types of media publicity. If exposed to such publicity, participants will be hindered from properly carrying out their roles in the proceedings, such as reaching an unbiased verdict based on the evidence presented in court. The sub judice rule therefore prohibits the media from publishing certain types of information about a case, so as to ensure that participants are not improperly influenced and that the case is decided on the evidence presented in court, rather than on facts, opinions, and suppositions offered by people outside the courtroom.

1.18 Arguably, the law of sub judice contempt has special importance in protecting juries in criminal trials from the possibility of influence. In this context, with its focus on the presumption of innocence and requirement of proof of guilt beyond reasonable doubt, it is particularly important to prevent jurors from encountering prejudicial material that is inadmissible (that is, it cannot be used) as evidence in court, such as material relating to the accused's prior convictions or alleged confessions of guilt.

1.19 The assumptions on which the sub judice rule is based remain largely untested by any empirical evidence, at least in Australia. Indeed, it seems very difficult, if not impossible, to provide any categorical proof of the extent, if any, to which a jury in a particular case may be prejudiced by media publicity. Until very recently, Australian courts have appeared reluctant to consider empirical data as a basis for reaching decisions about liability for contempt, preferring instead to justify their assumptions about the susceptibility of jurors and witnesses by reference to common human experience.[12]

Competing public interests

1.20 Because it imposes restraints on the publication of information, the sub judice rule may be seen to limit both access to information about matters coming before the courts and freedom of discussion in our society. The courts justify these limitations on the basis that the public interest in protecting the proper administration of justice, particularly in criminal cases, should generally outweigh the public interest in access to information and freedom of speech. Critics of the sub judice rule have sometimes questioned the balance which is struck between the competing public interests. The Commission examines these criticisms fully in Chapter 2.

Liability for sub judice contempt

1.21 In Australia, liability for sub judice contempt is governed by the common law, rather than by legislation. At common law, a person or organisation will breach the sub judice rule and so be liable for contempt if the following conditions are met:

- ☐ material is "published";
- ☐ the publication has a real and definite tendency, as a matter of practical reality, to interfere with the due administration

12. See *Attorney General (NSW) v John Fairfax Publications Pty Limited* [1999] NSWSC 318 at para 33.

of justice in specific legal proceedings,[13] or the publication prejudges the issues to be decided in those proceedings;[14]

- ☐ the person or organisation charged with contempt is responsible for the publication;
- ☐ at the time of publication, the relevant legal proceedings were current or pending;[15]
- ☐ the severity of possible prejudice to the administration of justice is not outweighed by the public interest in freedom of discussion of matters of public importance which form the subject of the publication; and
- ☐ the publication is not a fair and accurate report of proceedings in open court.

1.22 Chapters 2-9 of this Discussion Paper examines in detail all the aspects of liability which are set out above, and includes proposals for their reform.

Procedure for hearing a charge of contempt

1.23 In New South Wales, proceedings for sub judice contempt are heard by a single judge of the Common Law Division of the Supreme Court.[16] Contempt prosecutions are commenced by way of summons, and are generally brought by the Attorney General. In theory, however, prosecutions may be brought by any person, or at least any person or organisation with a special interest or personal stake in the proceedings allegedly affected by media publicity.

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13. An alternative formulation of this principle is in terms of "substantial risk of serious prejudice": see para 4.10-4.12.
14. The status of the prejudgment principle as an independent principle of liability is, at least in Australia, doubtful: see para 6.37-6.40, 6.45-6.47.
15. This requirement may not necessarily apply to cases of "intentional" contempt: see para 7.85.
16. Proceedings for sub judice contempt were, until recently, heard by the Court of Appeal: see para 12.47.

1.24 Although sub judice contempt is generally regarded as a criminal offence, many aspects of the procedure for hearing a contempt charge follow the rules of civil procedure, subject to certain evidentiary and procedural safeguards belonging to the criminal jurisdiction, such as the requirement to prove liability beyond reasonable doubt, with the burden of proof resting on the prosecution. Perhaps unusually for a criminal prosecution where imprisonment is a possible sanction following conviction, contempt prosecutions are heard by judge alone, without a jury, and evidence in support of the charge of contempt is usually given by affidavit.

1.25 The procedures for hearing a contempt charge are discussed in more detail in Chapters 10 and 11.

Sanctions

1.26 A court may impose a term of imprisonment or a fine, or both, for sub judice contempt. A fine is the most common sanction. There are no maximum limits set on the amount of the fine which may be imposed. A person may also be imprisoned for sub judice contempt, although this is extremely rare. There is no maximum term of imprisonment to which a person may be sentenced. At present, there does not appear to be any means by which a person or organisation may be ordered to pay compensation for expenses incurred as a result of media publicity.

1.27 The range of sanctions available for sub judice contempt and proposals for reform are dealt with in Chapters 10 and 11. The issue of compensation for expenses, with specific reference to the provisions of the *Costs in Criminal Cases Bill 1997*, is discussed in Chapter 14.

PREVIOUS REVIEWS OF THE LAW OF CONTEMPT BY PUBLICATION

1.28 Dissatisfaction with the law of contempt by publication is not new. In the last three decades, there have been several reviews of

contempt law in various common law jurisdictions. These reviews have all recommended the retention of the sub judice rule, in some form, while at the same time recommending substantial reform. To date, only the United Kingdom has implemented legislative change.[17]

1.29 A summary of the major reviews of contempt law is set out below. The Commission looks in more detail at specific recommendations of each review as they relate to issues for discussion in this Paper.

United Kingdom

1.30 The first major review of contempt law was commenced in the United Kingdom in 1971. A committee was appointed, commonly referred to as the "Phillimore Committee", to consider whether any changes were required to the law relating to contempt. Unlike Australia, there was legislation in force at that time which made some provision for the law of contempt of court.[18]

1.31 The Phillimore Committee made its final recommendations for reform in 1974.[19] An official response by the Lord Chancellor to these recommendations was presented to Parliament in 1978.[20]

17. *Contempt of Court Act 1981* (UK).
18. See *Administration of Justice Act 1960* (UK).
19. See United Kingdom, Committee on Contempt of Court, *Report of the Committee on Contempt of Court* (HMSO, London, Cmnd 5794, 1974). There had been a number of reports dealing with aspects of contempt law in Great Britain before the Phillimore report. See, for example, *Justice* (British Section of the International Commission of Jurists), *Contempt of Court* (Report, Stevens & Sons, London, 1959); United Kingdom, Home Office and Scottish Home and Health Department, *Report of the Interdepartmental Committee on the Law of Contempt As It Affects Tribunals of Inquiry* (HMSO, London, Cmnd 4078, 1969).
20. See United Kingdom, Lord Chancellor and Lord Advocate, *Contempt of Court: A Discussion Paper* (HMSO, London, Cmnd 7145, 1978). The Law Commission also considered the

The recommendations of the Phillimore Committee aimed broadly at achieving greater clarity and certainty in the law of contempt, particularly in respect of those parts affecting the media.[21] In relation to sub judice contempt, the recommendations sought to clarify and limit the scope of liability so as to ensure greater freedom of discussion for the media.[22]

1.32 The Legislature did not act on the recommendations of the Phillimore Committee until 1980, when the *Contempt of Court Bill* was introduced into Parliament.[23] The introduction of the Bill followed a controversial ruling by the European Court of Human Rights in a case known as the *Sunday Times* case.[24] The European Court found that, in the particular circumstances of the *Sunday Times* case, the English law of sub judice contempt had violated the right to freedom of discussion as enshrined in Article 10 of the European Convention on Human Rights.

1.33 In response to the European Court's ruling, the Bill was said to clarify the law, implement the recommendations of the Phillimore Committee, harmonise the law of the United Kingdom with the ruling of the European Court of Human Rights, and adopt a liberalising approach to publication by the media by limiting the

recommendations of the Phillimore Committee in the context of a reference on offences relating to interference with the course of justice. The Law Commission's report, however, looks only incidentally at the law of contempt by publication, in so far as it overlaps with the offence of intent to pervert the course of justice: see England and Wales, Law Commission, *Criminal Law: Offences Relating to Interference with the Course of Justice* (Report 96, 1979).

21. United Kingdom, Committee on Contempt of Court, *Report of the Committee on Contempt of Court* (HMSO, London, Cmnd 5794, 1974) at para 5-11.
22. United Kingdom, Committee on Contempt of Court, *Report of the Committee on Contempt of Court* (HMSO, London, Cmnd 5794, 1974) at para 112-114.
23. See Great Britain, *Parliamentary Debates (Hansard)* House of Lords, 9 December 1980, vol 415, col 657 forward.
24. *Sunday Times v United Kingdom* (1979) 2 EHRR 245.

scope of the restrictions imposed by the law.[25] The Bill was enacted on 27 July 1981.

Canada

1.34 In Canada, a review of the law of contempt of court was commenced by the (then) Canadian Law Reform Commission in 1977 and completed in 1982.[26] That Commission favoured the approach of codifying the law of contempt, with the aim of achieving a greater degree of precision and certainty.

1.35 Following the recommendations of the Canadian Law Reform Commission, a Bill was introduced into the Canadian Parliament in 1984. The Bill was intended to codify the law of contempt and incorporate provisions dealing with contempt into the Canadian Criminal Code[27] but lapsed when the Federal government lost office in the same year. No further legislative action has since been taken in respect of the Canadian Law Reform Commission's recommendations.[28]

25. See G Borrie, *Borrie & Lowe's The Law of Contempt* (3rd edition, Butterworths, 1996) at 98-104.
26. See Canada, Law Reform Commission, *Contempt of Court: Offences Against the Administration of Justice* (Working Paper 20, 1977); *Contempt of Court* (Report 17, 1982).
27. Bill C-19 (1984). See also Editorial, "Contempt of Court" (1984) 26 *Criminal Law Quarterly* 257; L Fuerst, "Contempt of Court" (1984) 16 *Ottawa Law Review* 316.
28. Information supplied by the Law Commission of Canada (27 March 2000). The Bill was also strongly criticised by the Canadian Judicial Council. See Canadian Judicial Council, *The Law of Contempt* (Working Paper, 1986). The Council, which consists of 39 members, is chaired by the Chief Justice of Canada and includes judges of all courts whose members are appointed by the federal government. Its objects are to promote efficiency and uniformity and to improve the quality of judicial service in superior courts and in the Tax Court of Canada.

Australia

1.36 In 1977, a South Australian committee made recommendations for reforming sub judice contempt law, as part of a broad review of the criminal law of South Australia.[29] The committee largely endorsed the recommendations of the Phillimore Committee in the United Kingdom. The committee's recommendations have not been implemented.

1.37 In 1985-1986, the New South Wales Law Reform Commission considered aspects of the law of sub judice contempt in its review of the jury in criminal trials.[30]

1.38 The Australian Law Reform Commission commenced a major review of the law of contempt in 1983 and published its final recommendations for reform in 1987.[31] In respect of sub judice contempt, the Commission recommended codification of this area

29. See South Australia, Criminal Law and Penal Methods Reform Committee of South Australia, *The Substantive Criminal Law* (Report 4, 1977) at para 3.9-3.12.
30. See New South Wales Law Reform Commission, *Criminal Procedure: The Jury in a Criminal Trial* (Discussion Paper 12, 1985) ch 7; (Report 48, 1986) ch 7.
31. See Australian Law Reform Commission, *Contempt* (Report 35, 1987). The Commission also published a series of consultative and research papers before reaching its final recommendations in Report 35. The most relevant to the law of contempt by publication are: *Reform of Contempt Law* (Issues Paper 14, 1984); *Contempt and the Media* (Discussion Paper 26, 1986); M Chesterman, *Public Criticism of Judges* (Australian Law Reform Commission, Reference on Contempt of Court, Tribunals and Commissions, Research Paper 5, 1984); A Riseley, *Deliberate Interference with Parties to Proceedings* (Australian Law Reform Commission, Reference on Contempt of Court, Tribunals and Commissions, Research Paper 3, 1986); I Freckelton, *Prejudicial Publicity and the Courts* (Australian Law Reform Commission, Reference on Contempt of Court, Tribunals and Commissions, Research Paper 4, 1986); M Keogh, *Prejudicial Publicity: Some Case Studies and their Implications* (Australian Law Reform Commission, Reference on Contempt of Court, Tribunals and Commissions, Research Paper 4A, 1987).

of the law, with an emphasis on achieving greater precision and certainty, and restricting the scope of liability to take into account the importance of freedom of discussion.

1.39 In 1987, the Victorian Law Reform Commission reviewed the recommendations of the Australian Law Reform Commission and largely agreed with their approach to sub judice contempt, although they had some reservations about the availability of a public interest defence.[32]

1.40 The Federal Attorney General's Department subsequently released a discussion paper and a position paper on the Australian Law Reform Commission's report on contempt.[33] The purpose of the papers was to consider the recommendations of the Australian Law Reform Commission and invite submissions from the public, in order to develop legislative proposals for implementation by the Commonwealth.

1.41 At the same time as the Federal government was consulting with the public, the recommendations of the Australian Law Reform Commission were referred for consideration to the Standing Committee of Attorneys General in 1991, with a view to achieving uniform legislation throughout Australia. If uniformity for all of contempt law was not considered to be feasible, it was suggested that uniform legislation in the area of contempt by publication would be particularly desirable, since without uniformity, the media would be forced to follow the law of the most restrictive jurisdiction when transmitting across state borders.[34]

32. Law Reform Commission of Victoria, *Comments on Australian Law Reform Commission Report on Contempt No 35* (unpublished, 1987).
33. Australian Attorney General's Department, *The Law of Contempt* (A Discussion Paper on the Australian Law Reform Commission's Report No 35, 1991); Australian Attorney General's Department, *The Law of Contempt* (Position Paper, 1992).
34. Australian Attorney General's Department, *The Law of Contempt* (Position Paper, 1992) at 1-2.

1.42 In 1993, a draft bill, entitled the *Crimes (Protection of the Administration of Justice) Amendment Bill 1993* (Cth) was prepared and circulated for comment. It was never introduced into Parliament.

Ireland

1.43 The Irish Law Reform Commission commenced a review of the law of contempt in 1989. Its final recommendations for reform were published in 1994.[35] In respect of sub judice contempt, it drew to a significant extent on the recommendations of the Australian Law Reform Commission, as well as the Phillimore Committee.

It emphasised the need in a democratic society for keeping the public fully informed of court proceedings, and subjecting those proceedings to open and reasoned analysis and discussion. It noted that these interests may be undermined by an unduly restrictive approach to the sub judice rule.

THE COMMISSION'S APPROACH TO REFORM

1.44 The Commission's aim is to achieve clarity and precision in the operation of the law on sub judice contempt, with only such restrictions on freedom of discussion as are necessary. In the pursuit of this objective, one possible approach is to codify the law and procedure on sub judice contempt. The main advantages of codification are easier access to, and greater clarity of, the law because all the rules and procedures would be found in one piece of legislation. This was the approach supported by the Australian Law Reform Commission.

35. See Ireland, Law Reform Commission, *Contempt of Court* (Consultation Paper, 1991); (Report 47, 1994).

1.45 This Discussion Paper does not support codification. Unlike the Australian Law Reform Commission's report, which examined the law of contempt in its entirety, this review is narrower in scope, being limited to sub judice contempt. To codify only one aspect of contempt and to leave the rest to the common law may lead to confusion and uncertainty for legal and media practitioners. This has been the experience in the United Kingdom where the *Contempt of Court Act 1981* (UK) purports among other things to codify the law of sub judice contempt but allows the rest of contempt to subsist chiefly in the form of common law principles. The Commission will accordingly propose legislation to cover some gaps and to clarify uncertainties in the law on sub judice contempt, while allowing the common law to develop.

1.46 The Commission is mindful that any legislative change in New South Wales on sub judice contempt would result in different rules compared to those found in other Australian states and territories, as well as to those which apply at the federal level. This could present practical difficulties for the media, especially those that publish in several states and territories. They would also have to contend with two sets of contempt laws depending on whether the proceedings are to be heard in a State or a federal court. Such a situation could increase confusion and uncertainty for the media. However, although the Commission considers that a uniform law on sub judice contempt is highly desirable, it is for the governments of the Commonwealth, States and territories to decide whether they want to take a coordinated approach to the reform of this area of law.[36]

36. The Standing Committee of Attorneys General considered, during the early 1990s, a uniform law on contempt of court or partially uniform contempt laws dealing only with publication but it appears that there was little enthusiasm at that time for a common statutory approach by the States and Territories: see para 10.75.

IMPROVING THE RELATIONSHIP BETWEEN THE COURTS AND THE MEDIA

1.47 It was suggested to the Commission that part of the problem for the media in complying with the sub judice rule and other restrictions on reporting arises from a lack of effective communication and cooperation between the courts and the media.[37] This concern forms part of a larger discussion about the relationship between the courts and the media.

1.48 The courts and the media have certain expectations of each other. For example, the courts expect that the media will report court proceedings accurately, will comply with court orders that restrict the publication of certain information, will summarise the effects of their judgments accurately and in a balanced manner, and will not disrupt court proceedings or the general administration of court business. The media, on the other hand, expect the courts' cooperation in obtaining quick access to information about current cases which may be particularly newsworthy. They may also expect the courts' assistance in understanding and complying with court orders and other legal requirements placed on them. The relationship between the courts and the media may be strained if these expectations are not properly or regularly fulfilled.

1.49 Obviously, a good relationship between the courts and the media gives rise to benefits that go beyond the area of contempt law. However, good communication and cooperation between the media and the courts can also be important in preventing breaches of the sub judice rule and other restrictions designed to avoid prejudice to particular court proceedings. For example, as noted in Chapter 10, the media may face difficulties in complying with orders restricting the publication of court proceedings if they are unable to ascertain whether such an order has been made and, if

37. Consultation held on 20 October 1998 at the Sydney office of the law firm Mallesons Stephen Jaques attended by representatives of the Seven Network, The Sydney Morning Herald, John Fairfax Pty Ltd, and Mallesons Stephen Jaques.

so, the terms of the order. Similarly, as noted in Chapter 7, it may be difficult for the media to discover whether particular proceedings are "current" or "pending" in order to determine whether they are or are not permitted to publish certain material in accordance with the sub judice rule. It is in the interest of the courts, and the general public, that the media are able to obtain quick access to this type of information in order to minimise the possibility of prejudice to the administration of justice.

Media liaison positions

1.50 In New South Wales, media liaison positions have been created in the Supreme Court, the Office of the Director of Public Prosecutions, and the Police Service. These positions are a source of information for the media about court proceedings and potentially provide a channel for effective communication and a cooperative relationship between the courts and the media.

1.51 ***Public information officer, NSW Supreme Court.***[38] The public information officer of the New South Wales Supreme Court is the media's first port of call for information and assistance relating to matters in the Supreme Court. For example, she can answer queries from the media as to whether proceedings are current or pending in the court, or she may assist the media in understanding the practical effect of court judgments and court orders. She also speaks at media seminars from time to time to provide the media with general information about her role and functions. In addition, she is able to assist the media in obtaining information about the District and Local Courts. She can, for instance, answer queries as to whether proceedings are current or pending in the District Court and several Local Courts. She also handles media requests for access to court files (except Local Court files), and initial requests for access to transcripts.

1.52 At present, there does not appear to be an established procedure in any of the courts to notify the public information

38. See K Ashbee, *Consultation* (21 July 1999).

officer of matters of concern for the media, such as the terms of suppression orders. It is a matter for the individual judicial officer to inform the public information officer of anything he or she considers to be of importance or of interest to the media. Sometimes, for example, a judicial officer may provide the public information officer with a summary of a judgment which is particularly newsworthy, or may speak with the officer about the effects of the judgment. Sometimes a judicial officer presiding over a matter that he or she considers will be of special interest to the media may suggest that a notice be prepared and distributed to the media detailing what may and may not be reported about the matter. The public information officer will then answer queries from the media about the notice.

1.53 A judicial officer may also notify the public information officer of the terms of a particular suppression order and the public information officer will then inform major media outlets of these terms. Whether this occurs or not is really a matter for the judicial officer in each case. However, a trial of a suppression order notification system is currently under way in the Supreme Court. As part of the trial, the judicial officer involved informs the public information officer of the terms of a suppression order, and the public information officer advises media organisations of those terms, on the same day as the order is made. Further consultation between the media and the public information officer needs to take place as part of the trial before a permanent system for notifying the media is established.

1.54 ***Media relations officer, NSW Office of the Director of Public Prosecutions.***[39] The Office of the Director of Public Prosecutions employs a consultant to work on media liaison for the Office and for the Police Integrity Commission. Any inquiry from the media to either of these bodies should therefore go to the media relations officer. He can, for example, answer enquiries from the media about the details of certain charges. It is also part of his role to arrange media interviews with the Director of Public Prosecutions.

39. See P Symonds, *Consultation (telephone)* (22 July 1999).

1.55 ***NSW Police Media Unit.*** The New South Wales Police Service has a media policy[40] which sets out general principles and protocols for police interaction with the media. The policy emphasises the importance of an open and cooperative relationship between the police and the media. The Police Media Unit is established as the point of contact for all major media outlets in New South Wales with the police. The media policy requires police commanders to notify the Media Unit of any police matter of significant media interest and to provide a full briefing of the matter to the Unit.

1.56 The Police Media Unit may provide certain information to the media about police investigations, such as whether a person has been charged with an offence, or the general nature of a crime and other "bare facts" such as the general location and time of the incident. The media may also obtain such information by direct communication with police officers involved in the particular investigation. According to the media policy, information should not generally be given by the police that a person has been arrested unless that person has also been charged.

The Victorian model

1.57 In Victoria, formal procedures have existed for some time to assist in achieving a cooperative relationship between the courts and the media. The Victorian model has been suggested as a good lead for New South Wales to follow in developing protocols for effective communication.[41]

1.58 A Courts Media Information Officer liaises with the media on behalf of all Victorian courts. Much of the emphasis of this position

40. See NSW, Police Commissioner, *Commissioner's Instruction 52 (Media Policy).*
41. Consultation held on 20 October 1998 at the Sydney office of the law firm Mallesons Stephen Jaques attended by representatives of the Seven Network, John Fairfax Pty Ltd, The Sydney Morning Herald, and Mallesons Stephen Jaques.

is on taking preventative measures to ensure problems in court reporting by the media do not arise. As such, the Courts Media Information Officer offers practical assistance to members of the media in understanding the legal requirements of court reporting. This is done in a number of ways, such as offering regular seminars with the media on court reporting and ways of avoiding liability for contempt, and providing detailed written guidelines on court reporting for journalists.[42] These guidelines "Covering the courts – a basic guide for journalists" are available on the Victorian Supreme Court's internet site.[43]

1.59 A great deal of the officer's day-to-day work consists of notifying the media of suppression orders or other orders affecting publication. Notice of these orders to the officer (usually conveyed to her by the judges' associates and court clerks) has become a matter of routine.[44] She sends these orders by facsimile to media organisations and their lawyers.[45] She also liaises with judicial officers to ensure that the terms of suppression orders are as clear and precise as possible, in order to assist the media in complying with them.[46]

1.60 In addition, a Courts Media Committee was established by the Chief Justice of the Victorian Supreme Court in 1993 and continues to meet. Its membership currently comprises the courts media information officer, judicial officers from the Supreme, County and Local Courts, the Director of Public Prosecutions, solicitors from private practice working in the area of media law, and journalists. The Committee meets on a needs basis to discuss issues of concern to the courts and the media, and to formulate means of addressing these concerns. For example, the Committee has developed guidelines on media access to court briefs and protocols for filming of judicial officers.[47]

42. P Innes, *Consultation (telephone)* 21 July 1999.
43. See http://www.supremecourt.vic.gov.au.
44. P Innes, *Consultation (telephone)* 25 February 2000.
45. P Innes, *Consultation (telephone)* 25 February 2000.
46. P Innes, *Consultation (telephone)* 21 July 1999.
47. P Innes, *Consultation (telephone)* 21 July 1999.

1.61 It has been suggested that the Courts Media Committee has been very successful in maintaining a harmonious relationship between the media and the courts, and that both the work of the Committee and the media information officer has resulted in significant community benefits. Specifically, it is claimed that the community is better informed about the work of the courts, and that a significant amount of the public's money is saved by reducing the incidence of trials aborted because of media reporting.[48]

Invitation to comment

1.62 At present in New South Wales, there appear to be a number of innovations under way to develop a more cooperative relationship between the courts and the media. There is certainly great potential for both the courts and the media to make use of the various media liaison positions to achieve such a relationship. There are, however, several factors which may stand in the way of more effective communication. For example, there is no one person or unit with exhaustive access to information about the District and Local Courts. This may make it difficult for the media to obtain information about proceedings and orders in those courts. Moreover, there is not at present an established protocol or routine procedure for judicial officers to communicate with the public relations officer on matters such as the existence and terms of suppression orders. This means that the public relations officer is not necessarily able to provide the media with an exhaustive list of suppression orders that are active. Lastly, there is no organised forum for discussion among the media, the courts and lawyers. The Victorian experience suggests that such a forum is very useful in developing protocols and practices as a means of achieving a harmonious relationship between the courts and the media.

1.63 The Commission considers that the issue of the relationship between the courts and the media is a very important part of the

48. P Innes, Victorian Courts Media Information Officer, *Consultation (telephone)* 21 July 1999.

discussion on reforming the law on sub judice contempt and ensuring compliance with the sub judice rule. At this stage, however, the Commission has sought simply to provide an outline of the current practices that exist in New South Wales, in order to invite comment from the public. As part of the consultation process after the release of this Paper, the Commission will be consulting extensively with representatives of the media, the courts, and others involved in the justice system to discuss ways of improving communication between the courts and the media, specifically in relation to encouraging compliance with the sub judice rule and minimising the risk of prejudice to court proceedings from media publications. The Commission also invites submissions on this issue.

THE STRUCTURE OF THIS PAPER

1.64 This Paper is divided into three parts. Part One deals with the principles governing liability for sub judice contempt.

- Chapter 2 addresses the fundamental question of whether the sub judice principle should be abolished or retained.
- Chapter 3 discusses persons and material attracting liability for sub judice contempt, that is, the issues of responsibility and the meaning of "publication".
- Chapter 4 discusses the test for determining whether a publication is prejudicial so as to infringe the sub judice rule. In the majority of Australian cases, that test is formulated in terms of a "tendency" to prejudice.
- Chapter 5 discusses the relevance of fault to liability for sub judice contempt.
- Chapter 6 discusses the application of the sub judice rule to publications concerning civil proceedings, including discussion of the prejudgment principle.
- Chapter 7 discusses the time limits for liability for sub judice contempt.

- Chapters 8 and 9 discuss the grounds of exoneration that may excuse a person from liability for sub judice contempt. Chapter 8 considers the public interest principle as well as a proposal to introduce a separate "public safety" defence. Chapter 9 considers the fair and accurate reporting principle.

1.65 Part Two deals with reporting legal proceedings and the open justice principle, more specifically with suppression orders. It also deals with access to and reporting of the contents of court documents.

- Chapter 10 discusses the use of suppression orders as a form of restriction to the principle of open justice. These orders are examined in the context of various other restraints courts may impose to conceal information concerning judicial proceedings from the public.
- Chapter 11 discusses access to and reporting on the content of court documents, an important corollary to the open justice principle.

1.66 Part Three deals with the procedure for prosecuting and alleged sub judice contempt, and the sanctions and remedies available, together with the power to order compensation.

- Chapter 12 discusses matters relating to the procedure for hearing a contempt prosecution, including who may prosecute, whether the summary procedure should be retained, and which court should hear the trial and the appeal proceedings.
- Chapter 13 discusses issues concerning penalties, such as whether there should be upper limits for fines and imprisonment imposed on persons convicted of contempt, and whether other forms of sanctions should be available in contempt cases. The chapter also looks at other remedies, such as injunctions.
- Chapter 14 deals with the issue of ordering the media to pay compensation for expenses incurred as a result of a contemptuous publication, with specific reference to the provisions of the *Costs in Criminal Cases Amendment Bill 1997*.

THE PURPOSE OF THE PROPOSALS

1.67 In this Discussion Paper, the Commission has formulated a number of proposals for reform to the law on sub judice contempt. These proposals are based on tentative views about aspects of the law that the Commission considers are in need of reform or clarification. The proposals do not, however, represent our final conclusions. They are intended to attract comment from interested groups and members of the public. The Commission welcomes submissions on the proposals and will be consulting with groups in the community following the release of this Paper. All views and comments will be considered by the Commission before finalising recommendations for reform to the Attorney General.

2. Should the sub judice rule be retained?

- Introduction
- Freedom of speech vs due process of law
- Empirical research regarding juries
- Alternative remedial measures
- Approaches in other jurisdictions
- Communications technologies
- Civil proceedings
- The Commission's view

INTRODUCTION

2.1 This chapter considers the fundamental question of whether liability for sub judice contempt should be retained at all, and, if so, what should be the underlying policy considerations that guide its operation.

2.2 The aim of the sub judice rule is to prevent publication of material that may cause prejudice to a particular case. A number of assumptions have been made in formulating the sub judice doctrine. Primarily, sub judice contempt assumes that if jurors and witnesses are exposed to media material about a trial that is not part of the evidence presented, tested and argued in court, they will be hindered from reaching an impartial and proper verdict. This premise itself assumes that prejudice induced by media reporting will not be neutralised by the evidence in court, and by judicial warnings and directions. This chapter seeks to evaluate the soundness of these assumptions, and whether the existence and operation of the rule is so integral to the proper administration of justice as to justify the resulting curtailment of freedom of speech.

2.3 The chapter examines:

- the competing public interests of ensuring the proper administration of justice and providing for freedom of speech, and in particular, freedom of the media to report, and comment on, the news;
- empirical studies of the effects of media trial reporting on public perceptions of the guilt or innocence of an accused;
- the effectiveness of devices designed to counteract potential prejudicial pre-trial publicity;
- approaches taken in other jurisdictions; and
- the implications for these issues of the increasing use of electronic communication.

FREEDOM OF SPEECH VS DUE PROCESS OF LAW

2.4 There is no doubt that freedom of expression is one of the hallmarks of a democratic society, and has been recognised as such for centuries.[1] Justice Mahoney, in *Ballina Shire Council v Ringland*,[2] spoke of the ends which are achieved by the capacity to speak without fear of reprisal and the importance of these ends in a free society: "ideas might be developed freely, culture may be refined, and the arrogance or abuse of power may be controlled".

2.5 However, freedom of speech cannot be absolute. In legal, political and philosophical contexts, it is always regarded as liable to be overridden by important countervailing interests, including state security, public order, the safety of individual citizens and protection of reputation.

2.6 One such countervailing interest is due process of law. Freedom of speech ought not to take precedence over the proper administration of justice, particularly in criminal trials where an individual's liberty and/or reputation are at stake, and where the public have an interest in securing the conviction of persons guilty of serious crime. Indeed, the belief that the public interest in a fair trial will almost always outweigh the public interest in freedom of expression, generally goes unchallenged. Therefore, a discussion of how to reconcile these competing public interests proceeds on the basis of the acceptance of that notion. The question to resolve, then, is whether justice can be done, as well as be seen to be done, in the absence of sub judice liability. If the answer to this is no, that is, that the sub judice rule is essential to achieving the proper balance between the competing interests, the question must then be asked whether the operation of the sub judice rule restricts freedom of speech more than is necessary to ensure a fair trial.

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1. "Numerous great political and intellectual figures – Burke, Paine, Jefferson and Mill, to name but a few – have been associated with this principle": Australian Law Reform Commission, *Contempt* (Report 35, 1987) at para 242. See also *Hinch v Attorney General* (1987) 164 CLR 15 at 57 (Deane J): "Freedom of public discussion of matters of legitimate public concern is, in itself, an ideal of our society."
2. (1994) 33 NSWLR 680 at 720.

Legal protection of freedom of expression

2.7 In 1992, the High Court held that the Commonwealth Constitution contained an implied guarantee of freedom of "political discussion" in Australia, and that Commonwealth legislative powers, at least, were limited by this implied freedom of communication.[3] In *Theophanous v Herald Weekly Times Ltd*,[4] the defendant relied on an implied constitutional freedom to publish material discussing government and political matters to defend an action for defamation. The defence was upheld. Chief Justice Mason and Justices Toohey and Gaudron defined "political discussion" as being "all speech relevant to the development of public opinion on the whole range of issues which an intelligent citizen should think about". The decision has been described as being "as close as the court has come to finding a 'personal right' to free speech, as opposed to a restriction on legislative power".[5] However, despite the wide definition of "political discussion", there was nothing in the judgment to suggest that the constitutionally implied freedom was a freedom of speech generally, such as is expressly provided for in the American *Constitution*. The freedom of speech which was guaranteed was that which was necessary to provide the democratic underpinnings for representative and responsible government.

2.8 In 1997, in *Lange v Australian Broadcasting Corp*,[6] the High Court considered the correctness of *Theophanous*. The court noted that the reasoning which gave rise to the rulings in *Theophanous* had the direct support of only three of the seven judges, and that, therefore, the decision does not have the same authority which it

3. *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1. A minority view in the High Court held that the implied guarantee did not impact upon the statutes of the States and Territories and the common law. See also *Australian Capital Television Pty Ltd v Commonwealth of Australia (No 2)* (1992) 177 CLR 106.
4. (1994) 182 CLR 104; *Stephens v Western Australian Newspapers Ltd* (1994) 182 CLR 211.
5. D Butler and S Rodrick, *Australian Media Law* (LBC Information Services, Sydney, 1999) at 15.
6. (1997) 189 CLR 520.

would have if the majority had concurred on the reasoning as well as the rulings.[7]

2.9 The court restated the implied constitutional freedom of political communication in a narrower form than the majority had suggested in *Theophanous*. It held that it was necessary, in order "to effectively serve the purpose of s 7 and 24 and related sections" of the Constitution which guarantee representative and responsible government, to imply freedom of political discussion: "freedom of communication on matters of government and politics is an indispensable incident of that system of representative government which the Constitution creates". However, those sections, which necessarily protect freedom of communication on political and government matters, "do not confer personal rights on individuals. Rather, they preclude the curtailment of the protected freedom by the exercise of legislative or executive power":

> Unlike the First Amendment to the American Constitution which has been interpreted to confer private rights, our Constitution contains no express right of freedom of communication or expression. Within our legal system, communications are free only to the extent that they are left unburdened by laws that comply with the Constitution.[8]

2.10 As with the decision in *Theophanous*, *Lange* is not an authority for there being a general, constitutionally guaranteed, freedom of speech:

> [T]he freedom of communication which the Constitution protects is not absolute. It is limited to what is necessary for the effective operation of that system of representative and responsible government provided by the Constitution.[9]

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7. In *Theophanous*, Justice Deane joined Chief Justice Mason, Justice Toohey and Justice Gaudron in ruling that the defences should be upheld but took a view of the scope of the freedom that was significantly different from that of the other three majority judges.
8. *Lange v Australian Broadcasting Corp* (1997) 189 CLR 520 at 567.
9. *Lange v Australian Broadcasting Corp* (1997) 189 CLR 520 at 561.

2.11 The court also stated in *Lange* that where restrictions on freedom of political discussion are imposed by common law principles, such as may at times occur under the sub judice doctrine, those principles might need to be amended so as to "conform with" the implied freedom.

2.12 Prior to *Lange*, it had indeed been held that laws restricting media publicity relating to criminal trials should be subject to scrutiny in the light of the implied constitutional freedom of political discussion. But the argument that the constitutional freedom had "abolished the long-standing protection of fair trial from unlawful or unwarranted media or other intrusion" had been firmly rejected.[10] The case was *Attorney General v Time Inc Magazine Co Pty Ltd*.[11] The New South Wales Court of Appeal observed that the common law principles have been established as a result of a balancing of competing interests: the public interest in freedom of expression and the public interest in the administration of justice. The court also stated that freedom of expression is not unconditional. "Expression can, for legally relevant purposes, be free even though it is subject to other legitimate interests."[12]

2.13 In international law, the right to freedom of expression is enshrined in the International Covenant on Civil and Political Rights ("ICCPR") to which Australia is a signatory:

> Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.[13]

10. *John Fairfax Publications Pty Ltd v Doe* (1995) 37 NSWLR 81 at 111 (Kirby P).
11. *Attorney General v Time Inc Magazine Co Pty Ltd* (NSW, Court of Appeal, No 40331/94, 15 September 1994, unreported).
12. *Attorney General v Time Inc Magazine Co Pty Ltd* (NSW, Court of Appeal, No 40331/94, 15 September 1994, unreported) at 10 (Gleeson CJ).
13. Article 19(2).

2.14 However, the ICCPR also provides that the exercise of the right to freedom of expression carries with it duties and responsibilities and may be subject to certain legal restrictions necessary, inter alia, for the respect of the rights or reputations of others.[14] Furthermore, Article 19 of the ICCPR is made subject to Article 14(1) which guarantees the right of individuals to a "fair … hearing by a competent, independent and impartial tribunal".

2.15 In this chapter it is argued that, although freedom of speech is restricted by the sub judice doctrine, this is necessary to ensure the proper administration of justice, and the right of an accused to a fair trial, and that, on the basis that the Commission's proposals for reform are adopted, the restrictions would operate only to the extent required to achieve that result.

Open justice

2.16 Closely linked with the right to freedom of speech is the public right to scrutinise and criticise courts and court proceedings. The principle of open justice is just as fundamental to a democratic society as freedom of speech[15] and is an accepted doctrine within the Australian justice system. Application of the principle of open justice assists in preventing judicial arbitrariness or idiosyncrasy and maintaining public confidence in the administration of justice.[16]

2.17 However, while the prima facie principle that court proceedings should be open and reportable helps to ensure the fair and efficient administration of justice in general terms, it can sometimes create a risk of prejudice to the fairness of individual proceedings. For example, high-profile and detailed reporting of

14. Article 19(3).
15. See C Walker, "Fundamental Rights, Fair Trials and the New Audio-Visual Sector" (1996) 59 *Modern Law Review* 517 at 517: "Because courts are a State responsibility, there is a legitimate demand for democratic accountability and discussion."
16. *Attorney General v Leveller Magazine Ltd* [1979] AC 440.

evidence presented at committal proceedings about an alleged offence might exert influence on the jury in the forthcoming trial. In such circumstances, the conflict between the open justice principle and the sub judice principle is generally resolved in favour of open justice – notably because fair and accurate reporting of open court proceedings is a defence to sub judice liability. Nonetheless, the power given to judges and magistrates to prohibit or postpone reporting of an individual case, through making suppression orders, although restricting open justice, protects against the serious risk of prejudice. In this way, the law relating to suppression orders has close links with the sub judice principle, and receives detailed consideration in this Discussion Paper.

2.18 In the USA, it has been argued that the media perform, on the community's behalf, a "watchdog" role in relation to the criminal justice system by discussing the broad issues of public concern which may arise in a criminal case. The argument continues that if the sub judice doctrine inhibits this role "the operation of the criminal justice system may become seriously inefficient, corrupt or otherwise unsatisfactory and debates on public interest questions may be seriously impaired".[17] The clear answer to this argument is that the media can effectively perform this "watchdog" role, promoting discussion of courts and the justice system, "without publishing the most obviously prejudicial material specifically relevant to a case".[18]

2.19 Furthermore, if the sub judice doctrine prevents reporting and discussion of court proceedings then, clearly, the principle of open justice is compromised. However, proof that a publication is a fair and accurate report of what has actually taken place in open court constitutes a defence to a charge of sub judice contempt. In addition, where the media has included prejudicial material in

17. This argument is set out in M Chesterman, "OJ and the Dingo: How Media Publicity Relating to Criminal Cases Tried by Jury is Dealt With in Australia and America" (1997) 45 *American Journal of Comparative Law* 109 at 137.
18. M Chesterman, "OJ and the Dingo: How Media Publicity Relating to Criminal Cases Tried by Jury is Dealt With in Australia and America" at 137.

reports of legal proceedings held in public, the prosecution in contempt proceedings must show that the prejudice arising is not outweighed by any competing public interest consideration. These grounds of exoneration allow the sub judice rule to operate without impinging unduly on the principle of open justice.

Rules of evidence

2.20 The presumption of innocence of an accused, until proven guilty beyond reasonable doubt, is a basic tenet of criminal procedure. Rules governing what evidence can be admitted in court, and discretions vested in judicial officers to exclude evidence whose prejudicial effect substantially outweighs its probative value, ensure that this tenet is upheld. Further, in the most serious criminal cases in New South Wales, trial by jury is a fundamental right of a defendant;[19] the belief is that justice can best be obtained by use of ordinary citizens, drawn from all sectors of society reflecting the community's attitudes, to decide questions of fact. Rules of evidence ensure that the material on which the jury bases its findings of fact is not hearsay, is relevant to the charge being heard and can be reliably tested in court, in the presence of the jury.

2.21 Rules of evidence exclude opinion evidence, allegations as to the general character or credibility of an accused, evidence of confessions which have not been established to be clearly voluntary and evidence as to the prior conduct of the accused, including any prior convictions.

19. Although, it should be noted that the defendant has a right to elect to be tried by a judge sitting alone. The exception to this is trials of Commonwealth offences, unless the defendant has been prosecuted on indictment in a superior or intermediate court: see M Chesterman, "Criminal Trial Juries in Australia: From Penal Colonies to a Federal Democracy" (1999) 62 *Law and Contemporary Problems* 69 at 74.

2.22 One of the most significant effects of the sub judice rule is to prevent the back-door entry, as it were, of inadmissible evidence into the trial. If jurors and witnesses are exposed to material through the media which they would have been prevented by the rules of evidence from being exposed to in court, the fairness of the trial is compromised.

Justice must be seen to be done

2.23 Due process of the law encompasses not only the right to a fair trial, but also the preservation of public confidence in the administration of justice. For that reason, the justice system must strive not only to achieve a fair result but must ensure that it is apparent to onlookers that a fair result has been achieved: "justice should not only be done, it should manifestly and undoubtedly be seen to be done".[20] In this way, public confidence in the administration of justice is maintained.

2.24 It can accordingly be argued that the sub judice doctrine protects against the appearance of decisions having been influenced by published material. If the media publish prejudicial material, they can appear to urge, or may in fact be urging, a particular finding: the media can "wage a campaign" against one of the parties to proceedings. If the jury decides in accordance with an outcome promoted by the media, it will appear as if the jurors were swayed by the media. By the same token, if the jury's decision does not accord with media opinion, it may appear as if they were deliberately reacting against it. Either way, it may appear that the jury's decision was not impartial and based on the evidence presented in court, even if it was.

2.25 Similarly, if material is published which may influence, or does influence, a witness, the decision reached in proceedings will not appear to have been arrived at free of that influence.

20. *R v Sussex Justices; Ex parte McCarthy* [1924] 1 KB 256 at 259.

2.26 The broad question whether the sub judice doctrine should prohibit publications which only *appear* to create a risk of unfairness, in addition to those which *actually do* create such a risk, is a controversial one, to which the Commission will be paying close attention in this Reference.

Time limits

2.27 Publication will only constitute a contempt under the sub judice rule if it relates to proceedings which are current or pending. For example, material concerning a particular crime, which is published before anyone has been arrested or charged with the crime, will not constitute a contempt, even if it later turns out to be prejudicial to the trial of the accused.

2.28 The sub judice rule does not, therefore, amount to suppression of discussion and dissemination of news but mere postponement until the judicial process has run its course. Operation of the rule must be seen in this perspective. Freedom of "newsworthy" reporting must not be confused with freedom to discuss, reveal and inform, all of which can take place when the danger of prejudicing a fair trial has passed.

Influence of media

2.29 In *Ballina Shire Council v Ringland*, Justice Mahoney examined the nature of the power which accompanies the media's employment of free speech:

> The media exercises power, because and to the extent that, by what it publishes, it can cause or influence public power to be exercised in a particular way. And … it needs no authority to say what it wishes to say or to influence the exercise of public power by those who exercise it. The media may, by the exercise of this power, influence what is done by others for a purpose which is good or bad. It may do so to achieve a public

> good or its private interest. It is, in this sense, the last significant area of arbitrary public power.[21]

2.30 A number of arguments have been advanced in favour of greater freedom of the press which question the real influence the media has on public perceptions. The empirical research which seeks to measure media influence is examined below at paragraphs 2.55-2.68. Some of the most commonly raised arguments are that: news stories are quickly forgotten; there is a tendency to overestimate the public's awareness of news; and, because of a mistrust of the media, the public would not believe much of what it read in the press or heard on radio and television.[22] Related arguments are that in large communities, where the pool of jurors is correspondingly large, it is possible to find jurors not aware of, or not corrupted by, reporting. On the other hand, in small communities, restrictions on media reporting would be of little effect because of word-of-mouth reporting of an incident.

2.31 The Australian Law Reform Commission also explored these arguments in its reference on contempt:[23] it noted that it is sometimes submitted "that there is no real conflict between freedom of publication and a fair trial, because no person involved in a trial … is ever actually influenced by publications relating to the trial."[24]

2.32 The reality is that many, if not most, jurors come to a trial with prejudices and preconceptions, both generic and specific to the trial, regardless of their exposure to media reporting. Unquestionably, one of the hallmarks of a fair trial is that a

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21. *Ballina Shire Council v Ringland* (1994) 33 NSWLR 680 at 725 (Mahoney J), quoted in D Butler and S Rodrick, *Australian Media Law* (LBC Information Services, Sydney, 1999) at 1.
22. See *US v Dickinson* 465 F2d 496 (1972) at 507 and *US v Peters* 754 F2d 753 (1983) at 762 discussed in J Shipman Jr and D Spencer, "Courts Recognise Multiple Factors in Free Press/Fair Trial Cases" (1990) 12(4) *Communications and the Law* 87 at 98.
23. ALRC Report 35 and I Freckelton, *Prejudicial Publicity and the Courts* (Australian Law Reform Commission, Reference on Contempt of Court, Tribunals and Commissions, Research Paper 4, 1986).
24. ALRC Report 35 at para 246; Research Paper 4 at 14-18, 29.

verdict will be reached by an "impartial jury". However, this does not mean that jurors must take their places in court as tabula rasa. This would be "an impossible ideal".[25] In fact, it has been argued that:

> To think that jurors wholly unacquainted with the facts of a notorious case can be impanelled today is to dream … The search for such a jury is a chimera. It is also unnecessary. Knowledgeable jurors today … can form an impartial jury. In fact, the very diversity of views and experiences that they possess is the best guarantee of an impartial jury.[26]

2.33 The Australian Law Reform Commission describes what is a reasonable expectation of the average juror's state of mind:

> Jurors must bring with them the knowledge, experience and values which they have acquired throughout their lives. In cases where the alleged offence stirs up particularly deep feelings – examples are rape and murder – the juror cannot be expected to erase these feelings completely, nor to identify with precision the extent to which they have been shaped by media treatment of the subject. Similarly conscious or unconscious likes or dislikes cannot be wholly suppressed. These may relate to essentially irrelevant factors such as the appearance, race, religion, sex or cultural attributes of any of the people involved in the trial.[27]

2.34 The Australian Law Reform Commission argued that it cannot be expected that the media's contribution to the formation of these likes or dislikes can be comprehensively identified with a view to formulating prohibitions on the relevant types of publicity. It drew attention to a further argument that the element of irrationality in all jury decisions is so marked that it is illogical to

25. M Chesterman, "OJ and the Dingo: How Media Publicity Relating to Criminal Cases Tried by Jury is Dealt With in Australia and America" at 112.
26. N N Minow and F H Cate, "Who is an Impartial Juror in an Age of Mass Media?" (1991) 40 *American University Law Review* 631 at 663.
27. ALRC Report 35 at para 281; Research Paper 4 at 4-6.

single out the elements of prejudice which may have arisen from media publicity, and to apply selective prohibitions to those alone.[28]

2.35 However, what the sub judice rule seeks to do is to filter out the most damaging of prejudicial effects so that views formed prior to the trial, or from extrinsic sources during the trial, are not held so strongly that they cannot be displaced by the evidence which is presented and tested in the courtroom, as well as by judicial directions and instructions on the law, and arguments and submissions by counsel on that evidence. It seeks to suppress only that material which, in accordance with the present common law test, has a real and definite tendency, as a matter of practical reality, to prejudice legal proceedings, or, on a reformulated test, creates a substantial risk that the fairness of the proceedings would be prejudiced. Furthermore, as pointed out above, suppression is for a limited time only and liability for contempt is only sheeted home where any of the grounds of exoneration (discussed below) are not available.

Defences

Fault

2.36 Chapter 5 examines the role of fault in liability for sub judice contempt, and weighs the arguments for and against absolute liability. Proposals 7 and 8 encapsulate the Commission's present view that the imposition of absolute liability fetters freedom of speech to an unacceptable degree and may indeed be counter-productive, through not making sufficient allowance for reasonable efforts made by media publishers to avoid prejudicing trials, or for situations where there is an absence of editorial control. In Proposal 7, it is proposed that a defence to a charge of sub judice contempt should be available on the basis that the person or organisation charged did not know a fact which was the cause of the publication being in breach of the sub judice rule, and

28. See ALRC Report 35 at para 281; see also D Howitt, "Pre-trial Publicity: The Case for Reform" (1982) 2 *Current Psychological Reviews* 311.

took all reasonable steps to ascertain any such facts. In Proposal 8, it is proposed that a defence to a charge of sub judice contempt should be available on the basis that the person or organisation charged had no control over the content of the prejudicial publication, and that they either did not know the material was prejudicial, or, on becoming aware of this, took all reasonable steps to prevent its publication.

2.37 If publishers know that they will not be held liable for any prejudice to legal proceedings which may result from their publications if they have taken all reasonable care to avoid such a result, they will publish with greater confidence and less interference with their dissemination of news, opinion and discussion. Hence, in limiting liability in this way, a proper balance between freedom of speech and the fair administration of justice can be achieved.

Public interest

2.38 The common law presently allows a person or organisation to avoid liability for contempt, in certain circumstances, where the publication relates to a matter of public interest. In this situation, the potential threat to a fair trial is deemed to be outweighed by the public interest in the discussion of a matter of public importance.[29]

2.39 Although the Commission proposes that the common law formulation of the defence be restricted somewhat, our tentative view is that a "public interest" defence should continue to be available.[30] This ground of exoneration expands the scope of freedom of speech, making it more palatable to retain the sub judice rule.

Public safety

2.40 Publications which are reasonably necessary or desirable to facilitate the arrest of a person, or aid in the investigation of an offence or to protect public safety, may be immune from

29. See *Hinch v Attorney General (Vic)* (1987) 164 CLR 15. See also Chapter 8 for a full discussion of the "public interest principle" and the relevant case law.
30. See Chapter 8 and Proposal 19.

application of the sub judice rule, even if they would otherwise be found to be in contempt, under a broad application of the public interest principle. The prosecuting authority may also exercise a discretion not to prosecute. The Commission has formed the preliminary view that legislation should specifically protect these kinds of publications.[31] A defence to a charge of contempt on the basis of "public safety" places a further check on the curtailment of freedom of speech which is otherwise a consequence of the operation of the sub judice rule. As with the availability of other defences, this lends weight to a position advocating retention of the rule.

Fair and accurate reporting

2.41 At common law, subject to several discrete exceptions, a publication will not constitute a contempt, even if it may be prejudicial to a case, if it is a fair and accurate report of proceedings which take place in open court. This ground of exoneration from liability acknowledges the importance of open justice and allows the sub judice rule to operate without encroaching upon the public interest in being informed about processes of the court, and those processes being open to scrutiny.[32]

Circumstances where liability cannot be avoided

2.42 The above paragraphs look at the availability of a number of defences to a charge of sub judice contempt which have the effect of expanding the media's freedom of expression. However, in some circumstances, liability for publication cannot be avoided even where it may, outwardly, seem unfair for a charge of contempt to stand. This, it has been argued, has a "chilling effect" on media coverage.[33] In particular, liability cannot be avoided on the basis that an alternative remedial measure incurring significant disadvantage and cost, such as postponing the start of the trial or changing the venue, would have been enough to negate prejudicial

31. See Chapter 8 at para 8.44-8.50 and Proposal 20.
32. See Chapter 9.
33. M Chesterman, "OJ and the Dingo: How Media Publicity Relating to Criminal Cases Tried by Jury is Dealt With in Australia and America" at 134.

influence.[34] Further, the actual impact of prejudicial publicity is not relevant to liability for sub judice contempt. However, rather than throw sub judice liability out altogether, the solution may be to redefine the test for liability and/or to make liability dependent on further factors. The Commission has proposed in Chapter 4 that the present common law test for liability, under which a publication is in contempt if it has a real and definite tendency, as a matter of practical reality, to prejudice or embarrass proceedings, be clarified and narrowed to depend on a substantial risk of prejudice. As well, as outlined in paragraph 2.36 above, the Commission proposes that where it can be shown that no one was at fault, there should be no liability for sub judice contempt.

Commercial nature of media publishing

2.43 In advocating freedom of the press, publishers may confuse the role they fill in satisfying the public's desire to be informed of events happening in the world with acting under a duty or privilege to so inform. In *Attorney General v Time Inc Magazine Co Pty Ltd*, Chief Justice Gleeson referred to an observation made by Chief Justice Martin that the publication of a newspaper is a commercial activity: no question of duty or privilege is involved.[35] While his Honour acknowledged that it is perfectly legitimate to seek profit from providing information and entertainment to the public, his Honour held that there is no right, under the Constitution or at common law, to do so at the expense of the due administration of justice.

34. This is discussed in Chapter 4 at para 4.110. It has been said in some recent cases, footnoted in Chapter 4 at footnote 131, that the effectiveness of judicial warnings to the jury (which are neither disadvantageous nor costly) can be given weight in determining the tendency of a publication to prejudice proceedings.
35. *Attorney General v Time Inc Magazine Co Pty Ltd* (NSW, Court of Appeal, No 40331/94, 15 September 1994, unreported); *Re The Evening News* (1880) 1 LR(NSW) 211 at 240 (Martin CJ), cited with approval by Windeyer J in *James v Robinson* (1963) 109 CLR 593.

2.44 In *Attorney General for New South Wales v TCN Channel Nine Pty Ltd* the observation was similarly made that the publication of highly newsworthy material concerning alleged offences, or the trial of those offences, "may have a capacity to advance the commercial or other interests of various persons and corporations". However, the court held that in the context of the administration of criminal justice, so long as proceedings are pending, "these interests, which may in themselves be perfectly legitimate, must yield to the higher interest of the due administration of justice".[36]

Specific examples of media publicity

2.45 There are particular risks of prejudice to a fair trial associated with the publication of certain kinds of material relating to accused persons and to criminal proceedings, against which the sub judice rule provides protection. High-risk publications include:

- ☐ a photograph of the accused where identity is likely to be an issue, as it will often be in criminal cases;[37]
- ☐ suggestions that the accused has previous criminal convictions, has been previously charged for committing an offence and/or previously acquitted, or has been involved in other criminal activity;[38]

36. *Attorney General (NSW) v TCN Channel Nine Pty Ltd* (1990) 20 NSWLR 368 at 380.
37. See *R v Australian Broadcasting Corp* [1983] Tas R 161; *Attorney General v Time Inc Magazine Co Pty Ltd; R v Pacini* [1956] VLR 544; *Attorney General (NSW) v Mirror Newspapers Limited* [1962] NSWR 856.
38. See, for example, *Attorney General (NSW) v John Fairfax & Sons Ltd* (NSW, Court of Appeal, No 371/87, 21 April 1988, unreported); *Gisborne Herald Co Ltd v Solicitor-General* [1995] 3 NZLR 563; *Hinch v Attorney General (Vic)* (1987) 164 CLR 15.

- ☐ suggestions that the accused has confessed to committing the crime in question;[39]
- ☐ suggestions that the accused is guilty or innocent of the crime for which he or she is charged, or that the jury should convict or acquit the accused;[40] and
- ☐ comments which engender sympathy or antipathy for the accused and/or which disparage the prosecution, or which make favourable or unfavourable references to the character or credibility of the accused or a witness.[41]

Identification evidence

2.46 Pre-trial publication of material identifying an accused person, especially photographs of the accused, is generally acknowledged to have a particular propensity to give rise to difficulties in ensuring a fair trial, and even to miscarriages of justice.[42] Identification evidence can be unreliable because it is so easy to make an out-and-out mistake about identity but, more importantly in the context of media publicity, because of what has been described as a "displacement effect" or "suggestibility".[43]

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39. *Attorney General (NSW) v John Fairfax & Sons Ltd* [1980] 1 NSWLR 362; *Registrar of the Court of Appeal v Willesee* (1985) 3 NSWLR 650; *Attorney General (NSW) v Dean* (1990) 20 NSWLR 650; *R v Day* [1985] VR 261; *Attorney General (NSW) v TCN Channel Nine Pty Ltd* (1990) 20 NSWLR 368.
40. *Director of Public Prosecutions (Cth) v Wran* (1987) 7 NSWLR 616; *Attorney General (NSW) v Dean* (1990) 20 NSWLR 650.
41. See *R v Truth Newspaper* (Vic, Supreme Court, Phillips J, No 4571/93, 16 December 1993, unreported); *R v Saxon, Hadfield and Western Mail Ltd* [1984] WAR 283; *Registrar of the Court of Appeal v Willesee* (1985) 3 NSWLR 650; *Attorney General (NSW) v John Fairfax & Sons* (1985) 6 NSWLR 695 at 713 (McHugh JA).
42. "There have been numerous cases where people have been wrongly convicted on the basis of inaccurate eyewitness testimony": The Australian Law Reform Commission, *Evidence* (Report 26 (Interim), 1985) Vol 1 at para 422.
43. The phenomenon in which a person seen in one situation is confused with and recalled as a person seen in a second situation is well recognised and has been termed "unconscious transference": ALRC Report 26 (Interim) Vol 1 at para 241, referring to research

People can honestly believe they recognise somebody because of ideas that have been suggested to them, including a previously published photograph of "a person suspected/charged with the crime", "and human nature is such that it is difficult, and sometimes impossible, for people to distinguish what they know, and what they believe, or between the various sources from which their beliefs have come to be made up".[44] It was held in *Attorney General v Time Inc Magazine Co Pty Ltd* that, in a case of murder, where identity was likely to be a central issue, the pre-trial publication of a photograph of an accused would ordinarily carry a real risk of contaminating identification evidence at the trial. Publication of identifying material of an accused not only jeopardises his or her right to a fair trial, but gives the defence the opportunity to attack the prosecution case on the basis of unreliable identification evidence. Either way, there may be a serious interference with the proper administration of justice.[45]

Prior criminal convictions

2.47 Whether or not the accused has a prior criminal record is not relevant to the charge presently being tried and prima facie is not admissible evidence. If jurors become aware of prior convictions through media publicity, there is a real risk of prejudice to their impartiality and to the right of the accused to be presumed innocent of the particular crime being tried, until proven guilty. It is knowledge which is very difficult to put out of mind, and its prejudicial effects are difficult to displace by warnings as to the irrelevancy and inadmissibility of the information. If the disclosure occurs during the trial, the judge may consider that the jury must be discharged on account of the potential for unfairness to the accused.

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carried out in E F Loftus, *Eyewitness Testimony* (Harvard University Press, Cambridge, 1979).

44. *Attorney General v Time Inc Magazine Co Pty Ltd* (NSW, Court of Appeal, No 40331/94, 15 September 1994, unreported).

45. See *Ex Parte Auld; Re Consolidated Press Ltd* (1936) 36 SR (NSW) 596, the leading authority in New South Wales on the pre-trial publication of photographs of accused persons.

Confessions of guilt

2.48 Similarly, confessions of guilt which are alleged by the media to have been made by the accused are particularly prejudicial and difficult to dismiss from the mind. If an allegation is made by the prosecution in court that the accused has confessed, then this evidence can be tested to determine whether it was truly voluntary and obtained in circumstances which makes the evidence admissible. Otherwise, the evidence is inadmissible. As has been rightly pointed out:

> [t]here is no point in maintaining that, prima facie at least, evidence of prior convictions or of an alleged confession which has not been proved to have been made voluntarily should be inadmissible if we don't have a sub judice principle prohibiting (prima facie) publications containing these categories of statements.[46]

2.49 In these particularly vulnerable areas of media reporting, limited remedial measures, including warnings given by the judge to the jury, are unlikely to undo any damage caused by the publication or to pre-empt the risk of prejudice. The Commission's present view is that, in the absence of sub judice liability, and in spite of the availability of remedial measures, the freedom to publish these kinds of information would have the potential to seriously impede the due administration of justice.

Influence on witnesses

2.50 Chapter 4 at paragraphs 4.33-4.48 examines in detail whether liability for sub judice contempt should continue to apply to publications which may influence witnesses. Publications have been found to constitute contempt on the basis that they may influence a witness, for example, where the witness or one of the parties to the proceedings has been personally criticised or they contained an interview with the witness, as a result of which he or

46. M Chesterman, "OJ and the Dingo: How Media Publicity Relating to Criminal Cases Tried by Jury is Dealt With in Australia and America".

she would be constrained from changing his or her account of the relevant events.

2.51 The Commission's tentative view is that there is sufficient ground to fear that the fairness of legal proceedings may be compromised by publications that influence a witness in any of the above circumstances. In Chapter 4, the Commission proposes reformulating the test of liability so that it is founded on substantial risk of prejudice, rather than tendency to prejudice. This would raise the threshold of liability, thereby widening the scope of material which can be published without being in contempt. It can be argued that this tipping of the scales in favour of freedom of speech allows for the counterbalance provided by applying the rule to circumstances in which there is some danger of prejudice. On this basis, retention of the sub judice rule to apply to influence on witnesses can be justified.

Influence on judicial officers

2.52 Chapter 4, at paragraphs 4.49-4.57, also considers the influence publications may have on judicial officers. The prevailing view at common law is that, based on the assumption that judicial officers are not susceptible to any significant degree to influence by media publicity, any such influence does not have the requisite tendency to prejudice proceedings, so as to constitute contempt. The Commission proposes that no change be made to the common law.

2.53 Not imposing liability for sub judice contempt on the basis of risk of influence on a judicial officer expands freedom of the press and gives full effect to the principle of open justice. This in turn vindicates retention of the sub judice rule.

2.54 However, Chapter 4 distinguishes the situation where liability for sub judice contempt may be imposed because a publication "embarrasses" a judicial officer.[47] That chapter

47. For example, where a sentence has been imposed on an offender, and the time for appealing against that sentence has not yet

observes that cases which have suggested that liability may arise because of "embarrassment" have not been concerned with the risk of influence but with protecting the integrity of the justice system from the perception of improper pressure. Although we concede that the common law is somewhat ambiguous in this area, at this stage we make no proposals for change.

EMPIRICAL RESEARCH REGARDING JURIES

2.55 The sub judice rule assumes that jurors will have come in contact with media publicity surrounding a case, that they will retain the information and that they will be influenced by what they read and hear in the media. There have been numerous studies conducted, mostly in the United States, which have endeavoured to test these hypotheses. In this Discussion Paper, we have not undertaken an exhaustive review of all relevant research. It is possible to rely on a sample of studies in order to draw some trends from empirical research in this area.

2.56 The Australian Law Reform Commission looked at some of the studies in its reference on contempt[48] and noted that there is evidence that people rely heavily on the media, with television being the most influential, for their knowledge and understanding of events in the world, and for impressions and perceptions that

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expired, publications which criticise the sentence passed may constitute contempt on the basis that they amount to a "press campaign" for the appellate court to increase the sentence. The court may be "embarrassed" in so far as it may be publicly perceived to be influenced by media pressure, whether or not this is in fact the case: See *Ex parte Attorney General; Re Truth & Sportsman Ltd* [1961] SR (NSW) 484, especially at 495-496. Similarly, a publication may constitute a sub judice contempt for its tendency to "embarrass" a magistrate in summary proceedings, in so far as it makes it difficult for the magistrate to decide the case fairly and free from the appearance of prejudice: See *R v Regal Press Pty Ltd* [1972] VR 67 at 79-80.

48. ALRC Report 35 and Research Paper 4.

form the basis for their own value-judgments.[49] On the other hand, research involving telephone interviews of people who have just watched a television news program concluded that their recall of the contents is poor.[50] Later studies have similarly demonstrated diverse results: some studies have found that "the media, especially television broadcasts, exert a strong and continuing influence on what people think and feel"; while others have found that "the degree to which the specific contents of media publications are recollected is generally very low".[51] The Australian Law Reform Commission refers to the theory, backed up by findings of a pattern of remembering described as a "memory curve",[52] that "what is chiefly retained in the human mind out of the large quantities of information received from the media is general impressions and value-judgments, rather than precise and detailed statements of fact".[53] If this is so, media influence arguably has greater potential to prejudice than if the effect were to instil the bare facts of an event in the reader's or viewer's mind.

49. ALRC Report 35 at para 284: see R F Carter and B S Greenberg, "Newspapers or Television: Which Do You Believe?" (1965) 42 *Journalism Quarterly* 29; I Freckelton, *Prejudicial Publicity and the Courts* (Australian Law Reform Commission, Reference on Contempt of Court, Tribunals and Commissions, Research Paper 4, 1986) at 19-29.
50. ALRC Report 35 at para 284; I Freckelton, *Prejudicial Publicity and the Courts* (Australian Law Reform Commission, Reference on Contempt of Court, Tribunals and Commissions, Research Paper 4, 1986) at 15: see P Edgar (ed), *The News in Focus* (McMillan, Melbourne, 1980) at 185ff.
51. See M Chesterman, "OJ and the Dingo: How Media Publicity Relating to Criminal Cases Tried by Jury is Dealt With in Australia and America" at 140 and footnotes 146 and 147.
52. People lose track of a considerable amount of the information received by them comparatively quickly, but the speed at which information is forgotten slows subsequently: see, for example, F C Bartlett *Remembering* (Cambridge University Press, 1977); R L Atkinson, R C Atkinson and E R Hilgard, *Introduction to Psychology* (8th Edition, Harcourt Brace, San Diego, 1983) at 243ff.
53. ALRC Report 35 at para 284.

2.57 The Australian Law Reform Commission also cites studies which have attempted to assess "whether it is genuinely possible to put information out of one's mind through a conscious act of will-power" and notes that the findings are equivocal.[54] In relation, particularly, to the effectiveness of alternative remedial measures, it is interesting to note that empirical research using mock juries is not conclusive as to whether the effects of prejudicial publicity is negated by evidence presented at the trial itself, together with judicial instructions to ignore material not presented as evidence in the courtroom.[55]

2.58 The Australian Law Reform Commission argues that whatever view the media presents of crime and criminals is likely to be highly influential and that media-created impressions may form the basis for an individual's understanding of an issue and attitude towards a person featured in the media. Furthermore, an individual is likely to organise later information or impressions so as to conform with an attitude or opinion originally adopted.[56]

54. ALRC Report 35 at para 285, footnote 99: D Broeder, "'Other Crimes' Evidence at Trial: Of Balancing and Other Matters" (1961) 70 *Yale Law Journal* 763; S Odgers, *Character and Conduct* (Australian Law Reform Commission, Reference on Evidence, Research Paper 11, 1983) at 255; H Kalven and H Zeisel, *The American Jury* (Brown & Co, Boston, 1966) at 160; R J Simon, "Murder, Juries and the Press" (1966) 3 *Trans-Action* 40.

55. See ALRC Report 35 para 285 citing, for example, M M Connors, "Prejudicial Publicity: An Assessment" (1975) 41 *Journalism Monographs* 1, summarising the effects of a number of American studies.

56. See, for example, S E Asch, "Forming Impressions of Personality" (1946) 41 *Journal of Abnormal Social Psychology* 258; D Krech and R S Crutchfield, *Theory and Problems of Social Psychology* (McGraw Hill, New York, 1948) referred to in ALRC Report 35 at para 284, footnote 94. "Repetition of material similar to that which provided the basis for the attitude or opinion first adopted will act by way of reinforcement, though if the subsequent material is markedly different it may obliterate or distort the recollection of information of information gathered by way of first impression": ALRC Report 35 at para 248; see, for example, W Wilcox, "The Press, the Jury and the Behavioural Sciences" (1968) 9 *Journalism Monographs* 1; E F Loftus, *Eyewitness Testimony*

If the first exposure to an event, at which time attitudes and opinions are formed, is through media publicity, this has significant implications for the conduct of a fair trial.

2.59 An American survey of a number of studies of juries reveals that there is evidence both for and against the hypothesis that prejudicial pretrial publicity can lead to bias in jurors.[57] Even within each camp, the results are sometimes equivocal. The findings of these studies are as follows:

- Although jurors were more likely to believe that a defendant was guilty after reading a "sensational" story than a conservative story, there was no difference in how the jurors who had read the "sensational" story and those who had read the conservative story would vote for conviction.[58]
- Sensational press coverage could enhance jurors' readiness to believe that a defendant was guilty but the trial process could reduce that belief to a minimum.[59]
- Persons not exposed to pre-trial prejudicial news coverage found the defendant guilty more often than those who were exposed to such coverage.[60]

(Harvard University Press, Cambridge, 1979) ch 4; E F Loftus and K E Ketcham, "The Malleability of Eyewitness Accounts" in S Lloyd-Bostock and B R Clifford, *Evaluating Witness Evidence* (John Wiley & Sons, Chichester, 1983) ch 9.

57. J M Shipman Jr and D Spencer, "Courts Recognise Multiple Factors in Free Press/Fair Trial Cases".
58. R L Goldfarb, "Public Information, Criminal Trials: Causes Celebre" (1963) 3 *Publishing, Entertainment, Advertising Law Quarterly* 57-68 quoted in J M Shipman Jr and D Spencer, "Courts Recognise Multiple Factors in Free Press/Fair Trial Cases" at 90.
59. Simon, "Murders, Juries and the Press" (1966) 3 *Trans-Action* 40 quoted in J M Shipman Jr and D Spencer, "Courts Recognise Multiple Factors in Free Press/Fair Trial Cases" at 90.
60. Roper, "The Gag Order: Asphyxiating the First Amendment" (1981) 35 *The Western Political Quarterly* 384 quoted in J M Shipman Jr and D Spencer, "Courts Recognise Multiple Factors in Free Press/Fair Trial Cases" at 90.

- ☐ Pretrial prejudicial news coverage does have a prejudicial effect. (This conclusion was based in part on the premise that the public considers news media reliable.)[61]
- ☐ There is some evidence that jurors use information from news coverage in deliberations.[62]
- ☐ Some jurors have said that news reports did have an effect on their verdicts.[63]
- ☐ The kinds of facts presented in a news story, and the more widespread and frequent the presentation, will lead to beliefs in guilt.[64]
- ☐ Where jurors had been exposed to publicity about a trial, there was a possibility that this would impact on their decisions.[65]

2.60 Another American survey of empirical studies[66] notes findings that:

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61. Doggin and Hanover, "Fair Trial v Free Press: The Psychological Effect of Pretrial Publicity on the Juror's Ability to be Impartial: A Plea for Reform" (1965) 38 *Southern California Law Review* 672 quoted in J M Shipman Jr and D Spencer, "Courts Recognise Multiple Factors in Free Press/Fair Trial Cases" at 90.
62. Grisham and Lawless, "Jurors Judge Justice: A Survey of Criminal Jurors" (1973) 3 *New Mexico Law Review* 252 quoted in J M Shipman Jr and D Spencer, "Courts Recognise Multiple Factors in Free Press/Fair Trial Cases" at 90.
63. Reed, "Jury Deliberation. Voting and Verdict Trends" (1965) 45 *South Western Social Science Quarterly* 361 quoted in J M Shipman Jr and D Spencer, "Courts Recognise Multiple Factors in Free Press/Fair Trial Cases" at 90.
64. Tans and Chaffee, "Pretrial Publicity and Juror Prejudice" (1966) 43 *Journalism Quarterly* 647 quoted in J M Shipman Jr and D Spencer, "Courts Recognise Multiple Factors in Free Press/Fair Trial Cases" at 90.
65. Kline and Jess, "Prejudicial Publicity: Its Effect on Law School Mock Juries" (1966) 43 *Journalism Quarterly* 113 quoted in J M Shipman Jr and D Spencer, "Courts Recognise Multiple Factors in Free Press/Fair Trial Cases" at 90.

- The impact of adverse, inadmissible pretrial publicity had affected the mock jurors' subsequent evaluation of evidence presented at the trial. Furthermore, it encouraged guilty verdicts and increased subjects' ratings of how convincing they found the prosecutor's case.[67]
- Prejudicial material had a powerful effect on juror's behaviour, influencing them to reach more guilty verdicts[68].

2.61 The author of the survey concludes that studies support the notion that pretrial publicity can have a strong prejudicial effect on trials.[69] On the other hand, another extensive review of empirical studies concludes that:

> the available social science literature on the effects of actual news coverage on potential jurors or on actual jury verdicts is not very useful. It appears that news coverage in highly publicised cases may influence the public, but it is also possible that those who are pro-prosecution *choose* to expose themselves to more news and/or remember more of it.[70]

2.62 The authors further conclude that studies are needed which reach a high degree of realism in the minds of subject-jurors and

66. L C Parker, *Legal Psychology: Eyewitness Testimony Jury Behaviour* (Charles C Thomas, Springfield, Illinois, 1980).
67. L C Parker, *Legal Psychology: Eyewitness Testimony Jury Behaviour* at 163.
68. A Padawer-Singer and A Barton, "The Impact of Pretrial Publicity" in R J Simon (ed) *The Jury System in America* (Sage Publications, Beverley Hills, 1975) discussed in Parker, *Legal Psychology: Eyewitness Testimony Jury Behaviour* at 164. The study included jurors engaged in real trials. Sixty nine per cent of jurors who had been exposed to prejudicial material found the defendant guilty compared with 35 per cent of jurors who had read neutral press clippings.
69. L C Parker, *Legal Psychology: Eyewitness Testimony Jury Behaviour* at 165.
70. J S Carroll, N L Kerr, J J Alfini, F M Weaver, R J MacCoun and V Feldman, "Free Press and Fair Trial: The Role of Behavioural Research" (1986) 10 (3) *Law and Human Behaviour* 187 at 194.

span different kinds of news, cases and alternative remedial measures.[71]

2.63 More recent empirical studies[72] have found that:

- ☐ some jurors are affected by adverse pretrial publicity and that traditional remedies for counteracting that publicity do not work;[73]
- ☐ jury deliberation did not remedy but magnified publicity-induced bias;[74]
- ☐ pretrial publicity, particularly negative information about the defendant's character, can influence subjects' initial judgements about a defendant's guilt. This bias is weakened, but not eliminated by the presentation of trial evidence.[75]

2.64 *Attorney General (NSW) v John Fairfax Publications Pty Ltd* is a recent Australian judgment that discusses the limitations of empirical research.[76] There was expert evidence[77] indicating that it

71. Carroll, Kerr, Alfini, Weaver, MacCoun and Feldman at 197.
72. The limitations of these studies are argued in R M Jones, "The Latest Empirical Studies on Pretrial Publicity, Jury Bias and Judicial Remedies – Not Enough to Overcome the First Amendment Right of Access to Pretrial hearings" (1991) 40 *American University Law Review* 841.
73. G P Kramer, N L Kerr and J S Carroll, "Pretrial Publicity, Judicial Remedies and Jury Bias" (1990) 14 *Law and Human Behaviour* 409.
74. G P Kramer, N L Kerr, J S Carroll and J J Alfini, "On the Effectiveness of the Voir Dire in Criminal Cases with Prejudicial Pretrial Publicity: An Empirical Study" (1991) 40 *American University Law Review* 665. See also the empirical studies discussed in "Selecting Impartial Juries: Must Ignorance be a Virtue in Our Search for Justice, Panel One: What Empirical Research Tells Us, and What We Need to Know About Juries and the Quest for Impartiality" *Annenberg Washington Program Conference* (1990) 40 *American University Law Review* 547.
75. A L Otto, S D Penrod and H R Dexter, "The Biasing Impact of Pretrial Publicity on Juror Judgments" (1994) 18 (4) *Law and Human Behaviour* 453.
76. *Attorney General (NSW) v John Fairfax Publications Pty Limited* [1999] NSWSC 318 at para 95.

was statistically unlikely that the publication alleged to be contemptuous would have come to the attention of, and been recalled by, the jurors. Justice Barr found that this evidence was of limited value in assessing the tendency of the publication to prejudice the administration of justice because the assumptions on which the opinions were based, and the methodology used to reach those opinions, were not sufficiently close to the realities of a "real-life" jury hearing the trial. His Honour noted the impossibility of replicating trial conditions in a survey of mock jurors and the consequent difficulty in accepting survey results as a reliable indicator of what might happen at a trial. His Honour found that the limitations on the survey in this case were so great, and the differences between the conditions of the survey and those which would apply at trial so marked, that the survey results could not form the basis for any reasonable conclusion that there was a small likelihood of the material prejudicing the administration of justice.

2.65 This conclusion by Justice Barr illustrates a general tendency for Australian judges to set little store by empirical studies of the likelihood that potential members of a jury may have been influenced by media publicity about the case.[78] It may be that a slightly more open judicial attitude to such endeavours would encourage the development of more sophisticated techniques for conducting such studies, to the eventual benefit of courts and media alike.

2.66 Be that as it may, there are, in summary, three main reasons why support for, or rebuttal of, assumptions underlying the rationale for the sub judice doctrine cannot reliably be derived from empirical studies of juries and witnesses. First, these studies fall almost equally into opposite camps in the conclusions they

77. The expert witnesses both had qualifications in psychology. The evidence of one was based largely on a study conducted of the effect of the publication on mock jurors.

78. See M Chesterman, "Criminal Trial Juries in Australia: From Penal Colonies to a Federal Democracy" (1999) 62 *Law and Contemporary Problems* 69 at 90.

reach. Secondly, their outcomes, within each camp, are often ambiguous. Thirdly, the methodology has a number of limitations:

- it is difficult for those taking part in studies to disassociate the influence of the media from their own preconceived notions;
- many studies are based on mock trials, mock juries or shadow juries, and on secondary material generally;
- those involved in the studies are often university students and may not truly reflect the usual cross-section of society of which juries are constituted. Australian studies are further limited by the restrictions placed on the questioning of juries.

2.67 Based on empirical studies to date, the Commission is presently of the view that it is not possible to conclude definitively from them either that the sub judice rule is needed to protect juries and witnesses from prejudicial media reporting, or that it is not so needed.

2.68 However, further research in this area may, in time, produce more reliable evaluations of the underlying assumptions. In particular, in formulating its final recommendations, the Commission will take into account the findings of research currently being undertaken into the impact of media publicity on jury deliberations in New South Wales.[79] Jurors from recently completed criminal trials are being asked about the extent, if any, to which media publicity may have influenced their views, or the views of their fellow jurors, about the trial. Their answers are being compared with the impressions formed on these same matters by the judge presiding at the trial and by counsel on both sides. The judges and barristers interviewed are also being asked for their opinions about the appropriateness and effectiveness of existing sub judice principles and of the procedural measures which a court may use to mitigate the impact of prejudicial publicity.

79. The research is being carried out under the direction of Professor Michael Chesterman (a Commissioner engaged on this Reference) and Dr Janet Chan, both of the University of New South Wales, in collaboration with the Justice Research Centre.

ALTERNATIVE REMEDIAL MEASURES

2.69 Where it appears that there has been publicity surrounding a case which may be prejudicial to a fair trial, the court may, on the application of one of the parties, or in some instances of its own volition, take steps to redress or minimise the damage. Chapter 4, at paragraphs 4.109-4.113, looks at the relevance of these remedial measures to liability for contempt. In this chapter, the availability and effectiveness of remedial measures is evaluated in order to determine whether they obviate the need for a sub judice rule. Chapter 10 looks at what might be termed preventative remedies: orders to suppress publication of specified prejudicial material.

2.70 Remedial measures which are available in New South Wales include:

- ordering an adjournment, or permanent stay, of proceedings (the latter being exceptional), or a change of venue; questioning jurors as to their contact with publicity, or discharging the jury;
- allowing the prosecutor or defence to challenge for cause (that is, to object to the selection of a person as a juror on the basis that that person is biased or partial); and
- directing the jury, during the course of the trial or in summing up, to disregard publicity about the case.

2.71 In New South Wales, providing the judge is satisfied that the accused has received legal advice on the issue and providing the prosecutor consents, a person who has been prosecuted on indictment in a superior or intermediate court can elect to be tried by a judge sitting alone.[80] The exception to this is where the accused is prosecuted on indictment on a Commonwealth offence,

80. See M Chesterman "Criminal Trial Juries in Australia: From Penal Colonies to a Federal Democracy" (1999) 62 *Law and Contemporary Problems* 69 at 74.

in which case s 80 of the Commonwealth Constitution requires that the trial be by jury.[81]

2.72 Although exceptional, in some cases, the damage from adverse publicity may only be remedied by a conviction being quashed on appeal. This is likely to occur where jurors have been exposed to inadmissible evidence that is highly prejudicial, such as a prior record of convictions. It is also open to the trial judge to put his or her opinion on record, during the trial and in the absence of the jury, that a verdict of guilty should be set aside because of adverse publicity surrounding the trial.

2.73 Unlike the approach taken in New South Wales, the US legal system relies far more heavily on remedial measures than it does on the restrictions on publicity imposed by contempt law, to minimise the possibility of prejudice to proceedings. This approach assumes that remedial measures will be effective in either producing a jury which has the requisite degree of impartiality, or in negating, or counteracting, the effects on juries of exposure to prejudicial material. In Australia, no such general assumption exists: indeed, the continuance of a law of sub judice is sometimes justified on the ground that it is an unsound assumption.[82]

2.74 As well as making use of the measures listed above, in order to preserve the impartiality of jurors, US courts have recourse to

81. "The trial on indictment of any offence against any law of the Commonwealth shall be by jury": *Constitution* (Cth) s 80. The High Court has held that the effect of s 80 is not to compel procedure by indictment but to require that if an offence is in fact prosecuted on indictment then it must be tried before a jury: see *Li Chia Hsing v Rankin* (1978) 141 CLR 182; *Zarb v Kennedy* (1968) 121 CLR 283; *R v Archdall; Ex parte Corrigan* (1928) 41 CLR 128; *Brown v The Queen* (1986) 160 CLR 171. See M Chesterman, "Criminal Trial Juries in Australia: From Penal Colonies to a Federal Democracy" at 75.

82. See M Chesterman, "OJ and the Dingo: How Media Publicity Relating to Criminal Cases Tried by Jury is Dealt With in Australia and America" at 140. This is clearly implicit in *R v Glennon* (1992) 173 CLR 592 at 601-606 (Mason CJ and Toohey J), at 611-617 (Brennan J).

other measures not available in New South Wales. An application can be made for sequestration of juries during the course of a trial so that they are quarantined from media publicity. Potential jurors can be cross-examined to determine their preconceptions and the possibility of partiality in a "voir dire" proceeding. The prosecution and defence can also avoid drawing jurors from a county where prejudicial publicity has been particularly pervasive.

2.75 Except for judicial directions to juries, remedial measures all come at a price, either pecuniary or non-pecuniary and sometimes both. A greater reliance on remedial measures increases the expenses which must be borne by the State and, unless there is a grant of legal aid (which is, of course, a cost borne by the State), by the accused. Where there has to be a new trial because it has been necessary to discharge the jury, or because a verdict is set aside on appeal, these expenses can be enormous. Remedies which delay the finalisation of criminal charges, including protracted striking of a jury and adjournment of proceedings, increase the strain and hardship suffered by the accused, who may be in custody. Remedies may also cause, at best, inconvenience and, more seriously, emotional upset and hardship to parties, witnesses and even jurors. It is easy to envisage these effects when a jury must be sequestered for part or all of the trial. In fact, the particular pressure imposed by jury sequestration "may be so arduous that the jury's capacity to deliberate with the requisite dispassionate calm is also put at risk".[83]

2.76 Likewise, a change of venue to locations away from the seat of the publicity would obviously be upsetting to lesser or greater degrees to all involved in the trial. In any event, the effectiveness of changing the venue has been called into question. It is argued that "publicity is often so widespread that relocating the trial will have little effect, the local community has a legitimate interest in the prosecution of the defendant, and defendants should not be

83. M Chesterman, "OJ and the Dingo: How Media Publicity Relating to Criminal Cases Tried by Jury is Dealt With in Australia and America" at 135.

compelled to choose between their rights to an impartial jury and a local jury."[84]

2.77 Where the possibility of prejudice to a fair trial is so serious as to warrant a permanent stay of proceedings, or where a conviction must be quashed due to prejudicial publicity, the public interest in administration of justice is frustrated: an accused who may have been found guilty of a crime (and, when publicity has been intense, it is most likely to have been a serious crime) goes unpunished; the victim of the crime is left without having his or her suffering and outrage aired and without seeing retribution.

2.78 In the USA, where "prior restraints upon expression are a far more grievous impingement on the First Amendment than are subsequent punishments"[85] for contempt, despite individual judges' objections to the prejudicial effects of media coverage,[86] it was not until 1959 that a conviction was reversed because of prejudicial publicity.[87] Since then, there have been a number of reversals of convictions as a result of pretrial publicity[88] and an increasingly categorical and aggressive stance taken by the courts towards prejudicial publicity. In *Irvin v Dowd*,[89] a case made into a *cause celebre* by the media, 268 of 430 prospective jurors said during voir dire examination that they had a fixed belief in the

84. R S Stephen, "Prejudicial Publicity Surrounding a Criminal Trial: What a Trial Court Can Do to Ensure a Fair Trial in the Face of a 'Media Circus'" (1992) 26 *Suffolk University Law Review* 1063 at 1086.
85. B C Schmidt, "Nebraska Press Association: An Expansion of Freedom and Contraction of Theory" (1977) 29 *Stanford Law Review* 431 at 431.
86. See, for example, *Stroble v California* 343 US 181 (1952) at 198.
87. *Marshall v United States* 360 US 310 (1959).
88. See *Irvin v Dowd* 366 US 717 (1961); *Rideau v Louisiana* 373 US 723 (1963); *Estes v Texas* 381 US 532 (1965); *Sheppard v Maxwell* 384 US 333 (1966).
89. 366 US 717 (1961).

defendant's guilt, and 370 entertained some opinion of guilt.[90] In its judgment reversing the conviction, the Supreme Court stated:

> With such an opinion [of the defendant's guilt] permeating [the jurors'] minds, it would be difficult to say that each could exclude this preconception of guilt from his deliberations. The influence that lurks in an opinion once formed is so persistent that it unconsciously fights detachment from the mental processes of the average man … With his life at stake it is not requiring too much that [the] petitioner be tried in an atmosphere undisturbed by so huge a wave of public passion and by a jury other than one in which two-thirds of the members admit, before hearing testimony, to possessing a belief in his guilt.[91]

2.79 Although the only judge to do so, Justice Frankfurter explicitly questioned the wisdom of remedying prejudicial publicity by reversal of convictions, rather than controlling the press before damage is done:

> The Court has not yet decided that, while convictions must be reversed and miscarriages of justice result because the minds of jurors or potential jurors were poisoned, the poisoner is constitutionally protected in plying his trade.[92]

2.80 In *Rideau v Louisiana*,[93] the Supreme Court held that no corrective action during the trial would have been sufficient to overcome the prejudicial effects of the pretrial publicity, and that, in the circumstances, the conviction could not stand.

2.81 And in *Sheppard v Maxwell*, Justice Clark of the Supreme Court emphasised that:

> the cure [for prejudicial publicity] lies in those remedial measures that will prevent the prejudice at its inception. The

90. B C Schmidt, "Nebraska Press Association: An Expansion of Freedom and Contraction of Theory" at 437.
91. *Irvin v Dowd* 366 US 717 (1961) at 727-28.
92. *Irvin v Dowd* 366 US 717 (1961) at 730.
93. 373 US 723 (1963).

> courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences.[94]

2.82 One wonders whether, if the US legal system were not constrained by the First Amendment to the Constitution, it would take what could be seen as the next logical step and protect court processes, not merely by remedying the effects of prejudicial publicity, but by applying sanctions against the media in order to try to prevent the prejudice at its inception. This is what the sub judice rule does.

2.83 It is, in the Commission's view, ironic that Justice Clark continued his comments by suggesting that trial judges should insulate witnesses from press interviews, should control statements made to the news media by counsel, witnesses, the Coroner and police officers, and should proscribe extrajudicial statements by lawyers, parties, witnesses and court officials which divulged prejudicial matters.[95] It might appear to be contradictory to suppress the free speech of all the participants in the trial, but not the media, as well as being an incomplete and circuitous way of averting prejudicial publicity. The court did note, however, that "unfair and prejudicial news comment on pending trials has become increasingly prevalent" and that courts "must take strong measures to ensure that the balance is never weighed against the accused".[96]

2.84 Not only do the remedies themselves involve increased costs and pressures, but reliance on remedial measures, rather than liability for contempt, which permits virtually unimpeded publicity (particularly surrounding notorious trials) can in itself place excessive pressure on jurors and witnesses, including the pressure to deliver a verdict which will be approved of by the public. It is also significant to note that, in this context of enormous freedom to give wide-ranging publicity to cases enjoyed by the US media, concerns about the fairness of the trial would seem to be expressed

94. 384 US 333 (1966) at 363.
95. At 361.
96. At 362.

by defence counsel in a higher proportion of trials than in Australia.[97]

Judicial warnings and instructions

2.85 At the conclusion of a trial, it is usual practice for the judge to instruct the jury to reach their verdict solely on the evidence and law that has been presented to them in the course of the trial, and to ignore extraneous considerations. In particular, if there has been media reporting of the trial, the jury will be given a warning in terms that any information or impressions gleaned from the media, which did not specifically correlate with the evidence and argument presented in court, must be ignored.

2.86 However, it is almost impossible to know whether these instructions and warnings have the effect of cleansing the juror's mind of preconceptions or prejudices. One American study actually concludes that such warnings enhance the likelihood that the verdict will be influenced by the relevant publicity.[98] It may be possible to put something out of one's mind at a conscious level, but it is impossible to say whether or not information may yet operate at a subconscious level to influence thinking. It also cannot be assumed, as the Australian Law Reform Commission points out, that members of a jury are wholly obedient and passive on instructions from the bench to ignore media publicity.[99] According to one newspaper article on jury deliberations, when a jury was told that their case had been discussed in the press and that they should ignore the press reports, their response was to make a special effort to find out what had been said in the press and to discuss its significance among themselves.[100]

97. M Chesterman, "OJ and the Dingo: How Media Publicity Relating to Criminal Cases Tried by Jury is Dealt With in Australia and America" at 130.
98. C Tanford, "The Law and Psychology of Jury Instructions" (1990) 69 *Nebraska Law Review* 71.
99. ALRC Report 35 at para 285.
100. ALRC Report 35 at para 285; C Petre, "View from the Jury Room" *National Times* (4-10 May 1984).

2.87 As argued above, where the jury has come into contact with evidence as to confessions or prior convictions, warnings from the bench are unlikely to displace the highly prejudicial effects of such material.

APPROACHES IN OTHER JURISDICTIONS

2.88 There have been a number of reviews of the law of contempt in other jurisdictions, including in other Commonwealth jurisdictions and in other states of Australia, which are outlined in Chapter 1, and discussed throughout this Discussion Paper where specific aspects are relevant. Every one of these reviews has advanced the principles of freedom of speech and open justice as being fundamental rights in a democratic society. However, each one upholds the right to a fair trial as being of overriding importance. While acknowledging the difficult balancing exercise between these competing public interests, not one review has concluded that the interest in a fair trial could be properly protected in the absence of the sub judice rule. All reviews have proceeded to recommend that the sub judice doctrine continue to operate, but in varying forms. Some of the recommended reforms have centred on the need to bring the public interest in freedom of speech into better balance with the interest in due process of law by restricting the application of the sub judice rule. Some pertinent comments are extracted from reports of three of those reviews in paragraphs 2.89-2.93 below.

The Australian Law Reform Commission review

2.89 As part of its review of the law of contempt in Australia, the Australian Law Reform Commission looked at whether reform of the law governing contempt by publication was desirable, and, if so, in what respects. The Australian Law Reform Commission concluded that "the right of citizens to a fair trial in criminal proceedings before a jury …would be significantly jeopardised if there were no restrictions whatsoever on freedom of publication

relating to the trial."[101] While the Australian Law Reform Commission attached considerable importance to the principle of open justice, which is promoted by reporting of what goes on in Australian courts, it concluded that "the prohibitions currently imposed by contempt law on publications relating to current or forthcoming trials should not …be completely dismantled." The Australian Law Reform Commission recommended, however, that prohibitions should be "confined to the minimum necessary to eliminate any substantial risk of prejudice."

Canada

2.90 Canada enshrines the right to free speech in s 2 of *The Canadian Charter of Rights and Freedoms*[102] which provides that everyone has the fundamental "freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication". In its 1982 report on the law of contempt of court,[103] the Canadian Law Reform Commission emphasised the weight which Canada gives to this principle when it asserted that the administration of justice and the judicial system should not be set apart, or be excepted from the public exercise of this freedom, including criticism and expression of opinions.[104] However, s 2 of *The Canadian Charter of Rights and Freedom* must be read with s 1, which guarantees the rights and freedoms set out in the Charter "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". It must also stand alongside s 11(d) which provides that any person charged with an offence has the right "to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal". Accordingly, the Canadian Law Reform Commission observed that the "State has not only a right but also a duty to see that the administration

101. ALRC Report 35 at para 247.
102. *Constitution Act 1982* (Canada) Sch B Part 1.
103. Canada, Law Reform Commission, *Report on Contempt of Court* (Report 17, 1982).
104. Canada, Law Reform Commission, Report 17 at 9.

of justice is impartial and fair".[105] The Canadian Law Reform Commission argued that, in the exercise of this duty, the State could not tolerate an individual attempting to influence unduly the outcome of a trial before a jury. Punishment of undue influence is justified on the basis that "it diverts freedom of expression from its true purpose in order to serve an antisocial purpose".[106]

2.91 The Canadian Law Reform Commission noted that the principal purpose of the sub judice rule is to preserve the impartiality of the judicial system by protecting it from undue influence which might affect its operation, or at least might appear to do so. Hence, the Canadian Law Reform Commission emphasised, as we have done in paragraph 2.23 above, that not only must justice be neutral, "it must seem to be so in everyone's eyes, so that an atmosphere of genuine confidence can be maintained".[107] In reconciling what may sometimes be opposing rights guaranteed in the *Canadian Charter of Rights and Freedoms*, the Canadian Law Reform Commission saw the need for retention of the sub judice rule.

Ireland

2.92 In recommending the retention of sub judice liability, the Irish Law Reform Commission expressed the view that:

> it cannot be emphasised too strongly that, particularly in the case of criminal proceedings, the powerful effect of coverage by the press, radio and television may, if not subjected to reasonable safeguards, have potentially serious effects for the proper administration of justice and may result in the imprisonment for lengthy periods of innocent people. In contrast, the public interest in the free flow of information is by no means wholly interrupted by a careful observance of the sub judice rule, since, at worst, the inhibition of

105 Canada, Law Reform Commission, Report 17 at 9.
106. Canada, Law Reform Commission, Report 17 at 10.
107. Canada, Law Reform Commission, Report 17 at 28.

> unrestricted comment and publication of allegedly relevant facts is of a temporary nature only.[108]

2.93 The Irish Law Reform Commission reached this conclusion after rejecting arguments for the abolition of the sub judice rule, including arguments that: it offends against the guarantee in the *Irish Constitution* of freedom of expression;[109] there is insufficient empirical support for the assumption underlying the rule's rationale that juries would be so affected by a publication as to prejudice the fairness of their adjudication; and that an extension and improvement of alternative remedies would suffice to ensure justice to all parties.[110]

COMMUNICATIONS TECHNOLOGIES

2.94 One of the most notable features of recent years is the growth and use of information technologies. Traditional media for mass communication – newspapers, magazines, radio and free-to-air television – have been joined by satellite and cable television, electronic mail and the Internet. This gives rise to new dilemmas in seeking to control the extent to which pretrial publicity affects the administration of justice. In particular, the influx of information from overseas gives rise to jurisdictional problems, as well as, to some extent, problems in identifying who may be liable for prejudicial material.

2.95 Illustrating the impact which communication technology can have on contempt law, an Australian company has recently established a website called CrimeNet which "is the world's first site to provide a complete information service on criminal records, stolen property, missing persons, wanted persons, con artists and

108. Ireland, Law Reform Commission, *Contempt of Court* (Report 47, 1994) at para 6.4.
109. *Constitution of Ireland* Art 40.6.1.
110. Ireland, Law Reform Commission, *Contempt of Court* (Consultation Paper, 1991) at 288-304.

unsolved crimes".[111] For the cost of six dollars, an Internet user can obtain the information contained in the site's database. The implications for protecting juries from prejudicial material concerning a person on trial for a criminal offence are evident. What is to stop a curious juror from doing some research of his or her own on the Internet? In fact, it was this fear that led Justice Hempel of the Victorian Supreme Court to discharge a jury in the retrial of a defendant whose previous trial was written about on CrimeNet.[112] Internet services such as these give rise to questions as to whether the sub judice rule has been infringed, and, if so by whom, questions which are discussed in the following paragraphs.[113] The resolution of these issues may be more clear-cut where the website has been created and publicised in Australia. However, if a similar website is created overseas, which a juror in Australia can easily access, enforcement of sub judice restrictions becomes extremely difficult.

2.96 It is one thing to control local media by the application of local laws. Controlling what publicity about a trial jurors and witnesses may be exposed to via satellite and cable television, electronic mail from overseas and the Internet presents a very different challenge. The potential for comment on court cases, and the speed with which publicity about crimes and civil disputes can be disseminated through these outlets suggests that the old mechanisms of legal pre-censorship and media cultures of restraint have grown increasingly weak.[114] One of the major electronic news and information companies, the CNN News Group, is available to over 700 million people worldwide with six cable and satellite television networks, three private networks, two

111. http://www.crimenet.com.au/menu.html, 4 May 2000.
112. See *R v McLachlan* (Vic, Supreme Court, Hempel J, No 1470/97, 24 May 2000, unreported). The CrimeNet entries went beyond the mere recording of the fact of a previous trial and the two relevant convictions with the sentences. They each attempted to describe the circumstances of the previous trial briefly.
113. Chapter 5 at para 5.55-5.62 discusses the availability to the service provider of a defence.
114. C Walker, "Fundamental Rights, Fair Trials and the New Audio-Visual Sector" (1996) 59 *Modern Law Review* 517 at 539.

radio networks, seven Web sites and a syndicated news service.[115] One World Wide Web search engine estimates that it scrutinises approximately 19 million potential information sources; the total of users who are not also publishers in this way is many times greater.[116] The question has reasonably been asked whether these figures do not suggest "that any legal regime, such as the sub judice doctrine, which purports to control the flow of information is bound in due time to look like King Canute?"[117]

2.97 In relation to the jurisdictional issue, where prejudicial material which infringes the sub judice rule is broadcast or sent electronically from foreign jurisdictions, there may not be a local distributor to hold liable.[118] Modern electronic technologies publishing material in New South Wales often do not rely on a local distributor answerable to the laws of this State.[119] In a Canadian murder trial, the case was discussed on bulletin board services carried by the Internet. These were traced to the University of Ontario but had there been no locally identifiable

115. http://cnn.com/CNN/index.old.html, 31 August 1999.
116. C Walker "Fundamental Rights, Fair Trials and the New Audio-Visual Sector" at 538 and footnote 176: "See http://www.lycos.com/sow/TrueCounting.html. This total is for available Uniform Resource Locators; there are an additional 13 million distinctly searchable documents and binary objects."
117. M Chesterman "OJ and the Dingo: How Media Publicity Relating to Criminal Cases Tried by Jury is Dealt With in Australia and America" at 142-143.
118. For an example of where a local distributor of foreign material was held liable see *R v Griffiths; Ex Parte Attorney General* [1957] 2 QB 192.
119. In England, a ban was placed on the identification of the defendants in the trial of the murder of James Bulger. This ban was respected by satellite stations with local offices, including Sky News and CNN, but the ban was breached by German, French and Italian satellite stations demonstrating that a range of television stations, readily available in the area of the trial, were beyond the control of the British courts. In Canada, in the cases of *Karla Bernardo (also known as Homolka)* and *Paul Teale* the Canadian courts could do nothing directly to interfere with or moderate United States broadcasts: see C Walker, "Fundamental Rights, Fair Trials and the New Audio-Visual Sector" at 524.

source, then the relay of the publication would have been unstoppable.[120]

2.98 Branscomb has suggested that "many providers of computer-mediated facilities do not permit genuine anonymity. They keep records of the real identity of pseudonymous traffic so that abusers can be identified and reprimanded".[121] She also cautions that there has been a trend in recent years towards the establishment of "anonymous remailers". Diverting traffic through several of these remailers can make it impossible to sheet home liability.

120. The trials of *Karla Bernardo (also known as Homolka)* and *Paul Teale*, referred to above: C Walker, "Fundamental Rights, Fair Trials and the New Audio-Visual Sector" at 525. In fact, an anonymous distribution had been attempted unsuccessfully via a server in Finland.

121. A Branscomb, "Anonymity, Autonomy, and Accountability: Challenges to the First Amendment in Cyberspaces" (1995) 104 *Yale Law Journal* 1639 at 1643.

2.99 In *Cubby Inc v CompuServ Inc,* a US defamation case, the plaintiff sued CompuServe, an Internet service provider, for posting defamatory material within an electronic segment operated as a daily newspaper by a company who bought the electronic space from CompuServe.[122] The court found that CompuServe was only a distributor, having no more editorial control over electronic publications than "a public library, book store, or newsstand", and that it was not required to be aware of everything contained in its electronic memory. In absolving CompuServe from liability, the court compared a computerised database with a traditional news vendor.[123]

2.100 As well, different arrangements between information providers, including bulletin board operators, and the service provider could produce different results in determining responsibility for comment. Since the decision in *Cubby Inc v CompuServ Inc*, the *Communications Decency Act 1996* (US) has been enacted which provides, in s 230, that "no provider or user of an interactive computer service shall be treated as publisher or speaker of any information provided by another information content provider".

2.101 *Cubby Inc v CompuServ Inc* draws attention to the difficulties which may arise in assigning liability for communications taking place in cyberspace.[124] Among the issues raised is the question whether service providers should ever, and if so, in what circumstances, be held liable for material published electronically which prejudices a fair trial. Should this question be answered differently depending on whether the service provider allows anonymous publication of material? It has even been suggested that "every user [of an online service] is a potential publisher who can 'publish' with the click of a mouse".[125]

122. *Cubby Inc v CompuServ Inc* 776 F Supp 135 (1991).
123. *Cubby Inc v CompuServ Inc* 776 F Supp 135 (1991) at 140.
124. See A Branscomb, "Anonymity, Autonomy, and Accountability: Challenges to the First Amendment in Cyberspaces" at 1648-1649.
125. B McKenna, "Internet Service provider Liability: Is a Code of Practice Necessary?" (1997) 2.1 *Artlines* 1 at 13.

2.102 Another case which illustrates the difficulties in categorising an electronic service provider for the purposes of determining liability concerned an information utility which allowed a subscriber's racist comments to be published within its e-mail service but refused to publish the comments in public spaces.[126] On some channels, the information provider was acting in the normal manner of a publisher editing content; in others it was delivering e-mail and acting as a carrier legally forbidden to monitor content; in others it was offering a public forum for discussion of public issues; and in others it was acting merely as a distributor.[127] Branscomb has argued that "it would be unwise to impose a generic legal regime clustering all of these legal metaphors into a single new metaphor purporting to serve as an overall umbrella for the Networld".[128]

2.103 In Australia, the *Broadcasting Services Amendment (On-Line Services) Act 1999* (Cth) has addressed certain aspects of the liability of Internet content hosts and service providers.[129] The Act regulates "prohibited content" and "potentially prohibited content", that is, material which has received an RC or X classification from the Classification Board. For present purposes, the Act is interesting because it provides prima facie protection from strict liability (civil or criminal) under State and Territory laws for Internet content hosts and Internet service providers in respect of anything published by them.[130] However, it is also

126. The services were offered by Prodigy, a joint venture between Sears and IBM in the USA: see A Branscomb, "Anonymity, Autonomy, and Accountability: Challenges to the First Amendment in Cyberspaces" at 1650-1652.
127. A Branscomb at 1652.
128. A Branscomb at 1652.
129. The Act has come into operation as Schedule 5 of the *Broadcasting Services Act 1992* (Cth).
130. *Broadcasting Services Act 1992* (Cth) Sch 5 cl 91(1). For a discussion of this Act, and the regulation of the Internet industry generally, see J Eisenberg, "Defining the New Content Gatekeepers: Local and International Approaches to Regulating Internet Content" Paper presented at *Cyberlaw '99: Your Rights in the Internet World* Conference, Sydney, 25-26 October 1999

possible for the Minister to exempt a specified law of a State or Territory, or a specified rule of common law or equity, from the operation of s 91(1).[131] Section 91 is discussed in more detail in Chapter 5 at paragraph 5.57.

2.104 Another reason it may prove difficult to apply traditional regulatory models to Internet communications arises from the "static" nature of traditional media publication as compared with the "dynamic" nature of Internet publication. McKenna argues that the "organic" nature of content, as well as the number of sources and volume of information, make detection of breaches, the gathering of evidence and enforcement of laws impracticable.[132]

2.105 The Commission has flagged these issues as ones which will become increasingly relevant as the use of information technology increases and the degree to which, and ways in which, it may threaten the conduct of fair trials becomes more apparent. Although the Commission's present view is that it will generally be more appropriate for the common law to respond to situations as they arise, until it becomes apparent that a legislative response is required, we propose that a defence be available to Internet service providers and Internet content hosts who can establish that they had no control over the content of prejudicial material and that they either did not know the content placed on the Internet contained prejudicial material or, having become aware of this, took all reasonable steps to prevent the material being published.[133] The Commission suggests that it is too early to reach a conclusion on whether the difficulties in controlling publicity in the context of these modern technological media might make

(Communications Law Centre, 1999) and J Eisenberg, "Safely Out of Sight: the Impact of the New Online Content Legislation on Defamation Law" (2000) 6 *University of New South Wales Law Journal Forum* 23.

131. Sch 5 cl 91(2).
132. See B McKenna, "Internet Service Provider Liability: Is a Code of Practice Necessary?" at 3.
133. See Proposal 8.

application of a sub judice rule unworkable and that it should, therefore, be abandoned altogether.

CIVIL PROCEEDINGS

2.106 It has been submitted to the Commission that sub judice liability should not apply at all to civil proceedings.[134] In Chapter 6, this proposition is examined and the extent to which it is appropriate to restrict publication of material relating to civil proceedings is fully discussed. In particular, given the limited number of civil cases in which a jury may be involved, and the limited role that a jury may play, it is questioned whether there is sufficient justification for retaining the sub judice rule.

2.107 The Commission has tentatively concluded that where a publication has a prejudicial effect on juries and witnesses, the sub judice rule should continue to apply. However, the Commission leans towards the view that no restrictions should apply out of concern to prevent a jury being influenced (a) in cases where the jury is to be empanelled under s 7A of the Defamation Act 1974, or (b) until, in any other category of case, it is known that a jury is in fact to be used.

2.108 In relation to material published which creates a substantial risk that a party or parties in civil proceedings will be subjected to improper pressure, the Commission's tentative conclusion is that the sub judice rule should continue to apply in these circumstances as well. The Commission has also formed the tentative view that liability for sub judice contempt cannot be founded simply on the basis that a publication prejudges issues at stake in the proceedings. Chapter 6 sets out in detail the Commission's analysis and reasons for reaching its conclusions.

134. See para 6.6.

THE COMMISSION'S VIEW

2.109 In considering whether the sub judice rule should be retained at all, the Commission has proceeded on the basis that due process of the law should take precedence over freedom of speech, but that a proper balance needs to be found between the two competing interests. The media should be free to publish material to the fullest extent possible without jeopardising the fair administration of justice. The Commission has examined whether it is possible to achieve this balance without the continued operation of the sub judice rule.

2.110 The Commission's tentative conclusion is that it is necessary for the proper administration of justice to retain the sub judice rule, subject to the reforms proposed in this Discussion Paper. At the very least, when we consider particular kinds of material that may be excluded as evidence in court proceedings, and which the sub judice rule is designed to keep from jurors and witnesses, retention of the rule can be justified. This includes alleged confessions, prior convictions and photographs of the accused. Once exposed to publicity of that nature, it is very hard to dismiss from the mind, despite judicial instructions and warnings as to the dangers in being influenced by the material, and as to its admissibility in the proceedings. The Commission's present view is that, in the absence of sub judice liability, and in spite of the availability of remedial measures, the freedom to publish these kinds of information would have the potential to seriously impede the due administration of justice.

2.111 Even in relation to less seriously prejudicial media publicity, the Commission is not presently satisfied that alternative remedial measures are sufficient alone, without the operation of the sub judice rule, to protect the fairness of court proceedings.

2.112 The Commission is mindful of the importance of open justice. However, our view, at present, is that retention of the sub judice rule is compatible with this significant public interest. To the extent that the media safeguard the principle of open justice,

promoting discussion of courts and the justice system, this role can be performed satisfactorily without publishing the most obviously prejudicial material concerning a specific case. At any rate, suppression of discussion is only for the limited time during which proceedings are current or pending. The media also have available to them the defences of "fair and accurate reporting" and "public interest". In the Commission's view, these grounds of exoneration allow the sub judice rule to operate without impinging unduly on the principle of open justice.

2.113 Likewise, the availability of other grounds of exoneration allows the sub judice rule to operate without, in the Commission's view, unacceptably infringing the wider public interest in freedom of expression.

2.114 We have also recognised the importance of the notion that justice must not only be done, but must be seen to be done. In the Commission's view, the sub judice doctrine upholds this principle by protecting against the appearance of decisions having been influenced by published material.

2.115 In reaching our tentative conclusion that sub judice liability should be retained, we have had regard to the fact that not one of the many recent reviews of the law of contempt has concluded that the public's interest in a fair trial could be properly protected without it (though various modifications to it have been proposed).

2.116 In the Commission's view, the reforms proposed throughout this Discussion Paper are essential in ensuring that sub judice liability does not encroach unduly on freedom of speech. In particular, two important reforms would ensure that a better balance is maintained between freedom of speech and the proper administration of justice. First, we are of the view that the operation of the rule should be clarified and restricted by making the test for liability one of "substantial risk" of prejudice rather than "a real and definite tendency, as a matter of practical reality, to prejudice legal proceedings". Secondly, liability for sub judice contempt should depend on an element of fault. These proposed changes are discussed in detail in Chapters 4 and 5.

PROPOSAL 1

Liability for sub judice contempt should be retained.

3. Basic concepts: publication and responsibility

- Introduction
- “Publication”
- Responsibility for publication

INTRODUCTION

3.1 To be liable for sub judice contempt, a person or organisation must first be found to be responsible for the "publication" of material. In this chapter, the Commission examines the meaning of "publication" and "responsibility" as prerequisites for liability, and discusses those reforms, if any, which should be introduced to these aspects of the operation of the sub judice rule.

"PUBLICATION"

The meaning of "publication"

3.2 The courts have not considered in any detail the meaning of "publication" in the context of sub judice contempt. Publications which have attracted prosecution for contempt have typically involved the dissemination of material, either written, visual, or audio, by media organisations, through newspapers, radio stations, or television channels. A film shown in a cinema may also, for example, amount to a publication for the purposes of sub judice contempt.[1]

3.3 A private communication to a single individual would not usually be considered a "publication" under the sub judice rule (unlike the position in defamation law).[2] This is because, in order to attract liability for sub judice contempt, the publication must have a tendency to cause prejudice to particular legal proceedings.

1. See *R v Hutchinson; Ex parte McMahon* [1936] 2 All ER 1514.
2. See *Attorney General (NSW) v TCN Channel Nine Pty Ltd* (1990) 20 NSWLR 368 at 378. There was some suggestion in earlier cases that publication to individuals or small groups of people may tend to interfere with the course of justice so as to amount to a contempt: see *R v Collins* [1954] VLR 46 at 56; *Ex parte Attorney General; Re Goodwin* [1969] 2 NSWR 360 at 362; see also S Walker, *The Law of Journalism in Australia* (Law Book Company, Sydney, 1989) at para 1.3.04. These cases are, however, best characterised as scandalising cases, rather than sub judice cases: see *R v Collins* at 50; *Ex parte Attorney General; Re Goodwin* at 362.

In order to have the requisite tendency, the material must be published to a sufficiently wide class of people to include potential participants in the proceedings.[3] A private communication, therefore, would not usually be considered to have such a tendency. However, a communication to an individual may give rise to liability for sub judice contempt if it is made in the context of a media interview, where it is foreseeable that the contents of the interview will be published to a wider audience (whether or not the material is in fact so published).[4] It is also possible that handing out pamphlets to people outside a courthouse amounts to a publication for the purpose of sub judice contempt, on the basis that people receiving the pamphlets would include jurors.[5]

Consideration of a legislative definition of "publication"

3.4 In the United Kingdom, legislation expressly defines the term "publication" for the purpose of sub judice contempt. Section 2(1) of the *Contempt of Court Act 1981* (UK) provides that "publication" includes a communication in any form which is addressed "to the public at large or any section of the public".[6]

3. See *Registrar, Court of Appeal v Collins* [1982] 1 NSWLR 682.
4. See *Attorney General (NSW) v Dean* (1990) 20 NSWLR 650. See also *Director of Public Prosecutions (Cth) v Wran* (1987) 7 NSWLR 616; and para 3.41.
5. See *Registrar, Court of Appeal v Collins* [1982] 1 NSWLR 682; *The Prothonotary v Collins* (1985) 2 NSWLR 549; *Commercial Bank of Australia Ltd v Preston* [1981] 2 NSWLR 554.
6. This legislative definition was endorsed by the Irish Law Reform Commission and by the South Australian Criminal Law and Penal Methods Reform Committee: Ireland, Law Reform Commission, *Contempt of Court* (Report 47, 1994) at para 6.2 and recommendation 19; South Australia, Criminal Law and Penal Methods Reform Committee, *The Substantive Criminal Law* (Report 4, 1977) at para 3.10.1. The Irish Law Reform Commission recommended an addition to the English legislative definition to include a communication to "a judge or juror who is involved in the legal proceedings to which the publication relates". The English legislative definition was also incorporated into the *Bill C-19 1984* (Canada) cl 33.

This definition seeks to distinguish between communications occurring in the private and the public arenas, and to prohibit only those communications which occur in the public arena. It follows a recommendation of the Phillimore Committee which considered it desirable to exclude expressly from the application of the sub judice rule the conduct of private individuals. It was thought to be unreasonable and wrong to make an ordinary individual liable for conduct carried out in their private lives as opposed to conduct carried out in public life.[7] Of course, conduct by a private individual may still amount to another form of criminal contempt or to an attempt to pervert the course of justice. However, different rules will apply to determining liability, and in particular, some form of fault or intention will usually need to be proved.[8]

3.5 The approach taken in the United Kingdom has been criticised on the grounds that it may not always be clear whether a communication is a private communication between individuals, or one made to a section of the public. For example, it is equivocal whether a communication circulated to a private club amounts to a public or a private communication.[9] To this extent, the wording of the legislative definition may, in theory, give rise to some ambiguity and uncertainty as to the sorts of communications that constitute contempt. However, the Commission is not aware of any cases to date where the legislative definition has in fact been the issue in the case.

3.6 In contrast to the approach taken in the United Kingdom, the Australian Law Reform Commission ("ALRC") recommended against adopting a legislative definition of the term "publication",

7. United Kingdom, Committee on Contempt of Court, *Report of the Committee on Contempt of Court* (HMSO, London, Cmnd 5794, 1974) at para 75-77, 80. The legislation builds on the recommendation of the Phillimore Committee by including within the meaning of "publication" a publication made to a section of the public as well as to the public at large.
8. As to the relevance of fault to sub judice contempt, see Chapter 5.
9. G Borrie, *Borrie & Lowe's The Law of Contempt* (3rd edition, Butterworths, London, 1996) at 110-112. See also C J Miller, *Contempt of Court* (Clarendon Press, Oxford, 1989) at 144.

considering it preferable to retain a degree of flexibility.[10] It concluded that in each case, the court should look at the communication in question to determine whether there was a sufficient degree of dissemination within the community as to create a risk of influencing a juror in the relevant legal proceedings. It argued that this approach would better meet the policy objectives of sub judice contempt than a legislative definition which restricted "publication" to "public" communications. The Commonwealth government supported the approach of the ALRC in its Discussion Paper in 1991.[11]

The Commission's tentative view

3.7 Although "publication" has not been clearly defined at common law, no real controversy or uncertainty appears to have so far arisen as a result. Subject to the discussion below, the Commission cannot at this stage see any advantage in introducing a legislative definition of the term "publication", with the inflexibility and ambiguity in interpretation which this is likely to bring.

Place of publication

3.8 It is becoming increasingly common for material to be available to the public of New South Wales which emanates from another jurisdiction. For example, a newspaper may originally be published in another Australian state, but may be made available to people in New South Wales (for example, by way of the Internet). Similarly, a television program prepared and transmitted in another country may be received by residents of New South Wales via cable or satellite television. Although the

10. Australian Law Reform Commission, *Contempt* (Report 35, 1987) at para 248-253. The Law Reform Commission of Canada also made no recommendation for a legislative definition of "publication": see Canada, Law Reform Commission, *Contempt of Court* (Report 17, 1982).
11. Australia, Attorney General's Department, *The Law of Contempt* (A Discussion Paper on the Australian Law Reform Commission's Report 35, 1991).

material in question is originally transmitted from another jurisdiction, if it is received by the public of New South Wales, the common law would regard that as a publication in New South Wales and may hold the publisher liable for sub judice contempt if the publication is found to have a tendency to prejudice proceedings in New South Wales.

3.9 Of course, it is a separate issue whether a New South Wales court would have any jurisdiction to punish for contempt a person who resided solely in another jurisdiction, or a person who, or an organisation which, carried out their business solely in another jurisdiction. In that situation, it may be more likely that a prosecution would be brought against a distributor in New South Wales, if there were a distributor.[12]

3.10 It should also be remembered that if liability for sub judice contempt is made dependent on some element of fault, then the liability of publishers in other jurisdictions will depend to a large extent on whether they are at fault in some way, such as whether they ought reasonably to have known the circumstances giving rise to a contempt in New South Wales. Given the protection that would be provided to publishers in other jurisdictions by the Commission's proposal for a defence of innocent publication[13] the Commission does not consider that it would be too harsh to hold publishers potentially liable for publications that are originally transmitted from another jurisdiction. At this stage, therefore, the Commission supports the common law approach in regarding any material that is made available to potential participants in legal proceedings in New South Wales as a publication, regardless of its original place of transmission.

12. See para 3.37-3.39.
13. See Proposal 7.

Time of publication

3.11 It may be important to determine when material is published in order to establish whether publication took place within the time period in which liability for contempt arises.

3.12 In general, a publication will only constitute a contempt under the sub judice rule if it relates to legal proceedings which are current or pending.[14] Criminal proceedings are generally regarded as "pending" once a person has been arrested or charged in relation to an alleged offence. Consequently, material concerning a particular crime which is published before anyone has been arrested for, or charged with, the crime will not constitute a contempt, even if it later proves to be prejudicial to the trial of the accused person.

3.13 Where material is initially published before an arrest is made or charges are laid, it may be questioned whether it could subsequently attract liability for sub judice contempt if it were still available to the public after the time of arrest or charge. For instance, if a magazine containing an article about a police suspect is initially made available to the public before the suspect is arrested or charged, could the publisher of the article later be held liable for potentially prejudicing the suspect's trial if the article is still available to the public after the suspect is charged? If a publication were potentially to attract liability in such circumstances, it would place an unreasonable burden on the publisher of the magazine to recall copies of the magazine after the time of arrest.

3.14 The Commission is not aware of any case dealing with this specific issue, nor whether any difficulties have arisen in practice from the need to identify the time of publication of material. Although in *Attorney General v Time Inc Magazine Co Pty Ltd*,[15] the court ordered the publisher to recall issues of its magazine, the case differed from the situation outlined above in so far as Time

14. The time limits for liability are discussed in detail in Chapter 7.
15. *Attorney General v Time Inc Magazine Co Pty Ltd* (NSW, Court of Appeal, No 40331/94, 15 September 1994, unreported).

Inc was found already to have breached the sub judice rule by the initial publication of the relevant issue of its magazine. The order to recall the issue was therefore made to prevent further breaches of the sub judice rule.

3.15 It would seem, as a matter of principle, that publication of material is taken to occur at the time of original publication, rather than regarded as a continuing process. Otherwise, the sub judice rule would potentially operate too harshly against publishers. In the reverse to the situation outlined above, it was held in *Director of Public Prosecutions (Cth) v Wran* that a person who participates in a media interview may be liable for contemptuous statements made in the interview, regardless of whether or not the contents of the interview are subsequently relayed to the public.[16] Liability only arose in the *Wran* case, however, because it should have been obvious to the speaker that his statements would very probably be republished in the near future to the community at large, resulting in prejudice to proceedings that were pending at the time when he spoke. Applying the same process of reasoning to television programs which are broadcast twice, publication occurs at the time of the original broadcast but, while not being a continuing process of liability, each relay of the original program would be a separate publication. An approach other than this may produce an unfair result when either the first or a subsequent broadcast occurs outside the period when the relevant proceedings are pending.

3.16 Under the current law, it would seem, therefore, that every distribution of written or printed material and every broadcast is treated as a separate act of publication, occurring at the time of the relevant distribution or broadcast. When republication in circumstances involving prejudice to pending proceedings is the natural and probable result of an initial act of publication, the original publisher may be treated as responsible for the consequences of republication. But even then, the act of publication on which liability is based is taken to have occurred at the time of the initial publication. There is no rule whereby

16. *Director of Public Prosecutions (Cth) v Wran* (1987) 7 NSWLR 616.

republication is regarded as a continuing process. The Commission believes these principles to be appropriate and does not recommend any change.

RESPONSIBILITY FOR PUBLICATION

Responsibility of media representatives, distributors, and vendors

3.17 To be liable for sub judice contempt, a person or organisation must be found to be "responsible" for the offending publication. In general, a person or organisation is responsible for a publication if they are in a position to exercise control over its contents, production, distribution, or broadcast.[17]

3.18 Contempt prosecutions are most commonly brought against the proprietor of the media organisation, the program producer, and/or the editor. Where an individual is contracted by a media organisation to prepare his or her own program for broadcast by that organisation, then it appears that both the individual and the proprietor of the organisation will be responsible for prejudicial material in the program.[18] Similarly, where an independent production company produces a program for broadcast by a broadcaster, both the production company and the broadcaster may be found responsible and so be liable for contempt.[19] Where a media organisation is owned by a company, a director of the company may be held personally responsible for prejudicial

17. See *Attorney General (NSW) v TCN Channel Nine Pty Ltd* (1990) 20 NSWLR 368 at 379; G Borrie, *Borrie & Lowe's The Law of Contempt* (3rd edition, Butterworths, London, 1996) at 375; S Walker, *The Law of Journalism in Australia* (Law Book Company, Sydney, 1989) at para 1.3.02.
18. See *Attorney General (NSW) v Radio 2UE Sydney Pty Limited* (NSW, Court of Appeal, No 40236/96, 16 October 1997, unreported).
19. See *Attorney General (NSW) v Willesee* [1980] 2 NSWLR 143.

material if he or she was actively involved in its publication.[20] Printers of newspapers have also been found liable, although the court may decide that it is not appropriate to punish them.[21]

3.19 In this section, the Commission focuses on the responsibility of reporters, editors, media proprietors, licensees, distributors, and vendors, as those most commonly involved in the various stages of the publication process. In particular, the Commission considers whether the law does and should hold responsible for contemptuous publications people such as reporters, those broadcasting programs under licence, distributors and/or vendors. The Commission also discusses the basis of liability for editors and media proprietors, and whether any such liability should be independent or based on the principles of vicarious liability.

Reporters

3.20 Individual reporters employed by media organisations have in the past been found to be responsible for a publication to the extent of attracting liability for sub judice contempt. It has been suggested that a reporter who merely provides information to an editor, rather than actually preparing material for publication, should not be held responsible for any subsequent publication of that material, since the reporter has not intended to publish that information to the general public.[22] On the other hand, a reporter who prepares material with the expectation that it will be published should be held responsible for the publication of offending material. A number of English cases support this view.[23]

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20. *Attorney General (NSW) v Willesee* [1980] 2 NSWLR 143 at 157 (Hope JA); *Harkianakis v Skalkos* (1997) 42 NSWLR 22 at 61 (Powell JA).
21. See *R v David Syme & Co Ltd* [1982] VR 173.
22. See G Borrie, *Borrie & Lowe's The Law of Contempt* (3rd edition, Butterworths, London, 1996) at 389-393; C J Miller, *Contempt of Court* (Clarendon Press, Oxford, 1989) at 290-292.
23. See *R v Odhams Press Ltd; Ex parte Attorney General* [1957] 1 QB 73; *R v Thomson Newspapers Ltd; Ex parte Attorney General* [1968] 1 All ER 268; *R v Evening Standard Co Ltd; Ex parte Attorney General* [1954] 1 QB 578. See also *Harkianakis v Skalkos* (1997) 42 NSWLR 22 at 61 (Powell JA), citing these English cases with approval.

3.21 In accordance with what appears to be the English approach, it has been held by the New South Wales Court of Appeal that a reporter who prepares a report for publication is responsible for it if it is published, although the same principle may not apply to a reporter who does no more than furnish information to an editor.[24] The court held that it is irrelevant to the question of responsibility that the reporter does not have a role in the final decision whether or not to publish, provided he or she was sufficiently involved in the publishing process. It was also held that a reporter could not escape responsibility on the ground that he or she relied on the editor and other supervising staff to remove contemptuous material or to seek legal advice before publishing.[25] This approach is consistent with the approach taken towards private individuals who speak to the media, as discussed in paragraphs 3.41-3.45 below. It was suggested by Justice Mahoney, however, that if the reporter prepared material but did not intend it to be published at a time or in circumstances when the publication would prejudice the relevant legal proceedings, then the reporter would not be liable.[26]

3.22 Similarly, in a Victorian decision, it was held that the journalist who prepared the contemptuous material should be responsible and therefore liable for the contempt (together with others, including the editor and proprietors of the newspaper involved).[27] The court made the comment that journalists should appreciate that they have responsibilities in the reporting of court proceedings, and that training programs offered to them to ensure that they understand the relevant rules should be taken seriously. While the journalist in the particular case was convicted of contempt, the court did not consider it appropriate to punish him.

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24. *Registrar, Court of Appeal v John Fairfax Group Pty Ltd* (NSW, Court of Appeal, No 40478/92, 21 April 1993, unreported).
25. But see the dissenting view of Justice Priestley at 7.
26. *Registrar, Court of Appeal v John Fairfax Group Pty Ltd* (NSW, Court of Appeal, No 40478/92, 21 April 1993, unreported) at 10 (Mahoney JA).
27. *R v Spectator Staff Pty Ltd* (Vic, Supreme Court, No 7754/98, James J, 9 April 1999, unreported).

3.23 Law reform bodies have taken differing views of the responsibility of individual reporters for contemptuous publications. The ALRC recommended a formulation of the notion of responsibility that focused on the publishing organisation and any officer or employee of that organisation in a position to exercise editorial control or supervise a checking system, rather than imposing liability on the individual reporter.[28] The Phillimore Committee in the United Kingdom appeared to take the view that the individual employee should be responsible for preparing material for publication that is later found to constitute a contempt.[29] The Irish Law Reform Commission recommended that a reporter should be responsible for a piece which appears in publication unamended, unless the reporter had no reason to expect that the material would be published without further communication with the publisher.[30]

3.24 As the law currently stands, the notion of responsibility for publication is sufficiently broad to include individual reporters within the scope of liability for sub judice contempt, but at the same time protects reporters who have no involvement in the publishing process. The question for consideration is whether this is the appropriate approach to take in imposing liability, or whether it would be more appropriate to hold responsible only those higher up in the hierarchy of a media organisation, that is, those who are in positions of control over the operation of the organisation and the material that it publishes. Although the Commission presently leans towards retaining the common law, there are advantages in both approaches and have suggested Proposal 2 as a possible alternative. This proposal would protect a reporter from liability where he or she was not in a position to authorise publication, exercise a significant degree of control over publication or supervise a system for safeguarding against

28. Australian Law Reform Commission, *Contempt* (Report 35, 1987) at para 261.
29. United Kingdom, Committee on Contempt of Court, *Report of the Committee on Contempt of Court* (HMSO, London, Cmnd 5794, 1974) at para 146.
30. Ireland, Law Reform Commission, *Contempt of Court* (Report 47, 1994) at para 6.34.

breaches of the sub judice rule. The Commission invites submissions on which is the preferable approach.

Editors

3.25 Editors will usually be held responsible for a publication, on the basis that they have overall control of its contents.[31] In general, an editor will be liable even if he or she has no knowledge of the contents of the publication, although the court may consider it appropriate in these circumstances not to impose a penalty, particularly if the editor has exercised all reasonable precautions to exclude contemptuous material.[32] It has been said that editors should be held responsible, even if they have no personal knowledge of the publication, because they occupy positions of central responsibility in the publisher's organisation.[33]

3.26 There has been some debate among commentators as to the nature of the liability imposed on editors, namely whether it is vicarious or primary.[34] According to the principles of vicarious liability, an employer is liable for the wrongful conduct of an employee who is acting in the course of their employment.

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31. *Harkianakis v Skalkos* (1997) 42 NSWLR 22 at 61 (Powell JA); *R v David Syme & Co Ltd* [1982] VR 173 at 178; *R v Odhams Press Ltd; Ex parte Attorney General* [1957] 1 QB 73 at 80 (Goddard CJ); *R v Evening Standard Co Ltd; Ex parte Attorney General* [1954] 1 QB 578.
32. See, for example, *R v David Syme & Co Ltd* [1982] VR 173 at 178-179 (Marks J); *Harkianakis v Skalkos* (1997) 42 NSWLR 22 at 61 (Powell JA); *R v Evening Standard Co Ltd; Ex parte Attorney General* [1954] 1 QB 578.
33. *R v Evening Standard Co Ltd; Ex parte Director of Public Prosecutions* (1924) 40 TLR 833 at 836 (Hewart CJ).
34. See G Borrie, *Borrie & Lowe's The Law of Contempt* (3rd edition, Butterworths, London, 1996) at 379-382, 387-388; C J Miller, *Contempt of Court* (Clarendon Press, Oxford, 1989) at 292-297; I Freckelton, *Prejudicial Publicity and the Courts* (Australian Law Reform Commission, Reference on Contempt of Court, Tribunals and Commissions, Research Paper 4, 1986) at 104-108; *Laws of Australia* (Law Book Company Ltd, Sydney, 1998) title 10.11 ch 2 at para 47. See also Ireland, Law Reform Commission, *Contempt of Court* (Consultation Paper, 1991) at 337-338.

The employer's own conduct is irrelevant. If an editor is vicariously liable for the preparation by a reporter of contemptuous material, liability will focus on the conduct of the reporter, rather than on the conduct of the editor. If, on the other hand, an editor is liable as a principal for the publication of contemptuous material, then liability will focus on the editor's own conduct. At present in Australia, however, there is no practical significance in classifying an editor's liability as either vicarious or primary, because there is no element of fault required for primary liability for sub judice contempt.[35] This means that liability does not depend on whether the conduct of the person was blameworthy in some way. Consequently, whether an editor is vicariously liable or liable as a principal, liability will not require consideration of the blameworthiness of conduct, whether of the editor or the reporter.

3.27 If, however, some form of fault were introduced as an element of, or a defence to, primary liability for contempt, then it may become important to determine whether to classify an editor's liability as primary or vicarious. If an editor were vicariously liable for a publication, then liability in a particular case would depend on whether the reporter was in some way at fault, and acting within the course of his or her employment. If an editor were liable as a principal, liability would depend on whether the editor was in some way at fault in failing to exclude contemptuous material from the publication.

3.28 The Commission supports the current approach at common law in generally holding editors responsible for contemptuous publications. Given that it is usually editors who exercise control over the contents of a publication, it seems appropriate that they should be liable for breaches of the sub judice rule. At this stage, the Commission tends towards the view that editors' liability should not be vicarious. There are two reasons for this. First, vicarious liability can operate harshly against those who take all reasonable care to avoid breaking the law, but are nevertheless held responsible for the negligent or unreasonable actions of their

35. See Chapter 5.

employees. The Commission can see no real justification for imposing such a harsh standard of liability in the context of sub judice contempt. The fundamental purpose of the law in this area is to prevent prejudice to the administration of justice by deterring the media from engaging in conduct that presents a risk of such prejudice. The imposition of vicarious liability on editors provides no stronger deterrent than the imposition of primary liability: with vicarious liability, it does not matter whether the editor exercises reasonable care or not, he or she may still be held liable for the actions of a more junior employee. The second reason for rejecting vicarious liability as a basis for responsibility is that editors are not in fact employers, but are themselves employees of the media proprietor. It would be very unusual to impose vicarious liability on employees for the actions of other, albeit more junior, employees. The principle of vicarious liability, as it has evolved through the law of torts, is based on the "master-servant" relationship, where one person (or organisation) engages another to perform specific duties.[36]

Media proprietors

3.29 Media proprietors, such as newspaper or magazine proprietors, may be held liable for sub judice contempt, and are usually the primary targets for contempt prosecutions. As with editors, however, the basis for proprietors' liability is unclear, namely whether they are vicariously liable or liable as a principal.[37]

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36. See J Fleming, *The Law of Torts* (9th edition, LBC Information Services, Sydney, 1998) at 412-420; R P Balkin and J L R Davis, *Law of Torts* (2nd edition, Butterworths, Sydney, 1996) at 739-742.
37. See G Borrie, *Borrie & Lowe's Law of Contempt* (3rd edition, Butterworths, London, 1996) at 382-388; C J Miller, *Contempt of Court* (Clarendon Press, Oxford, 1989) at 297-301; *Laws of Australia* (Law Book Company, Sydney, 1998) at para 47. See also *R v Evening Standard Co Ltd* [1954] 1 QB 578 at 585 (Goddard LJ); *Ex parte Bread Manufacturers; Re Truth and Sportsman Ltd* (1937) 37 SR (NSW) 242 at 250 (Jordan CJ); *Fitzgibbon v Barker* (1992) 111 FLR 191 at 202-203.

3.30 Again, the basis of a proprietor's liability may have no practical significance under the existing law of sub judice contempt in Australia, where, arguably, fault is not a requirement of liability. However, if liability is in some way made dependent on fault or blameworthiness, it becomes important to clarify the basis of a proprietor's liability, in order to determine whether a proprietor's liability will result from the fault of an employee, or from the proprietor's own blameworthy conduct.

3.31 Unlike editors, a proprietor's liability may be more readily classified as vicarious, in so far as the relationship between a proprietor and, for example, an editor or reporter is properly one of employer/employee. However, against this it may be argued that the criminal law should be cautious in imposing vicarious liability, since, as noted in paragraph 3.28 above, it potentially operates harshly against proprietors who take all reasonable precautions and are nevertheless held responsible for the unreasonable actions of their employees. The Commission can see no real purpose to be served in imposing vicarious liability on media proprietors. At this stage, the Commission takes the view that they, like other media representatives, should be subject to primary, rather than vicarious liability.

3.32 This approach requires more careful consideration in the context of proprietors that are corporate bodies, as opposed to individuals. In particular, it would be necessary to identify the "corporate mind" if fault is to be an element of, or a defence to, liability for sub judice contempt. The Commission discusses this issue at paragraphs 5.66-5.71

Programs broadcast under licence

3.33 The following paragraphs 3.34-3.36 examine the liability of subordinate television stations, in a network of stations, which receive programs under "licence" from the principal station. As with editors, the channel broadcasting a program under licence is held responsible for a contemptuous publication, whether or not they have knowledge of its contents and even though it may have received the program on instantaneous transmission from another channel. In one case, it was held that a broadcaster that

transmitted material prepared by an independent media company according to a contractual agreement was liable for transmitting the independent company's contemptuous material, even though the broadcaster had no knowledge of the contents of the program.[38] In another case, in which a Sydney television station forwarded a prejudicial news program to a Wollongong television station for broadcast in Wollongong in accordance with a licensing agreement, both television stations were found to be responsible for the publication.[39]

3.34 The High Court has considered the issue of the responsibility of television channels broadcasting programs under licence in the area of defamation law.[40] A television channel had been sued for defamation for a television program which it broadcast under a licensing agreement with another channel. The High Court held that the channel broadcasting the program was liable for defamatory statements contained in the program, since it had the ability to control and supervise the material it televised. It was not merely a "conduit" for the program and therefore a subordinate disseminator. The court rejected the argument put forward by the television channel that time did not permit it to monitor the content of the program between its receipt from the other channel and its broadcast. The court noted that it was the decision of the television channel receiving the program to broadcast it live or instantaneously, and it was not obliged to do so under the licensing agreement.

3.35 The question of the responsibility of channels broadcasting programs under licence for contemptuous publications is a difficult one to resolve. At this stage, the Commission considers that the most appropriate approach may be that taken by the High Court in the case described above. That is, a broadcaster should be

38. *Attorney General (NSW) v Willesee* [1980] 2 NSWLR 143; see also *Registrar of the Court of Appeal v Willesee* (1985) 3 NSWLR 650.
39. *Attorney General (NSW) v TCN Channel Nine Pty Ltd* (1990) 20 NSWLR 368.
40. *Thompson v Australian Capital Television Pty Ltd* (1996) 186 CLR 574, especially at 589-591 (Brennan CJ, Dawson and Toohey JJ) and at 594-596 (Gaudron J).

responsible for a publication if the broadcaster does, or could if it so chose, monitor and alter the content of programs which it receives from another organisation. It would be no excuse for the broadcaster to argue that it had no time to check programs which it broadcasts live, if the decision to broadcast live is not an obligation under the licensing agreement. The decision whether to check programs or to broadcast them instantaneously will often be a commercial decision made by the broadcaster, and it should therefore be accepted as a possible consequence of that decision that the broadcaster may attract liability for contempt. Moreover, it will often be the local broadcaster, receiving programs from a central broadcaster, who is in the best position to know or find out whether there are current legal proceedings which may be prejudiced by the broadcast of a particular program. It is therefore appropriate to expect that the local broadcaster ought to be responsible for maintaining an appropriate checking system to ensure that such prejudice does not arise. Liability would attach to broadcasters in this way if a provision such as that contained in Proposal 2, set out below, is enacted. However, a defence of innocent publication, as formulated in Proposal 8,[41] would be available to broadcasters charged with contempt.

3.36 Although liability would apply equally to pay television stations, it is unlikely to apply to Internet service providers, who can more appropriately be classified as a "conduit" for the material appearing on the Internet. The exception to this would be if, in a particular case, an Internet service provider had received notice of prejudicial material and took no steps to remove it. In that situation, the Internet service provider may also be liable for contempt.

Distributors of printed material

3.37 It is possible that distributors of printed material may also be held responsible for a prejudicial publication, even though they have no knowledge of the contents of the material which they are distributing. In an English case, it was held that an importer and distributor of a foreign magazine were responsible for putting a

41. See para 5.38-5.47.

magazine into circulation in England, and were therefore responsible for its publication. They were found liable for sub judice contempt for a publication in an issue of the magazine which had a tendency to prejudice a criminal trial in England.[42] The court emphasised, however, that no other person or organisation who could be held responsible for the publication, such as the magazine owner or editor, resided or carried out their business in England. The distributor and importer were consequently the only people over whom the English courts could exercise jurisdiction to punish for contempt.[43] It remains unclear whether an Australian distributor of an Australian owned magazine or newspaper would be found liable for contempt by an Australian court.

3.38 Legislation was introduced in the United Kingdom in response to the case noted above.[44] It gave distributors a defence to an action for contempt where they did not know and had no reason to suspect that the publication contained offending material. That legislative provision was approved by the Phillimore Committee[45] and was subsequently reproduced in the *Contempt of Court Act 1981* (UK).[46]

3.39 The Commission considers that a similar approach should be taken in relation to the responsibility of distributors of printed material as that proposed in relation to the responsibility of channels broadcasting programs under licence. That is, a distributor should be held responsible for a contemptuous publication if in a position to monitor and alter, or cause to be altered, the contents of the printed material. However, the Commission proposes in Chapter 5 that a defence based on the absence of any "fault" should be available.

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42. *R v Griffiths; Ex parte Attorney General* [1957] 2 QB 192.
43. *R v Griffiths; Ex parte Attorney General* [1957] 2 QB 192 at 204 (Goddard LCJ).
44. *Administration of Justice Act 1960* (UK) s 11(2).
45. United Kingdom, Committee on Contempt of Court, *Report of the Committee on Contempt of Court* (HMSO, London, Cmnd 5794, 1974) at para 154.
46. *Contempt of Court Act 1981* (UK) s 3.

Vendors of printed material

3.40 Chapter 5 argues that vendors of printed material, such as newsagents or street sellers, are at the lower end of the distribution network and should be distinguished from that of large-scale distributors. One commentator has suggested that vendors cannot be said to intend to publish, since they are ignorant of the contents of material and are under no duty to be acquainted with them, and for this reason they would not be held responsible for a contemptuous publication.[47] Another commentator, with whom the Commission agrees, has expressed the view that a vendor would act reasonably in assuming that others higher up in the chain have taken care to avoid dissemination of prejudicial material.[48] The defence of innocent publication which the Commission proposes in Chapter 5 should be available for persons with no editorial control over the content of a publication includes a proviso that the person took reasonable care. The standard of reasonable care expected of a vendor would not be as high as that expected of large-scale distributors.

Responsibility of private individuals

3.41 Private individuals, who do not represent the media, may be found responsible for a publication and so be liable for contempt. For example, in past cases, a police officer[49] and a politician[50] who participated in interviews with media representatives were held responsible for prejudicial statements which they made in the interviews. It is no excuse that the person was unaware of the relevant rules of contempt law, or did not intend to prejudice proceedings, although these may be matters which the court takes into account in determining the appropriate penalty. Nor can the person avoid liability by relying on the editorial discretion of the media to omit prejudicial information from the published

47. G Borrie, *Borrie & Lowe's The Law of Contempt* (3rd edition, Butterworths, London, 1996) at 393.
48. C J Miller, *Contempt of Court* (Clarendon Press, Oxford, 1989) at 302.
49. *Attorney General (NSW) v Dean* (1990) 20 NSWLR 650.
50. *Director of Public Prosecutions (Cth) v Wran* (1987) 7 NSWLR 616.

material.[51] If it is highly likely that the statements will be published by the media to the public, then the individual will be responsible for their publication.[52] Even if the media subsequently decide not to publish the interview, the individual will still be liable for any contemptuous statements made in the interview, the offence of contempt having been committed and completed at the time of giving the interview, and so not affected by any subsequent acts or omissions.

3.42 It would seem to follow that any individual who speaks to the media about a matter relating to specific proceedings may be liable for contempt. In theory, this may include, for example, the alleged victim of a crime or his or her family, although it is perhaps unlikely that the prosecuting authority would exercise its discretion to prosecute in this situation. It also seems possible, at least in theory, that a person accused of a crime may be found liable for contempt if he or she publicly asserts his or her innocence, although in practice such a statement uttered by an accused would probably not be considered to constitute a contempt.[53]

3.43 It is also clear that a media organisation which publishes prejudicial statements made by a private individual may be found responsible for the publication and so be liable for contempt.[54] One commentator has suggested that the media should not be liable for the prejudicial statements of an individual, if those statements are

51. *Attorney General (NSW) v Dean* (1990) 20 NSWLR 650 at 658.
52. See *R v Pearce* (1992) 7 WAR 395 at 425 (Malcolm CJ). See also *Director of Public Prosecutions (Cth) v Wran* (1987) 7 NSWLR 616 at 627.
53. See *Director of Public Prosecutions (Cth) v Wran* (1987) 7 NSWLR 616 at 627. In most cases, it may be argued that jurors are unlikely to be influenced by an accused person's public protestations of innocence, on the ground that this is what a person accused of a crime might be expected to say, and therefore the statement does not have a tendency to prejudice the administration of justice.
54. *Director of Public Prosecutions (Cth) v Wran* (1987) 7 NSWLR 616; *Attorney General (NSW) v TCN Channel Nine Pty Ltd* (1990) 20 NSWLR 368.

broadcast live and are unexpected and unprovoked by the media interviewer.[55] This issue does not appear to have been addressed in Australia. However, following general principles of liability for sub judice contempt, it is difficult to see how the media could avoid liability in this situation, although they may not be prosecuted or may be given a lenient sentence.

3.44 The Commission has no firm view on whether or not private individuals should be responsible for contemptuous statements made to the media. On the one hand, there is merit in retaining the flexibility of the common law approach and allowing for private individuals to be liable for sub judice contempt. In most cases, it seems likely that individuals would not be prosecuted, or would receive a very lenient sentence. If, however, a person had acted recklessly in speaking to the media without regard to the probable effect this would have on legal proceedings, then the common law would allow for that person to be prosecuted and punished appropriately.

3.45 On the other hand, as with the case of individual reporters, it could be argued that the aim of the sub judice rule is to encourage the media to implement proper systems to ensure that they do not compromise the proper administration of justice. This purpose is not served by holding a private individual liable for a statement made to the media if that individual has no real control over whether or not that statement is published to the general community, and in what form that statement is published. Following this approach, the focus of allocating responsibility for contemptuous statements should be on the degree of control that the person or organisation in question exercises over the published material and whether that person or organisation is in a position to implement systems to check that prejudicial material is not published. Proposal 2 reflects this latter approach, as an alternative to the existing approach at common law. However, as is emphasised in paragraph 3.46, this proposal is not necessarily the Commission's preferred option. It is raised in order to invite

55. G Borrie, *Borrie & Lowe's The Law of Contempt* (3rd edition, Butterworths, London, 1996) at 397.

comment on whether it would be a more appropriate approach to take in preference to the approach taken at common law.

The Commission's proposal

3.46 At present, the Commission is inclined towards retaining the common law on determining who is responsible for the publication of contemptuous material. The common law notion of responsibility for publication is sufficiently broad to include individual reporters within the scope of liability for sub judice contempt. However, it is noted that the ALRC concluded that each officer or employee who was in a position to exercise editorial control in relation to the contemptuous publication, or whose duties included the establishment or supervision of a system for ensuring the sub judice rule was not breached, should be liable for the contempt. Accordingly, Proposal 2 is put forward as an alternative and submissions are invited on whether to recommend legislative implementation of the proposed principle, or whether the common law should be retained.

PROPOSAL 2

A person or organisation should be liable as a principal for the publication of material if that person or organisation was in a position to:

- **authorise the publication of the material;**
- **exercise a significant degree of control over the contents of the publication or that part in which the prejudicial material is contained; and**
- **supervise a system for ensuring that material was not published that would constitute a contempt of court.**

4. Prejudicial publications

- Introduction
- Current test for liability: tendency
- Criticisms of the tendency test
- Reformulating the test: tendency versus risk
- Publications that may influence witnesses
- Publications influencing judicial officers
- Publications prejudicing civil proceedings
- Prescribing the types of publications to give rise to liability
- Admissibility and utility of expert evidence to prove tendency or substantial risk
- Factors relevant to determining liability

INTRODUCTION

4.1 In this Chapter, a number of important, but miscellaneous, aspects of the test for liability for sub judice contempt are reviewed. In this regard, the following issues are examined:

- whether the test for liability can and should be reformulated in a way to make it clearer and more limited in scope; in particular, whether it would be better formulated in terms of risk rather than tendency;
- whether the test should include possible influence on a witness and/or a judicial officer as a basis for liability; and
- whether particular categories of publications should be specified as either giving rise to liability or making out the range of potential liability.

4.2 The Commission also considers the admissibility of expert evidence to assist the court in determining the tendency of a particular publication to prejudice proceedings. Lastly, the Commission examines the relevance of a number of factors in determining liability, namely evidence of actual prejudice and exposure of jurors to publicity, and the significance of pre-existing publicity.

CURRENT TEST FOR LIABILITY: TENDENCY

4.3 In Australia, the test for determining whether a publication is prejudicial so as to infringe the sub judice rule is formulated in terms of "tendencies". To amount to contempt, a publication must be shown to have a real and definite tendency, as a matter of practical reality, to prejudice or embarrass particular legal proceedings.[1] The prosecution bears the burden of proving the necessary tendency, beyond a reasonable doubt.

1. *Hinch v Attorney General (Vic)* (1987) 164 CLR 15 at 34 (Wilson J), at 46 (Deane J), at 70 (Toohey J), at 88 (Gaudron J). See also *Attorney General (NSW) v John Fairfax & Sons Ltd* (1985) 6 NSWLR 695; *Director of Public Prosecutions (Cth) v Australian Broadcasting*

4.4 It is clear from this formulation that liability depends on the *potential* effect of a publication on legal proceedings, rather than any actual effect it may have had. Consequently, the prosecution in contempt proceedings is not required to prove that any prejudice to a case in fact occurred as a result of media publicity, but merely that the publicity had the potential to cause such prejudice. The court assesses tendency by examining the nature of the publication and the circumstances surrounding it, as they appeared at the time of publication. It should not have regard to later events, such as that the relevant proceedings were not in fact affected by the publication because the accused died before the trial or elected at the trial to plead guilty.[2]

4.5 It should be noted that, while the tendency test operates as the substantive principle of liability for sub judice contempt, there is another principle of liability which may apply specifically to publications concerning civil proceedings. This is commonly known as the "prejudgment principle" and applies in addition to the tendency test as a means of assessing the liability of a publication for sub judice contempt. The Commission discusses the prejudgment principle, in the context of the operation of contempt law to protect civil proceedings, in Chapter 6.

Corp (1987) 7 NSWLR 588; *Director of Public Prosecutions (Cth) v Wran* (1987) 7 NSWLR 616; *Attorney General (NSW) v Dean* (1990) 20 NSWLR 650; *Attorney General (NSW) v Radio 2UE* (NSW, Court of Appeal, No 40236/96, 16 October 1997, unreported).

2. See *Ex parte Auld; Re Consolidated Press Ltd* (1936) 36 SR (NSW) 596 at 598 (Jordan CJ); *Hinch v Attorney General (Vic)* (1987) 164 CLR 15 at 70 (Toohey J); *Director of Public Prosecutions (Cth) v John Fairfax & Sons Ltd* (1987) 8 NSWLR 732 at 736 (Kirby P); *Attorney General (NSW) v TCN Channel Nine PtyLtd* (1990) 20 NSWLR 368 at 382; *R v Glennon* (1992) 173 CLR 592 at 605 (Mason CJ and Toohey J).

CRITICISMS OF THE TENDENCY TEST

4.6 The tendency test has been a central focus of criticism by commentators on the sub judice rule.[3] There are two principal grounds for criticism: first, that the test is imprecise and unclear, and secondly, that it is too broad. A main issue for review in this chapter, therefore, is whether the substantive test for liability needs to be defined in a way which is more precise, clearer, and more limited in its application.[4]

Imprecision

4.7 Precision and clarity are important to the fair operation of the criminal law. A criminal offence should be defined with sufficient precision to allow members of the public to know, with a satisfactory degree of certainty, the conduct that will expose them to criminal liability. The limits of liability should be sufficiently clear to the public to allow them to regulate their conduct in order to avoid attracting liability. These are regarded in some jurisdictions as essential principles of justice, with the consequence that, if a criminal offence is too vague or difficult to apply, it may violate these fundamental principles and therefore

3. See S Walker, *The Law of Journalism in Australia* (Law Book Company, Sydney, 1989) at para 1.3.13; Australian Law Reform Commission, *Contempt and the Media* (Discussion Paper 26, 1986) at para 52-59; Australian Law Reform Commission, *Contempt* (Report 35, 1987) at para 288-295; R Pullan, "Contempt: Judicial Assertions But No Evidence" (1996) 34 *Law Society Journal* 48 at 49; M Chesterman, "Reforming the Law of Contempt" (1984) 58 *Law Institute Journal* 380 at 381.
4. This has been a central focus of review by law reform bodies in the past: see United Kingdom, Committee on Contempt of Court, *Report of the Committee on Contempt of Court* (HMSO, London, Cmnd 5794,1974) at para 83, 103, 112-114; Australian Law Reform Commission, *Contempt* (Report 35, 1987) at para 288-295; Ireland, Law Reform Commission, *Contempt of Court* (Report 47, 1994) at para 6.9.

be invalid.[5] Sub judice contempt is generally regarded as imposing criminal liability. It attracts criminal sanctions, potentially the imposition of a term of imprisonment. It therefore follows that the principles of liability governing this offence should be defined with sufficient precision and clarity as is necessary in the interests of fairness.

4.8 Critics of the "tendency test" have asserted that "tendency" is a very vague and general notion on which to base liability, and that it is impossible to know whether a particular statement, if published, will be found to have a tendency to prejudice proceedings. Of course, absolute certainty in the limits of liability is not necessary for the fair operation of an offence. The question is whether the tendency test provides sufficient guidance to allow the media to regulate their activities in order to be reasonably certain of avoiding liability.

5. In Canada, see *United Nurses of Alberta v Attorney General for Alberta* (1992) 89 DLR (4th) 609 at 636 (McLachlin J), although in this case it was held that an offence need not be codified in order to be sufficiently clear. In the context of the *European Convention on Human Rights*, see the ruling of the European Court of Human Rights in *Sunday Times v United Kingdom* [1979] 2 EHRR 245 at para 49. In the United States of America, the Due Process Clauses of the Fifth and Fourteenth Amendments of the *Constitution* embody a doctrine which would invalidate a law for vagueness when its prohibition is so vague as to leave an individual without knowledge of the nature of the activity that is prohibited. It has been held that a statute establishing a criminal offence must define the offence with sufficient clarity that ordinary people or persons of reasonable intelligence can understand what conduct is prohibited: see *US v Erickson* 75 F 3d 470 (1996); *US v Gray* 96 F 3d 769 (1996); *US v Overstreet* 106 F 3d 1354 (1997); *US v Amer* 110 F 3d 873 (1997); *US v Sepulveda* 115 F 3d 882 (1997); *US v Brenson* 104 F 3d 1267 (1997); *State v Allen* 565 NW 2d 333 (1997); *State v Roucka* 573 NW 2d 417 (1998); *State v Groom* 947 P 2d 240 (1997); *State v McKnight* 739 So 2d 343 (1999); *US v Rahman* 189 F 3d 88 (1999); *Karlin v Foust* 188 F 3d 446 (1999); *US v Velastegui* 56 F Supp 2d 313 (1999).

4.9 In the interests of protecting freedom of discussion, the test for liability for sub judice contempt should apply to restrict publication of information only to the extent that is necessary to ensure the proper administration of justice. If the test for liability is too broad in its application, it may be criticised for intruding unjustifiably on freedom of discussion. The current test may be criticised for setting too low a threshold for liability, by requiring no more than a "tendency" to prejudice. As a result, publications may be prohibited which have a tendency to prejudice but which do not pose any serious risk to the administration of justice. As well, if the tendency test really is unclear, it may result in the media being overly cautious in publishing material. This may also result in an unnecessary intrusion on freedom of discussion.

REFORMULATING THE TEST: TENDENCY VERSUS RISK

"Substantial risk" as an alternative formulation

4.10 The majority of judges in Australian cases have adopted the "tendency" formulation as the test for liability for sub judice contempt. This formulation has not, however, been universally favoured. Chief Justice Mason of the High Court preferred a formulation drafted in terms of "risk" rather than "tendency". According to this formulation, a publication amounts to a contempt if it is shown to have a substantial risk of serious, or real, interference with particular legal proceedings.[6] A small number of judges have followed Chief Justice Mason's approach in preference to the tendency approach.[7]

6. See *Hinch v Attorney General (Vic)* (1987) 164 CLR 15 at 27-28 (Mason CJ).
7. See, for example, *R v Day and Thomson* [1985] VR 261 at 264; *Attorney General (NSW) v Radio 2UE Sydney Pty Ltd* (NSW, Court of Appeal, No 40762/91, 28 August 1992, unreported) at 3 (Priestley JA); *Attorney General (NSW) v Television and Telecasters (Sydney) Pty Ltd* (NSW, Supreme Court, No 11752/97, James J, 10 September 1998, unreported) at 13.

4.11 Chief Justice Mason favoured the "substantial risk" formulation because, in his view, it balanced more appropriately the competing interests in free speech and the administration of justice. He considered that the "tendency" formulation was vague and uncertain, and may be seen to give too much weight to the protection of the administration of justice over freedom of speech. However, he noted that the proviso in the "tendency" formulation, that the tendency to interfere be a matter of practical reality, may be sufficiently clear as to eliminate his objection to that formulation.

4.12 A "substantial risk" test has been adopted in legislation in the United Kingdom as the test for liability for sub judice contempt.[8] The legislation provides that a publication will amount to a contempt if it creates a "substantial risk" that the course of justice will be "seriously impeded or prejudiced". In New Zealand, the courts appear to favour a test that focuses on whether the publication created a "real risk", as a matter of practical reality, that the trial would be "likely" to be prejudiced.[9] The Canadian courts also appear to determine liability for sub judice contempt according to whether there was a "real risk" of prejudice to the course of justice.[10]

Differences in the meaning of "tendency" and "substantial risk"

4.13 In considering a reformulation of the test for liability, it is obviously important to identify the differences in meaning, if any,

8. *Contempt of Court Act 1981* (UK) s 2(2), adopting the recommendation of the Phillimore Committee: see para 4.19.
9. See *Solicitor-General v Radio Avon Ltd* [1978] 1 NZLR 225 at 234; *Solicitor-General v Broadcasting Corporation of New Zealand* [1987] 2 NZLR 100 at 107; *Gisborne Herald Co Ltd v Solicitor-General* [1995] 3 NZLR 563 at 569 (Richardson J).
10. See *R v Chek TV Ltd* (1987) 30 BCLR (2d) 36 at 43 (Anderson JA); *Re Attorney General for Manitoba and Radio OB Ltd* (1976) 31 CCC (2d) 1 at 6.

between the "tendency" and the "substantial risk" formulations. Chief Justice Mason considered that there may be no substantive difference between the two, and the courts have at times seemed to use both interchangeably.[11] Is there, therefore, any real difference in meaning between the two formulations? In particular, does one present a more precise and clear test for liability? Does one impose a higher threshold for liability, making the scope of contempt more limited in prohibiting publications?

4.14 The courts have not spelt out what they understand by the term "tendency", although they have made it clear what the term does not mean, namely, it does not mean proof of any actual prejudice, and it does not require any intention on the part of the publisher to cause prejudice.[12]

4.15 The Macquarie Dictionary defines "tendency" as a "prevailing disposition to move, proceed, or act in some direction or towards some point, end or result".[13] The word "tendency" therefore seems to imply a degree of likelihood or possibility that a certain result will eventuate. In the context of contempt law, this is a degree of likelihood or possibility that prejudice will result from a publication.

4.16 A publication will have the necessary "tendency" if, from its nature, as distinct from its actual effect in the specific circumstances, it *might* have an effect on the relevant proceedings.[14] The New South Wales Court of Appeal has noted

11. (1987) 164 CLR 15 at 28.
12. *John Fairfax & Sons Pty Ltd v McRae* (1955) 93 CLR 351 at 371 (Dixon CJ, Fullagar, Kitto and Taylor JJ); *Lane v Registrar, Supreme Court (NSW)* (1981) 148 CLR 245 at 258; *Victoria v Australian Building Construction Employees' & Builders Labourers' Federation* (1982) 152 CLR 25 at 56 (Gibbs CJ); *Hinch v Attorney General (Vic)* (1987) 164 CLR 15 at 46 (Deane J), at 69 (Toohey J), at 85 (Gaudron J); *Registrar of Court of Appeal v Willesee* (1985) 3 NSWLR 650 at 652-660 (Kirby P).
13. *The Macquarie Dictionary* (2nd edition, Macquarie Library, Sydney, 1992).
14. *Attorney General (NSW) v John Fairfax & Sons Ltd* [1980] 1 NSWLR 362.

that the degree of likelihood required by the word "tendency" in this context is not one of probability, but rather a "real possibility" of interference,[15] and the High Court has said that the degree of possibility required by the test must be more than a remote possibility that justice will be interfered with.[16]

4.17 However, the courts have not expressly addressed the precise degree of possibility that is required by the term "tendency", other than that it must be more than remote. The only guidance given is the qualification that the tendency must be real and definite, and must exist as a "matter of practical reality". It may be argued that this implies a degree of possibility that is something greater than simply "not remote". President Kirby (as he then was), in considering the words "practical reality", has commented that the courts must beware of over-sensitivity to the mere possibility of interference in a criminal trial.[17]

4.18 It may be worth noting that the "tendency" formulation, as it is most commonly articulated by the courts, makes no reference to any requirement for "serious" prejudice, but simply requires a tendency to prejudice, or embarrass, proceedings.

4.19 The word "substantial" in "substantial risk" would seem to require a higher degree of likelihood than one which is simply more than remote. Certainly, the parliamentary debates leading up to the introduction of the legislation in the United Kingdom suggest that its drafters intended the word to mean something which is serious, considerable, and real, imposing a high threshold on liability for sub judice contempt in order to restrict its intrusion on freedom of expression.[18] However, the English courts seem to have given a broader interpretation to the word "substantial",

15. *Attorney General (NSW) v John Fairfax and Sons Ltd* (1985) 6 NSWLR 695 at 697-698 (Samuels JA).
16. *Victoria v Australian Building Construction Employees' and Builders Labourers' Federation* (1982) 152 CLR 25 at 56 (Gibbs CJ).
17. See *Director of Public Prosecutions (Cth) v United Telecasters Sydney Ltd* (1992) 7 BR 364 at 371 (Kirby P).
18. See United Kingdom, *Parliamentary Debates (Hansard)* House of Lords, 15 January 1981 at 182-184.

choosing to define it more in terms of what it is *not*, than what it is. It has been said that "substantial" as a qualification of risk does not mean "weighty", but rather means "not insubstantial" or "not minimal".[19] On other occasions, "substantial" has been said simply to exclude a risk that is only remote.[20] While it is not clear exactly what level of risk will generally be considered by the English courts to be substantial, it could be argued that the interpretation of the term "substantial" as excluding a remote or minimal risk allows for liability to arise from a smaller risk of prejudice than was originally suggested by the drafters of the legislation.[21] The English courts have qualified their interpretation of the term "substantial" to the extent that they have said the risk must be practical and not theoretical.[22]

4.20 It is not clear how the Australian courts would interpret the phrase "substantial risk". In the context of reviewing a claim by an accused person that his or her trial was unfair and subsequent conviction was unsafe because of prejudicial media publicity, the Australian courts have seemed willing to allow for some degree of risk of prejudice to a trial without finding that the proper administration of justice has been compromised. The High Court has noted that some degree of risk to the integrity of criminal justice is accepted as a price which must be paid to allow a degree of freedom of public expression.[23] It could be argued from this that

19. See *Attorney General v News Group Newspapers Ltd* [1987] 1 QB 1 at 15 (Donaldson MR). Similarly, in a recent Canadian decision, the British Columbia Court of Appeal said that the degree of risk required to trigger liability for sub judice contempt must be more than trifling or trivial, but less than a certainty: see *R v CHBC Television* (British Columbia, Court of Appeal, No 24128, 8 February 1999, unreported).
20. See *Attorney General v English* [1983] 1 AC 116 at 141-142 (Diplock LJ); *Attorney General v Birmingham Post and Mail Ltd* [1998] 4 All ER 49 at 52 (Simon Brown LJ).
21. See C J Miller, *Contempt of Court* (Clarendon Press, Oxford, 1989) at 155.
22. See *Attorney General v News Group Newspapers Ltd* [1987] 1 QB 1 at 16 (Donaldson MR).
23. *R v Glennon* (1992) 173 CLR 592 at 613 (Brennan J).

the Australian courts would be more willing to interpret the term "substantial risk" in a way which required a higher degree of risk than seems currently to be required by the courts in the United Kingdom.

4.21 It may also be worth noting that the "substantial risk" formulation, as articulated in the English legislation and by Chief Justice Mason, refers to a risk of "serious" or "real" interference. This contrasts with the tendency formulation which, as noted in paragraph 4.17 above, makes no such reference to any particular degree of prejudice required. The Australian courts do not appear to have placed any emphasis on the difference between the two formulations in this regard. It has been noted in the United Kingdom, however, that the requirement of "serious prejudice" demands separate consideration from the issue of whether there is a substantial risk, there being two limbs to the test for liability. Different factors may be relevant in assessing whether there was serious prejudice from whether there was a substantial risk.[24] On the other hand, the Australian Law Reform Commission ("ALRC") expressly rejected the requirement in the English legislation that there be shown to be a substantial risk of "serious" prejudice, preferring instead to include within the scope of liability a substantial risk of any prejudice, whether serious or not. It took the view that to require a substantial risk of serious prejudice placed too heavy a burden on the prosecution seeking to establish contempt.[25]

Recommendations of law reform bodies

4.22 The ALRC, the Phillimore Committee in Great Britain, and the Irish Law Reform Commission all recommended a test for liability which was formulated in terms of risk, as opposed to tendency.

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24. See *Attorney General v News Group Newspapers* [1986] 2 All ER 833 at 841 (Donaldson MR).
25. Australian Law Reform Commission, *Contempt* (Report 35, 1987) at para 317.

4.23 The ALRC expressly noted its preference for a "substantial risk" formulation over a "tendency" formulation. It considered that the "tendency" formulation was vague and too wide in its application, with the consequence that it imposed an excessively broad prohibition on media publicity.[26] It recommended a general principle of liability in the following terms: a publication must create a substantial risk that, by virtue of the influence it might exert on the court or jury, a fair trial might be prejudiced.[27] In addition, it recommended that, in relation to publicity about criminal jury trials, only publications within legislatively defined categories be capable of giving rise to liability for sub judice contempt. That is, in respect of a publication relating to a criminal jury trial, liability for contempt would only be found if the publication both came within one of the legislatively defined categories and was considered to create a substantial risk of prejudice. These recommendations were subsequently endorsed by the Victorian Law Reform Commission.[28]

4.24 In the United Kingdom, the Phillimore Committee recommended that, to amount to a contempt, a publication must create a risk that the course of justice will be seriously impeded or prejudiced.[29] The Committee did not qualify the degree of risk required, but placed emphasis instead on the severity of the prejudice as the key element to liability. This contrasts with the formulation recommended by the ALRC, under which liability does not arise unless there is a "substantial" risk. The Phillimore Committee took the view that the creation of a risk of serious prejudice should always be prohibited, without any qualification that the risk be substantial. However, under the *Contempt of*

26. Australian Law Reform Commission, *Contempt* (Report 35, 1987) at para 291, 292, 294-295.
27. Australian Law Reform Commission, *Contempt* (Report 35, 1987) at para 295.
28. See Victoria, Law Reform Commission, "Comments on Australian Law Reform Commission Report on Contempt No 35" (Unpublished paper, Melbourne, 1987) at para 4.1.
29. United Kingdom, Committee on Contempt of Court, *Report of the Committee on Contempt of Court* (HMSO, London, Cmnd 5794, 1974) at para 113.

Court Act 1981 (UK), which adopted most of the recommendations of the Phillimore Committee, the test for liability requires a "substantial" risk of prejudice.[30] The Parliament of the United Kingdom considered it desirable to include "substantial" in the legislation to ensure that interference with freedom of expression occurred only to the extent that was absolutely necessary to preserve the proper administration of justice.[31]

4.25 The Irish Law Reform Commission recommended a test for liability which followed the legislation in Great Britain.[32] That is, liability should arise where the publication creates a substantial risk that the course of justice will be seriously impeded or prejudiced. Originally, the Irish Law Reform Commission had proposed that the principle for liability should require merely a risk "other than a remote one".[33] It later recommended that this be changed to a "substantial risk", having concluded that a higher threshold for liability was necessary to protect freedom of expression.

Formulating liability in terms of possible not actual prejudice

4.26 It has on occasions been argued that the principle of liability for sub judice contempt should focus on whether prejudice to proceedings has actually occurred, rather than whether it may

30. See *Contempt of Court Act 1981* (UK) s 2(2).
31. See United Kingdom, *Parliamentary Debates (Hansard)* House of Lords, 15 January 1981 at 182-184. See the dissenting view of the Lord Chancellor, who argued that there was no real difference between a "substantial risk" and a "risk" in this context: at 183.
32. See Ireland, Law Reform Commission, *Contempt of Court* (Report 47, 1994) at para 19-20. The Irish Law Reform Commission also recommended that legislation include a list of the types of publications which could give rise to liability for contempt, following the approach of the Australian Law Reform Commission.
33. See Ireland, Law Reform Commission, *Contempt of Court* (Consultation Paper, 1991) at 309-310.

possibly occur.[34] By punishing for the mere possibility of prejudice, rather than actual prejudice, it may be argued that the scope of liability is too broad. For example, a publication condemning a particular accused may be found to amount to contempt for having a tendency to prejudice proceedings when, in fact, it is clear that actual prejudice did not arise, or was not compelling, because the jury acquitted the accused. It may be questioned whether, in such a case, a publication should attract liability.

4.27 At this stage, the Commission does not agree that liability for sub judice contempt should be limited to cases where actual prejudice to proceedings can be proven. The principal aim of the law in this area is to prevent publications that may damage the administration of justice before any actual damage is done. It is therefore necessary to frame liability in terms of the likelihood of prejudice, rather than punish after prejudice has occurred, in order to deter the media from publishing prejudicial material, and encourage them to exercise proper care in carrying out their business. The analogy has been given of legislation regulating industrial safety and road safety.[35] Employers and drivers may be punished for maintaining an unsafe workplace or driving unsafely, even though no-one sustains an injury. In this way, the law imposes a positive duty to prevent injury from arising, rather than waiting for injury to occur.

4.28 It is a separate issue whether evidence of actual prejudice, or alternatively, evidence that no prejudice has occurred, should be considered relevant in determining whether a publication creates the necessary risk of prejudice. For example, it may be questioned whether the courts should take into account evidence that the jury in the relevant trial did not actually encounter the relevant publication, or evidence that the trial judge decided not to discontinue the trial despite the media publicity. This is an issue which the Commission considers in more detail in paragraphs 4.77-4.80 below.

34. See Australian Law Reform Commission, *Contempt* (Report 35, 1987) at para 292.
35. See Australian Law Reform Commission, *Contempt* (Report 35, 1987) at para 259, 293.

The Commission's tentative view

4.29 The Commission takes the tentative view that a test for liability based on "substantial risk" is preferable to one based on "tendency". Because of the restrictions that the sub judice rule places on freedom of discussion, it is important that its scope is limited as much as possible, so that it applies only where it is necessary to ensure that the proper administration of justice is not seriously compromised. It is also desirable that the test for liability be formulated in the most precise terms possible, in order that the media may know with a reasonable degree of certainty which publications will expose them to prosecution. "Substantial risk" is a more precise term than "tendency" since it quantifies the degree of risk by use of the word "substantial".

4.30 The Commission acknowledges concerns that the "substantial risk" test may at times have been interpreted by the English courts to impose a lower threshold for liability than was originally intended. However, the Commission is not convinced, at this stage at least, that this will be the experience in New South Wales.

4.31 The Commission also takes the tentative view that the test for liability should require a substantial risk of "prejudice", rather than a risk of "serious prejudice". Prejudice to the fairness of legal proceedings is, by its nature, serious. In the context of a fair trial, there are not degrees of prejudice. The Commission cannot imagine a situation in which there could be, for example, a risk of "trivial" prejudice to the fairness of the proceedings. The adjective "serious" therefore adds nothing in real terms to the test for liability.

4.32 Proposal 3 reflects the Commission's tentative view on an appropriate formulation of the test of liability in terms of "substantial risk of prejudice".

PUBLICATIONS THAT MAY INFLUENCE WITNESSES

4.33 Contempt law assumes that witnesses, as well as jurors, are susceptible to influence by media publicity (whether they be

witnesses in civil or criminal proceedings). It is feared that media publicity may deter a witness from coming forward to give evidence, or may influence the evidence that witness gives, either consciously or subconsciously.[36] Consequently, the law restricts the publication of material if it is considered that it will have such an effect.

4.34 It is worth noting, however, that at common law Australian courts appear to have become increasingly reluctant to restrict the publication of information on the basis that it may influence a witness in civil proceedings. One issue that arises in considering the test for liability is whether liability should continue to be imposed on the basis of possible influence on a witness in proceedings, or whether the risk to the administration of justice in such a case is not sufficient to justify retaining influence on a witness as a ground for restricting the publication of information.

4.35 The courts seem now to place greater faith in the honesty of witnesses and the power of cross-examination to expose prejudice and inconsistencies.[37] In one case, three judges of the High Court considered that it was "no more than speculation" to suggest that a potential witness in the relevant civil proceedings would be influenced.[38] In a more recent case, the New South Wales Court of Appeal acknowledged that there may be circumstances where a publication created a real and substantial risk of adversely influencing witnesses or potential witnesses, particularly where the publication included interviews with witnesses which may

36. See *Vine Products Ltd v Green* [1966] Ch 484 at 495 (Buckley J); *Victoria v Australian Building Construction Employees' and Builders Labourers' Federation* (1982) 152 CLR 25; *Civil Aviation Authority v Australian Broadcasting Corp* (1995) 39 NSWLR 540.

37. See *Victoria v Australian Building Construction Employees' and Builders Labourers' Federation* (1982) 152 CLR 25 at 57-59 (Gibbs CJ); *Civil Aviation Authority v Australian Broadcasting Corp* (1995) 39 NSWLR 540 at 552.

38. See *Victoria v Australian Building Construction Employees' and Builders Labourers' Federation* (1982) 152 CLR 25 at 59 (Gibbs CJ), at 103 (Mason J), at 131-132 (Wilson J), at 119 (Aickin J agreeing), at 75 (Stephen J dissenting on this point), at 176-177 (Brennan J dissenting on this point, though not expressly considering the issue of possible influence on witnesses), Murphy J did not consider this issue.

cause their memory of events to be distorted.[39] However, in the circumstances of that case, the court did not consider that there was any such risk and found that the radio broadcast in question did not amount to a contempt. The witnesses who were interviewed were either expert witnesses or eyewitnesses of the accident in question, and their testimony, it was claimed, would be unlikely to be affected. Expert witnesses in particular were considered to be less susceptible to influence by media publicity.[40]

Categories of possible influence

4.36 Publications have been found to constitute contempt on the basis that they influence a witness in one of the following ways:[41]

(1) They criticise a potential witness.[42] The courts have expressed concern that a witness may be reluctant to give evidence, or may alter the evidence which he or she gives, if that witness is subjected to personal criticism by the media.

(2) They criticise one of the parties to the proceedings.[43] It is considered that public criticism of a party to proceedings may

39. See *Civil Aviation Authority v Australlian Broadcasting Corp* (1995) 39 NSWLR 540 (Handley JA dissenting).
40. See *Civil Aviation Authority v Australian Broadcasting Corp* (1995) 39 NSWLR 540 at 552-553 (Kirby P), at 567 (Handley JA). See also *Schering Chemicals v Falkman Ltd* [1982] 1 QB 1 at 40 (Templeman LJ).
41. See generally, Australian Law Reform Commission, *Contempt* (Report 35, 1987) at para 387-395; G Borrie, *Borrie & Lowe's The Law of Contempt* (3rd edition, Butterworths, London, 1996) at 197-203; United Kingdom, Committee on Contempt of Court, *Report of the Committee on Contempt of Court* (HMSO, London, Cmnd 5794, 1974) at para 53, 55-56; C J Miller, *Contempt of Court* (Clarendon Press, Oxford, 1989) at 245-246.
42. See *Re Doncaster and Retford Co-operative Societies Agreement* [1960] 1 WLR 1186.
43. See *Hutchison v Amalgamated Engineering Union, Re Daily Worker* (1932) *Times*, 25 August. See also *Victoria v Australian Building*

make a potential witness reluctant to support that party by giving evidence in court, for fear of encountering similar criticism.

(3) They contain an interview with a witness on matters to which that witness, or another witness, will subsequently testify in court.[44] The courts have expressed concern that witnesses' testimony may be influenced by the fact of the earlier publication, to the extent that they may be determined to make sure their evidence is consistent with their previous statements to the media. Moreover, other witnesses may modify their own testimony in light of the publication. Potential witnesses may also be reluctant to come forward as witnesses as a result of the publication. The potential for a witness' testimony to be distorted because of a previous media interview may increase if the witness has been offered money for the interview.[45]

(4) They contain material which may in some way influence the testimony of a witness who is to give an eyewitness account of the incident forming the basis of the proceedings. In criminal proceedings, an example is the publication of a

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Construction Employees' and Builders Labourers' Federation (1982) 152 CLR 25.

44. See *Attorney General (NSW) v Mirror Newspapers Ltd* [1980] 1 NSWLR 374; *Civil Aviation Authority v Australian Broadcasting Corp* (1995) 39 NSWLR 540 (although the majority in the latter case found that, in the circumstances of the case, no contempt arose). See also United Kingdom, Home Office and the Scottish Home and Health Department, Interdepartmental Committee on the Law of Contempt as it Affects Tribunals of Inquiry, *Report of the Interdepartmental Committee on the Law of Contempt as it Affects Tribunals of Inquiry* (HMSO, London, Cmnd 4078, 1969) at para 31-32; United Kingdom, Committee on Contempt of Court, *Report of the Committee on Contempt of Court* (HMSO, London, Cmnd 5794, 1974) at para 55-56.

45. See United Kingdom, Committee on Contempt of Court, *Report of the Committee on Contempt of Court* (HMSO, London, Cmnd 5794, 1974) at para 56; S Pugh, "Checkbook Journalism, Free Speech and Fair Trials" (1995) 143 *University of Pennsylvania Law Review* 1739.

photograph of the accused, when the witness is to give evidence concerning the identity of the offender. In civil proceedings, an example is a television re-enactment of an accident of which the witness is to be called to give an eyewitness account.

4.37 These categories of possible influence on a witness appear to be based more on the courts' own views about the susceptibility of witnesses to media publicity, according to their experience and assumptions about human behaviour, rather than on empirical data. As with much of this area of the law, there appears to be little empirical or psychological evidence to test the validity of the courts' assumptions.

4.38 Psychologists have made general observations about the malleability of memory. In particular, studies have suggested the potential for memory to be embellished and even transformed by new information received after an event,[46] although views differ on the ways in which and degree to which memory might be affected, especially where the event in question is out of the ordinary.[47] Psychologists' observations do at least offer some support to restricting the publication of material that may have an effect on a witness's recollection of events. However, they are not relevant to testing the assumption that a witness may be deterred from giving evidence because of public criticism of a party or of the witness, or because of previous statements made by that witness or another witness (except to the extent that those previous statements may have an effect on a witness' recollection of events).

4.39 For the publication to infringe the sub judice rule, the risk of influence must be shown to be more than merely "speculative".[48]

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46. See, for example, L C Parker Jr, *Legal Psychology: Eyewitness Testimony Jury Behaviour* (Charles C Thomas, Illinois, 1980) ch 2-3; E Loftus and J Doyle, *Eyewitness Testimony: Civil and Criminal* (Kluwer Law Book Publishers, New York, 1987) at para 3.05.
47. See generally E Magner, "Witness Memory and the Courts" (1995) 7 *Judicial Officers Bulletin* 11, 15.
48. See *Victoria v Australian Building Construction Employees' and Builders Labourers' Federation* (1982) 152 CLR 25.

There must be a "real and substantial risk of adversely influencing actual or potential witnesses".[49] Justice Kirby has noted that "the danger of this occurring is more acute where the witnesses themselves are interviewed in advance of a hearing".[50] However, in that situation, the English courts have drawn a distinction between the impact of the publication on expert and non-expert witnesses. The courts have suggested that non-expert witnesses might be more likely than expert witnesses to be influenced by advance knowledge of the evidence of their fellow-witnesses.[51]

Arguments for and against restrictions by reason of possible influence on a witness

4.40 On the one hand, there is arguably sufficient ground to fear that the fairness of legal proceedings may be compromised by media publicity, on the basis of prejudice to a witness. There does at least seem to be a basis for concern that a witness' memory of events may be coloured by publicity. Whether a potential witness might also be deterred from giving evidence because of media publicity is a question for which there does not appear to be a clear and decisive answer. Arguably, there is at least the possibility that media publicity will have such an effect.

4.41 On the other hand, the following arguments may be made against restricting publications on the basis that they may influence a witness in proceedings. First, it could be argued that there is nothing special about the influence exerted on a witness by media publicity as opposed to influence by any other means. There may be just as much danger that a witness' testimony will be influenced by discussion of the proceedings with family or

49. *Civil Aviation Authority v Australian Broadcasting Corp* (1995) 39 NSWLR 540 at 551 (Kirby P).
50. *Civil Aviation Authority v Australian Broadcasting Corp* at 551 (Kirby P).
51. See *Vine Products Ltd v Green* [1966] ch 484 at 496 (Buckley J); *Pickering v Liverpool Daily Post & Echo Newspapers Plc* [1991] 2 AC 370 at 425 (Lord Bridge).

friends, or by having made a previous statement on the same facts to police or to solicitors, or by having been exposed to public discussion or debate about the general matters to which the proceedings relate and which distort that witness' attitude towards the proceedings or the parties. It could be questioned why the law considers it necessary or desirable to prevent the risk of influence by one means, namely media publicity, while there are many other ways in which a witness, or potential witness, may be influenced.

4.42 Secondly, it could be argued that the possibility of influence on a witness, whether by media publicity or other means, is a matter which may be fully explored and exposed through cross-examination in court. To this extent, it may be said that the risk to proceedings created by media influence on a witness is less significant than the risk created by media influence on jurors. There is much less scope to expose a juror's bias through questioning.

4.43 Thirdly, it may be argued that fears that potential witnesses will be deterred from giving evidence are speculative and not sufficiently substantiated to warrant intruding on the media's right to freedom of discussion through restrictions on publishing information about proceedings.

Recommendations of law reform bodies

4.44 Previous reviews of the law of contempt have considered the restrictions imposed on the media to prevent influence to a witness. The Phillimore Committee in the United Kingdom noted the risks that may arise from media interviews with potential witnesses, but made no specific recommendation for legislative reform to address the issue.[52] A previous committee in the United

52. The Phillimore Committee recommended instead that a special inquiry be conducted into the issue of payment of potential witnesses for media interviews, to consider whether legislation was necessary to restrain or wholly prohibit this practice: see United Kingdom, Committee on Contempt of Court, *Report of the*

Kingdom, which reviewed the law of contempt as it affected tribunals, made a recommendation to the effect that it should be a contempt for any person to say or do anything or cause anything to be said or done, in relation to evidence relevant to the subject matter before the tribunal, which was intended or obviously likely to alter, distort, destroy, or withhold such evidence from the tribunal.[53]

4.45 The Irish Law Reform Commission recommended the creation of a new offence relating specifically to the payment of witnesses by the media for interviews.[54] It proposed that it be an offence to make or offer payment to any person who is, or is likely to be, a party or a witness in legal proceedings (whether civil or criminal) where, in the particular circumstances, the making or offer of such payment creates a substantial risk of injury to the administration of justice.

4.46 The ALRC made a general recommendation[55] that sub judice restrictions should not be imposed on publications relating to civil proceedings which are heard by a judge alone. While it recognised the possible danger of influence to a witness, it took the view that this possibility did not justify restricting the publication of information unless it could be established that a jury may also be influenced. It therefore recommended that publications relating to civil proceedings in which a jury was not sitting should not amount to contempt, unless it could be shown that there was a

Committee on Contempt of Court (HMSO, London, Cmnd 5794, 1974) at para 78-79.

53. See United Kingdom, Home Office and the Scottish Home and Health Department, Interdepartmental Committee on the Law of Contempt as it Affects Tribunals of Inquiry, *Report of the Interdepartmental Committee on the Law of Contempt as it Affects Tribunals of Inquiry* (HMSO, London, Cmnd 4078, 1969) at para 32.
54. Ireland, Law Reform Commission, *Contempt of Court* (Report 47, 1994) at para 7.8-7.9; Ireland, Law Reform Commission, *Contempt of Court* (Consultation Paper, 1991) at 340-343.
55. Australian Law Reform Commission, *Contempt* (Report 35, 1987) at para 391-392.

deliberate intention on the part of the publisher to distort the evidence.

4.47 In relation to publications concerning criminal proceedings, the ALRC recommended that liability be imposed only where the risk of prejudice arose from possible influence on a jury or, in certain circumstances, on a judicial officer, but not on a witness.[56] An exception was made in respect of a publication of a photograph, sketch or description of the physical attributes of a person in circumstances from which it could reasonably be inferred that the person was charged with or suspected of having committed an offence.[57] Publications of this kind were prohibited according to the ALRC's recommendations. The Victorian Law Reform Commission later endorsed this approach,[58] as did the Commonwealth government in its draft bill.[59]

The Commission's tentative view

4.48 The Commission's tentative view is to retain the existing common law without modification in relation to influence on witnesses. The Commission recognises that there is not a great amount of empirical evidence either to support or oppose the notion of influence on witnesses by media publicity, and that the ALRC recommended that influence on witnesses as a possible source of risk of prejudice should largely be removed as a ground for imposing sub judice restrictions. However, the Commission considers that there is sufficient reason for concern that a witness may be so influenced, at least in so far as his or her memory may

56. Australian Law Reform Commission, *Contempt* (Report 35, 1987) at 462-465 (*Administration of Justice (Protection) Bill 1987* (Cth) cl 16, 17).
57. Australian Law Reform Commission, *Contempt* (Report 35, 1987) at 465-465 (*Administration of Justice (Protection) Bill 1987* (Cth) cl 18).
58. Victoria, Law Reform Commission, "Comments on Australian Law Reform Commission Report on Contempt No 35" (Unpublished paper, Melbourne, 1987) at para 4.3.
59. *Crimes (Protection of the Administration of Justice) Amendment Bill 1993* (Cth) cl 50J.

be affected by media publicity. While there are, of course, other sources of possible influence on a witness' testimony, that does not seem sufficient justification to abolish the protection against this source of influence that is provided by the law of sub judice contempt. Proposal 3 reflects the Commission's tentative view that influence on witnesses should remain as a possible basis for imposing liability for sub judice contempt in respect of publications relating to both criminal and civil proceedings. The Commission emphasises, however, that its views in relation to witnesses are certainly not final, and the Commission welcomes submissions on whether or not it is preferable to impose fewer restrictions than are currently imposed by the common law in relation to publications that may influence a witness.

PUBLICATIONS INFLUENCING JUDICIAL OFFICERS

4.49 In the past, it has been suggested that judicial officers may be susceptible to influence by media publicity in the same way as jurors and witnesses.[60] However, the general view of the courts now appears to be that any such influence on judicial officers will not be sufficient to amount to a "real and definite tendency" so as to constitute contempt, because judicial officers have training and experience in disregarding information that is not obtained by way

60. See, for example, *Bell v Stewart* (1920) 28 CLR 419 at 433 (Isaacs and Rich JJ); *Kerr v O'Sullivan* [1955] SASR 204.

of evidence admitted in court.[61] This view encompasses coroners,[62] and magistrates hearing summary proceedings.[63]

4.50 Most law reform bodies have tended to take the view that judicial officers should generally be assumed capable of resisting any significant influence by media publicity. Despite this, they have not gone so far as to exclude altogether as a possible ground of liability for sub judice contempt the risk of influence on a judicial officer. The justification for this approach is twofold: first, it is always possible that a judicial officer may be subconsciously influenced; and secondly, it is just as important to protect the public perception of judges' impartiality as to protect against the risk of actual bias.[64] The ALRC, however, reached a slightly

61. See *Victoria v Australian Building Construction Employees' & Builders Labourers' Federation* (1982) 152 CLR 25 at 58 (Gibbs CJ), at 103 (Mason J), at 136 (Wilson J); *Attorney General (SA) v Nationwide News Pty Ltd* (1986) 43 SASR 374 at 381-386 (Jacobs J), at 391-393 (Matheson J).

62. See *Attorney General (NSW) v Mirror Newspapers Ltd* [1980] 1 NSWLR 374 at 387; *Civil Aviation Authority v Australian Broadcasting Corp* (1995) 39 NSWLR 540 at 548-550 (Kirby P), at 564 (Handley JA), at 574 (Sheller JA).

63. See *X v Amalgamated Television Services Pty Ltd (No 2)* (1987) 9 NSWLR 575 at 590-591 (Kirby P); *R v Regal Press Pty Ltd* [1972] VR 67 at 79.

64. See United Kingdom, Committee on Contempt of Court, *Report of the Committee on Contempt of Court* (HMSO, London, Cmnd 5794, 1974) at para 49, where the Phillimore Committee noted that judges are generally capable of putting extraneous matter out of their minds. However, in its recommendations, the committee did not exclude influence on judicial officers as a ground of liability. The Irish Law Reform Commission followed a similar approach: see Ireland, Law Reform Commission, *Contempt of Court* (Consultation Paper, 1991) at 115. The Canadian Law Reform Commission took the view that, while judges may generally be impervious to influence, the possibility of such influence could not be ruled out altogether, and that in the case of judicial officers, the sub judice rule served an important function of protecting the public perception of impartiality: see Canada, Law Reform Commission, *Contempt of Court: Offences Against the Administration of Justice* (Working Paper 20, 1977) at 42-43; (Report 17, 1982) at 30.

different result from other law reform bodies. Although recommending that the rule apply to criminal cases heard by a judge alone,[65] it recommended that the sub judice rule should *not* apply to restrict the publication of information relating to civil proceedings that are tried by a judge alone.

65. See Australian Law Reform Commission, *Contempt* (Report 35, 1987) at 464-465 (*Administration of Justice (Protection) Bill 1987* (Cth) cl 17) and at para 376-386. Although, the recommendation was that the rule apply in a modified form.

4.51 At this stage, the majority of Commissioners supports the general assumption that judicial officers are not susceptible to any significant degree to influence by media publicity.[66] Following on from this assumption, the Commission considers that liability for sub judice contempt should not be imposed on the basis of risk of influence on a judicial officer. The Commission concedes that there is little empirical data to support or refute the assertion that judicial officers are not likely to be significantly influenced by media publicity.[67] However, in the interest of freedom of discussion, the Commission considers that a line needs to be drawn to delineate clearly the boundaries of liability for sub judice contempt. Unlike previous law reform bodies, the majority of Commissioners considers that concern about influence on a judicial officer is essentially speculative. It does not amount to sufficient justification for extending liability to restrict publications where the only possible ground of influence is influence on a judicial officer. Furthermore, this approach follows the more recent trend of the courts, referred to above, of finding that publications do not have the requisite tendency to prejudice proceedings where the basis for such prejudice is influence on judicial officers.

4.52 While the Commission takes the view that influence on a judicial officer ought not to be a ground of liability, it emphasises that a publisher should not be able to avoid liability for a publication concerning proceedings that may be heard by a jury but which, fortuitously, end in being heard by a judge alone, unless it is already known for certain that the proceedings are to be heard by a judge.

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66. Justice Greg James is of the view that this assumption may safely be made *except* in the case of publicity calculated actually or ostensibly to influence the judicial officer so that the proceedings are affected, for example, by a necessary disqualification. Such an instance might be regarded, however, as attracting liability because of "embarrassment": see para 4.53-4.57.

67. For examples of empirical research conducted into the effect of extraneous information on judicial officers, see S Landsman and R Rakos, "A Preliminary Inquiry into the Effect of Potentially Biasing Information on Judges and Jurors in Civil Litigation" (1994) 12 *Behavioral Sciences and the Law* 113.

4.53 The situation where liability may be imposed because of "embarrassment" to judicial officers needs to be distinguished from the discussion above concerning influence on a judicial officer. Cases which have suggested that liability may arise because of "embarrassment" have not been concerned with the risk of influence but with protecting the integrity of the justice system from the perception of improper pressure.

4.54 There is some uncertainty for the media in determining whether they may be liable for sub judice contempt for a publication that concerns proceedings heard by a judicial officer alone on the basis that the publication "embarrasses" the judicial officer. Despite concerns expressed in some cases about "embarrassing" judicial officers, it has been held by the High Court that "embarrassment" of a court was not sufficient ground for finding liability for sub judice contempt.[68] The same view has been taken by other courts.[69] However, in a recent decision of the Victorian Supreme Court, it was 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 judge sitting alone) would appear not to have been free from any extraneous influence.[70]

4.55 Although the common law relating to liability for sub judice contempt because of "embarrassment" to judicial officers is by no means clear, at this stage, with one area of exception, the Commission makes no proposal to modify the law. However, submissions on the issue are invited, specifically whether legislative change to the common law in this area is either necessary or appropriate.

68. *Victoria v Australian Building Construction Employees' & Builders Labourers' Federation* (1982) 152 CLR 25.
69. See *Attorney General (NSW) v Mundey* [1972] 2 NSWLR 887; *Attorney General (SA) v Nationwide News Pty Ltd* (1986) 43 SASR 374.
70. *R v The Herald & Weekly Times Ltd* [1999] VSC 432; *R v The Herald & Weekly Times Ltd (No 2)* [2000] VSC 35.

4.56 The exception referred to relates to the sentencing stage of criminal proceedings. In Chapter 7, in relation to determining an appropriate time to end restrictions on publishing material about proceedings, there is lengthy discussion on the influence of prejudicial material on judicial officers.[71] The tentative conclusion in that chapter is that sub judice contempt should not apply to publications beyond the conclusion of the trial or hearing at first instance, except in two circumstances: when a re-trial is ordered; and in relation to the sentencing process, although in a limited way.[72]

4.57 The latter exception addresses the concern that media comment about the sentencing of an offender may "embarrass" the sentencing judge, and may thereby amount to sub judice contempt.[73] The reasons for treating the sentencing process differently from other stages of legal proceedings are explained fully in Chapter 7 at paragraph 7.75 and relate to the strong discretionary element in determining a sentence. Proposal 14 suggests a limited application of sub judice liability to the sentencing process. It is proposed that legislation should prohibit publications expressing opinions as to the sentence to be passed on any specific convicted offender, whether at first instance or on appeal.

PUBLICATIONS PREJUDICING CIVIL PROCEEDINGS

4.58 Chapter 6, "Publications Relating to Civil Proceedings" examines whether the sub judice rule should apply at all to restrict the publication of information concerning civil proceedings. The discussion in that chapter is extensive and not repeated here. There is also discussion in Chapter 7[74] as to the time period during which sub judice liability should arise for publications relating to civil proceedings. Briefly, the Commission is of the tentative view that the rule should apply equally to prevent publications which prejudice civil proceedings as it does to prevent prejudice to

71. See para 7.75.
72. See para 7.72-7.77, Proposals 14, 15 and 16.
73. See para 7.75.
74. See para 7.40-7.48, 7.78-7.84.

criminal proceedings. There is one proviso to this: the restrictions imposed by the sub judice rule to prevent juries being influenced should not apply in cases where the jury is to be empanelled under s 7A of the *Defamation Act 1974* (NSW).[75] Proposal 3, below, reflects the Commission's position, explained in detail in Chapters 6 and 7.

PROPOSAL 3

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 (other than a jury empanelled under s 7A of the *Defamation Act 1974* (NSW)), 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.

PRESCRIBING THE TYPES OF PUBLICATIONS TO GIVE RISE TO LIABILITY

4.59 Previous reviews have recommended that the principle of liability for sub judice contempt be clarified by prescribing in legislation the types of statement that may or will give rise to liability.[76] A provision to this effect could operate either as an

75. See at para 7.47 for the reasons for this.

76. Ireland, Law Reform Commission, *Contempt of Court* (Consultation Paper, 1991) at 309-310; Ireland, Law Reform Commission, *Contempt of Court* (Report 47, 1994) at para 6.9; Victorian Law Reform

additional requirement for liability, in conjunction with the substantial risk requirement, or, alternatively, as the sole test for liability, that is, in substitution for the substantial risk test. Following the first approach, a publication would only amount to a contempt if it included a statement which came within one of the categories of publications listed in the legislation, and was also shown to have a substantial risk (or tendency) to prejudice proceedings. Following the second approach, a publication would amount to contempt if it contained a statement which came within one of the categories listed in the legislation, without regard to the degree of risk it posed to proceedings.[77]

Publications which typically give rise to liability

4.60 At present, the principle of liability for sub judice contempt requires no more than proof of a tendency to prejudice proceedings. It does not specify any particular type of publication which will automatically give rise to liability. Instead, the contents of each publication are assessed according to the facts of the particular case. Arguably, this makes it difficult for media organisations to know with any certainty whether information they wish to publish about a case will or will not be found to have a tendency to cause prejudice.

4.61 The law is not, however, completely unpredictable.[78] Based on findings in previous cases, it is possible to foresee, to some

Commission, *Comments on Australian Law Reform Commission Report on Contempt No 35* (unpublished paper, 1987) at 4.1; Australian Law Reform Commission, *Contempt* (Report 35, 1987) at para 291 (*Administration of Justice (Protection) Bill 1987* (Cth) cl 16).

77. This was the approach favoured by the Commonwealth government in its 1992 position paper: Australian Attorney General's Department, *The Law of Contempt* (Position Paper, 1992) at 4-5. See also M Chesterman, "Specific Safeguards Against Media Prejudice" (1985) 57 *Australian Quarterly* 354 especially at 358.

78. See *Packer v Peacock* (1912) 13 CLR 577 at 587 (Griffiths CJ).

extent at least, the types of publications that will and will not typically be found to have a tendency to prejudice proceedings.

4.62 For example, it is now well established that the media may publish the "bare facts" of a case without incurring liability for contempt. These are the "extrinsic ascertained" facts to which any eyewitness could bear testimony, and include facts such as the finding of a body and its condition, the place in which it was found, the person(s) by whom it was found, and the arrest of a person accused of committing a crime.[79] This is not an exhaustive list of "bare facts", but simply examples of the types of facts concerning a case which the media may publish without breaching the sub judice rule.

4.63 In addition, there are certain types of publications that are typically found to amount to a contempt. The media may be fairly certain that, if they publish material of this kind, there is at least a strong possibility that the publication will be found to have a tendency to cause prejudice, and so attract liability for contempt. For reasons which are explained in Chapter 2, the sorts of publications typically found to amount to contempt are those that relate to criminal trials in which a jury is, or may be, empanelled, as opposed to civil proceedings, or to any proceedings that are heard by a judge alone. The types of material typically considered to have the requisite tendency relate to:

(1) suggestions that the accused has previous criminal convictions, been previously charged for committing an offence and/or previously acquitted, or been involved in other criminal activity;[80]

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79 See *Packer v Peacock* (1912) 13 CLR 577 at 588 (Griffiths CJ); *Attorney General (NSW) v John Fairfax & Sons Ltd* [1980] 1 NSWLR 362 at 369-370.

80. See, for example, *Attorney General (NSW) v John Fairfax & Sons Ltd* (NSW, Court of Appeal, No 371/87, 21 April 1988, unreported); *Gisborne Herald Co Ltd v Solicitor-General* [1995] 3 NZLR 563.

(2) suggestions that the accused has confessed to committing the crime in question;[81]

(3) suggestions that the accused is guilty or innocent of the crime for which he or she is charged, or that the jury should convict or acquit the accused;[82]

(4) comments which engender sympathy or antipathy for the accused and/or which disparage the prosecution, or which make favourable or unfavourable references to the character or credibility of the accused[83] or a witness;[84] or

(5) a photograph of the accused, if, at the time of the publication, there was a likelihood that the identity of the offender would be an issue at trial (it should generally be assumed that identity will be an issue at the trial, even if an authority such as the police have suggested that it will not be).[85]

4.64 Chapter 2 at paragraphs 2.45-2.49 discusses the reasons why these types of media publicity carry particular risks of prejudice to a fair trial.

Advantages and disadvantages of prescribing categories of prejudicial statements

4.65 Arguably, the main advantage in prescribing the types of statement that will or may give rise to liability is that it provides greater certainty and clarity for the media. Liability for sub judice

81. *Attorney General (NSW) v John Fairfax & Sons Ltd* [1980] 1 NSWLR 362; *Registrar of the Court of Appeal v Willesee* (1985) 3 NSWLR 650; *Attorney General (NSW) v Dean* (1990) 20 NSWLR 650.
82. *Director of Public Prosecutions (Cth) v Wran* (1987) 7 NSWLR 616; *Attorney General (NSW) v Dean* (1990) 20 NSWLR 650.
83. *R v Truth Newspaper* (Vic, Supreme Court, No 4571/93, Phillips J, 16 December 1993, unreported).
84. See *Attorney General (NSW) v John Fairfax & Sons Ltd* (1985) 6 NSWLR 695 at 713 (McHugh JA).
85. *R v Pacini* [1956] VLR 544; *Attorney General (NSW) v Mirror Newspapers Ltd* [1962] NSWR 856; *R v Australian Broadcasting Corp* [1983] Tas R 161.

contempt would be more precisely defined, allowing the media to be certain of the types of publications which are at least at risk of being held in contempt.[86]

4.66 The degree of certainty to be achieved by prescribing categories would depend on the exact formulation of the test for liability. If liability were formulated in a way that required only that a publication come within the listed publications in order to attract liability, that is, with no additional requirement that there be a substantial risk of prejudice, then the media should be able to be absolutely certain about the limits of liability, and the types of publications which they could and could not publish without attracting prosecution. The only possible area of uncertainty in the application of this test would be in interpreting the categories to determine whether particular material was prohibited by the legislation. It would certainly be a more clear-cut test for liability than presently exists, and would appear far easier for the media to apply when faced with the daily decision whether to publish a story under pressing time constraints.

4.67 A significant disadvantage of following this approach is the restriction it imposes on freedom of discussion. There may be statements which fall within one or more of the prohibited categories, but which, in the circumstances of the particular case, do not pose a risk of prejudice to legal proceedings. It could therefore be argued that the restrictions imposed by a blanket prohibition are more than is necessary to preserve the proper administration of justice, and therefore represent an unjustifiable limitation on freedom of discussion.[87]

4.68 If liability were formulated in a way that required a publication to come within the categories listed in legislation, and also to have a substantial risk of prejudicing proceedings, then the media will not have absolute certainty as to the limits of liability. The requirement of a substantial risk would demand consideration

86. See Australian Law Reform Commission, *Contempt* (Report 35, 1987) at para 291.
87. This was the conclusion reached by the Australian Law Reform Commission: see Report 35, 1987 at para 317.

on a case by case basis as to the degree of possibility of prejudice.[88] However, the advantage of this approach is that it would not restrict the publication of information if there were not a substantial risk of prejudice to proceedings. Consequently, the media would have greater freedom to publish. Moreover, it may be argued that this approach would provide a clearer and more certain test for liability than currently exists, because the media would be certain of the parameters within which liability may arise.

4.69 A disadvantage of prescribing categories of publications, whether with or without an additional requirement to show substantial risk, is that it may prove an inflexible approach to imposing liability. There is always the danger that legislation will omit from the list a category of publication later found to have the potential to cause prejudice to proceedings. The result will be that the media will be free to publish a statement, even though it may cause prejudice to a case, and will escape liability.[89]

4.70 The Australian and the Irish Law Reform Commissions had two different approaches to resolving the problem of inflexibility. The ALRC recommended that legislation prescribe, as an exhaustive list, the categories of statements to give rise to liability for contempt. It recognised the danger of omitting a statement that would later prove to cause prejudice in a particular case, but considered that this was a problem best resolved by subsequent amendment to the legislative list, if this was thought to be necessary.[90] The Irish Law Reform Commission saw the advantage in listing in legislation the types of statements to give rise to liability, but took the view that it would be too inflexible to restrict

88. For this reason, the Federal government in 1994 took the view that this approach did not provide sufficient certainty for the media: see Australia, Attorney General's Department, *The Law of Contempt* (Position Paper, 1992) at 5.

89. This was a concern expressed by the NSW Court of Appeal in *Attorney General (NSW) John Fairfax & Sons Ltd* [1980] 1 NSWLR 362 at 367-368. See also *Packer v Peacock* (1912) 13 CLR 577 at 587 (Griffith CJ).

90. Australian Law Reform Commission, *Contempt* (Report 35, 1987) at para 291.

liability only to those statements. Instead, it recommended that legislation set out the types of statements that may give rise to liability as an illustrative, non-exhaustive list. That is, the list would serve only to provide guidance to the media as to the types of publications which would attract liability, but with the possibility that statements not included in the list could also attract liability if found by the courts to carry a substantial risk of prejudice to proceedings.[91]

4.71 Whether, in practice, there is any real danger of omitting a prejudicial statement from the list of prohibited material is a matter for debate. The Commission is not aware of any case in which contempt has been proven that has involved a publication that could not be described as falling within one of the categories listed in paragraph 4.63 above. The categories are fairly broad. For example, the prohibition against statements which engender antipathy or sympathy for the accused is broad enough to cover a wide range of statements, from a statement denouncing the accused as "hideous scum"[92] to a statement criticising the financial and emotional cost of a trial for the accused.[93]

The Commission's tentative view

4.72 The Commission can see some merit in following the approach of the Irish Law Reform Commission and including in

91. Ireland, Law Reform Commission, *Contempt of Court* (Consultation Paper, 1991) at 309-310; Ireland, Law Reform Commission, *Contempt of Court* (Report 47, 1994) at para 6.9. This was also the approach suggested by the Victorian Law Reform Commission: see Victoria, Law Reform Commission, *Comments on Australian Law Reform Commission Report on Contempt No 35* (unpublished paper, 1987) at para 4.1.
92. See *Attorney General (NSW) v Radio 2UE Sydney Pty Ltd* (NSW, Court of Appeal, No 40236/96, 16 October 1997, unreported) (liability), (NSW, Court of Appeal, No 40236/96, 11 March 1998, unreported) (penalty).
93. See *R v Truth Newspaper* (Victoria, Supreme Court, No 4571/93, Phillips J, 16 December 1993, unreported).

legislation, as an illustrative list only, the types of statements that, if published, may give rise to liability. A list of this kind would not be intended to be exhaustive. Statements not included within the list could still amount to sub judice contempt if they were found to create a substantial risk of prejudice to proceedings. At this stage, the Commission does not consider it desirable for legislation to prescribe exhaustively the types of statements that may give rise to liability. The obvious danger of that approach is that it may exclude from the list (and consequently from liability) statements that are later considered to create a substantial risk of prejudice. While it may be true that the case law has not revealed statements other than those listed in paragraph 4.63 as statements likely to constitute contempt, the Commission is hesitant, at this stage at least, to exclude the possibility of other statements attracting liability if they do not come within the terms of the legislative list.

4.73 The Commission is interested to receive submissions on Proposal 4 to include in legislation an illustrative list of prejudicial statements. In particular, comments on whether a list of this kind would serve a useful purpose in making the law of sub judice contempt more certain and clear are invited. As already noted, the common law already seems fairly clear as to the types of statements that will typically give rise to liability for sub judice contempt. To that extent, it is questionable whether the law is made any more certain by prescribing these statements in legislation, particularly if they are provided as an illustrative rather than exhaustive list. There is still an element of uncertainty for the media in so far as it is possible for statements not included in the list to constitute a contempt.

4.74 In the Commission's view, the main purpose to be served in including a list in legislation is to educate members of the media and to provide them with a quick reference point for examples of the types of statements they should avoid publishing. The Commission welcomes submissions on whether it is appropriate or necessary to adopt this approach to meet this purpose rather than, or in addition to, relying, for example, on training for those who work in the media.

4.75 The categories of statements included in Proposal 4 are the types of statements that typically give rise to liability at common law, as noted in paragraph 4.63 above. In Chapter 2, the reasons why these types of statements are generally considered to cause potential prejudice to criminal proceedings are discussed. For the same reasons, the Commission considers that they should be included within an illustrative list as statements that will typically give rise to liability.

PROPOSAL 4

Legislation should set out the following as an illustrative list of statements that may constitute sub judice contempt if they also comply with the requirements set out in Proposal 3:

- **A statement that suggests, or from which it could reasonably be inferred, that the accused has a previous criminal conviction, has been previously charged for committing an offence and/or previously acquitted, or been otherwise involved in other criminal activity;**
- **A statement that suggests, or from which it could reasonably be inferred, that the accused has confessed to committing the crime in question;**
- **A statement that suggests, or from which it could reasonably be inferred, that the accused is guilty or innocent of the crime for which he or she is charged, or that the jury should convict or acquit the accused;**
- **A statement that could reasonably be regarded to incite sympathy or antipathy for the accused and/or to disparage the prosecution, or to make favourable or unfavourable references to the character or credibility of the accused or of a witness;**

- **A photograph, sketch or other likeness of the accused, or a physical description of the accused.**
- **The legislation should make it clear that this list is not exhaustive and that a statement may amount to a contempt even though it does not fall within one of the categories listed above.**

ADMISSIBILITY AND UTILITY OF EXPERT EVIDENCE TO PROVE TENDENCY OR SUBSTANTIAL RISK

4.76 Until very recently, the courts have not relied on expert evidence, such as evidence from a statistician or psychologist, to assist them in determining whether a particular publication has the requisite tendency to prejudice proceedings. Indeed, to the Commission's knowledge, the question of the admissibility of such expert evidence was not raised until 1999, at least in New South Wales. Courts in Queensland and New Zealand have noted briefly that the question whether a publication has a tendency to prejudice a jury in a particular trial is a matter of impression for the judge hearing the contempt prosecution, and the judge may draw on his or her own experience as both counsel and judicial officer gained in the conduct of trials over years.[94] These comments certainly seem to be in line with the general approach taken by the courts in New South Wales of assessing the tendency of a publication based on impression, and judicial inferences from "common experience", rather than with reference to any expert evidence.

4.77 On a separate point, the use of expert evidence to test whether a jury has been already tainted by publicity, as distinct from the tendency of a publication to prejudice, has been raised in the courts. In two cases, the defence lawyers, seeking leave to challenge individual jurors for cause or to obtain a temporary or permanent stay of proceedings, have attempted to introduce both

94. See *R v Sun Newspapers Pty Ltd* (1992) 58 A Crim R 281 at 285; *Solicitor-General v Broadcasting Corporation of New Zealand* [1987] 2 NZLR 100 at 108.

empirical and expert evidence of jurors having been prejudiced by publicity.[95] In each case, this evidence was rejected on methodological grounds by the trial judge, whose decision on this point was upheld on appeal.

95. See *Bush v The Queen* (1993) 43 FCR 549; and *Connell v The Queen (No 6)* (1994) 12 WAR 133.

4.78 The general approach of the courts to assessing tendency contrasts with their approach to reviewing appeals from conviction, where the appeal is based on an argument that the jury was biased by media publicity. In the latter context, some judges have arguably appeared more willing to require, or at least consider, some kind of evidentiary basis on which to find that a jury was likely to have been biased. In one case,[96] the majority of the High Court refused to overturn a conviction on this basis, partly on the ground that the argument of bias was mere speculation, with no evidence to support it.

4.79 It appears that the past approach of the courts towards assessing tendency may be undergoing some change. In February 1999, a contempt prosecution was heard in the New South Wales Supreme Court, alleging contempt by publication in a newspaper of material relating to a man accused of a criminal offence.[97] Expert witnesses were called by the defendant to give evidence that it was statistically unlikely that the publication in question would have come to the attention of, and been recalled by, jurors hearing the accused's trial. The expert witnesses both had qualifications in psychology, and one expert's evidence was based largely on a survey of the effect of the publication on a selected group of readers.

4.80 While the evidence of the expert witnesses was held to be admissible, the reliability of that evidence was challenged. The court ultimately found that the expert evidence was of limited value in assessing the tendency of the publication to prejudice the administration of justice. Justice Barr considered that the assumptions on which the expert opinions were based, and the methodology used to reach those opinions, were not sufficiently close to the realities of a "real-life" jury hearing the trial to be particularly useful in determining whether the publication had the requisite tendency. In relation to the survey in particular, His Honour noted the impossibility of replicating trial conditions in a

96. See *R v Glennon* (1992) 173 CLR 592. In this case, survey evidence was in fact tendered, but was held to be inconclusive.

97. *Attorney General (NSW) v John Fairfax Publications Pty Ltd* [1999] NSWSC 318.

survey and the consequent difficulty in accepting survey results as a reliable indicator of what might happen at a trial. As a result, the judge reached the conclusion that the limitations on the survey in this case were so great, and the differences between the conditions of the survey and those which would apply at trial so marked, that the survey results could not form the basis for any reasonable conclusion that there was a small likelihood of the material prejudicing the administration of justice.[98]

4.81 The Commission can see no reason in terms of general principle why expert opinion should not be admissible on the issue of the substantial risk of a publication to cause prejudice. Certainly, the provisions of the *Evidence Act 1995* (NSW) relating to the admissibility of expert evidence appear to be sufficiently broad to admit expert evidence on this issue, provided, of course, the expert witness is considered qualified to give such evidence.[99]

FACTORS RELEVANT TO DETERMINING LIABILITY

4.82 As noted in paragraph 4.3 above, whether a publication has a tendency (or substantial risk) to prejudice proceedings is an issue which must be determined objectively,[100] by reference to the nature and circumstances of the publication as they appear at the time of publication.[101] At present, the courts may take into account a number of factors as relevant to determining tendency, such as the delay between the time of publication and the time of commencement of the relevant proceedings, the medium of publication, and the public status of the person making the statement.

98. See *Attorney General (NSW) v John Fairfax Publications Pty Ltd* [1999] NSWSC 318 at para 95, 102.
99. See *Evidence Act 1995* (NSW) Part 3.3, especially s 79, 80.
100. *Attorney General (NSW) v John Fairfax & Sons Ltd* [1980] 1 NSWLR 362 at 368; *Attorney General (NSW) v Television and Telecasters (Sydney) Pty Ltd* (NSW, Supreme Court, No 11752/97, James J, 10 September 1998, unreported) at 12.
101. *R v Australian Broadcasting Corp* [1983] Tas R 161.

4.83 The courts have not always been consistent or clear in their views of the extent to which some of the possible factors should be taken into account. The relevant ones are:

- the likelihood of the publication which has given rise to the proceedings coming to the attention of participants in proceedings;
- evidence that a trial has or has not been discontinued as a result of the publication;
- evidence of pre-existing publicity on the same subject matter as the publication in question;
- the availability of remedial measures as reducing the tendency of the publication to prejudice proceedings.

4.84 The Commission discusses below the attitude of the courts, the extent to which these factors should be considered relevant, and whether it is desirable to clarify in legislation the effect of these factors on the question of liability for sub judice contempt.

Likelihood of the publication coming to the attention of participants in the proceedings

4.85 One of the factors which the court must consider is the likelihood of the publication coming to the attention of participants, or potential participants, in the legal proceedings to which the publication relates.[102] In relation to a publication before the proceedings have commenced, the courts have on occasion been willing to find that no liability for contempt arises, on the basis that there was no real likelihood of the publication coming to the attention of potential participants. For example, in one case involving a publication in a newspaper, the court found that the newspaper had a relatively small circulation in the area from

102. *Attorney General v MGN Ltd* [1997] 1 All ER 456 at 460 (Schiemann LJ); *Attorney General (NSW) v Radio 2UE Sydney Pty Ltd* (NSW, Court of Appeal, No 40236/96, 16 October 1997, unreported) at 7 (Powell JA).

which jurors for the relevant trial would be drawn, making it "statistically unlikely" that a potential juror in the trial would read the offending article. This was one of several factors which was found to reduce the tendency to prejudice the pending proceedings to the extent that the article was found not to constitute a contempt.[103]

4.86 The attitude of the courts is less clear in respect of publications after the relevant proceedings have commenced. It has been held, in relation to a publication of this kind, that liability for sub judice contempt does not require proof that the publication actually came to the attention of participants in the trial. On the contrary, all that is required is a real, not a fanciful, possibility that the publication came to their attention.[104] However, the courts have appeared generally reluctant to inquire into, or attach much weight to, the likelihood of the publication coming to participants' attention as a factor which may reduce the tendency of the publication to cause prejudice.

4.87 In several proceedings for prosecution for contempt, the court has been provided with evidence that the jury did not, or was unlikely to have, come into contact with the offending publication, yet it has nevertheless found the publisher guilty of sub judice contempt on the basis that there was a tendency to prejudice the proceedings.[105] In one case, for example, the trial judge had questioned the jury as to whether they had read a newspaper

103. *Attorney General (NSW) v John Fairfax & Sons Ltd* (1985) 6 NSWLR 695 at 713 (McHugh JA), at 697 (Glass JA). See also *Attorney General v MGN Ltd* [1997] 1 All ER 456 at 465 (Schiemann LJ).

104. *Attorney General (NSW) v Radio 2UE Sydney Pty Ltd* (NSW, Court of Appeal, No 40236/96, 16 October 1997, unreported) at 7 (Powell JA).

105. See *Registrar of the Court of Appeal v John Fairfax Group Pty Ltd* (NSW, Court of Appeal, No 40478/92, 21 April 1993, unreported); *R v David Syme & Co Ltd* [1982] VR 173; *R v Pearce* (1992) 7 WAR 395; *Attorney General (NSW) v Radio 2UE Sydney Pty Ltd* (NSW, Court of Appeal, No 40236/96, 16 October 1997, unreported). See also M 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.

article relating to the trial. The judge had been satisfied with the accuracy of the jury's response when they replied that they had not. While acknowledging this, the Court of Appeal, in finding the publisher liable for contempt, concluded that the article did have a tendency to prejudice the proceedings, even though it seemed highly likely that the jury had not in fact read it.[106] In another case,[107] in Victoria, it was held that the fact that there was no evidence that the publication came to the jury's attention was irrelevant to the question of liability for contempt. The judge hearing the contempt charge was satisfied that there was a real possibility of the publication coming to a juror's attention, based solely on the fact that the publication in question appeared in a daily newspaper distributed in Victoria. It is relevant to note in this context that the prosecution in sub judice contempt proceedings bears the burden of proving the necessary tendency beyond a reasonable doubt.

4.88 This apparent inconsistency may be justified on the basis that liability for sub judice contempt is concerned with the possibility of prejudice rather than actual prejudice. The sub judice rule aims to prevent damage to legal proceedings from occurring by deterring the media from publishing material which may cause damage, rather than punishing them for damage which has already occurred. To this extent, analogies have been drawn in the

106. *Registrar of the Court of Appeal v John Fairfax Group Pty Ltd* (NSW, Court of Appeal, No 40478/92, 21 April 1993, unreported). See *R v Meissner* (NSW, Court of Criminal Appeal, No 60170/92, 30 October 1992, unreported) for an account of the trial judge's questioning of the jury. See also *Registrar, Supreme Court of South Australia v Advertiser Newspaper Ltd* (SA, Supreme Court, No 2418/95, Bollen J, 17 May 1996, unreported), in which it was clear that the jury could not have read the offending publication because they had been sequestered, but the publisher was nevertheless liable for contempt. In this case, however, the publisher pleaded guilty, which meant that the court was not required to consider the relevance of the fact that the jury could not have read the publication to the issue of liability.

107. See *R v Nationwide News Pty Ltd* (Victoria, Supreme Court, No 6129/97, Gillard J, 22 December 1997, unreported) at 22.

past between the law on sub judice contempt and laws against careless driving,[108] and industrial safety laws.[109] The aim of both is to regulate conduct in a way which requires appropriate precautions to be exercised to prevent damage or injury, and do not require proof of actual damage in order for liability to arise. Arguably, it would be undesirable for liability for sub judice contempt to rely on proof that the offending publication in fact came to jurors' attention, with the result that a publisher of highly prejudicial material may fortuitously escape liability because the publication happened not to come into contact with participants in the relevant proceedings.

4.89 While it is true that liability for sub judice contempt focuses on tendency rather than on actual prejudice, it has been suggested that there is still scope for the court to consider the likelihood of participants actually coming into contact with the publication, and that, indeed, the qualification that the publication have a tendency "as a matter of practical reality" to cause prejudice requires the court to consider the objective likelihood, determined as at the time of publication, of participants encountering the publication in question.[110] Indeed, a judge in a Western Australian case[111] has ruled that, to find liability for sub judice contempt, the court must be satisfied beyond a reasonable doubt that the publication might be communicated to members of the jury, as a matter of practical reality, although it is not necessary to prove a strong likelihood of this happening.

4.90 The Commission considers that it may be useful to include in the basic test for liability a separate requirement to consider the likelihood of contact by jurors, or witnesses, with the publication

108. See *Registrar of the Court of Appeal v John Fairfax Group Pty Ltd* (NSW, Court of Appeal, No 40478/92, 21 April 1993, unreported) at 3 (Mahoney JA); Australian Law Reform Commission, *Contempt* (Report 35, 1987) at para 259, 293.
109. Australian Law Reform Commission, *Contempt* (Report 35, 1987) at para 259.
110. M Chesterman, "Media Prejudice During a Criminal Jury Trial: Stop the Trial, Fine the Media, or Why not Both".
111. *R v Pearce* (1992) 7 WAR 395 at 425-426 (Malcolm CJ).

in question. This does not mean that liability for sub judice contempt would depend on proof of actual contact, but simply proof of a "substantial risk" of contact. In this way, the courts would be expressly directed to give consideration to the issue of risk of contact as separate from the issue of risk of influence. The existing test, framed either in terms of "tendency" or in terms of "substantial risk", does not separate these two issues, and there is therefore the danger that the courts may blur the notions of risk of contact and risk of prejudice when determining liability. According to Proposal 3, the court would be required to consider, first, whether there was a substantial risk of contact with the publication in question and, if so, whether there was a substantial risk of prejudice arising from contact with that publication.

4.91 Following this approach, a separate requirement for the court to consider the risk of recall, that is, the risk that jurors, or witnesses, will recall the publication is included in Proposal 3. This requirement will be relevant in respect of publications that occur before the commencement of the legal proceedings in question. While the notion of risk of recall may be presently subsumed in the general notion of risk of prejudice to proceedings, Proposal 3 would ensure that the courts give separate consideration to the degree of risk of recall as opposed to the risk that the publication, if recalled, would influence the jury or witness. Proposal 3 does not limit the requirement to consider the risk of recall to publications that occur before the commencement of the relevant legal proceedings. However, for publications that occur after the commencement of proceedings, it will be usually be self-evident that there is a substantial risk of recall.

Relevance of the trial being aborted

4.92 If a trial judge considers that a publication concerning the trial is so prejudicial as to make the trial unfair, he or she may discharge the jury. The jury should be discharged if, in all the circumstances, this is necessary in the interests of ensuring a fair

trial.[112] Discharging the jury means that the trial must stop, or be aborted, and a new trial, with a new jury, will usually be fixed to commence on some later date.

4.93 The fact that a trial has been aborted because of a publication is not considered by the courts as determinative of guilt for sub judice contempt, although it is considered relevant to the penalty to be imposed following a contempt conviction.[113] By the same token, the fact that a jury is not discharged, despite the publication of material relating to the trial, does not mean that the publisher will escape liability for contempt. This is consistent with the principle noted above, that liability for sub judice contempt does not rely on proof of actual prejudice and is, in the Commission's view the proper approach. To allow the fact that a jury has, or has not, been discharged to be *determinative* of the question whether the publication amounts to a contempt would be contrary to the primary concern of contempt law to prevent damage rather than require proof of actual prejudice before imposing liability. Moreover, different considerations will often be taken into account in deciding whether to abort a trial as opposed to whether a publication is contemptuous.

4.94 Although the Commission proposes that the fact that a jury has or has not been discharged should not be determinative of liability for contempt, the questions arise nonetheless whether evidence of this fact should be admissible at all in the contempt proceedings, and, if so, what weight that evidence should carry.

4.95 It was recently held in New South Wales that evidence that a trial had been aborted as a result of a publication was not relevant and was inadmissible on the issue of whether a contempt had been

112. See *R v George* (1987) 9 NSWLR 527; *R v Murdoch* (1987) 37 A Crim R 118; *R v Glennon* (1992) 173 CLR 592.

113. See *Registrar of the Court of Appeal v Willesee* (1985) 3 NSWLR 650; *R v Sun Newspapers Pty Ltd* (1992) 58 A Crim R 281; *Attorney General (NSW) v Television and Telecasters (Sydney) Pty Ltd* (New South Wales, Supreme Court, No 11752/97, James J, 10 September 1998, unreported); *R v Day and Thomson* [1985] VR 261.

committed.[114] It was found that, since the tendency of the publication must be determined objectively, by reference to the nature and circumstances of the publication, the actual effect of the publication on proceedings was irrelevant. One commentator has suggested that this ruling should not be interpreted as a statement of a general rule regarding the admissibility of evidence of an aborted trial, but rather a conclusion based on the particular facts of that case.[115]

4.96 Comments in a number of Australian cases suggest that evidence of an aborted trial *is* relevant to the question of liability for contempt, though not determinative of it.[116] It has been suggested that, at the least, the fact that a trial has been aborted should be considered relevant to determining that the tendency of the publication to interfere with the course of justice was not fanciful.[117] In one case, it was noted:

> that the [television] programme was likely and had a tendency to interfere with the administration of justice … is

114. *Attorney General (NSW) v Television and Telecasters (Sydney) Pty Ltd* (NSW, Supreme Court, No 11752/97, James J, 10 September 1998, unreported). See also *Attorney General (NSW) v John Fairfax & Sons Ltd* (NSW, Court of Appeal, No 371/87, 21 April 1988, unreported) at 23; *R v Barber* (WA, Supreme Court, Full Court, No 2330/90, 22 October 1990, unreported); *Attorney General (NSW) v John Fairfax & Sons Ltd* [1980] 1 NSWLR 362 at 368; *Director of Public Prosecutions (Cth) v United Telecasters Sydney Ltd (in liquidation)* (1992) 7 BR 364 at 370 (Kirby P), at 379 (Sheller JA). But see *Registrar of the Court of Appeal v Willesee* (1985) 3 NSWLR 650; *Attorney General v Birmingham Post and Mail Ltd* [1998] 4 All ER 49 at 57 (Simon Brown LJ).
115. M Chesterman, "Media Prejudice During a Criminal Jury Trial: Stop the Trial, Fine the Media, or Why not Both?" at 80.
116. See *Registrar of the Court of Appeal v Willesee* (1985) 3 NSWLR 650 at 663 (Hope JA); *R v Day* [1985] VR 261 at 264 (Gobbo J). But see the consideration of *R v Day* by James J in *Attorney General (NSW) v Television and Telecasters (Sydney) Pty Ltd* (NSW, Supreme Court, No 11752/97, James J, 10 September 1998, unreported) at 9-10.
117. See *R v Day* [1985] VR 261 at 264 (Gobbo J).

> illustrated, although of course not proved, by the circumstance that it led to the discharge … of the jury …[118]

4.97 In another recent case in New South Wales,[119] evidence that the trial judge had refused to stay a criminal trial because of a publication in a newspaper appears to have been admitted in proceedings against the newspaper for sub judice contempt. However, the judge hearing the contempt charge found that the refusal by the trial judge to stay the trial was not binding on the decision in the contempt proceedings as to whether the publication had the requisite tendency to prejudice proceedings. The trial judge had noted that it would be highly unlikely that any juror or prospective juror would link the newspaper publication with the accused. Nevertheless, the judge hearing the contempt charge held that there was nothing in the trial judge's decision that bound the court in the contempt proceedings to entertain a reasonable doubt about the requisite tendency of the publication.

4.98 In England, it was recently held that the fact that a trial is discontinued and the jury discharged is not determinative of liability for contempt, but is a "telling pointer" on a prosecution for contempt.[120] On the other hand, in Canada, the Court of Appeal of British Columbia has noted that there may be many reasons why a publication is found to be potentially so prejudicial as to amount to a contempt, while at the same time the trial to which it relates is allowed to continue.[121] For example, issues such as the cost of aborting a trial, and the strain on witnesses, jurors, victims, and the accused of ordering a new trial, may weigh in favour of continuing the trial, despite the media publicity.

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118. *Registrar of the Court of Appeal v Willesee* (1985) 3 NSWLR 650 at 663 (Hope JA). In that case, although the publication had the requisite tendency, the defendant was found not to be liable for contempt, on the basis that the publication was in the public interest.
119. *Attorney General (NSW) v John Fairfax Publications Pty Ltd* [1999] NSWSC 318.
120. See *Attorney General v Birmingham Post and Mail Ltd* [1998] 4 All ER 49 at 59 (Simon Brown LJ).
121. See *R v CHBC Television* (British Columbia, Court of Appeal, No 24128, 8 February 1999, unreported) at 75 (Esson JA).

4.99 The question whether to discharge a jury is clearly different from the question whether a publication amounts to a contempt, and different considerations may concern the court in deciding each question.[122] In deciding whether to discharge a jury following the publication of material, a trial judge must assess the effect of the publication, taking into account the nature and circumstances of the trial.[123] A publication, on its own, may not be regarded as creating a high risk of prejudice to a trial. However, when viewed in the light of other circumstances which have caused concern about the fairness of the trial, the cumulative effect of the publication and those other circumstances may be considered sufficient to warrant discharging the jury. In proceedings for contempt, however, the same publication may not be considered to carry a sufficiently substantial risk of prejudice on its own as to amount to a contempt, since the court in those proceedings will not have regard to the other prejudicial factors which contributed to the trial judge's decision to discharge the jury.

4.100 Although the court in contempt proceedings would not have regard to other factors that led to a jury being discharged, it can be argued that the court can consider the actual circumstances surrounding the publication, including any finding by the trial judge of the effect of the publication on the trial. This is because liability for contempt presently requires consideration of whether there is a tendency to prejudice *as a matter of practical reality*, or, if the alternative formulation is adopted, whether there is a substantial risk of prejudice. In some cases, it may appear illogical that the same publication is deemed to be sufficiently prejudicial to require the discharge of the jury, but is then considered not to have a tendency to prejudice proceedings. Conversely, it may be a matter of concern if a jury's verdict of guilty is allowed to stand, despite a finding that a publication was contemptuous because it had a tendency to prejudice the proceedings in which that verdict was handed down.

122. See *Director of Public Prosecutions (Cth) v United Telecasters Sydney Ltd (in liquidation)* (1992) 7 BR 364 at 370 (Kirby P).
123. *R v George* (1987) 9 NSWLR 527 at 533 (Street CJ).

4.101 However, it is often difficult to identify the precise reasons for aborting a trial, and on that basis it may be considered unfair to take into account evidence that a trial has been aborted in determining liability for contempt. A party in criminal proceedings may have particular forensic reasons for bringing an application to the trial judge to discharge the jury. The opposing party may similarly have its own forensic reasons for not opposing that application. Moreover, in deciding whether or not to discharge the jury because of a publication, the trial judge will not have taken into account any arguments of the publisher as to the publication's potential to cause prejudice. In response, it could be said that these are all matters which the court in the contempt proceedings may take into account in determining the weight to attach to evidence of the trial judge's decision, and are not reasons in themselves to impose a blanket prohibition on the admissibility of such evidence.

4.102 A further difficulty concerning the relevance of the discharge of a jury to the contempt proceedings arises because the time at which the potentially prejudicial effect of a publication is assessed may differ when determining liability for contempt from when deciding whether to discharge the jury. The tendency to cause prejudice for the purpose of contempt is assessed as at the time of publication. The decision whether to discharge a jury may take into account any subsequent matters which arose after publication which increase or lessen the risk of prejudice to the trial. For example, a radio program may be broadcast at the time when the jury is sitting in court, following which they are sequestered for the night.[124] Subsequently, the trial judge may decide that there was insufficient risk of prejudice to the trial from the radio broadcast, taking into account the sequestering of the jury, to warrant aborting the trial. On the other hand, when determining the possibility for the program to cause prejudice at the time of broadcast, a court may find that the program was in breach of the sub judice rule.

124. Although this rarely happens.

4.103 It may be thought appropriate that the degree of prejudice (or threshold of risk) required for liability for contempt should be less than that required to discharge a jury in a criminal trial.[125] As noted in paragraph 4.16, at present, the courts in contempt prosecutions appear to require no more than that the tendency to prejudice proceedings was not remote or fanciful, but was "real and definite". Arguably, the risk of prejudice which is needed to warrant discharging a jury is greater, requiring the trial judge to be satisfied that a discharge is necessary in order to protect the fairness of the trial. If this is correct, then it could be argued that where a trial is in fact aborted because of a publication, there is a stronger claim that the publication amounted to contempt, since the higher threshold of risk has been deemed satisfied (taking into account, of course, the other considerations which may have influenced the decision to discharge).[126] The argument which flows from this is that evidence that a jury has been discharged ought, therefore, to be relevant in determining liability for contempt.

4.104 On balance, the Commission is inclined towards the view that evidence of the discharge of a jury should be treated as relevant to the issue of liability for contempt and the appropriate penalty. However, although being able to rely on the fact of discharge of the jury, the prosecution would still need to prove

125. See *Attorney General v Birmingham Post and Mail Ltd* [1998] 4 All ER 49 at 53 and 57-58 (Simon Brown LJ), at 61-62 (Thomas J).

126. An English judge has commented that it would be difficult to envisage a publication which has concerned a trial judge sufficiently to discharge the jury and yet is not properly to be regarded as a contempt: *Attorney General v Birmingham Post and Mail Ltd* [1998] 4 All ER 49 at 59 (Simon Brown LJ). See also *Attorney General v Morgan* [1998] EMLR 294. In that case, a decision of the Queen's Bench Division, counsel for the defendants successfully applied for a stay of proceedings when their case came to trial on the basis of prejudice caused by a newspaper article. The article had described the alleged conspiracy with which the defendant had been charged as established fact and referred to the defendants' criminal records, thereby creating a substantial risk that subsequent criminal proceedings would be seriously prejudiced.

that the publication creates a substantial risk of prejudice in order to succeed in the contempt proceedings. The findings relating to the discharge of the jury in the discontinued criminal proceedings could not be admissible to prove the sub judice contempt. Pursuant to the *Evidence Act 1995* (NSW), evidence of reasons for judicial decisions is inadmissible in other proceedings, except by use of published reasons.[127]

PROPOSAL 5

The fact that a trial judge has decided to dismiss, or has decided not to dismiss, a jury in a criminal trial following the publication of material concerning that trial should be admissible in the contempt proceedings as relevant to the issue of liability for sub judice contempt in respect of that publication. It should not, however, be determinative of the question of liability.

Relevance of pre-existing publicity

4.105 Another factor which may affect a publication's tendency to cause prejudice is where material on the same topic has been published previously, through another source. Because of the pre-existing publicity, the current publication may be considered to be "old news". In one case, it was held that the tendency of a publication to prejudice a trial was lessened because, among other things, its prejudicial information had already been made known to the public through previous media coverage.[128] It appears, however, that a previous publication can only be relied on as a factor lessening the tendency of a current publication if the

127. *Evidence Act 1995* (NSW) s 129.
128. *Attorney General (NSW) v John Fairfax & Sons Ltd* (1985) 6 NSWLR 695. See also *Attorney General v MGN Ltd* [1997] 1 All ER 456 at 463 (Schiemann LJ).

previous publication did not itself constitute a contempt. As a matter of policy, it seems, the courts will not find a publication has less of a tendency to prejudice a trial simply because there have been previous publications which have also breached the sub judice rule.[129]

4.106 The ALRC took the view that a publisher should not be able to rely on any pre-existing publicity as a factor reducing the tendency of its own publication to cause prejudice, whether it be previous publicity which was or was not itself a contempt.[130] It was said to be flawed reasoning that, because there had been pre-existing publicity, the prejudicial effect of the present publication would therefore be lessened. In fact, it has been held that, although in most cases, the influence of a later publication would become merged in the effect of previous publications, a particular publication of information may be "so dramatic as to cause the effect of that publication to persevere whereas the effect of the previous publication would otherwise have been erased by the passage of time".[131] Moreover, it was considered that it would be wrong for the law to withdraw its protection from accused persons who have been subjected to widespread adverse publicity, simply on the assumption that further adverse publicity would not make any difference to the already hostile public feeling generated by previous publicity. The law should do as much as possible to protect the fair trial of such people through appropriate restrictions imposed by the sub judice rule.

4.107 At this stage, the Commission is inclined to agree with the conclusion reached by the ALRC. A publisher should not be able to rely on the fact that there is pre-existing publicity as a basis for arguing that its publication did not have the requisite risk, or tendency. As a matter of policy, the Commission agrees that the law should not withdraw its protection from accused persons who,

129. *Director of Public Prosecutions (Cth) v Wran* (1986) 7 NSWLR 616 at 628-629.
130. Australian Law Reform Commission, *Contempt* (Report 35, 1987) at para 318-319.
131. *Attorney General (NSW) v TCN Channel Nine* (1990) 5 BR 10 at 20 (Hunt J).

for whatever reason, attract a large amount of media publicity. And as a matter of logic, the Commission agrees that the prejudicial effect of a publication is not necessarily lessened because there is pre-existing publicity but, on the contrary, may serve to reinforce in the public's minds facts and suppositions that would otherwise have been forgotten.

4.108 The common law is arguably unclear in this area, seeming to make a distinction between pre-existing publicity which is itself a contempt and that which is not. If one accepts that evidence of pre-existing publicity should not be relied on as a factor lessening the risk of a publication to cause prejudice, it would be appropriate to introduce legislation to remove ambiguities in the common law.

PROPOSAL 6

Legislation should provide that a publication is not incapable of constituting a contempt by reason only that a previous publication has already given rise to a substantial risk of prejudice to the fairness of legal proceedings.

Relevance of remedial measures to liability for contempt

4.109 It is arguably unclear whether the availability of remedial measures is or should be considered relevant to the question of whether a publication has a tendency, or substantial risk, of prejudice to proceedings. The term "remedial measures" refers to the measures available to minimise the possible prejudicial effect of media publicity on legal proceedings, particularly criminal trials. Remedial measures which are available in New South Wales include the power of the court to order an adjournment of proceedings or a change of venue, or to discharge the jury, the power of the prosecutor or defence to challenge for cause (that is, object to the selection of a person as a juror on the basis that that person is biased or partial), and directions by the trial judge to the

jury, during the course of the trial or in summing up, to disregard publicity about the case.

4.110 The issue for consideration in the context of sub judice contempt is whether the media should be able to rely on the availability of any or all of these remedial measures to excuse them from liability for sub judice contempt, on the basis that these measures lessen the tendency, or substantial risk, of a publication to prejudice the proceedings in question. It seems that, in Australia, the courts at present do not generally recognise the availability of remedial measures as relevant to the question of liability for sub judice contempt. At the most, it has been found in some recent cases that judicial warnings to the jury can be effective in overcoming or minimising the effect of media publicity, and that fact can be given weight in determining the tendency of a publication to prejudice proceedings.[132] However, other remedial measures, which place a greater demand on the court's and parties' resources, such as a change of venue, have been rejected as a basis for finding that the tendency of a publication to cause prejudice is lessened.[133]

4.111 As noted in Chapter 2, the approach in the United States is to rely heavily on alternative remedies, such as cross-examining jurors in a "voir dire", as a means of overcoming the risk of prejudice to the administration of justice, instead of prohibiting the publication of information by the media. In Canada, the

132. See *Waterhouse v Australian Broadcasting Corp* (1986) 6 NSWLR 716 at 736 (Mahoney JA); *Attorney General (NSW) v TCN Channel Nine Pty Ltd* (1990) 20 NSWLR 368 at 383. See also *Attorney General v News Group Newspapers Ltd* [1987] 1 QB 1 at 16 (Donaldson MR); *Ex parte Telegraph Plc* [1993] 2 All ER 971 at 978 (Taylor CJ); *Attorney General v MGN Ltd* [1997] 1 All ER 456 at 461.

133. See *Attorney General (NSW) v Macquarie Publications Pty Ltd* (1988) 40 A Crim R 405 at 410-411 (Kirby ACJ) (although it is worth noting that, in that case, the Court was concerned with factors affecting the penalty for contempt, rather than the question of liability, since the newspaper publisher had admitted the contempt alleged). See also, for New Zealand authority on this point, *Gisborne Herald Co Ltd v Solicitor-General* [1995] 3 NZLR 563 at 573-574 (Richardson J).

Supreme Court has recently considered the relevance of remedial measures to the question of whether to prohibit media publications. In the case of *Dagenais v Canadian Broadcasting Corp*,[134] the court was asked to decide whether to impose a publication ban before the commencement of a criminal trial, on the basis that certain media publications may cause a real and substantial risk to the fairness of the trial. The court decided not to impose the ban, concluding that it was unnecessary in light of the alternative measures which were available to minimise any risk of prejudice, such as changing venues, adjourning the trial, or sequestering the jurors.[135] Of course, the Canadian courts, unlike the Australian courts, must take into account the impact of the Canadian *Charter of Rights and Freedoms* when dealing with matters concerning freedom of discussion and the right to a fair trial.

4.112 In England, the Queen's Bench Division of the High Court recently considered the relevance of remedial measures to the issue of the substantial risk of a publication to cause serious prejudice.[136] The court discussed whether a substantial risk of serious prejudice could be said to arise if there is a substantial risk that the trial judge, acting reasonably, would resort to a remedial measure such as the stay of proceedings or discharge of the jury. In the end, the court appeared not to favour this approach, which based liability for sub judice contempt on whether or not there was a substantial risk of resort to a remedial measure. It was noted that one disadvantage of linking liability with resort to remedial measures in this way was that it would require the media to second-guess the responses of trial judges. As well, it may require the media to be represented before the trial judge on the question of whether the prejudice caused by the publication was sufficient

134. (1994) 120 DLR (4th) 12.
135. See *Dagenais v Canadian Broadcasting Corp* (1994) 120 DLR (4th) 12 at 38 (Lamer CJ) (in the majority). The New Zealand Court of Appeal took the view that the same reasoning would apply: see *Gisborne Herald Co Ltd v Solicitor-General* [1995] 3 NZLR 563 at 573 (Richardson J).
136. See *Attorney General v Birmingham Post and Mail Ltd* [1998] 4 All ER 49, especially at 53-59 (Simon Brown LJ), at 61 (Thomas J).

to resort to the remedial measure in question, such as a stay of proceedings.[137]

4.113 A proposal for the courts in New South Wales to be required to give greater weight to the availability of remedial measures in determining liability for sub judice contempt would have the potential advantage of minimising the limitations on freedom of discussion imposed by the law of contempt. However, other considerations must be weighed against that potential advantage. To require the courts to take remedial measures into account in determining tendency, or substantial risk, would be to require greater reliance on these measures as a means of overcoming the possibility of prejudice from media publicity. Greater reliance on most of these measures would be likely to involve greater expense to both the State and the accused, as well as greater delays in finalising criminal trials. In addition, there is the possibility of inconvenience, emotional upset, and hardship to the parties, witnesses, and even jurors. As noted in Chapter 2, the Commission takes the view, at this stage at least, that the availability of these remedial measures does not justify the abolition of the law of sub judice contempt. For the same reasons, the Commission does not consider that they should be factors to be given great weight in determining the tendency, or substantial risk, of a publication to cause prejudice. The exception is the availability of judicial warnings to juries to ignore certain media publicity, since this is an expedient means of reducing the possibility of prejudice, without the same potential for expense, inconvenience and hardship which arises from the other remedial measures. The courts in New South Wales already appear prepared to take judicial warnings into account in assessing liability for sub judice contempt. Consequently, the Commission does not at this stage consider it necessary to propose any legislative reform in this regard.

137. See *Attorney General v Birmingham Post and Mail Ltd* [1998] 4 All ER 49 at 53 (Simon Brown LJ).

5. Fault

- The relevance of fault to liability
- Criticisms of the current approach
- Justifications for the current approach
- Alternative approaches
- Fault and principles of responsibility
- Where actual intent is proven

THE RELEVANCE OF FAULT TO LIABILITY

5.1 In Australia, it is not necessary to prove that a person or organisation actually intended to interfere with the administration of justice, in order to establish liability for sub judice contempt.[1] All that is needed to establish liability is an intention to publish the material in question,[2] and proof that the publication had a tendency to interfere with the administration of justice.

5.2 Because intention to interfere is not a requirement of liability, it seems that a person or organisation may be guilty of contempt even if they publish material without knowing that proceedings are current or pending which may be prejudiced by that material.[3]

5.3 Similarly, liability may be imposed even though the publisher has taken precautions to exclude prejudicial material, such as setting up a checking system,[4] or seeking legal advice on

1. See, for example, *R v David Syme & Co Ltd* [1982] VR 173; *Director of Public Prosecutions (Cth) v Australian Broadcasting Corp* (1987) 7 NSWLR 588; *Attorney General (NSW) v Dean* (1990) 20 NSWLR 650; *Director of Public Prosecutions (Cth) v United Telecasters Sydney Ltd* (1992) 7 BR 364 at 378 (Sheller JA) (Handley JA concurring); *Attorney General (NSW) v Radio 2UE* (NSW, Court of Appeal, No 40236/96, 16 October 1997, unreported). It has been argued that earlier cases in the United Kingdom supported a view that some sort of intention or negligence was required to establish liability: see *Daily Mirror; Ex parte Smith* [1927] 1 KB 845; C J Miller, *Contempt of Court* (Clarendon Press, Oxford, 1989) at 284. However, later cases have rejected this approach: see especially the discussion of the *Daily Mirror* case in *Ex parte Auld; Re Consolidated Press Ltd* (1936) 36 SR (NSW) 596 at 598-599 (Jordan CJ).
2. See *McLeod v St Aubyn* [1899] AC 549 at 562; *Registrar, Supreme Court, Equity Division v McPherson* [1980] 1 NSWLR 688 at 696-697 (Moffitt P and Hope JA); *Attorney General (SA) v Nationwide News Pty Ltd* (1986) 43 SASR 374 at 408 (Olsson J).
3. See *R v Odhams Press Ltd; Ex parte Attorney General* [1957] 1 QB 73; See also the criticisms of this approach in *Registrar of the Court of Appeal v Willesee* (1985) 3 NSWLR 650 at 655 (Kirby P).
4. See *Thomson Newspapers Ltd; Ex parte Attorney General* [1968] 1 All ER 379.

which basis it believed (incorrectly) that the publication would not breach the sub judice rule,[5] or checking with sources such as the police or the accused's legal representative that a certain matter, such as identity, will not be at issue at the trial.[6]

5.4 There are some authoritative dicta to the effect that, although intention to interfere is not a requirement, it is a relevant consideration in determining liability.[7] The courts have not, however, elaborated greatly on the way in which it may be relevant. Intention is acknowledged to be relevant to the question of whether the publication is exempt from liability on the basis that it relates to a matter of public interest.[8] It is at least clear that the intention of the publisher is relevant to sentencing, whether it be a factor which the court considers in deciding whether to punish the publisher at all for the contempt,[9] or in determining the appropriate penalty to impose.[10]

5.5 There has also been some suggestion in some older cases[11] that a person or organisation may escape liability for sub judice contempt on the basis that they had no knowledge of, and had no reason to know of, the existence of the legal proceedings said to be prejudiced. However, more recently, that suggestion has been

5. See *R v Australian Broadcasting Corp* [1983] Tas R 161.
6. See *R v Pacini* [1956] VLR 544.
7. See, for example, *Registrar, Court of Appeal v Collins* [1982] 1 NSWLR 682; *Registrar of the Court of Appeal v Willesee* (1985) 3 NSWLR 650; *John Fairfax & Sons Pty Ltd v McRae* (1954) 93 CLR 351 at 371 (Dixon CJ, Fullagar, Kitto and Taylor JJ); *Attorney General (SA) v Nationwide News Pty Ltd* (1986) 43 SASR 374 at 386-387.
8. *Registrar of the Court of Appeal v Willesee* (1985) 3 NSWLR 650; *Hinch v Attorney General (Vic)* (1987) 164 CLR 15 at 52-53 (Deane J), at 69-70 (Toohey J), at 43 (Wilson J), at 86 (Gaudron J).
9. See *Hinch v Attorney General (Vic)* (1987) 164 CLR 15 at 42 (Wilson J).
10. *Director of Public Prosecutions (Cth) v Wran* (1987) 7 NSWLR 616; *Attorney General (NSW) v Dean* (1990) 20 NSWLR 650.
11. See *Ex parte Bread Manufacturers Ltd; Re Truth & Sportsman Ltd* (1937) 37 SR (NSW) 242 at 250-251 (Jordan CJ) (Davidson J concurring), at 254 (Bavin J); *John Fairfax & Sons Pty Ltd v McRae* (1955) 93 CLR 351 at 359 (Dixon, Fullagar, Kitto and Taylor JJ); *R v David Syme & Co Ltd* [1982] VR 173 at 179 (Marks J).

doubted[12], and it certainly appears to have been rejected as a ground of exoneration at common law in England.[13]

CRITICISMS OF THE CURRENT APPROACH

5.6 As is obvious from the discussion above, the current approach to fault, specifically its relevance to liability, is by no means clear. There is some suggestion that an intention, or lack of intention, to interfere with proceedings is at least relevant to the question of liability.[14] It is possible that publishers may be able to claim that they had no reason to know that proceedings were pending, as a basis for escaping liability. However, there is also authority suggesting that the current approach is to impose liability, even if the publisher had no reason to know that a particular publication constituted a contempt.

5.7 If the current approach is to impose liability with no consideration of any fault, or lack of fault, on the part of the publisher, then there are three main criticisms which may be made of this approach. They are, to some extent, inter-related, and may be summarised as follows:

- This approach is contrary to the general trend of the criminal law to require some form of intention before imposing liability, or, at the least, to impose strict liability rather than absolute liability for offences which are more than merely regulatory offences.
- This approach is unfair to the individual publisher, who may be convicted of an unintended and reasonable mistake.
- This approach represents an unjustifiable infringement on freedom of discussion.

12. See *R v Pearce* (1992) 7 WAR 395 at 428-429 (Malcolm CJ).
13. See *R v Odham's Press Ltd; Ex parte Attorney General* [1957] 1 QB 73.
14. *John Fairfax & Sons Pty Ltd v McRae* (1955) 93 CLR 351 at 371 (Dixon CJ, Fullagar, Kitto and Taylor JJ); *Hinch v Attorney General (Vic)* (1987) 164 CLR 15 at 69 (Toohey J).

Offences of "absolute" and "strict" liability

5.8 Sub judice contempt is generally regarded as imposing criminal liability, and carries criminal sanctions. It is a general principle of criminal law that, to be guilty of an offence, a person must both commit the conduct prohibited by law and intend the consequences of that conduct, or be reckless or at least negligent as to whether the conduct will have those consequences. For example, to be guilty of murder, a person must both have killed another human being and have intended to kill, or be reckless as to whether certain conduct will result in another person's death.

5.9 There are exceptions to this general principle. Some offences allow a person to be convicted without any proof of intention to commit the offence in question.[15] In this context, the criminal law distinguishes between offences which impose "absolute liability" and those which impose "strict liability".[16]

5.10 Offences of "absolute liability" do not require proof that the accused knew or could reasonably have known that his or her act was wrongful, and do not recognise any excuse of honest and reasonable mistake. For example, a statute which makes it an offence to sell adulterated meat, even if the vendor does not know that the meat was adulterated, and honestly and reasonably (though mistakenly) believed that the meat was pure, imposes absolute liability.[17]

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15. For example, regulatory offences such as speeding, driving a vehicle on a public road that is overweight, riding on public transport without paying the fare, selling liquor to a person under 18 years, and those offences relating to health and safety, hygiene, and weights and measures.
16. See *Proudman v Dayman* (1941) 67 CLR 536; *He Kaw Teh v The Queen* (1985) 157 CLR 523; *Hawtgorne v Morcam Pty Ltd* (1992) 29 NSWLR 120.
17. This example comes from D Brown, D Farrier, D Neal and D Weisbrot, *Criminal Laws: Materials and Commentary on Criminal Law and Process in New South Wales* (2nd edition, Federation Press, Sydney, 1996) Volume 1 at para 4.7.3. See also *Hawthorne v Morcam Pty Ltd* (1992) 29 NSWLR 120, which concerned the classification of an offence created by the *Pure Food Act 1908* (NSW) (which has since been repealed).

5.11 In contrast, offences of "strict liability" exempt the accused from liability if the accused was honestly and reasonably mistaken as to the existence of facts which (if true) would have made the act innocent. For example, a statute imposes strict liability if it makes it an offence to sell adulterated meat, but exempts from liability a vendor who honestly and reasonably believed that the meat sold was pure.

5.12 Following the distinction between offences of absolute and strict liability as generally understood by the courts, it would appear that sub judice contempt may well be an offence of absolute liability under current Australian law. That is, it imposes liability even if the publisher did not know, and could not reasonably have known, that an offence was being committed. So, for example, a publisher cannot escape a contempt conviction by arguing that it made reasonable efforts to check that no proceedings were pending which may be affected by its publication. If such an argument were accepted as an excuse, then sub judice contempt would be properly classified as an offence of strict liability. Some confusion may arise because, when describing the nature of sub judice contempt, courts and commentators have often referred to it as an offence of strict liability.[18] It would appear, however, that what they mean by this term is what is generally referred to in criminal law as absolute liability.

5.13 The general approach taken by Australian courts is however to limit the range of offences which are interpreted as offences of absolute liability.[19] In one case, *He Kaw Teh v The Queen*,[20] the

18. See, for example, *Registrar of the Court of Appeal v Willesee* (1985) 3 NSWLR 650 at 658 (Kirby P); S Walker, *The Law of Journalism in Australia* (Law Book Company, Sydney, 1989) at 43-44; C J Miller, *Contempt of Court* (Clarendon Press, Oxford, 1989) at 21. See also Australian Broadcasting Commission, Letter to the Attorney General (20 September 1997) in *Submission* at 2; John Fairfax Publications Pty Limited and News Limited, *Joint Submission to Attorney General* at 5.
19. See *Hawthorne v Morcam Pty Ltd* (1992) 29 NSWLR 120 at 132 (Hunt CJ); *He Kaw Teh v The Queen* (1985) 157 CLR 523.
20. *He Kaw Teh v The Queen* (1985) 157 CLR 523 at 564 (Brennan J), at 594-595 (Dawson J), at 529-530 (Gibbs CJ).

High Court said that, in the context of interpreting legislation to determine whether it imposes absolute or strict liability, a number of factors should be taken into account. One factor is whether the creation of strict liability will be effective to promote the objects of the statute by encouraging greater vigilance to prevent the commission of the prohibited act. Offences may more readily be regarded as imposing absolute liability if they are more regulatory than truly criminal in nature, for example if they regulate industrial conditions or protect revenue, and particularly if the penalty for infringement is monetary and not too large.

5.14 The High Court's ruling in *He Kaw Teh v The Queen* does not appear to have had an effect on the law of sub judice contempt, or, indeed, to have been considered in any great detail in the context of the relevance of intention to liability for sub judice contempt.[21] It could be argued, however, that the current approach in imposing liability for contempt goes against the general trend of the courts in limiting the offences which are interpreted to impose absolute liability.

Fairness

5.15 It may be argued that it is unfair to impose criminal liability without any regard to whether the publisher has in some way been at fault, either by intending to interfere with the administration of justice or being negligent as to the consequences of publication. It could be said that the law requires publishers to be aware of every legal proceeding in the state which may be affected by a publication, no matter how unreasonable that may be, and to be able to guess at every statement which could be found to have a tendency to prejudice.[22]

21. But see *Registrar of the Court of Appeal v Willesee* (1985) 3 NSWLR 650 at 652-654 (Kirby P).
22. See *Registrar of the Court of Appeal v Willesee* (1985) 3 NSWLR 650 at 652-654 (Kirby P).

5.16 By making intention irrelevant to liability, sub judice contempt fails to focus on the blameworthiness of the offender. Yet it could be argued that the primary aim of the criminal law should be to punish conduct which is blameworthy, whether it amounts to an intentional act or gross carelessness. The imposition of liability without any element of fault should be restricted to situations where it is absolutely necessary, to protect society. It may be questioned whether sub judice contempt is such a situation.[23] The courts tend to view the imposition of absolute liability as generally more appropriate to offences of a regulatory nature. Such offences are not so much concerned with the condemnation of individual blameworthy behaviour, but with ensuring that people regulate their behaviour to promote a particular public interest, such as public safety.[24]

5.17 It is questionable whether contempt is a mere regulatory offence. The penalties for a contempt conviction are not limited to fines, and while the usual penalty imposed is a fine, the amount can be large and indeed, in theory, limitless. Moreover, conviction for contempt carries the possibility of imprisonment. There is no maximum term of imprisonment which may be set.

5.18 In Canada, it has been suggested that the imposition of absolute liability for sub judice contempt is so unfair as to be unconstitutional.[25] It is argued that the absence of any requirement of fault in sub judice contempt violates the right of an accused person to fundamental justice, as enshrined in s 7 of the Canadian *Charter of Rights and Freedoms*. The Canadian Supreme Court, in a different context, has held that to impose absolute liability for an offence which carries the possibility of

23. This was the argument put forward by the Canadian Law Reform Commission in its Working Paper on contempt: see Canada, Law Reform Commission, *Contempt of Court: Offences Against the Administration of Justice* (Working Paper 20, 1997) at 40.
24. See *He Kaw Teh v The Queen* (1985) 157 CLR 523 at 594-595 (Dawson J); *Hawthorne v Morcam Pty Ltd* (1992) 29 NSWLR 120 at 125-126 (Mahoney JA).
25. J P Allen and T Allen, "Publication Restrictions and Criminal Proceedings" (1994) 36 *Criminal Law Quarterly* 168 at 181-184.

imprisonment is a breach of the right to fundamental justice, unless it can be justified in the interests of a free and democratic society.[26] In the past, Canadian contempt law did not appear to require any form of fault as an element of liability for sub judice contempt,[27] and this was not subjected to constitutional challenge. In several recent cases, however, Canadian courts have emphasised the need for some form of fault as a component of sub judice contempt, such as a requirement of reasonable foreseeability of risk created by the publication.[28]

Freedom of discussion

5.19 As the Irish Law Reform Commission pointed out, publication of information is not an activity which is prima facie suspect and anti-social, but, on the contrary, is integral to human

26. See *Reference re: Motor Vehicle Act* (1985) 23 CCC (3d) 289.
27. See *Attorney General for Manitoba v Groupe Quebecor Inc* (1987) 45 DLR (4th) 80; *R v Southam Inc* (1992) 6 Alta LR (3d) 115. Contrast with the position taken by the Canadian Supreme Court in *United Nurses of Alberta v Attorney General for Alberta* (1992) 89 DLR (4th) 609 in relation to contempt by disobedience of a court order: Justice McLachlin held at 637 that for that type of contempt, the prosecution was required to prove knowledge or recklessness on the part of the accused that disobedience will tend to depreciate the authority of the court.
28. See *R v CHBC Television* (British Columbia, Court of Appeal, No 24128, 8 February 1999, unreported); *R v Bowes Publishers Ltd* (1995) 30 Alta LR (3d) 236 at 240 (Perras J). In contrast, in New Zealand, it appears that the courts still do not require any element of fault in order to impose liability for sub judice contempt: see, for example, *Solicitor-General v Radro Avon Ltd* [1978] 1 NZLR 225 at 232; *Solicitor-General v Radio NZ Ltd* [1994] 1 NZLR 48; *Duff v Communicado Ltd* [1996] 2 NZLR 89. Although New Zealand has the *Bill of Rights Act 1990*, that Act does not appear to provide, in the same way as the Canadian Charter, for the right of an accused person to "fundamental justice".

society and freedom.[29] Yet liability for sub judice contempt is currently formulated in such a way that, if publishers want to be sure of avoiding prosecution, the only option for them is to choose not to publish. Once they publish, they are susceptible to attracting liability, no matter how careful they are, and whether or not the threat to the administration of justice arising from the publication could be reasonably anticipated.

5.20 As a consequence, in so far as contempt law represents a compromise between the competing interests in the fair administration of justice and freedom of discussion, it could be argued that, by imposing absolute liability, it tilts the balance too far at the expense of freedom of discussion. Such an intrusion on freedom of discussion may be able to be justified if it could be shown to be necessary to prevent interference with the administration of justice. However, as discussed below, it is questionable whether the imposition of absolute liability provides any more of a deterrence against prejudicial publicity than would the imposition of liability requiring some element of fault.

JUSTIFICATIONS FOR THE CURRENT APPROACH

5.21 If the current approach is indeed to impose absolute liability, then it may be justified on the basis that it is necessary to prevent serious prejudice to legal proceedings. The law on sub judice contempt aims, as a matter of overriding importance, to prevent interference with the proper administration of justice. It has been pointed out that the risk of such interference is just as real, and in just as much need of being prevented, whether it is brought about intentionally or unintentionally by the publisher.[30] By imposing absolute liability, the law of sub judice contempt places strong obligations on the publisher to ensure that the risk of prejudice to legal proceedings does not arise. In this way, the law seeks to

29. See Ireland, Law Reform Commission, *Contempt of Court* (Consultation Paper, 1991) at 324.
30. See *Attorney General (NSW) v Dean* (1990) 20 NSWLR 650 at 656.

prevent damage arising from prejudice to proceedings, rather than trying to remedy such damage after it has already occurred.

5.22 It might also be argued that media organisations, which are the prime targets of contempt prosecutions, are businesses operating for profit. Their profit is derived from the same activity that poses a risk to the administration of justice. It makes sense, therefore, that the benefits obtained from such a business should carry certain obligations and responsibilities. Consequently, it may be argued that it is appropriate to impose laws that require media organisations to devote resources to avoid the risk of interfering with the administration of justice.

5.23 Moreover, it could be argued that it places too heavy a burden on the prosecution in contempt cases to be required to prove, beyond a reasonable doubt, intention or carelessness on the part of the publisher. By placing the onus of proving fault on the prosecution, the law would no longer be seen to impose positive obligations on the media to exercise proper care when carrying out their business. As a consequence, the law would lose its deterrent effect and would be less effective in preventing prejudice to the administration of justice.

The Commission's tentative view

5.24 The Commission acknowledges the arguments in favour of absolute liability. However, when scrutinised, we do not consider that they are sufficiently strong to justify the imposition of liability without any element of fault.

5.25 First, while the law of sub judice contempt aims to prevent prejudice from arising by deterring the media from indulging in risky activities, the deterrent force of the law is not made any stronger by the imposition of absolute liability. As the law currently appears to stand, there is, in theory, nothing that the media can do to be certain of avoiding liability, no matter how careful they are and how reasonably they act to ensure that they

do not breach the sub judice rule. By contrast, a fault requirement may give them more incentive to be careful.

5.26 Secondly, the Commission agrees that it is appropriate to impose obligations on media organisations that derive profit from the publication of material. However, the imposition of absolute liability is not the only means of imposing positive obligations to take care, and indeed, is arguably not the most effective means of doing so. Liability could be formulated in a way that required a publisher to take reasonable precautions in order to avoid prosecution. Arguably, this would impose the same obligations on the media to exercise reasonable care.

5.27 Thirdly, the concern that it would be too onerous on the prosecution to have to prove intention beyond a reasonable doubt may be addressed by placing the burden of proof instead on the defendant, as a defence to a charge of contempt. This has been the approach adopted by several law reform bodies as a means of injecting an element of fault into liability for sub judice contempt.[31]

5.28 Given these considerations, the Commission takes the preliminary view that it is fairer to require an element of fault rather than imposing absolute liability for sub judice contempt. The imposition of absolute liability appears unnecessary and, ultimately, unjustifiable. At present, it is not clear whether the law of sub judice contempt imposes absolute liability, and the Commission therefore considers that legislative reform may be desirable to make it clear that fault is an element of liability.

ALTERNATIVE APPROACHES

5.29 There are three alternative approaches which could be adopted to inject some element of fault into liability for sub judice contempt. These are:

31. See para 5.39-5.40.

(1) a requirement to show actual intention to interfere with the administration of justice, including recklessness as to whether interference will arise;

(2) a requirement to show negligence, that is that the publisher did not exercise reasonable care in preventing the risk of an interference with the administration of justice; and

(3) no requirement of intention or negligence, but a defence which excuses a publisher from liability if it can be shown that the publisher exercised reasonable care to prevent a risk of prejudice from arising.

Actual intention or recklessness

5.30 Liability for sub judice contempt could be formulated in a way that required the prosecution to prove, beyond a reasonable doubt, that the defendant had an actual intention to interfere with the administration of justice. This approach was favoured by President Kirby (as he then was) in the case of *Registrar, Court of Appeal v Willesee*,[32] on the basis that it conforms with ordinary principles of criminal law. A requirement of intention could include reckless indifference as to whether a publication interfered with particular proceedings.[33]

5.31 None of the previous reviews of contempt law has recommended the inclusion of actual intention as a requirement of liability for sub judice contempt.[34] The Australian Law Reform

32. *Registrar of the Court of Appeal v Willesee* (1985) 3 NSWLR 650 at 652-658.
33. Reckless indifference would require the defendant to foresee the probability that his or her act would result in interference with the administration of justice.
34. The Bill introduced in the Canadian Parliament in 1984 required that the offending publication must have been made "knowingly": Bill C-19 (1984) cl 33. This is different from the wording of the Bill prepared by the Law Reform Commission of Canada, which did not

Commission ("ALRC") and the Irish Law Reform Commission expressly rejected this approach.[35] At this stage, the Commission agrees that it does not seem desirable to require proof of actual intention or recklessness as an element of liability for sub judice contempt. It is the Commission's tentative view that to require proof of actual intention would be to place too heavy a burden on the prosecution. One of the aims of the law in this area is to impose positive obligations on the media to take care when publishing information about court proceedings. If the law were changed to require actual intention to interfere, it would exclude from liability those who are unreasonably careless. As a consequence, the sub judice rule would lose much of its deterrent effect, relieving the media of any real obligation to take precautions when publishing potentially damaging information.

5.32 The Commission does not consider that it is contrary to general principles of criminal law to require something less than actual intention or recklessness to commit an offence. There are other criminal offences which accept, for example, negligence as the threshold for imposing liability.[36] This argument is made stronger if maximum limits are set on the sanctions which may be imposed for contempt, which take into account the fact that liability may have been incurred unintentionally.[37]

Negligence

5.33 Liability for sub judice contempt could be formulated in a way that requires the prosecution to prove negligence on the part of the defendant. That is, it would have to be proven, beyond a

require intention: Canada, Law Reform Commission, *Contempt of Court* (Report 17, 1982) at 54.

35. Australian Law Reform Commission, *Contempt* (Report 35, 1987) at para 260; Ireland, Law Reform Commission, *Contempt of Court* (Report 47, 1994) at para 6.10, (Consultation Paper, 1991) at 322-323.
36. For example, offences centring on risk-producing conduct, such as negligent driving and culpable navigation.
37. See Chapter 13.

reasonable doubt, that a reasonable person in the defendant's position would have anticipated that the publication created a substantial risk of prejudice to the administration of justice, or alternatively, that a reasonable person would have anticipated that the publication would prejudice the administration of justice. It would be for the court in each case to determine what was "reasonable", and presumably a number of factors could be considered, such as the steps taken by the publisher to ensure that the specific publication would not breach the sub judice rule.

5.34 A main advantage of formulating liability in terms of negligence is that it punishes the careless, without punishing those who have taken all reasonable steps to avoid offending the law. It sets a lower standard of fault for liability than a requirement to prove actual intention, by punishing those defendants who have unintentionally breached the sub judice rule. However, it is arguably fairer than the current approach, which takes no account of the reasonableness of the defendant's conduct. In this way, it is a compromise between the current approach, which could be criticised for setting too low a threshold for liability, and an approach requiring proof of actual intention or recklessness, which could be said to set too high a threshold. The Canadian Law Reform Commission recommended that liability for sub judice contempt be formulated in terms of negligence.[38]

5.35 One disadvantage of formulating sub judice contempt in terms of negligence is that it may not be a very precise way of setting the limits of liability. That is, it may not be clear what factors the courts will consider relevant in determining whether conduct was "reasonable". For example, will the courts consider it relevant to take into account the financial and other resources available to individual publishers to determine whether they conducted a reasonable search to ensure that no proceedings were current or pending before publishing? Will it necessarily be considered reasonable for a publisher to rely on legal advice in deciding whether to publish? Will the courts consider it relevant to

38. See Canada, Law Reform Commission, *Contempt of Court* (Report 17, 1982) at 54-55.

take into account the particular time constraints facing the individual publisher when preparing for publication, in recognition of the practical demands which come with having to compete with other media organisations to be the first to deliver the most up-to-date information to the public?

5.36 To some extent, it seems inevitable that the decision as to what is reasonable will require a value judgment by the individual court hearing the case. The consequential uncertainty may pose problems both for the prosecution, in deciding whether to proceed with the prosecution and in proving its case beyond reasonable doubt, and for the media, in avoiding liability and in defending a charge. Admittedly, questions of negligence and what is reasonable are issues which the courts address on a regular basis, as they are elements of many criminal offences and civil causes of action. It would also be possible for legislation to include some or all of the factors that may be relevant to determining whether a publisher's conduct was reasonable. This would provide some guidance to the media to avoid prosecution.

5.37 Another arguable disadvantage of this approach is that it places too heavy a burden on the prosecution to require it to prove, beyond a reasonable doubt, that the publisher acted unreasonably. Rather than imposing positive obligations of care on the media, this formulation would put the onus on the prosecution to prove that the defendant's conduct was blameworthy. In this way, the deterrent effect of the sub judice rule may be significantly diminished. It could be said that the effect is to tilt the balance too far in favour of freedom of discussion over the public interest in the proper administration of justice. For this reason, the ALRC, the Phillimore Committee in the United Kingdom, and the Irish Law Reform Commission rejected this approach.[39]

39. See Australian Law Reform Commission, *Contempt* (Report 35, 1987) at para 262; Ireland, Law Reform Commission, *Contempt of Court* (Report 47, 1994) at para 6.10, (Consultation Paper, 1991) at 329; United Kingdom, Committee on Contempt of Court, *Report of the Committee on Contempt of Court* (HMSO, London, Cmnd 5794, 1974) at para 133. (The recommendation of the Phillimore Committee

Defence of innocent publication

5.38 The third approach would be to maintain the current position, which includes no element of fault amongst the matters to be proved by the prosecution, but to confirm that taking reasonable care, with reference (among other things) to being aware of pending proceedings, should be a ground of defence. This would allow defendants to be excused from liability if they could show that they exercised reasonable care to avoid creating a substantial risk of interference with the administration of justice.

5.39 The ALRC, the Irish Law Reform Commission, and the Phillimore Committee in the United Kingdom, all recommended, in various forms, a defence of reasonable care. The ALRC recommended[40] that there be a defence of "innocent publication" to a charge of sub judice contempt. The Irish Law Reform Commission put forward a similar recommendation.[41] Following this recommendation, the prosecution would not be required to prove any form of intention or negligence in order to establish liability. However, persons or organisations considered responsible for a prejudicial publication could be excused from liability if they could prove, on the balance of probabilities, that they had no knowledge of the relevant facts, and that, having regard to available resources, all reasonable care was taken to ascertain such facts. This defence could apply both to the situation where the defendant does not know that proceedings are current or pending which may be affected by the publication, and to a situation where the defendant knows that proceedings are pending or current but does not know and takes all reasonable care to exclude material which is likely to be prejudicial to the proceedings.

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in the United Kingdom built on existing legislation which provided a defence of innocent publication).

40. Australian Law Reform Commission, *Contempt* (Report 35, 1987) at para 262.
41. Ireland, Law Reform Commission, *Contempt of Court* (Report 47, 1994) at para 6.10; (Consultation Paper, 1991) at 329-330.

5.40 In the United Kingdom, legislation also provides for a defence of innocent publication or distribution, adopting the recommendation of the Phillimore Committee.[42] According to this defence, the prosecution is not required to prove intention or negligence, but the publisher, or distributor, may be excused from liability by proving the defence on the balance of probabilities. The defence of innocent publication is formulated in narrower terms than that recommended by the ALRC. It applies only to the situation where the publisher does not know and has no reason to suspect that the proceedings affected by the publication were active. It does not provide any relief from liability for the publisher who knows that proceedings are active, but exercises reasonable care to exclude from publication any material which has a substantial risk of prejudicing the proceedings. Moreover, unlike the recommendation of the ALRC, the provision in the United Kingdom does not expressly allow for the court to take into account the resources available to the defendant in determining what is reasonable.

5.41 The obvious advantage of this approach is that it introduces an element of fault into the offence of sub judice contempt, but provides less barriers to a successful prosecution for contempt by placing the onus of proving reasonable care on the defendant. For this reason, the Commission considers that this may be the preferable approach to adopt. It recognises that there is a degree of uncertainty in any test that requires consideration of what is "reasonable", and that it may involve, to some extent at least, a value judgement by the court deciding the issue. However, it may

42. See *Contempt of Court Act 1981* (UK) s 3. This follows the recommendation of the Phillimore Committee, which in turn was based on an existing legislative defence at the time the Committee was conducting its review: see United Kingdom, Committee on Contempt of Court, *Report of the Committee on Contempt of Court* (HMSO, London, Cmnd 5794, 1974) at para 133; *Administration of Justice Act 1960* (UK) s 11(1). The South Australian Criminal Law and Penal Methods Reform Committee favoured the approach taken in the United Kingdom: see South Australia, Criminal Law and Penal Methods Reform Committee, *The Substantive Criminal Law* (Report 4, 1977) at para 3.10.2.

be necessary to allow for some uncertainty in order to provide sufficient flexibility to take into account the facts of each particular case. Any uncertainty in the operation of the defence should be reduced with the development of case law on what is "reasonable" in this context.

The Commission's proposals

5.42 The Commission proposes a defence of innocent publication which should be available to two broad categories of persons who may be liable for sub judice contempt. The first covers those persons who are in a position to exercise editorial control in relation to the contemptuous publication. This includes, for example, publishers editors and reporters. The second covers those persons who have no such control, for example, distributors, vendors and broadcasters who broadcast live interviews. As the situations for these two sets of persons are quite different, the Commission has separate proposals for each. The underlying principle for both of them is the need to exercise reasonable care.

Proposed defence for persons responsible for the content of the publication

5.43 For persons who are in a position to exercise editorial control over the contemptuous publication, the Commission makes the following proposal:

PROPOSAL 7

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.**

5.44 Proposal 7 is intended to follow the third option outlined above by making it clear, through legislation, that a defence of innocent publication, which requires the exercise of reasonable care, is available against a charge of sub judice contempt. As noted, the Commission considers that reliance on a defence of this kind may be the fairest means of ensuring that there is an element of fault in determining liability for sub judice contempt, without imposing too heavy a burden on the prosecution to prove, beyond a reasonable doubt, actual knowledge or negligence on the part of the defendant.

5.45 Proposal 7 is largely modelled on the formulation recommended by the ALRC. However, it is worth noting that, under the ALRC's formulation, in determining whether the defendant took "reasonable steps", the court was expressly required to consider the resources available to the defendant to ascertain the relevant facts. This would require the court to consider, for example, the financial resources available to the particular publisher, as well as the degree of assistance available from agencies such as the police and the courts in determining whether proceedings were pending or current.

5.46 At this stage, the Commission does not consider it desirable to include a specific reference to the defendant's resources in a formulation of a defence of innocent publication. The resources available to the defendant is just one of a number of matters that the court may wish to take into account in determining what is "reasonable". The Commission questions whether it is necessary or appropriate to single out resources in legislation as something requiring express mention. However, it is interested to receive submissions on whether it would be useful to include in a formulation of a defence of innocent publication specific reference to the accused's resources.

Proposed defence for persons with no editorial control of the content of the publication

5.47 The Commission makes the following proposal with respect to persons who do not have control over the content of the contemptuous publication:

PROPOSAL 8

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 being published.

5.48 Proposal 8 is intended to cover at least two broad situations. The first, which is contained in paragraph (i), is patterned after the defence of innocent distribution in the *Contempt of Court Act 1981* (UK) s 3(2). It is primarily aimed at giving distributors of printed material[43] a defence to a charge of sub judice contempt. Distributors are not in any way involved in the production of the material and therefore could not be obliged to exercise the same

43. The liability of distributors of printed material is discussed in para 3.37-3.39.

kind of care as that expected of editors or publishers in ascertaining whether a substantial risk of prejudice to pending proceedings will result from the publication. However, although they do not have control over the content of the publication, they do have control in its dissemination and therefore have the capacity, on exercise of reasonable care, to prevent the risk of prejudice from arising. The Commission is of the view that distributors should be held responsible if at the time of the publication they had reason to suspect that contempt might arise.

5.49 However, the situation of innocent distributors at the lower end of the distribution network, such as the street-corner vendor or newsagent, should be distinguished from that of large-scale distributors. The Commission agrees with the view expressed by one commentator that the former would act reasonably in assuming that others higher up in the chain have taken care to avoid dissemination of prejudicial material.[44] In other words, the reasonable care that is to be expected of big distributors should be higher than that of newsagents and others who directly sell the papers.

5.50 The proposed defence as it relates in paragraph (i) of Proposal 8 is intended to apply not only to distributors in the print media but also to distributors of broadcast (television/radio) material. A broadcasting station which is doing no more than relaying a program prepared by another station and has no control over the contents of the program should be able to avail itself of the proposed defence. However, a subordinate station would be unable to use the proposed defence if under its contract with the principal station, it had the opportunity to check for and censor material that was prejudicial.[45]

5.51 The other situation which Proposal 8 seeks to address is where the offending material was published through the facilities

44. C J Miller, *Contempt of Court* (Clarendon Press, Oxford, 1989) at 302.
45. See *Thompson v Australian Capital Television Pty Ltd* (1996) 186 CLR 574, a defamation case, where it was held that if the television broadcaster which took no part in the production of the program but had the ability to supervise and control the material televised but chose not to, the publication was not innocently disseminated.

of the accused who became aware of the contemptuous material prior to or after its publication and who could have taken steps to prevent its publication. As in paragraph (i) of the proposal, the accused, under paragraph (ii), nor any person for whose conduct in the matter it is responsible, must have had no editorial control of the content of the offending material. Under the proposal, the accused will only be guilty of sub judice contempt if it failed to take reasonable steps to prevent the material from being published.

5.52 The situation where the proposed defence will have likely application is live radio or television broadcast of contemptuous statements by interviewees or contributors.[46] While the source of the prejudicial statement, eg the interviewee, should be liable for sub judice contempt, the liability of the broadcaster remains unclear. The Phillimore Committee considered this issue and concluded that the editorial responsibility should remain strict in this situation.[47] It was of the view that even if the broadcaster had no reason to suspect that a contributor would make a particular statement, it should still be held liable, although this circumstance should be taken into account in the imposition of the penalty.[48]

46. See *Window v 3AW Broadcasting Co* (County Court of Victoria, 5 March 1986, unreported) for an illustration of liability for defamation for statements in radio talk-back where the radio station failed to use the so-called "panic button". See also *Thompson v Australian Capital Television Pty Ltd* (1996) 186 CLR 574 for an illustration of the application of the defence of innocent dissemination in defamation in the context of a live television interview.
47. See United Kingdom, Committee on Contempt of Court, *Report of the Committee on Contempt of Court* (HMSO, London, Cmnd 5794, 1974) at para 152.
48. See United Kingdom, Committee on Contempt of Court, *Report of the Committee on Contempt of Court* (HMSO, London, Cmnd 5794, 1974) at para 152.

5.53 The Commission does not agree with this position[49] and has already stated that it is not in favour of imposing liability without any element of fault.[50] It takes the position that liability should be formulated in a way that requires a person to take reasonable precautions in order to avoid conviction for contempt. In circumstances where remarks which were not anticipated by the broadcaster are made during a live interview, the broadcaster should be exonerated from a charge of sub judice contempt if it can show that when it became aware of the contemptuous statement, it took all reasonable steps within its means to prevent the publication of the statement.

5.54 Radio "talk" stations are a case in point. Most of them operate on systems which allow for delayed broadcast of an average of 7.2 seconds.[51] Such systems allow for certain words or names to be "dropped out" from the broadcast.[52] Moreover, the producer and the radio talent on air usually both control a "panic button" which will allow them to stop the broadcast of a statement by the interviewee/contributor.[53] Under those circumstances, the radio broadcaster and others involved do indeed have the means to, upon hearing the contemptuous statement, prevent it from being broadcast. Failure to use the mechanism would be construed by courts as a failure to exercise the reasonable care required by the proposed defence.

5.55 The proposed defence contained in paragraph (ii) of Proposal 8 is also intended to apply to two types of entities which play a major part in the distribution of information through the Internet. These are the Internet service providers ("ISPs") and the

49. For a criticism of the Phillimore Committee's position of this issue, see C J Miller, *Contempt of Court* (Clarendon Press, Oxford, 1989) at 304-305.
50. See para 5.24-5.28.
51. Information provided D Bacon, Chief Executive Officer of the Federation of Australian Radio Broadcasters Ltd (4 May 2000).
52. Information provided D Bacon, Chief Executive Officer of the Federation of Australian Radio Broadcasters Ltd (4 May 2000).
53. Information provided D Bacon, Chief Executive Officer of the Federation of Australian Radio Broadcasters Ltd (4 May 2000).

Internet content hosts ("ICHs"). An ISP is a person who gives to the public the facility to access the Internet.[54] An ICH is a person who hosts Internet content, which is information kept on a data storage device and accessed through the Internet.[55]

5.56 Most ISPs and ICHs have no control over the content of the information that goes through their systems, although they may have the capacity to include or exclude certain information. The liability of ISPs and ICHs for carrying or hosting material that breaches the sub judice principle has not yet been considered by any Australian court. It is uncertain whether the common law principles developed regarding the liability of distributors[56] or even those concerning licensees of television channels[57] would apply to ISPs and ICHs.

5.57 The Commonwealth Government recently passed the *Broadcasting Services Amendment (Online Services) Act 1999* which establishes a framework for dealing with "offensive" content on the Internet. Among its additions to the *Broadcasting Services Act 1992* (Cth) is Schedule 5, s 91 which states that a law of a State or Territory, or a rule of common law or equity, has no effect to the extent to which it would: (1) subject an ISP or ICH to civil or criminal liability for hosting or carrying content where it was not aware of its nature; (2) and require an ISP or ICH to monitor, make inquiries about or keep records of content which it hosts or carries.

5.58 It has been argued that the immunity granted by cl 91(1) to ISPs and ICHs should be broadly construed because there is no apparent limitation in the Act on the subject matter of the laws that might be overridden by cl 91(1), nor is there a limitation on the type of content applicable.[58] Consequently, even though the

54. See *Broadcasting Services Act 1992* (Cth) Sch 5 cl 3.
55. See *Broadcasting Services Act 1992* (Cth) Sch 5 cl 8(1).
56. See para 3.37.
57. See para 3.33-3.34.
58. J Eisenberg, "Safely Out of Sight: the Impact of the New Online Content Legislation on Defamation Law" (2000) 6 *University of New South Wales Law Journal* 23.

immunity under cl 91(1) is granted in the context of the regulation of "offensive" online content, Eisenberg agues that the new defence applies to a range of State based content liability laws, such as defamation law, the law on sub judice contempt and statutory reporting restrictions.

5.59 The consequence of such a broad construction of s 91 with respect to sub judice contempt is that ISPs and ICHs are not obliged to actively monitor the content that goes through their systems to determine whether a publication has a substantial risk of prejudice to pending proceedings. Furthermore, they cannot be held liable for sub judice contempt for hosting or carrying contemptuous publication if they were not aware of such offending material.

5.60 The Commission agrees in principle with this interpretation of cl 91. The Commission acknowledges the difficulties ISPs and ICHs may encounter in screening material posted on the Internet. It also agrees with the objectives of the *Broadcasting Services Amendment (Online Services) Act 1999* (Cth) of encouraging the development of Internet technologies and services and avoiding putting unnecessary administrative and financial burdens on ISPs and ICHs.[59]

5.61 Nevertheless, the Commission considers that where an ISP or ICH becomes aware of some contemptuous publication which it carries or hosts, it should then have an obligation to take steps within its means to prevent the material from being further published. This is consistent with the framework of the *Broadcasting Services Act 1992* (Cth) as amended by the *Broadcasting Services Amendment (Online Services) Act 1999* (Cth) whereby ISPs and ICHs are required to remove content following formal notification by the Australian Broadcasting Authority.[60] This position is reflected in paragraph (i) of Proposal 8.

5.62 An Australian company has recently established a website called CrimeNet which provides details over the Internet about

59. *Broadcasting Services Act 1992* (Cth) s 4(3).
60. See generally *Broadcasting Services Act 1992* (Cth) Sch 5 Pt 4.

individuals who have been convicted of a serious crime.[61] This has implications on sub judice contempt as it is possible that a juror sitting on a criminal case may decide to look up this or a similar Internet site and be exposed to the prior criminal record of the accused. The question then arises as to whether the publication of the criminal record of a person by such means (that is, through a database on the Internet), where the person has a pending criminal case, constitutes contempt. The persons responsible for this kind of service will be unable to rely on the defence in Proposal 8 because they were fully aware of and had control of the contents of their publication. However, they may be able to invoke the defence contained in Proposal 8, if they can prove that they did not know that there was a pending criminal proceeding against the person whose criminal record they had published and, before the publication was made, took all reasonable steps to ascertain this fact.

FAULT AND PRINCIPLES OF RESPONSIBILITY

5.63 The Commission's proposal for a defence of innocent publication requires consideration of the principles of responsibility for a publication, and the availability of the defence according to those principles.

5.64 According to the Commission's Proposal 2, concerning responsibility for a publication, a range of persons may be held liable as principals for a contemptuous publication. For example, both an individual reporter, and a supervising editor, may be liable as principals. Since the basis for liability is primary rather than vicarious, a defence of innocent publication may be available to either the reporter or the editor, or both, depending on each person's conduct. That is, an editor may rely on the defence by showing that he or she did not know of the relevant facts and took all reasonable care to ascertain those facts. The success of the defence would depend on the editor's own conduct, rather than

61. http://www.crimenet.com.au/menu.html, 4 May 2000.

that of the reporter (as would be the case if the basis for the editor's liability were vicarious).

5.65 A consequence of classifying liability as primary rather than vicarious, in the context of claiming the proposed defence of innocent publication, is that one defendant may be convicted, and another acquitted of contempt for the one publication.

Corporate media proprietors: identifying the "corporate mind"

5.66 The Commission's proposed defence of innocent publication requires particular consideration in its application to media proprietors, where the proprietor is a corporate body. Media proprietors are commonly corporate bodies, rather than individuals. A problem in applying the proposed defence of innocent publication to corporate proprietors is identifying the "corporate mind", that is, who exactly in the organisation is to be shown to have exercised reasonable care in order for the proprietor to rely on the defence.

5.67 To address the issue of criminal responsibility of corporate bodies generally, the criminal law has developed a principle of corporate criminal liability. According to this principle, the "corporate mind" of a corporation is located in certain, senior-ranking employees, on the basis that they are acting as the company and directing the "mind" of the company.[62] It has been suggested that if the principle of corporate criminal liability

62. See *Tesco Supermarkets Ltd v Nattrass* [1972] AC 153. See generally, D Brown, D Farrier, D Neal and D Weisbrot, *Criminal Laws: Materials and Commentary on Criminal Law and Process in New South Wales* Volume 1 at para 4.8.4-4.8.6; Australia, Criminal Law Officers Committee of the Standing Committee of Attorneys General, *Model Criminal Code: Chapter 2: General Principles of Criminal Responsibility* (Discussion Draft, July 1992) at 95-97; G Borrie, *Borrie & Lowe's Law of Contempt* (3rd edition, Butterworths, London, 1996) at 384-385.

applies to the law of sub judice contempt, liability of a media proprietor could depend, for example, on the blameworthiness of an editor, on the basis that editors are superior officers in the day-to-day control of the company, and could be regarded as the "brain" of the organisation's publishing activities.[63]

5.68 The principle of corporate criminal liability has been criticised for being out of touch with modern corporate structures, in which greater delegation to relatively junior employees occurs,[64] and as representing no more than an unsatisfactory form of compromised vicarious liability.[65]

5.69 An alternative approach to corporate criminal liability is to rely on basic principles of vicarious liability for corporate bodies, but with provision for the corporation to avoid liability if it can show that it took reasonable precautions and exercised due diligence to avoid the criminal conduct engaged in by its director, servant or agent.[66]

5.70 The Commission takes the tentative view that a corporation is liable, primarily, by virtue of the fact of publication, but has a defence if all relevant employees have behaved reasonably in relation to the publication and taken reasonable steps to prevent the conduct amounting to contempt. To rely successfully on the

63. See G Borrie, *Borrie & Lowe's Law of Contempt* at 385.
64. See Australia, Criminal Law Officers Committee of the Standing Committee of Attorneys General, *Model Criminal Code: Chapter 2: General Principles of Criminal Responsibility* (Discussion Draft, July 1992) at 95; (Final Report, December 1992) at 105; B Fisse, "Recent Developments in Corporate Criminal Law and Corporate Liability to Monetary Penalties" (1990) 13 *University of New South Wales Law Journal* 1 at 3-4.
65. B Fisse and J Braithwaite, *Corporations, Crime and Accountability* (Cambridge University Press, Melbourne, 1993) at 46-47.
66. See *Industrial Chemicals (Notification and Assessment) Act 1989* (Cth) s 109; *Ozone Protection Act 1989* (Cth) s 65. See also the recommendation of the Criminal Law Officers Committee of the Standing Committee of Attorneys General, *Model Criminal Code: Chapter 2: General Principles of Criminal Responsibility* (Final Report, December 1992) at proposed s 501.4.

proposed defence of innocent publication, the media proprietor must show, on the balance of probabilities, that every employee involved in the publication process for the publication in question exercised reasonable care according to the requirements set out in Proposals 7 and 8.

5.71 The Commission has taken the tentative view that the proprietor of a media organisation should be held primarily liable for a contemptuous publication. The proposed defence of innocent publication would therefore be available to a media proprietor on the basis that the proprietor exercised reasonable care in avoiding a breach of the sub judice rule.

WHERE ACTUAL INTENT IS PROVEN

5.72 Although it is not a necessary element of the offence, proof of actual intention to interfere with the administration of justice may give rise to liability for sub judice contempt. The law, however, is arguably uncertain in this situation. It is not clear whether, if actual intent to interfere is proven, it is also necessary, in order to establish liability, to prove that the intent was accompanied by an act which had a tendency to interfere with the administration of justice. It has been said in some cases that liability may arise solely from an intention to interfere with the course of justice, so long as the conduct charged created at least a remote possibility of interference.[67] That approach, however, does not appear to be supported by statements in other cases.[68]

67. It was suggested in the following cases that proof of intention is sufficient to establish liability, with no additional requirement that the conduct had a tendency to interfere with proceedings: see *Attorney General (NSW) v John Fairfax* [1980] 1 NSWLR 362 at 369; *Registrar, Court of Appeal v Collins* [1982] 1 NSWLR 682 at 691 (Moffitt P). See also *Commercial Bank of Australia Ltd v Preston* [1981] 2 NSWLR 554 at 561, where Justice Hunt commented that a public statement which is intended to influence a party to proceedings amounts to a contempt. Justice Hunt made no reference to any additional requirement that the public statement

5.73 In the New South Wales Court of Appeal, President Mason recently noted the trend of the courts in past cases to regard actual intention to interfere as sufficient in order to prove liability for contempt, without any regard to whether the intention was accompanied by an act which had a tendency to interfere.[69] President Mason commented that there was no clear explanation for this approach. One possibility was that the courts considered that a person who does an act with such an intention admits a belief that he or she has a reasonable chance of success, with this admission being used as evidence of the fact. Another possible explanation was that proof of actual intention was analogous to an attempt to commit an offence. That is, intention to interfere, together with preparatory acts to carry out that intention, would be sufficient to sustain a charge for contempt. President Mason did not attempt to resolve the uncertainties in the law in this area.

5.74 These comments by President Mason echo suggestions by an earlier commentator that the trend in past cases represents a move by the courts towards recognising an offence of attempted contempt.[70] It is unclear what would be the practical significance of a finding of attempted contempt, as opposed to one of contempt, for example, whether it would result in the imposition of a lesser penalty.

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be shown to have a tendency to influence. But see *The Prothonotary v Collins* (1985) 2 NSWLR 549 at 550-555 (Kirby P), at 571 (McHugh JA), in which it was held that intention to interfere is not sufficient on its own to establish liability, but must be accompanied by an act which has the requisite tendency.

68. See *John Fairfax & Sons Pty Ltd v McRae* (1955) 93 CLR 351 at 371 (Dixon CJ, Fullagar, Kitton and Taylor JJ), in which it was said that the "ultimate question is as to the inherent tendency of the matter published". See also *Lane v Registrar, Supreme Court (NSW)* (1981) 148 CLR 245; *The Prothonotary v Collins* (1985) 2 NSWLR 549 at 550-551 (Kirby P), at 570-571 (McHugh JA).
69. See *Harkianakis v Skalkos* (1997) 42 NSWLR 22 at 28 (Mason P).
70. I Freckelton, *Prejudicial Publicity and the Courts* (Australian Law Reform Commission, Reference on Contempt of Court, Tribunals and Commissions, Research Paper 4, 1986) at 92-94.

5.75 It is arguably contrary to general principles of criminal law to impose criminal liability for the existence of an intention without the requisite act to give effect to that intention.[71] It may be said that the law should not seek to punish those who contemplate the commission of an offence, unless they also engage in conduct which effectively carries out their intent. One exception to this general principle appears to be the statutory offence of perverting the course of justice, as provided for in s 319 of the *Crimes Act 1900* (NSW). Section 319 requires only the commission of an act with the intention to pervert the course of justice, with no additional requirement that the act be likely or tend to succeed in perverting the course of justice.[72] The offence of perverting the course of justice overlaps with the offence of contempt, in so far as both offences seek to punish conduct which may interfere with the proper administration of justice.

The Commission's tentative view

5.76 To the extent that there may currently exist at common law a separate offence of "intentional sub judice contempt", the Commission can see no reason why it should continue to operate independently of the ordinary principles of liability for sub judice contempt. There is already an offence of perverting the course of justice, which focuses on the intention of the offender rather than the acts taken to carry out that intention. There does not appear to be any need to retain as well a category of contempt which imposes liability for a mere intent to prejudice proceedings. It would appear preferable to have one form of sub judice contempt, which requires

71. See D Brown, D Farrier, D Neal and D Weisbrot, *Criminal Laws: Materials and Commentary on Criminal Law and Process in New South Wales* (2nd edition, Federation Press, Sydney, 1996) Volume 1 at 327.

72. The statutory offence appears to differ from the common law offence of perverting the course of justice. The common law offence requires the commission of an act which is both intended and which has the tendency to pervert the course of justice: see *R v Vreones* [1891] 1 QB 361; *R v Selvage* [1982] QB 372.

a substantial risk of serious prejudice, with a defence of reasonable care. Evidence of actual intention will then simply be relevant to the question of penalty, rather than liability. Where there is evidence of actual intention, without an accompanying act amounting to a substantial risk of serious prejudice, it may be possible to charge the publisher with the offence of intent to pervert the course of justice under s 319 of the *Crimes Act 1900* (NSW).

PROPOSAL 9

Legislation should make it clear that mere intent to interfere with the administration of judice does not constitute sub judice contempt, in the absence of a publication that creates a substantial risk of prejudice to the administration of justice.

6. Publications relating to civil proceedings

- Overview
- Effect of publicity on judicial officers and witnesses
- Effect of publicity on civil juries
- Effect of publicity on parties
- The prejudgment principle

OVERVIEW

6.1 In theory, the sub judice rule applies equally to prevent prejudice to civil proceedings as it does to prevent prejudice to criminal proceedings. In practice, however, it has a very limited operation in restricting publication of material concerning civil proceedings.

6.2 Civil proceedings are usually determined by a judge, or magistrate, without a jury. As noted in Chapter 4, the courts now generally assume that judicial officers, including magistrates and coroners, will not be adversely influenced or affected by publicity about a case, because they have experience and training in making decisions on the evidence presented in court. This means that a publication will not usually be considered to have a tendency to prejudice the administration of justice in cases heard by a judicial officer alone, if the only basis for possible prejudice is the potential for influencing the judicial officer.[1] For this reason, most prosecutions for contempt under the sub judice rule arise from publications about criminal cases, in which a jury is sitting, or is likely to be sitting. Publications concerning civil cases, as well as publications concerning summary hearings by a magistrate, appellate proceedings, and coronial inquests, are far less likely to attract liability for contempt.

6.3 In addition, civil proceedings generally tend to attract less media publicity than do criminal proceedings, because the subject matter of civil proceedings is generally less dramatic or sensational. Arguably, therefore, the sub judice rule has less practical importance in restricting publications relating to civil proceedings.

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1. See, for example, *Civil Aviation Authority v Australian Broadcasting Corp* (1995) 39 NSWLR 540; *Waterhouse v Australian Broadcasting Corp* (1986) NSWLR 733; *Attorney General (NSW) v John Fairfax & Sons Ltd* (1985) 6 NSWLR 695; *Victoria v Australian Building Construction Employees' and Builders Labourers' Federation* (1982) 152 CLR 25; *cf X v Amalgamated TV Service (No 2)* (1987) 9 NSWLR 575 at 590 (Kirby J); *Attorney General (SA) v Nationwide News Pty Ltd* (1986) 43 SASR 374 at 379 (Jacobs J).

6.4 Publications relating to civil proceedings are not, however, completely immune from prosecution for sub judice contempt. As noted in Chapter 4, there are grounds for finding that a publication has a tendency to prejudice proceedings, other than by reason of its possible influence on a jury. It may be considered to have the potential to prejudice a witness, or to place pressure on a party to litigation to discontinue or compromise that party's action or defence. Both the possibility of prejudice to a witness, and pressure on a party, mean that the sub judice rule may, at least in theory, operate to restrict publication of material in civil proceedings.

6.5 In addition, a publication relating to civil proceedings may amount to contempt on the basis that it prejudges the issues at stake in particular proceedings. This aspect of contempt law is commonly referred to as the "prejudgment principle". The prejudgment principle is part of the sub judice rule, but does not rely on the traditional formulation of a tendency (or substantial risk) to cause prejudice to proceedings. It is concerned with ensuring that media publicity does not compromise the general administration of justice, rather than the administration of justice in a particular case, by usurping the courts' role and undermining public confidence in the court system. The operation of the prejudgment principle in Australia is unclear.

6.6 It has been submitted that the sub judice rule should not apply at all to restrict the publication of material relating to civil proceedings.[2] In this chapter, the Commission considers this proposition. This chapter also review the grounds on which liability for contempt may be based for publications relating to civil proceedings, and discusses whether these grounds provide sufficient reason for retaining the sub judice rule to restrict publications concerning civil proceedings.

2. Australian Broadcasting Corporation, *Submission* at 1.

EFFECT OF PUBLICITY ON JUDICIAL OFFICERS AND WITNESSES

6.7 In Chapter 4, the Commission noted that liability for sub judice contempt may be imposed, at least in theory, on the basis of possible influence on a witness or on a judicial officer. The justifications for imposing liability in this context are discussed in that chapter.

6.8 The Commission reached the tentative view that there was sufficient ground for concern about the effects of media publicity on a witness to justify imposing sub judice restrictions to protect against a substantial risk of such influence. This conclusion applies to witnesses in both criminal and civil proceedings. Proposal 3, which sets out a reformulation of the basic test for liability for sub judice contempt, refers to witnesses in "legal proceedings" as a basis for imposing liability. Following that reformulation, the law would continue to impose liability for a publication relating to civil proceedings on the basis of potential influence on a witness (or potential witness).

6.9 While the Commission's proposed formulation of the test for liability refers to influence on a witness as a possible ground of liability, it may be that the courts would generally be reluctant to find a substantial risk of prejudice in the context of a publication that is said potentially to influence a witness in civil proceedings.[3] There may, however, be extreme cases where the court considers there is a substantial risk of prejudice. For this reason, the Commission proposes retaining as a possible ground of liability influence on a witness in both civil and criminal proceedings.

3. See See *Victoria v Australian Building Construction Employees' and Builders Labourers' Federation* (1982) 152 CLR 25 at 59 (Gibbs CJ), at 103 (Mason J), at 131-132 (Wilson J), at 119 (Aickin J agreeing), at 75 (Stephen J dissenting on this point), at 176-177 (Brennan J dissenting on this point, though not expressly considering the issue of possible influence on witnesses), Murphy J did not consider this issue: see also para 4.34-4.35.

6.10 The Commission reached the tentative conclusion in Chapter 4 that the law should not impose liability for sub judice contempt on the basis of possible influence on a judicial officer. This view accords with the current common law trend. Proposal 3 includes influence on jurors and witnesses as grounds for imposing liability. Following this formulation of the basic test, liability could not be imposed for a publication on the basis of influence on a judicial officer. This applies equally to publications relating to civil proceedings as to publications relating to criminal proceedings.

6.11 The Commission noted in paragraphs 4.53-4.55 of Chapter 4 that liability may be imposed for a publication relating to civil proceedings, not because of possible influence on a judicial officer, but because the publication may "embarrass" the judicial officer. The Commission makes no proposal to modify the common law in this area, but calls instead for submissions on whether modification is necessary or desirable.

EFFECT OF PUBLICITY ON CIVIL JURIES

6.12 In principle, it may be assumed that juries in civil trials are as susceptible to influence by media publicity as are juries in criminal trials, and should therefore be protected from the possibility of such influence.

6.13 In practice, the role of the jury in civil proceedings is far more limited than in criminal proceedings. In general, most civil proceedings in the Supreme and District Courts are heard by judge alone.[4] The courts do have the power to order trial by jury,[5] but this is not the usual practice. In the Supreme Court, a party to civil proceedings relating to a common law claim[6] may request

4. See *Supreme Court Act 1970* (NSW) s 85; *District Court Act 1973* (NSW) s 77-78.
5. *Supreme Court Act 1970* (NSW) s 85(1); *District Court Act 1973* (NSW) s 77(3).
6. A common law claim is a claim for damages or other money, or for possession of land, or for detention of goods, in proceedings in the Common Law Division of the Supreme Court: see *Supreme Court Act 1970* (NSW) s 19(1).

that issues of fact in the proceedings be tried by a jury.[7] In the District Court, a party may request a trial by jury if the proceedings relate to a claim exceeding $5,000.[8] The District Court also has the power to order trial by jury for civil proceedings arising from a motor vehicle accident.[9] In addition, proceedings in the Supreme Court in which there are issues of fact on a charge of fraud, or on a claim for malicious prosecution, false imprisonment, seduction, or breach of promise of marriage, or for defamation, must be heard by a jury. In practice, the most common of these are defamation proceedings.[10] Since 1994, however, the role of the jury in defamation proceedings has been greatly restricted.[11] Juries in defamation proceedings now do not decide issues about the truth of the imputation in question, or its fairness as a comment, or other similar matters on which they may be swayed by publicity that is prejudicial to either party.

6.14 Given the limited role now played by juries in civil proceedings, it may be questioned whether there is sufficient justification for retaining the sub judice rule for publications relating to civil proceedings, if the main basis for such restrictions is the danger of influence on a jury. That is, can the infringement on freedom of discussion by a general ban on publications creating a tendency or risk of prejudice be justified in this context, given the small number of cases in which a jury may be exposed to prejudicial information, and the arguably little practical significance that any such media influence may have?

6.15 The Australian Law Reform Commission ("ALRC") noted the limited role of the jury in civil proceedings. It did not, however, suggest total abolition of the sub judice restrictions on publications relating to civil proceedings, but did recommend more limited

7. *Supreme Court Act 1970* (NSW) s 86.
8. *District Court Act 1973* (NSW) s 78(1).
9. *Supreme Court Act 1970* (NSW) s 87; *District Court Act 1973* (NSW) s 79.
10. *Supreme Court Act 1970* (NSW) s 88.
11. See *Defamation Act 1974* (NSW) s 7A, inserted by the *Defamation (Amendment) Act 1994* (NSW) Sch 1[2] and the explanation of the effect of this section at para 7.47.

restrictions than may arise under the general tendency formulation at common law.[12] It recommended that liability for contempt in respect of publications relating to civil proceedings arise only where a jury was sitting, and only where a publication implies that:

- ☐ a party or witness is or is not credible;
- ☐ evidence does or does not have probative value;
- ☐ a party has a good or bad character; or
- ☐ a certain outcome is likely or proper.

The publication must also give rise to a substantial risk of prejudice.

6.16 However, in recommending the retention of the sub judice restrictions in relation to civil proceedings, the ALRC observed that juries were used extensively in defamation and personal injury proceedings. Since the release of the ALRC's report, the role of juries has been significantly reduced in civil proceedings, including defamation proceedings, in New South Wales, as noted in paragraph 6.13 above.

6.17 It can argued that, whether or not juries are used infrequently in civil proceedings, there may still be significant interference with the administration of justice in a particular case as a result of the influence of media publicity on a jury. On the other hand, because of the differing operation of rules of evidence, the potential for influence on a jury in a civil case is arguably far less than that in a criminal case. In civil proceedings, the rules of evidence are generally not as stringent in excluding evidence where its prejudicial effect is considered to outweigh its probative value, and there is therefore less danger that a jury will be made aware of information through the media which has been kept from them by the court. Furthermore, in a civil trial, unlike most criminal trials receiving media attention, a person's liberty is not in question. There is therefore more room to compromise between the competing public interests in a fair trial and freedom of discussion.

12. Australian Law Reform Commission, *Contempt* (Report 35, 1987) at para 338.

The Commission's tentative view

6.18 Weighing up the opposing arguments, the Commission is presently inclined towards the view that the sub judice rule should apply equally to prevent publications that prejudice civil proceedings as it does to prevent prejudice to criminal proceedings. For reasons set out in Chapter 7 at paragraph 7.47, the Commission is, however, inclined to exclude defamation proceedings from application of the sub judice rule. Proposal 3, in Chapter 4 and Proposal 13, in Chapter 7, reflect the Commission's tentative conclusion.

EFFECT OF PUBLICITY ON PARTIES

6.19 A publication may constitute contempt if it tends to impose improper pressure on a party to proceedings as to the conduct of those proceedings. For example, a publication may have a tendency to pressure a party to discontinue or settle proceedings.[13] The basis for restricting the publication of material in this context is concern that the individual party, as well as litigants and potential litigants generally, will be discouraged from seeking access to the courts for vindication of their legal rights, and in this way the due administration of justice will be impeded.

6.20 The parameters within which a publication may comment on, or criticise, a party without constituting a contempt are somewhat uncertain.[14] Judges have adopted various approaches to defining

13. See *Commercial Bank of Australia Ltd v Preston* [1981] 2 NSWLR 554; *Harkianakis v Skalkos* (1997) 42 NSWLR 22; *Attorney General v Times Newspapers Ltd* [1973] QB 710; *Hamersley Iron Pty Ltd v Lovell* (1998) 19 WAR 316. See also A Riseley, *Improper Pressure on Parties to Court Proceedings* (Australian Law Reform Commission, Reference on Contempt of Courts, Tribunals and Commissions, Research Paper 3, 1986).
14. See S Walker, *The Law of Journalism in Australia* (Law Book Company, Sydney, 1989) at para 1.3.25; A Riseley, *Improper Pressure on Parties to Court Proceedings* (Australian Law Reform Commission, Reference on Contempt of Courts, Tribunals and Commissions, Research Paper 3, 1986) ch 3; *Harkianakis v Skalkos* (1997) 42 NSWLR 22 at 27 (Kirby J).

these parameters, with the result that it is difficult to distil any clear majority view as to the material that it is permissible to publish without attracting liability for contempt.

6.21 In the United Kingdom, three different approaches for defining the parameters for permissible comment were suggested by the House of Lords in *Attorney General v Times Newspapers Ltd.*[15] According to the first approach, a publication will only amount to sub judice contempt by reason of improper pressure on a party if it has a tendency to impose such pressure, and it contains injurious misrepresentations and intemperate criticism.[16] Following this approach, the media would be free to publish material without attracting liability for contempt, provided the publication did not contain misrepresentations and was not "intemperate", even if it could be shown to have a tendency to subject a party to pressure. According to the second approach, a publication will amount to a contempt if it subjects a party to "public obloquy" or abuse for exercising that party's legal rights.[17] This approach does not appear to place much emphasis on whether the publication has a tendency to affect the party's conduct or not. Following this approach, any publication would amount to a contempt if it could be said to hold a party up to public abuse, whether or not it was an accurate representation of the facts and contained reasoned and temperate discussion. The third approach is similar to the second approach, but includes within liability for contempt pressure by a private individual (that is, pressure other than by publication), unless that pressure can be justified.[18]

6.22 In *Commercial Bank of Australia Ltd v Preston and Another*,[19] the court adopted the approach put forward by Lord Reid in *Attorney General v Times Newspapers Ltd*. Justice Hunt

15. *Attorney General v Times Newspapers Ltd* [1974] AC 273.
16. *Attorney General v Times Newspapers Ltd* [1974] AC 273 at 295-299 (Lord Reid), at 326 (Lord Cross), at 305-307 (Lord Morris).
17. *Attorney General v Times Newspapers Ltd* [1974] AC 273 at 313 (Lord Diplock).
18. *Attorney General v Times Newspapers Ltd* [1974] AC 273 at 318-319 (Lord Simon).
19. *Commercial Bank of Australia Ltd v Preston* [1981] 2 NSWLR 554.

held that a publication will only amount to a contempt by reason of pressure on a party if it: first, has a tendency to influence a party; and secondly, contains misrepresentations of the facts and/or consists of intemperate opinion or discussion.[20] The exception to this principle would be if the publisher actually intended to influence a party in the conduct of proceedings. Where actual intention can be shown, liability for contempt would arise whether or not the publication was accurate and/or temperate.

6.23 In *Harkianakis v Skalkos*,[21] the Court of Appeal did not follow the principles set down by Justice Hunt in *Commercial Bank of Australia Ltd v Preston*. Justice Mason found that a problem with Lord Reid's test, adopted by Justice Hunt, was that reference to misstatement of the facts meant that a publication may be contemptuous simply by reference to its lack of complete accuracy, as a function of its truth value. Yet a party is just as likely to feel the deterrent effects of publicity regardless of the truth or falsity of the issues in question.[22]

6.24 Justice Mason considered all three approaches suggested by the House of Lords in the *Times Newspapers* case, but decided that "the tests [for distinguishing when criticisms of a litigant does not constitute contempt were] not consonant and, in any event, [were] not without their difficulties. Indeed they all appear to be at odds with the balancing approach recognised in Australian law as represented by the *Bread Manufacturers'* case".[23] He adopted as the test of when pressure on a party may be a contempt the words of Deane J in *Hinch v Attorney General* that the publication have a tendency "to disparage or vilify a party … because he is a litigant … or because of the litigation or allegations made in it".[24] Justice Beazley concurred in this aspect of the court's decision. The court also held that intent to deter the litigant from initiating,

20. See *Commercial Bank of Australia Ltd v Preston* [1981] 2 NSWLR 554 at 561 (Hunt J).
21. *Harkianakis v Skalkos* (1997) 42 NSWLR 22.
22. *Harkianakis v Skalkos* (1997) 42 NSWLR 22 at 36 (Mason J).
23. *Harkianakis v Skalkos* (1997) 42 NSWLR 22 at 34 (Mason J).
24. *Hinch v Attorney General (Vic)* (1987) 164 CLR 15 at 54-55; see also *Hamersley Iron Pty Ltd v Lovell* (1998) 19 WAR 316.

continuing or discontinuing litigation must be shown;[25] otherwise, the court must be satisfied beyond reasonable doubt that the publication has, as a matter of practical reality, the impugned tendency to deter.[26]

6.25 As Justice Mason himself pointed out,[27] "the ascertainment and application of the principles to be applied with respect to contempt by improper pressure on a litigant party" is a difficult area and one which still does not have clarity. Although both Justice Mason[28] and Justice Powell[29] invoked the distinction between "proper" and "improper" pressure, little guidance is given as to the limits of what is "proper" pressure for the purpose of assessing the tendency of the publication to cause prejudice. Justice Mason refers to the means the court in *Meissner v The Queen*[30] identified as being improper, including the application of force, intimidation and financial inducement motivated by the private concerns of the payer. Justice Mason also points out that in *Meissner v The Queen* (in obiter) it was recognised that even certain types of persuasion could cross the line between proper and improper. As well, the mere fact that something that is lawful is threatened does not mean that the pressure is necessarily proper.[31]

6.26 Justice Mason explained that the reason the law is concerned to distinguish between proper and improper pressure is because the litigant's freedom to conduct litigation as he or she chooses is not an absolute one. The public interests in free speech and the

25. See also *Hamersley Iron Pty Ltd v Lovell* (1998) 19 WAR 316. In that case, there was an express finding of intent to deter.
26. *Harkianakis v Skalkos* (1997) 42 NSWLR 22 at 42 (Mason J).
27. *Harkianakis v Skalkos* (1997) 42 NSWLR 22 at 27 (Mason J).
28. *Harkianakis v Skalkos* (1997) 42 NSWLR 22 at 32 (Mason J).
29. *Harkianakis v Skalkos* (1997) 42 NSWLR 22 at 63 (Powell J).
30. *Meissner v The Queen* (1995) 184 CLR 132 at 142-143, 158-159.
31. *Harkianakis v Skalkos* (1997) 42 NSWLR 22 at 30 (Mason J). See also *Attorney General v TCN Channel Nine Pty Ltd* (1990) 5 BR 10 (Hunt J), especially at 29: "Of course, numerous repetitions in the media of the nature of the evidence available against a party to pending proceedings could well amount to [improper] pressure."

proper administration of justice need to be balanced.[32] In reconciling these competing interests, the court "must consider the entire content of the broadcasts and ask itself whether their prejudicial effect outweighs the public interest they seek to serve."[33] In this regard, *Harkianakis v Skalkos* could be relied on for recommending that no change to the common law be made, it being best to judge in each particular case whether pressure on a party has been proper or improper.

6.27 There is one other possible point of uncertainty in this area of the law of sub judice contempt. It has been questioned whether the tendency of the publication should be measured against the capacity to withstand pressure of the particular litigant involved, or whether against some hypothetical litigant of "ordinary" fortitude. This issue has not been resolved, although Justice Mason has expressed a preference for the latter approach.[34]

6.28 In New Zealand, the issue of publications exerting pressure on parties in civil proceedings was considered by a single judge of the High Court.[35] It was held that a publication would amount to a contempt if it went beyond fair and temperate comment and could be seen to have a real likelihood of inhibiting a litigant of average robustness from availing itself of the right to have the case determined by a court, or if it was intended to have such an effect. It was noted that the process of determining what is fair and temperate comment involves a balancing of a number of factors, including whether there is any legitimate public interest in the comment being made. The court also appeared to take the view that the prejudicial effect of a publication should be measured according to a hypothetical litigant of ordinary fortitude, rather than according to the particular characteristics of the litigant concerned.

32. *Harkianakis v Skalkos* (1997) 42 NSWLR 22 at 37 (Mason J).
33. *Hinch v Attorney General (Vic)* (1987) 164 CLR 15 at 76 (Toohey J), adopted by Justice Mason in *Harkianakis v Skalkos* (1997) 42 NSWLR 22 at 38 (Mason J).
34. *Harkianakis v Skalkos* (1997) 42 NSWLR 22 at 29 (Mason J).
35. *Duff v Communicado Ltd* [1996] 2 NZLR 89 (Blanchard J).

6.29 The ALRC took the approach that there should be no liability for sub judice contempt if the only basis for liability was possible pressure on a party, unless actual intention to impose pressure could be proven.[36]

The Commission's tentative view

6.30 At this stage, the Commission is inclined to the view that the law should provide some protection against pressure by a publication on parties in civil proceedings to compromise the manner in which they conduct those proceedings. The Commission is uncertain, however, as to how liability for contempt should be imposed in this situation, and what should be the limits of liability.

6.31 One option is to adopt an approach similar to that of the ALRC. That is, the law could impose liability for contempt if a publisher could be shown to have intended to impose pressure on a party to withdraw from litigation or have intended to vilify a person or organisation in their capacity as a party to proceedings. Liability could be made subject to the public interest principle, that is, a publisher may escape liability in this situation if its publication related to a matter of public interest.

6.32 A second option is to adopt a formulation similar to that put forward in the New Zealand decision of *Duff v Communicado Ltd*,[37] outlined in paragraph 6.28 above. The law could impose liability for contempt for a publication that goes beyond fair and temperate comment and has a real likelihood of inhibiting a litigant from asserting its right to have its case determined by a court. Liability could also be imposed for a publication that was intended to have such an effect. Again, a finding of liability could be made subject to the public interest principle. The likely effect of a publication could be measured according to the "reasonable" litigant, or a litigant of "reasonable" fortitude.

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36. See Australian Law Reform Commission, *Contempt* (Report 35, 1987) at para 399.
37. *Duff v Communicado Ltd* [1996] 2 NZLR 89 (Blanchard J).

6.33 A third option is to follow Justice Mason's approach and impose liability when a publication is found to have a substantial risk of imposing improper pressure on a party in civil proceedings as to the conduct of those proceedings. Consideration could be given to attempting to define in legislation, or at least give some guidance on the meaning of, "improper" pressure.

6.34 Legislation could impose liability according to one of the three options above. Alternatively, the common law could remain unmodified by statute and allowed to develop on a case by case basis.

6.35 At this stage, the Commission makes no proposal in relation to publications that exert pressure on parties in civil proceedings. Instead, submissions are invited on:

- ☐ first, whether it is desirable to impose liability for sub judice contempt in this situation;
- ☐ secondly, whether it is desirable to clarify and/or modify the common law on this aspect by statute; and
- ☐ thirdly, which is the preferable approach for imposing liability.

6.36 It should be noted that in some cases where actual intention to interfere with civil proceedings (or, for that matter, criminal proceedings) can be proved, the offender can be charged with either or both of two criminal offences, namely, perverting, or attempting to pervert, the course of justice.[38] The statutory offence of perverting the course of justice does not appear to require proof of an objective tendency to pervert, differing from the common law offence in that respect.

38. *Crimes Act 1900* (NSW) s 319.

THE PREJUDGMENT PRINCIPLE

Overview

6.37 It is possible that media publications will attract liability for contempt if they prejudge issues that are at stake in a case currently before a court. For example, a newspaper article may amount to a contempt if it claims that a drug company has been negligent in selling an unsafe drug while there are proceedings pending before a court for an action in negligence against that company.[39]

6.38 The prejudgment principle is generally regarded as an aspect of the sub judice rule. However, in contrast with the general principles of liability for sub judice contempt, the prejudgment principle is not concerned with the potential influence of a publication on the court hearing the case in question. It seems that the principle may be applied to find guilt for contempt even though the publication does not have a tendency to influence participants in the proceedings. Instead of aiming to prevent prejudice in a particular case, the prejudgment principle has a more general goal of preventing the media from usurping the role of the courts, undermining public confidence in the court system, and deterring future litigants, by engaging in a "trial by media". As one judge expressed it:

> Responsible "mass media" will do their best to be fair, but there will also be ill-informed, slapdash or prejudiced attempts to influence the public. If people are led to think that it is easy to find the truth, disrespect for the processes of the law could follow, and, if mass media are allowed to judge, unpopular people and unpopular causes will fare very badly.[40]

6.39 Because the prejudgment principle does not require proof of a tendency to prejudice a particular case, it will predominantly operate to restrict publications relating to civil proceedings.

39. See *Attorney General v Times Newspaper Ltd* [1974] AC 273.
40. *Attorney General v Times Newspaper Ltd* [1974] AC 273 at 300 (Lord Reid).

Publications relating to criminal proceedings, which comment on the guilt or innocence of the accused, will generally be assessed according to the traditional principle of their tendency to prejudice proceedings, by reason of their potential influence on the jury. In theory, the prejudgment principle may also operate to restrict publication of material relating to appeals (whether civil or criminal), since jurors and witnesses do not participate in appeal proceedings, and therefore publications relating to appeals are unlikely to be found to have a tendency to prejudice the court.

6.40 The restrictions imposed by the prejudgment principle may have particular importance to investigative journalism, and even, perhaps, academic and scientific publications on matters which are the subject of civil proceedings. Yet it is uncertain how far the prejudgment principle operates in Australia or, indeed, whether it operates in this country at all.

The operation of the principle in the United Kingdom: the Sunday Times case

6.41 The leading case on the prejudgment principle comes from the United Kingdom, and is commonly referred to as the *Sunday Times* case.[41] In that case, the House of Lords granted an injunction to restrain the publication of a newspaper article. The article related to civil proceedings for negligence brought against a drug company by parents of children who had suffered physical deformities which they claimed were caused by a drug containing thalidomide. The drug was manufactured and marketed by the defendant company. The newspaper article discussed the civil proceedings and suggested that the drug company should offer much more money to the thalidomide victims than they had done in order to settle the claim. The House of Lords granted the injunction to restrain the publication of the article, on the basis that the article in effect charged the company with negligence and therefore prejudged the issues to be decided in the civil proceedings.

41. *Attorney General v Times Newspaper Ltd* [1974] AC 273.

6.42 The newspaper subsequently brought a claim before the European Court of Human Rights against the decision of the House of Lords.[42] The newspaper claimed that the decision violated Article 10 of the *European Convention on Human Rights*, to which the United Kingdom was a signatory. Article 10 provides that everyone has the right to freedom of expression, which includes the right to impart information and ideas without interference by public authority. That right might be restricted if necessary in a democratic society for, among other things, maintaining the authority and impartiality of the judiciary.

6.43 The European Court of Human Rights upheld the newspaper's claim. The court considered that the thalidomide controversy was a matter of public concern which was not outweighed by any need on the facts to maintain the authority of the judiciary. It took the view that a court cannot operate in a vacuum and that, consequently, there could not be a complete ban on prior discussion of disputes outside the courts.

6.44 The courts in the United Kingdom have not applied the prejudgment principle since the *Sunday Times* case.[43] Legislation was introduced to reverse the House of Lords' decision in the *Sunday Times* case,[44] although it is not clear whether it succeeded in abolishing the operation of the prejudgment principle.[45]

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42. See *Sunday Times v UK* (1979) 2 EHRR 245.
43. See *Blackburn v BBC* (1976) Times, 15 December; *Schering Chemicals Ltd v Falkman Ltd* [1982] 1 QB 1; *Re Lonrho Plc* [1990] 2 AC 154.
44. See *Contempt of Court Act 1981* (UK) s 2(2), which provides that, in the absence of an intention to prejudice the administration of justice, liability for sub judice contempt will only arise where there is a substantial risk of serious prejudice.
45. The *Contempt of Court Act 1981* (UK) does not expressly abolish the prejudgment principle. Furthermore, s 2 of the Act applies only to publications which interfere with "particular legal proceedings". It may be argued that the prejudgment principle aims to prevent interference with the administration of justice as a whole, rather than interference with particular proceedings, and therefore the common law relating to this aspect of contempt law survives the

The operation of the principle in Australia

6.45 The attitude of the Australian courts towards the *Sunday Times* case is unclear. Several Australian judges have referred with approval to the prejudgment principle as articulated by the House of Lords.[46] Other judges have expressed doubt that the principle does or should apply to restrict publications under Australian law.[47]

6.46 In *Civil Aviation Authority v ABC*, Justice Kirby was critical of the prejudgment principle.[48] He suggested that it could be in breach of Australia's international obligations to respect the right of freedom of expression[49] and may be inappropriate in light of our implied constitutional right to freedom of political discussion.

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introduction of the legislation. See *Attorney General v English* [1983] 1 AC 116 at 143 (Lord Diplock); A M Tettenborn, "The Contempt of Court Bill: Some Problems" (1981) 125 *Solicitors Journal* 123. But see the argument that the legislation should be interpreted as abolishing the prejudgment principle in G Borrie, *Borrie and Lowe's The Law of Contempt* (3rd edition, Butterworths, London, 1996) 117-121. See also *Re Lonrho Plc* [1990] 2 AC 154.

46. See *Watts v Hawke & David Syme & Co Ltd* [1976] VR 707; *Commercial Bank of Australia Ltd v Preston* [1981] 2 NSWLR 554; *Victoria v Australian Building Construction Employees' and Builders Labourers' Federation* (1982) 152 CLR 25 at 167-168 (Brennan J); *Hinch v Attorney General (Vic)* (1987) 164 CLR 15 at 54-55 (Deane J); *National Mutual Life Association of Australasia Ltd v General Television Corporation Pty Ltd* (1988) 62 ALJR 553 at 555-556 (Toohey J).
47. See *Victoria v Australian Building Construction Employees' and Builders Labourers' Federation* (1982) 152 CLR 25 at 96 (Mason J); *Civil Aviation Authority v Australian Broadcasting Corp* (1995) 39 NSWLR 540 at 553-560 (Kirby J).
48. (1995) 39 NSWLR 540 at 554-562.
49. *International Covenant on Civil and Political Rights*, Art 19: "Although such obligations are not binding on this Court as part of the law of Australia, the Convention not having been incorporated into domestic law, they should certainly be considered when determining the state of the common law when it is necessary to resolve an uncertainty": *Civil Aviation Authority v Australian Broadcasting Corp* (1995) 39 NSWLR 540 at 558 (Kirby J).

Justice Kirby doubted whether the prejudgment principle is essential to the protection of the capacity of courts effectively to discharge their functions.

6.47 There has not been a case in Australia in which liability for contempt has been established based on the prejudgment principle, as articulated by the House of Lords.

Other jurisdictions

6.48 In New Zealand, the operation of the prejudgment principle appears as unclear as does its operation in Australia. In the past, New Zealand courts have referred to the principle, as articulated by the House of Lords in the *Sunday Times* case, as forming part of the common law of New Zealand.[50] However, in one recent case,[51] a single judge of the New Zealand High Court questioned whether the prejudgment principle formed part of the law of New Zealand, given its treatment in the United Kingdom since the *Sunday Times* case, and in light of the provisions of the New Zealand *Bill of Rights Act 1990*[52] for the protection of freedom of expression. The judge did not, however, consider it necessary to make a final determination about the operation of the principle, based on the facts of the particular case with which he was concerned. In a subsequent case,[53] however, another single judge of the New Zealand High Court referred to the prejudgment principle as forming part of the law of New Zealand.

6.49 In Ireland, the *Sunday Times* decision has not, so far, been followed by the courts. In *State (DPP) v Walsh* Henchy J observed that there was a presumption that the Irish law of contempt is in

50. See, for example, *Knapp Roberson and Associates v Roberson* (1987) 6 NZLR 493; *R v Chignell* (1990) 6 CRNZ 476.
51. *Greenpeace New Zealand Inc v Minister of Fisheries* [1995] 2 NZLR 463 (Doogue J).
52. *Bill of Rights Act 1990* (NZ) s 14, 15.
53. *Pharmac v Researched Medicines Industry* [1996] 1 NZLR 472 (McGechan J).

conformity with the *European Convention on Fundamental Rights and Freedoms*, particularly Articles 5 and 10(2).[54] Given that in *Sunday Times v United Kingdom*[55] the European Court of Human Rights found that decision in the *Sunday Times* case was in breach of Article 10, the clear indication is that the Irish courts reject the operation of the prejudgment principle.

Recommendations of law reform bodies

6.50 The ALRC, the Phillimore Committee in the United Kingdom, and the Irish Law Reform Commission have all considered the prejudgment principle. Ultimately, none recommended that the principle should form part of the law of contempt, although for different reasons.

6.51 The Phillimore Committee[56] observed that real dangers may arise from publications which engage in "trial by media". However, the committee concluded that it was not possible to devise a satisfactory formulation of the prejudgment principle, and recommended against its inclusion in the law of sub judice contempt.

6.52 The ALRC took the view[57] that it was unjustifiable to restrict the publication of information on the basis only that it prejudged issues in proceedings. The concern on which the prejudgment principle was based, namely that public confidence in the legal system would be undermined, was arguably speculative and therefore not established with a sufficient degree of certainty to warrant general restrictions on freedom of publication. Furthermore, the principle had attracted criticism in other

54. [1981] IR 412 at 440 (Henchy J).
55. [1979] 2 EHRR 245.
56. United Kingdom, Committee on Contempt of Court, *Report of the Committee on Contempt of Court* (HMSO, London, Cmnd 5794, 1974) at para 106-111.
57. Australian Law Reform Commission, *Contempt* (Report 35, 1987) ch 9.

jurisdictions, and was likely to be incompatible with international covenants protecting the right to freedom of expression.

6.53 The Irish Law Reform Commission initially proposed that liability for contempt should extend to publications which are likely to cause serious injury to the administration of justice in general. This was, in effect, a form of the prejudgment principle, although it was arguably more restricted in its scope than the formulation put forward in the *Sunday Times* case, since it required a higher degree of likelihood of injury. In the end, however, the Irish Law Reform Commission retreated from this position, and recommended that the prejudgment principle in any form should not form part of Irish law on contempt.

The Commission's tentative view

6.54 The Commission is, like others, concerned that application of the prejudgment principle in contempt law unacceptably infringes on freedom of expression. The difficulty arises in curtailing "free public discussion of topics of general concern"[58] where no potential for actual damage to a particular case can be identified. Furthermore, the operation of a prejudgment principle in some form involves difficulties in definition and possible wide scope of liability. For example, depending on how the principle is defined, it may apply to dissertation in academic or scientific journals about matters which are the subject of litigation. The joint judgment of the majority of the European Court of Human Rights in *Sunday Times v United Kingdom* encapsulates the Commission's present view regarding this issue:

> Whilst … [the courts] are the forum for the settlement of disputes, this does not mean that there can be no prior discussion of disputes elsewhere, be it in specialised journals, in the general press or amongst the public at large. Furthermore, whilst the mass media must not overstep the

58. *Schering Chemicals Ltd v Falkman Ltd* [1982] 1 QB 1 at 30 (Lord Shaw).

bounds imposed in the interests of the proper administration of justice, it is incumbent on them to impart information and ideas concerning matters that come before the courts just as in other areas of public interest. Not only do the media have the task of imparting such information and ideas: the public also has a right to receive them.[59]

PROPOSAL 10

Legislation should make it clear that liability for sub judice contempt cannot be founded simply on the basis that a publication prejudges issues at stake in proceedings.

59. (1979) 2 EHRR 245 at 280.

7. Time limits on liability for sub judice contempt

- Overview
- Problems in identifying when proceedings are “pending”
- Fixing an appropriate starting point for sub judice contempt
- Identifying when proceedings are no longer “pending”: fixing an appropriate end point for sub judice contempt
- Time limits and “intentional” contempt

OVERVIEW

7.1 The sub judice rule operates within a specific time period. Material published outside that time period will not attract liability for sub judice contempt, even if it is prejudicial.[1]

7.2 In Australia, the sub judice rule restricts the publication of information relating to proceedings that are "current" or "pending". So, for example, a publication that contains prejudicial information about a person will not attract liability for contempt, if proceedings involving that person are not yet pending (although a publication in this situation may attract liability on another legal ground, for example, defamation).

7.3 By limiting the operation of the sub judice rule to a specific time period, the law seeks to confine the restrictions placed on freedom of discussion. If there were no such time limit, the media could never be certain that a publication would not attract liability for contempt in the future if, after issuing a publication, proceedings were commenced which dealt with the people or events described in the publication.[2]

7.4 There are two main issues that arise when considering the time limits for liability. The first is whether the law needs to be clarified as to when exactly proceedings are "pending" or "current". The second is whether the law should be reformed to fix earlier or later starting and end points for the sub judice period than currently exist.

7.5 A third issue in respect of time limits is the practical difficulties the media may face on a day-to-day basis in ascertaining from the courts and the police whether a matter is

1. It is possible, though not clear, that the general time limits for sub judice contempt do not apply to situations where it is alleged that the publisher actually intended to prejudice proceedings: See *Attorney General v News Group Newspapers Ltd* [1988] 2 All ER 906.
2. See *James v Robinson* (1963) 109 CLR 593 at 607 (Kitto, Taylor, Menzies and Owen JJ).

current or pending. This issue is part of the larger question of whether it is possible, or desirable, to achieve a more co-ordinated approach between the media and those involved in the court system to prevent breaches of the sub judice rule. The Commission raised this issue in Chapter 1.[3]

PROBLEMS IN IDENTIFYING WHEN PROCEEDINGS ARE "PENDING"

7.6 Legal proceedings are said to be pending if they have been commenced and have not yet been completed, that is, if the processes of the law have been set in motion and a court has become "seised" of the matter.[4] Arguably, it is not always easy to ascertain when proceedings may be regarded to have commenced so as to be "pending" and therefore attract the operation of the sub judice rule. In this discussion, the Commission considers the meaning of the term "pending" in the context, first, of publications relating to criminal proceedings, and secondly, publications relating to civil proceedings.

Publications relating to criminal proceedings

7.7 In relation to criminal proceedings, it has been said that the sub judice period commences from the time of the procedure prescribed by law for bringing an accused person to trial.[5] Curial procedures, not merely police activity, must have been commenced.[6] For example, proceedings will not be pending simply

3. See para 1.48-1.64.
4. See *James v Robinson* (1963) 109 CLR 593; *Attorney General (NSW) v TCN Channel Nine Pty Ltd* (1990) 20 NSWLR 368.
5. *Packer v Peacock* (1912) 13 CLR 577 at 586.
6. *James v Robinson* (1963) 109 CLR 593 at 615-616 (Windeyer J). See also *The Prothonotary v Collins* (1985) 2 NSWLR 549 at 567 (McHugh JA); *Watson v Attorney General (NSW)* (1987) 8 NSWLR 685 at 700; *X v Amalgamated Television Services Pty Ltd (No 2)*

because police have identified a person as a suspect, or have questioned a suspect, with no further action being taken.

7.8 It is now clear that if a person has been arrested with or without a warrant and charged, or simply arrested with a view to being charged, proceedings against that person are considered "pending" so as to attract the operation of the sub judice rule to any publication relating to the matter.[7] The basis for determining that an arrest falls within the sub judice period is that it is made for the purpose of bringing a person into the criminal justice system, and carries with it certain legal obligations on the part of the police to bring the arrested person before a court within a specified time frame. In this way, a person comes within the processes and protection of the court on arrest, and the court becomes "seised" of the matter, so as to trigger the operation of the sub judice rule.

7.9 In the same way, it might be argued that the issue of a summons to appear comes within the meaning of "proceedings pending" for the purposes of the time limits on liability for sub judice contempt. A summons to appear is another way of bringing a person before a court to answer a criminal charge or charges, as an alternative to arresting that person. The same basis as for arrest may therefore be relied on to argue that a summons to appear comes within the sub judice time period, in so far as a summons is issued as a means of initiating the criminal process against a person, at which point a court becomes seised of the matter in question.[8]

(1987) 9 NSWLR 575 at 605 (Mahoney JA); *Attorney General (NSW) v TCN Channel Nine Pty Ltd* (1990) 20 NSWLR 368 at 375; *R v Rogerson* (1992) 174 CLR 268 at 276 (Mason CJ).

7. *James v Robinson* (1963) 109 CLR 593; *Attorney General (NSW) v TCN Channel Nine Pty Ltd* (1990) 20 NSWLR 368.

8. To the Commission's knowledge, the courts have not considered the question of whether proceedings are pending on the issue of a summons to appear. The court did refer in *Attorney General (NSW) v TCN Channel Nine Pty Ltd* (1990) 20 NSWLR 368 at 374-375 to the fact that there are various methods by which the criminal process may be initiated in New South Wales, so as to come within

7.10 It is less certain whether steps which may occur before the arrest of a person, or the issue of a summons to appear, are considered to be part of "proceedings pending" so as to trigger the application of the sub judice rule. Specifically, it is unclear whether the issue of a warrant for arrest, the laying of an information or making of a complaint, and extradition proceedings come within the meaning of "proceedings pending", or fall outside the time period for liability for sub judice contempt.

Warrant for arrest

7.11 The courts have not given much consideration to the question of whether the issue of a warrant for arrest comes within the sub judice period. It was noted in a couple of Australian cases that an arrest by the police marks the commencement of proceedings, and therefore the commencement of the sub judice period.[9] Those comments could be seen to suggest that a warrant for arrest, occurring before an arrest takes place, would not be sufficient to trigger the operation of the sub judice rule. If this were the case, the media would be free to publish information at the time of the issue of a warrant without regard to whether the publication had a tendency to prejudice the matter to which the warrant for arrest related. However, since the facts in both cases involved an arrest, without a warrant for arrest being first issued, it is questionable whether the courts' comments in regard to the commencement of proceedings at the time of arrest are relevant to cases where a warrant for arrest is issued before an arrest is made.

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the sub judice period. The court referred to the methods discussed in the judgment of Gleeson CJ in *R v Hull* (1989) 16 NSWLR 385 at 390 as the methods by which the criminal process may be initiated. That judgment refers to the issue of a summons to appear as one method of initiating criminal proceedings in New South Wales. It may be argued from that reference that the courts would be likely to consider the issue of a summons to appear as coming within the sub judice period.

9. *James v Robinson* (1963) 109 CLR 593 at 615-616 (Windeyer J); *Attorney General (NSW) v TCN Channel Nine Pty Ltd* (1990) 20 NSWLR 369 at 374-375.

7.12 It was suggested in an old English case[10] that, at common law, the sub judice period *does* commence with the issue of a warrant for arrest, with the result that any comments made after the issue of a warrant for arrest which have a tendency to prejudice the administration of justice would constitute contempt. It was argued in the case that the issue of a warrant for arrest is a judicial act, involving the exercise of judicial discretion, and is therefore the first step in the criminal process. Arguably, however, some additional basis would be needed for regarding a warrant for arrest as coming within the meaning of "pending proceedings" other than that it involves a judicial act. If that were the only basis for determining that an act falls within the sub judice period, then, for example, the issue of a warrant to search a person's premises could also be regarded as triggering the application of the sub judice rule. Yet these steps, while involving an exercise of judicial discretion, can hardly be seen as initiating the criminal process against a particular individual for the alleged commission of a criminal offence.

Laying of an information or making of a complaint

7.13 The laying of an information or making of a complaint before a Justice occurs as the step before the issue of a summons to appear or the issue of a warrant for arrest.[11] Legislation in New South Wales provides that an information is taken to be laid if a person is charged and given a copy of the charge sheet, and subsequently released on bail.[12] In general, a prosecution for an indictable offence is commenced by the laying of an information, which vests the Local Court with jurisdiction to proceed to a committal hearing. However, there is also provision for the Attorney General or the Director of Public Prosecutions to commence a prosecution for an indictable offence by filing an indictment in the Supreme or District Court without an information having been laid and, consequently, without the

10. See *R v Clarke; Ex parte Crippen* (1910) 103 LT 636 at 641 (Coleridge LJ, in obiter).
11. See *Justices Act 1902* (NSW) s 21-24 (for indictable offences), s 59, 60 (for summary offences).
12. See *Justices Act 1902* (NSW) s 22A, 52A.

requirement for a committal hearing.[13] This is commonly referred to as an "ex officio indictment".

7.14 To the Commission's knowledge, the courts have not considered the question of whether the laying of an information, making of a complaint, or filing of an ex officio indictment come within the meaning of "proceedings pending". On one view, these procedures represent the initial act that brings a particular matter to the attention of a court, and in that way sets the criminal process in motion against a particular person. In that sense, it could be argued that they should come within the sub judice period. Moreover, the fact that an information is taken to be laid if a person is charged and given a copy of the charge sheet may be considered to support the argument that the laying of an information forms part of "proceedings pending". The courts have previously held that charging a person comes within the sub judice period.[14]

Extradition and return to jurisdiction

7.15 It is arguably unclear whether extradition proceedings come within the sub judice period or whether the media may publish information at this stage without attracting liability for contempt.

7.16 If a person is not within the jurisdiction of the courts in which the person has been accused of an offence, then that person will need to be brought into the jurisdiction to face trial.

7.17 The procedures for bringing a person into New South Wales to stand trial will depend on whether the fugitive is, at the time, located within another Australian jurisdiction, within the jurisdiction of New Zealand, or within the jurisdiction of another part of the world. In all three of these situations, a warrant must be issued for the arrest of the accused person.[15]

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13. See *Criminal Procedure Act 1986* (NSW) s 4(2).
14. *James v Robinson* (1963) 109 CLR 593 at 615 (Windeyer J); *Packer v Peacock* (1912) 13 CLR 577 at 586.
15. See the *Service and Execution of Process Act 1992* (Cth) s 82 with respect to extradition among the Australian States. See the *Extradition Act 1999* (NZ) s 41 for extradition between Australia

7.18 The return of a person to New South Wales who is located within Australia is governed by the *Service and Execution of Process Act 1992* (Cth). After the issue of a warrant the person may be arrested by an officer of the police force of the State in which the person is found, or the Sheriff or Sheriff's officers of that State or a member of the Australian Federal Police.[16] After the person is apprehended, he or she is brought before a magistrate in that state.[17] The magistrate may order that the person be remanded on bail on the condition that the person appear at a particular time and place in the state of New South Wales. Alternatively the person may be taken into custody, or may be released if the magistrate is satisfied that the warrant is invalid, or the matter may be adjourned for up to five days.[18]

7.19 If the fugitive is, at the time the warrant is issued, situated outside Australia, the procedure required to secure the person's return to Australia is largely governed by the law of that other country, which may be affected by treaty arrangements with Australia.[19] Australia and New Zealand have special arrangements with regard to the return of fugitives. The arrangements consist of what is known as "the backing of warrants". The procedure requires that a warrant issued in Australia be endorsed by a New Zealand District Court Judge prior to the arrest of the fugitive.[20] Requests to other foreign jurisdictions for the extradition of a person accused of an offence in Australia must be made by the Commonwealth Attorney

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and New Zealand. With respect to extradition between Australia and other countries, the requirements will be provided for in the treaty between Australia and the other country, but the general procedure is that a warrant is to be issued prior to application for extradition: Information provided by the Australian Attorney General's Department.

16. *Services and Execution of Process Act 1992* (Cth) s 82(3).
17. *Services and Execution of Process Act 1992* (Cth) s 83.
18. *Services and Execution of Process Act 1992* (Cth) s 83.
19. E P Aughterson, *Extradition: Australian Law and Procedure* (Law Book Company, Sydney, 1995) at 247-248.
20. *Extradition Act 1999* (NZ) s 40, 41.

General.[21] What is required in a particular application will depend upon treaty arrangements and the domestic law of the surrendering country. For this reason, the time it will take to return an accused person to Australia is essentially indeterminate.

7.20 To the Commission's knowledge, the courts have not considered the issue of whether proceedings to return a person to New South Wales come within the sub judice period. The question would probably be determined according to whether it could be said that, at the time of extradition, a New South Wales court had become "seised" of the matter. Since a warrant for arrest is invariably issued to initiate extradition proceedings, it may ultimately depend on whether the issue of a warrant for arrest is to be regarded at common law as bringing a matter into the sub judice period.

7.21 In England, the issue of extradition proceedings in the context of the sub judice period was considered in 1910 in the case of *R v Clarke; Ex parte Crippen.*[22] That case involved the publication of contemptuous material after a warrant had been issued for the arrest of the accused, the accused had been arrested in Canada, and had already been brought before a judge in Quebec to instigate proceedings to have him remitted to London for trial. At the time of publication, the Canadian judge had not yet disposed of the case. Justices Darling and Pickford of the King's Bench Division limited their consideration of the commencement of the sub judice period to the circumstances of the particular case. Justice Darling stated that the fact that the accused was actually in custody on warrant and actually brought before the court in Canada[23] meant that proceedings were "pending". Justice Pickford, on the other hand, emphasised the fact that the accused had been arrested, asserting "[i]t does not seem to matter in the least that that arrest was in Canada, and that the accused was at that time

21. *Extradition Act 1988* (Cth) s 40.
22. [1908-1910] All ER 915.
23. [1908-1910] All ER 915 at 919.

in prison in Canada".[24] Lord Justice Coleridge reached his decision on the sole fact that a warrant had been issued. He declared:[25]

> But after an information has been laid before the magistrate and he has issued a warrant, in my opinion, at any rate, all comments after that, tending to prejudice the administration of justice, are in the nature of contempt.

7.22 From these comments, it could be argued that the sub judice period begins at the very least when a person has been arrested by the appropriate authorities in the surrendering country, if not at the time the warrant is issued by the requesting country. However, until Australian courts decide on the issue, the commencement of the sub judice period in relation to accused persons located outside of New South Wales remains uncertain.

Publications relating to civil proceedings

7.23 Civil proceedings are pending once the initiating process to bring a civil action has been set in motion, for example, by the issue of a writ or statement of claim.[26] It is not necessary that the matter actually be set down for trial in order for the sub judice period to begin.

24. [1908-1910] All ER 915 at 920.
25. [1908-1910] All ER 915 at 921.
26. *James v Robinson* (1963) 109 CLR 595 at 615 (Windeyer J); see also *Dunn v Bevan* [1922] 1 Ch 276 at 284 (Sargant J); *Re Crown Bank* (1890) 44 Ch D 649 at 651 (North J).

FIXING AN APPROPRIATE STARTING POINT FOR SUB JUDICE CONTEMPT

Publications relating to criminal proceedings

7.24 There is clearly a need for clarification as to the time at which criminal proceedings are pending for the purposes of the law of sub judice contempt. Law reform bodies in the past have come to the same view, and have recommended the introduction of legislation to spell out precisely when liability for sub judice contempt begins.[27]

7.25 Clarification requires consideration of what is an appropriate starting point for the sub judice period. As with all aspects of liability for sub judice contempt, it is necessary, in determining what is appropriate, to weigh up considerations of freedom of discussion and protection of the administration of justice. An earlier starting point will potentially mean greater restrictions on freedom of discussion, or at least, restrictions for a longer period of time. At the same time, a later starting point may give rise to serious prejudice to a particular case through media publicity which is not restrained by the sub judice rule.

"Imminent" proceedings

7.26 In determining what is an appropriate starting point for sub judice contempt, the Commission takes the tentative view that the sub judice period should not begin as early as when proceedings are "imminent". In England and Wales, the common law appears to allow for liability for sub judice contempt to begin when legal

27. Australian Law Reform Commission, *Contempt* (Report 35, 1987) at para 304-306; Ireland, Law Reform Commission, *Contempt of Court* (Report 47, 1994) recommendation 21; Canada, Law Reform Commission, *Contempt of Court* (Report 17, 1982) at 28-29; United Kingdom, Committee on Contempt of Court, *Report of the Committee on Contempt of Court* (HMSO, London, Cmnd 5794, 1974) at para 115-123.

proceedings are imminent.[28] While it is not always clear what is meant by "imminent", the term fixes an earlier starting point than one that begins when proceedings are pending. "Imminent" proceedings would seem to cover acts occurring before the legal process has formally been set in motion, such as, for example, police questioning of a suspect. The English courts have justified the inclusion of imminent proceedings within the sub judice period on the basis that media publicity at that stage may cause just as serious a degree of prejudice to a case as publicity at the time when proceedings are pending or current.[29]

7.27 It is possible that, particularly in sensational cases, media publicity occurring at a time when proceedings are imminent may cause serious prejudice to the administration of justice in any future trial. However, it seems likely that the risk of such prejudice would generally be less than the risk arising from publicity at a later stage, at a time which is closer to the time of the trial. Moreover, the uncertainty for the media in determining at what time proceedings may be considered "imminent" would arguably impose too severe a restriction on freedom of discussion, as they would be reluctant to report on police activities if it were thought that they may attract criminal liability for doing so. Other law reform bodies have similarly rejected "imminent proceedings" as an appropriate starting point for the sub judice period for the same reasons.[30]

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28. See, for example, *R v Odham's Press Ltd; Ex parte Attorney General* [1957] 1 QB 73; *R v Savundranayagan* [1968] 3 All ER 439; *Attorney General v Times Newspaper Ltd* [1974] AC 273 at 301 (Lord Reid); *Attorney General v Leveller Magazine Ltd* [1979] AC 440 at 449 (Diplock LJ).
29. See Justice Wills in *R v Parke* [1903] 2 KB 432 at 437: "It is possible very effectually to poison the fountain of justice before it begins to flow."
30. See United Kingdom, Committee on Contempt of Court, *Report of the Committee on Contempt of Court* (HMSO, London, Cmnd 5794, 1974) at para 117; Australian Law Reform Commission, *Contempt* (Report 35, 1987) at para 306; Canada, Law Reform Commission, *Contempt of Court: Offences Against the Administration of Justice* (Working Paper 20, 1977) at 44-45; (Report 17, 1982) at 29-30.

Recommendations of law reform bodies

7.28 On the basis, therefore, that the sub judice period should commence at a stage later than when proceedings are merely imminent, the question is when exactly should liability for sub judice contempt begin. Various law reform bodies have recommended different starting points.

7.29 The Phillimore Committee recommended that a publication attract liability for contempt if it creates a risk of serious prejudice to proceedings from the time when a person is charged or a summons is served.[31] The Committee rejected the issue of a warrant for arrest or an actual arrest as appropriate starting points, on the basis that a warrant may be issued, and an arrest effected, in private, or without any general public announcement. It would therefore be difficult for the media to know with any certainty whether or not liability for sub judice contempt had begun. Moreover, if the issue of a warrant for arrest were sufficient to trigger the operation of the sub judice rule, the restrictions on the media could continue to apply for as long as the warrant remained active, if the person the subject of the warrant were never apprehended.

7.30 In their discussion paper of 1978, in response to the recommendations of the Phillimore Committee, the Lord Chancellor and Lord Advocate expressed reservations about this choice of starting point, commenting that there may be just as great a need to protect an accused person from prejudicial comment during the period immediately before that person is

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But see the Irish Law Reform Commission's views supporting the extension of the sub judice period to proceedings that are imminent, but only where the publisher is aware of facts which, to the publisher's knowledge, render the publication virtually certain to cause serious prejudice to a person whose imminent involvement in criminal (or civil) proceedings is virtually certain: Ireland, Law Reform Commission, *Contempt of Court* (Consultation Paper, 1991) at 320-321; (Report 47, 1994) at para 6.11-6.13.

31. See United Kingdom, Committee on Contempt of Court, *Report of the Committee on Contempt of Court* (HMSO, London, Cmnd 5794, 1974) at para 123.

charged, when media and public interest in the crime is strong.[32] The *Contempt of Court Act 1981* (UK) subsequently adopted as the starting point for liability the time of arrest without warrant, or the issue of a warrant for arrest, or the issue of a summons to appear, or the service of a document specifying a charge.[33]

7.31 The Canadian Law Reform Commission recommended that legislation fix as an appropriate starting point for liability in relation to criminal proceedings the time when an information is laid or an indictment preferred.[34]

7.32 The Australian Law Reform Commission ("ALRC") fixed as the appropriate starting point the time of the issue of a warrant for arrest, or the time of arrest without a warrant, or the time when charges are laid, whichever is the earliest.[35] It referred to the practical problem for the media in ascertaining when a warrant has been issued, or charges laid, or an arrest made, and noted that there would be greater certainty for the media if a formal public event, such as the appearance of an accused in court, were chosen as the starting point for liability. In the end, however, it took the view that an earlier starting point was preferable, on the basis that a case may receive its most intense and prejudicial media publicity at this time. Its recommendation for an earlier starting point was made in the context of its recommendation for a defence of innocent publication, which would provide the media with a ground of exoneration where they took all reasonable steps

32. See United Kingdom, Lord Chancellor and Lord Advocate, *Contempt of Court* (Discussion Paper, HMSO, London, Cmnd 7145, 1978) at para 14.
33. See *Contempt of Court Act 1981* (UK) s 2(3), 2(4), Sch 1 (note that slightly different provisions apply to Scotland, as set out in Schedule 1, to take account of the different criminal procedures which apply there). See also United Kingdom, *Parliamentary Debates (Hansard)* House of Commons, 2 March 1981 at 76-77; House of Lords, 7 May 1980 at 1728-1738; House of Lords, 20 January 1981 at 392-403.
34. See Canada, Law Reform Commission, *Contempt of Court* (Working Paper 20, 1977) at 43-44; (Report 17, 1982) at 29, 55-56.
35. See Australian Law Reform Commission, *Contempt* (Report 35, 1987) at para 297, 304-308.

to ascertain whether any of the relevant events occurred. This defence would assist the media if they encountered difficulties in ascertaining whether, for example, a warrant for arrest had been issued so as to trigger the operation of the sub judice rule. The recommendation included a proviso that the sub judice period would cease to run twelve months after the issue of the warrant for arrest, if no arrest had yet been made.

7.33 The Irish Law Reform Commission followed a similar approach and recommended that the sub judice restrictions commence in respect of publications concerning criminal proceedings when an arrest without a warrant is made, or a warrant for arrest is issued, or a summons to appear is issued, or an indictment or other document specifying the charge is served, or when an oral charge is made.[36]

The Commission's tentative view

7.34 Perhaps the Commission's current view is that the starting point for the application of the sub judice contempt rule should be either from when the arrest of the accused takes place or when the charges are laid. The Commission is of the view that the starting point for liability for sub judice contempt should be from the time the criminal process is first set in motion against a person. Since the aim of sub judice contempt is to protect the administration of justice, it makes sense that liability should at least begin at that point. The time when an information is laid, or a complaint made, or when an ex officio indictment is filed, is the first time at which a matter comes to the attention of a court, and the formal procedures for bringing a person to answer to the court for the alleged criminal misconduct are first set in motion. Following the past reasoning of the courts, therefore, that would appear to be an appropriate starting point for liability for sub judice contempt. It is, moreover, a recognisable event which the media would be able to verify for purposes of deciding whether or not to publish the material concerning the particular event.

36. See Irish Law Reform Commission, *Contempt of Court* (Report 47, 1994) recommendation 21.

7.35 The same reasoning may be made concerning the time of the arrest and the issue of summons. The arrest carries with it legal obligations on the part of the police to bring the arrested person before the court so that a person would come within the processes and protection of the court.[37] A summons to appear is another way of bringing a person before a court to answer criminal charges, as an alternative to arresting that person. More importantly with respect to the time of arrest, this is usually the time at which the case may receive quite intense and possibly prejudicial publicity. The time of arrest is therefore, in the Commission's view, an appropriate time when the media should take care that publicity surrounding the case should not create a substantial risk of prejudice to the proceedings. Because the arrest and issue of summons are, like the laying of charges, events capable of confirmation by the appropriate authorities, the media would be in a position to take reasonable steps to avoid such a risk of prejudice.

7.36 The Commission is, however, not inclined to extend the sub judice rule to a period earlier than either the time of arrest or the laying of charges. More specifically, it takes the position that the sub judice rule should not commence from the issue of a warrant for arrest nor from the time when proceedings may be said to be "imminent". The main consideration for not using the issue of a warrant as a starting point for the sub judice rule is that there may be a significant time lapse between such issue and the actual arrest. Since the period between the arrest and the trial is

37. In concluding that the rule of contempt begins to operate from the time of arrest, the New South Wales Court of Appeal observed: "That was the time of initiation of criminal proceedings against [the accused]. That was when the criminal law was set in motion. From that time there was an obligation to bring him before a court as soon as reasonably practical. From that time he was … "under the care and protection of the court". The processes and procedures of the criminal justice system, with all the safeguards they carry with them, applied to [the accused] and for his benefit, and … publications with tendency to reduce those processes, procedures and safeguards to impotence are liable to attract punishment as being in contempt of court": *Attorney General (NSW) v TCN Channel Nine Pty Ltd* (1990) 20 NSWLR 368 at 378.

generally also lengthy, any prejudicial publicity at the issue of the warrant will most probably have lost its capacity to cause substantial prejudice by the time of the commencement of the proceedings. The Commission concedes that the issue of a warrant for arrest may be a highly newsworthy event,[38] but the possibility that the warrant may not be executed immediately would create an undue restriction on the freedom of the media to report on the events. If a wanted person, for example, was never found, the media would continue to be restricted with regard to what could be published for as long as the warrant existed. In any case, if the warrant were executed, the arrest would surely generate as much, if not more, publicity than the arrest and would certainly carry more risk of prejudice by virtue of its greater proximity to the trial.

7.37 The Commission also considers that the sub judice rule should not commence from the time the proceedings are "imminent". The exceptional power of judges to punish for contempt, which allows a court to try the case without jury and impose penal sanctions, is aimed at empowering judges to protect the proceedings over which a court has control to ensure a fair trial for the accused. Where the proceedings have not reached the point where the courts have control over the proceedings, such as when the proceedings are merely "imminent", such an extraordinary power should be available only where it is shown to be absolutely necessary. While it is possible that media publicity occurring at a time when proceedings are "imminent" may cause serious prejudice to the administration of justice in any future trial, it seems likely that the risk of such prejudice would generally be less than the risk arising from publicity at a later stage, such as at the time of arrest or some other time closer to the time of the trial. More importantly, there is a lack of certainty as to the meaning of "imminent". Commenting on this issue, Borrie and Lowe stated:[39]

38. See the observations in Australian Law Reform Commission, *Contempt* (Report 35, 1987) at para 307.
39. G Borrie, *Borrie & Lowe's The Law of Contempt* (3rd edition, London, Butterworths, 1996) at 245-246.

> 'Imminence' is an elusive concept, and while it would seem clearly to cover cases where 'a man is helping police with their inquiries', or the situation in *Beaverbrook Newspapers* where the publication appeared while the police were surrounding a suspect's house, it appears to go beyond that. Are proceedings 'imminent' when there is a massive manhunt in operation for a named man? The answer might well depend on how quickly the suspect is arrested after the publication.

7.38 The concept of "imminence" could therefore apply arbitrarily depending on the uncertain or even chance outcome of events. Borrie and Lowe also criticised the "obviousness" test for "imminence" propounded in the case of *R v Savundranayagan and Walker*[40] as a very uncertain test observing that "[w]hat is obvious after the event is by no means clear beforehand."[41] The uncertainty for the media in determining at what time proceedings may be considered "imminent" would arguably impose too severe a restriction on freedom of discussion, as they would, for example, be reluctant to report on police activities if it were thought that they may attract criminal liability for doing so.

7.39 The Commission considers it necessary to clarify by legislation the starting point for the sub judice period where the accused is not in New South Wales. The main factor to be looked at is how quickly the case is likely to come before the New South Wales courts. The Commission is of the tentative view that where the accused is not in New South Wales, but is in another Australian jurisdiction, criminal proceedings should be treated as pending from the time of the arrest of the accused in the other jurisdiction. However, where the accused is overseas, the Commission proposes that the criminal proceedings be treated as pending from the making of the order for the extradition of the

40. [1968] 3 All ER 339 at 441 (Salmon LJ) who stated that at the time of the television interview of Savundranayagan whose conviction it was being argued had been prejudiced by the interview, "it surely must have been *obvious* to everyone that he was about to be arrested and tried on charges of fraud" (emphasis supplied).
41. G Borrie, *Borrie & Lowe's The Law of Contempt* (3rd edition, Butterworths, London, 1996) at 245.

accused. The Commission considers that arrest overseas should not make proceedings pending because overseas extradition proceedings can be said generally to take longer than interstate extradition. By the time the trial commences in New South Wales, the publicity would have been spent. An alternative starting point for cases involving overseas extradition is the time when the substantive extradition trial commences. However, the time frame for this would vary from country to country and there would be difficulty in defining it in legislation. The issue of the extradition order is a more verifiable event for the media than the commencement of the extradition proceedings in the relevant country. It is also closer in time to when the case would be taken up in New South Wales so that any publicity surrounding the issue of the extradition order would have a greater impact than that made at a prior time.

PROPOSAL 11

Legislation should provide that the sub judice rule applies to a publication only if the proceedings are pending at the time of the publication.

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.

PROPOSAL 12

Legislation should provide that: (a) where the accused is not in New South Wales but is in another Australian jurisdiction, criminal proceedings become pending from the arrest of the accused in the other

jurisdiction; and (b) where the accused is overseas, the criminal proceedings become pending from the making of the order for the extradition of the accused.

Publications relating to civil proceedings

7.40 As with publications relating to criminal proceedings, law reform bodies have on previous occasions recommended the introduction of legislation to spell out precisely when liability for sub judice contempt begins for publications relating to civil proceedings.

7.41 The Phillimore Committee in the United Kingdom recommended[42] that the sub judice restrictions for publications concerning civil proceedings should begin to apply only from the date of setting down for trial. That was seen as the latest convenient and ascertainable date. The Committee took the view that, since civil proceedings are usually heard by judges sitting without a jury, the protection of the administration of justice does not demand an earlier starting point. The Committee considered fixing an earlier starting point in relation to civil proceedings to be heard by a jury, but rejected this approach. The recommendation of the Phillimore Committee was subsequently adopted in s 12 of the *Contempt of Court Act 1981* (UK).

7.42 Both the Irish Law Reform Commission[43] and the Canadian Law Reform Commission[44] recommended following the approach taken in s 12 of the *Contempt of Court Act 1981* (UK).

42. United Kingdom, Committee on Contempt of Court, *Report of the Committee on Contempt of Court* (HMSO, London, Cmnd 5794, 1974) at para 127.
43. Ireland, Law Reform Commission, *Contempt of Court* (Consultation Paper, 1991) at 321; (Report 47, 1994) at 37.
44. Canada, Law Reform Commission, *Contempt of Court* (Working Paper 20, 1977) at 45; (Report 17, 1982) at 31, 54.

7.43 The ALRC recommended that the restrictions on publications relating to civil proceedings begin when it is known that a trial will take place before a jury, and pre-trial proceedings have reached the stage where the case is genuinely ready to proceed and is only waiting for an appointed day of commencement to arrive, or for its turn in a court list.[45] It considered the recommendation of the Phillimore Committee, but took the view that the time of fixing of a date for hearing may sometimes be too early since, in Australia, cases are often set down for trial comparatively early.

The Commission's tentative view

7.44 In determining the starting point of the sub judice period for civil proceedings, a distinction should be made between prejudice to the parties, on the one hand, and prejudice to the jury and witnesses, on the other. With respect to prejudice to the jury and witnesses, the Commission is of the view that the protection of the administration of justice does not demand that the sub judice rule should start from the time of the commencement of the civil proceedings or earlier (for example, when they are only "imminent"). It agrees with the observations made by the ALRC that the restrictions imposed by contempt law on publications relating to civil jury trials should be less stringent than those imposed in criminal proceedings because the liberty of the subject is not involved, the strong presumption of innocence in favour of the accused is not present and the law of evidence does not shield from the civil jury the same broad range of allegations that are treated as inadmissible in a criminal trial on the ground that they are likely to be more prejudicial than probative.[46] Moreover, the Commission is concerned that an action may be commenced, for example by way of a writ, for the purpose of commencing the sub judice rule and therefore "gagging" the media as regards the case.

7.45 Consequently, the Commission agrees with the recommendation of the Phillimore Committee that the basic starting point of the

45. Australian Law Reform Commission, *Contempt* (Report 35, 1987) at para 339.
46. Australian Law Reform Commission, *Contempt* (Report 35, 1987) at para 337.

sub judice rule for civil proceedings should be the time of the setting down of the matter for hearing. In contrast to the time of the commencement of the proceedings, the time of the setting down of the matter for hearing is close enough to the trial for publicity about the proceedings to have a potentially prejudicial effect. The Commission also prefers this starting point because:

- it creates certainty for the media, as the setting of a hearing date can easily be verified with the courts;
- it shortens the sub judice period and therefore shifts the balance in favour of freedom of speech; and
- it prevents the tactic of commencing proceedings for the purpose of stifling media comment on the matter, since if proceedings are maintained until this relatively late stage of the pre-trial phase, it is unlikely that they are being maintained just for this purpose.

7.46 The Commission, however, notes that while there are cases where jury trial is certain to occur at the time of the setting down for hearing, there are also cases where trial by jury is not ordered or ever contemplated until a later period of time. For example, in the case of Supreme Court proceedings commenced by summons where there is an appointment for hearing,[47] a requisition for a jury filed by a defendant may be filed at any time before the date of the hearing,[48] which implies that a defendant may still seek a jury trial after the matter has been set down. In such a case, it is only from the filing of the requisition for a jury that it becomes known that the matter will be tried by jury. There are also cases where trial by jury may be available in the exercise of the court's discretion.[49] This discretion may very well be exercised even after the matter has been set down for trial. In such cases, the Commission considers that the restrictions imposed by the sub judice rule to protect the jury should commence only from the time when it is known that a jury trial will occur, for example through

47. See *Supreme Court Rules 1970* (NSW) Pt 5 r 4A.
48. But not later than 14 days after the date for hearing stated in the summons: *Supreme Court Rules 1970* (NSW) Pt 34 r 3(1)(b)(ii).
49. See, for example, *Supreme Court Act 1970* (NSW) s 87.

an order of the court to this effect or, where jury trial may be claimed as a matter of right by a party, when a requisition for a jury has in fact been filed.

7.47 Defamation proceedings merit different treatment. The Commission is of the view that the restrictions imposed by the sub judice rule out of concern to prevent a jury being influenced should not apply in cases where the jury is to be empanelled under s 7A of the *Defamation Act 1974* (NSW). In defamation proceedings instituted after 1 January 1995, s 7A has greatly restricted the role of juries. The court first determines whether the matter is reasonably capable of carrying the imputation(s) pleaded by the plaintiff and whether any or all of such imputations are reasonably capable of being defamatory of the plaintiff. Only if the court makes positive findings on those issues will a jury be empanelled to determine whether the matter complained of carries any imputation pleaded, and if it does, whether the imputation is defamatory of the plaintiff. More significantly, the jury also does not determine whether any defence raised by the defendant has been established nor does it determine the damages that should be awarded or any issues of fact relating to the determination of that amount. Hence, juries in defamation proceedings now do not decide issues about the truth of the imputation in question, or its fairness as a comment, or other similar matters on which they may be swayed by publicity that is prejudicial to either party. Instead, the jury considers only the nature and meaning of the published matter, having regard to the circumstances in which it was published. In doing this, it takes no account of the actual or deserved reputation or credibility of any of the parties.

7.48 In the previous chapter, the Commission expressed the view that the law should provide some protection against pressure by a publication on parties in civil proceedings, including for example, pressure for a litigant to discontinue or settle the proceedings. Although the Commission has not made a proposal for legislation on this issue, it has outlined a number of possible reform options and invited submissions on a number of issues.[50] Subject to the

50. See para 6.30-6.36.

outcome of the consultations on these issues and to the final recommendation of the Commission on the application of the sub judice contempt rule to publications that affect parties to civil proceedings, the Commission considers it necessary to clarify the starting point for the sub judice period in this context. It takes the position that in the case of a publication which tends to impose improper pressure on parties to civil proceedings, the proceedings should be treated as pending from the issue of a writ or summons. The time of the setting down of the matter for hearing is too late because the pressure on a party may occur from the time when the proceedings are commenced. Pressure on parties by the media may occur during the pre-trial negotiations, and the law should accord to the parties some degree of protection during this period. On the other hand, the Commission is of the view that the sub judice period should only start when the proceedings are commenced, not when they are merely "imminent". As discussed above, "imminence" is an uncertain concept, which is difficult to define.

PROPOSAL 13

Legislation should provide that in the case of a publication which tends to impose improper pressure on parties to civil proceedings, the proceedings become pending from the issue of a writ or summons. In the case of other forms of publications relating to civil proceedings, the proceedings should become pending from the time the matter is set down for hearing. This is subject to two provisos, both of which relate only to the restrictions on publication which the sub judice principle imposes out of concern to prevent influence on a jury. First, these restrictions should apply only from the time when it is known that a jury will be used in the proceedings. Secondly, they should not apply in cases where the jury is to be empanelled under s 7A of the *Defamation Act 1974* (NSW).

IDENTIFYING WHEN PROCEEDINGS ARE NO LONGER "PENDING": FIXING AN APPROPRIATE END POINT FOR SUB JUDICE CONTEMPT

Publications relating to criminal proceedings

7.49 At the moment in New South Wales, the sub judice restrictions on publications relating to criminal proceedings continue till the time for lodging an appeal has expired, or a judgment on appeal has been handed down.[51] That period covers the time after a jury reaches its verdict and before the judge sentences the accused (if convicted), after sentence has been passed and before a notice of appeal has been or should be lodged, during appellate proceedings, and the time before and during any retrial which is ordered on appeal.

7.50 In this section, the Commission considers whether it is appropriate or desirable to follow the existing approach at common law or whether it is preferable to fix an earlier time as the end point for liability for sub judice contempt.

Operation of sub judice restrictions at the sentencing stage

7.51 Once a person is convicted of, or pleads guilty to, a criminal offence, he or she is sentenced by a judicial officer. In theory, the sub judice restrictions apply at this stage to the publication of information about the case. Given the general assumption underlying the law of sub judice contempt that a judicial officer is not susceptible to influence by media publicity, it could be suggested that to apply the restrictions of the sub judice rule to the sentencing stage is an unnecessary and unjustifiable infringement on freedom of discussion. Arguably, liability for sub judice contempt should not extend to publications occurring at the sentencing stage of a matter. Instead, the media should be free at that time to publish any information about the case without risk of breaching the sub judice rule.

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51. *Attorney General v Mundey* [1972] 2 NSWLR 887 at 901 (Hope JA); *Kerr v O'Sullivan* [1955] SASR 204; *R v Duffy; Ex parte Nash* [1960] 2 QB 188.

7.52 Despite this argument, the ALRC took the view[52] that a narrow form of the sub judice restrictions should apply to the sentencing stage of the criminal process. It conceded that, on the whole, judicial officers are not considered to be vulnerable to influence by publicity. However, the court referred to the high degree of judicial discretion involved in sentencing, which made the determination of a sentence particularly susceptible to influence, or at least susceptible to the appearance of influence by media publicity. On this basis, it recommended that legislation prohibit the publication of an opinion about the sentence to be passed on any specific convicted offender, from the time of the laying of a charge to the final disposition of the proceeding, or while an appeal against sentence was pending. This prohibition is much narrower than the general sub judice restrictions imposed by the common law and those recommended by the ALRC in respect of publications occurring before or during a criminal trial. It would allow the media to publish, for example, details of an accused's criminal history at the time of sentencing, without attracting liability, provided this did not amount to an opinion about the sentence to be passed. However, it still extends the operation of the sub judice rule, in some form, over the sentencing period, on the basis of preventing prejudice to the administration of justice in the sentencing process.

7.53 The Phillimore Committee in the United Kingdom also recommended that the sub judice period continue until sentence is passed, in order to avoid "the creation of a prejudicial atmosphere" and to give protection to any witnesses as to character who might be called by either side.[53] That recommendation was subsequently enacted into legislation.[54] Unlike the ALRC, the Phillimore Committee did not recommend a different form of sub judice restriction to apply at the sentencing stage than at the trial stage

52. See Australian Law Reform Commission, *Contempt* (Report 35, 1987) at para 384, Appendix A (*Administration of Justice (Protection) Bill 1987* (Cth) cl 19).
53. See United Kingdom, Committee on Contempt of Court, *Report of the Committee on Contempt of Court* (HMSO, London, Cmnd 5794, 1974) at para 132.
54. See *Contempt of Court Act 1981* (UK) s 2(3), 2(4), Sch 1.

of criminal proceedings. The Irish Law Reform Commission also recommended the inclusion of the sentencing stage within the sub judice period,[55] as did the Canadian Law Reform Commission.[56]

Operation of sub judice restrictions during appeals

7.54 Once a person has been convicted and sentenced for a criminal offence, certain avenues of appeal are available to that person and to the prosecution to appeal against the conviction and/or sentence.

7.55 A person convicted on indictment and sentenced in the District or Supreme Courts may appeal to the Court of Criminal Appeal against the conviction on a question of law, or, with the court's leave, on a question of fact or of fact and law, or, with the court's leave, against the sentence imposed.[57] On hearing such an appeal, the court may set aside the verdict of the jury on the ground that it is unreasonable, or cannot be supported by the evidence, or that the trial court made a wrong decision in law, or that there was a miscarriage of justice.[58] The Director of Public Prosecutions, or the Attorney General, also has a right to appeal to the Court of Criminal Appeal against the sentence imposed, and the court may in its discretion vary the sentence and impose a sentence which it considers to be proper.[59]

7.56 A person convicted by the Supreme Court in its summary jurisdiction may appeal to the Court of Criminal Appeal against the conviction and sentence imposed, and any such appeal is by way of a rehearing of the evidence.[60]

7.57 A person convicted and sentenced by a magistrate may appeal to the District Court against the conviction and/or

55. See Ireland, Law Reform Commission, *Contempt of Court* (Report 47, 1994) recommendation 21.
56. See Canada, Law Reform Commission, *Contempt of Court* (Working Paper 20, 1977) at 43-44; (Report 17, 1982) at 54, 56.
57. See *Criminal Appeal Act 1912* (NSW) s 5(1).
58. See *Criminal Appeal Act 1912* (NSW) s 6(1).
59. See *Criminal Appeal Act 1912* (NSW) s 5D(1).
60. See *Criminal Appeal Act 1912* (NSW) s 5AA.

sentence.[61] Such an appeal is by way of a rehearing of the evidence. The District Court will usually rely solely on the transcripts of evidence heard before the magistrate in the Local Court, although it is possible, with the court's leave, to admit new evidence on the appeal, and, in certain circumstances, the court may call a witness to give evidence in person in the hearing of the appeal.[62] As well, the Director of Public Prosecutions may, in certain circumstances, appeal to the District Court against the sentence imposed by a magistrate.[63] A person convicted in the Local Court may also now appeal to the Supreme Court on a question of law, or on the ground that the conviction or sentence cannot be supported having regard to the evidence, or, with the court's leave, on a question of mixed law and fact.[64]

7.58 Appeals lie from the state Supreme Court to the High Court only on the grant by the High Court of special leave to appeal.[65]

7.59 There are three grounds for arguing in favour of the operation of the sub judice rule during appellate proceedings. The first is the risk of influence of media publicity on appellate judges, and on other potential participants in the proceedings. The second is the risk of influence on any future jury if the appellate court orders a retrial. The last ground is the risk that a party may be deterred from exercising his or her right to appeal because of pressure from media publicity.

7.60 Arguably, the first ground is not a particularly sound justification for restricting public discussion, at least in light of the general view that judicial officers are not susceptible to influence by media publicity. It was argued by the ALRC[66] that there is even less scope for influence on judicial officers in appellate proceedings than at trial because most of the matters to be determined on

61. See *Justices Act 1902* (NSW) s 120(1).
62. See *Justices Act 1902* (NSW) s 132, 133.
63. See *Justices Act 1902* (NSW) s 133F.
64. See *Justices Act 1902* (NSW) s 104(1).
65. See *Judiciary Act 1903* (Cth) s 35.
66. See Australian Law Reform Commission, *Contempt* (Report 35, 1987) at para 383.

appeal involve considerations of questions of law, rather than questions of fact. There are grounds of appeal to the Court of Criminal Appeal which require the court to review the evidence as a whole, but these provide fairly limited scope to overturn the decision of the jury or of the trial judge, requiring the court to be satisfied that the verdict was unreasonable, or not supported by the evidence, or that there was a miscarriage of justice. The court cannot simply overturn the decision at trial if it favours another interpretation of the facts. There is perhaps greater scope for the exercise of judicial discretion in appeals heard by the District Court from the Local Court, in so far as these appeals are by way of a rehearing. It is worth noting that the Phillimore Committee recommended that the sub judice rule should apply from the moment an appeal is set down, where that appeal involves a complete rehearing, with witnesses.[67]

7.61 It is also possible that appeals heard by the District Court will involve new evidence, and that witnesses may be called in person to give evidence. It is therefore necessary to consider, in relation to appeals to the District Court, the possibility of influence by media publicity not only on the judicial officer hearing the appeal, but also on any witness who may be called to give evidence. However, witnesses are rarely called to give evidence in person in such proceedings.

7.62 It may be argued that the hearing of an appeal against sentence involves a higher degree of judicial discretion than is generally involved in hearing an appeal against conviction, and for that reason there is a greater need to protect judicial officers against influence by media publicity in appeals against sentence. The ALRC took the view that judicial officers should be protected from media influence when sentencing or hearing an appeal on sentence.[68]

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67. See United Kingdom, Committee on Contempt of Court, *Report of the Committee on Contempt of Court* (HMSO, London, Cmnd 5794, 1974) at para 132.
68. See Australian Law Reform Commission, *Contempt* (Report 35, 1987) at para 384.

7.63 The second ground for arguing in favour of the operation of sub judice restrictions during appeal proceedings is the risk of prejudice from media publicity to participants in a retrial, if a retrial is ordered by the appellate court. In particular, it could be argued that if the law permits the media to publish material about a case during an appeal, there is a risk that a future jury sitting in the retrial of the case may be prejudiced by that publicity.

7.64 The ALRC took the view that the risk of prejudice to any future retrial was not sufficient justification for restricting the publication of information during appeal proceedings.[69] It came to this conclusion on the basis, first, that retrials are rarely ordered by appellate courts, and secondly, that there is generally a delay between the order for a retrial and the commencement of the retrial, with the result that any potential for prejudice is likely to be significantly diminished with the passage of time.

7.65 On the other hand, the Canadian Law Reform Commission appeared to favour extending the operation of the sub judice rule till completion of any hearing on appeal, in case a retrial were ordered by the appellate court. It did not, however, make any clear recommendation to this effect.[70]

7.66 Neither the Irish Law Reform Commission nor the Phillimore Committee expressly considered the possibility of retrials when recommending that the sub judice period not operate during appellate proceedings.[71] However, it is worth noting that the *Contempt of Court Act 1981* (UK) does not follow the recommendation of the Phillimore Committee, and instead provides in s 15 that the sub judice restrictions apply during appeal proceedings.

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69. The Australian Law Reform Commission's discussion on this point included consideration of the period between the jury handing down a verdict and the time for lodging an appeal. See Australian Law Reform Commission, *Contempt* (Report 35, 1987) at para 309-310.
70. See Canada, Law Reform Commission, *Contempt of Court* (Working Paper 20, 1977) at 44; (Report 17, 1982) at 54-56.
71. See United Kingdom, Committee on Contempt of Court, *Report of the Committee on Contempt of Court* (HMSO, London Cmnd 5794, 1974) at para 132; Ireland, Law Reform Commission, *Contempt of Court* (Report 47, 1994) at para 6.14.

7.67 The third suggested ground for restricting publications during appeal proceedings is the possibility that unfavourable media publicity will deter parties from exercising their right to appeal.

7.68 This argument was considered by the Phillimore Committee in the United Kingdom,[72] but was ultimately rejected as a ground for applying the sub judice rule to this period. The Phillimore Committee concluded that there was no evidence of any case in which a party had been shown to have been deterred from appealing because of media publicity.

Operation of sub judice restrictions after sentence and before appeal

7.69 It is also necessary to consider whether the sub judice restrictions should apply in the period after sentence has been passed but before it is known whether or not an appeal will be made or leave to appeal sought. In New South Wales, the accused and the prosecution generally have 28 days from the time of such conviction or sentence in which to lodge a notice of appeal to the Court of Criminal Appeal[73] or to the District Court.[74] Similarly, there is a 28 day time limit for filing an application for special leave to appeal to the High Court.[75]

7.70 The ALRC[76] did not recommend including within the sub judice period the time after sentence and before an appeal is lodged (or time to appeal has expired), except in relation to publications that express an opinion on sentence. This approach was rejected by the Federal government in its 1992 position paper

72. United Kingdom, Committee on Contempt of Court, *Report of the Committee on Contempt of Court* (HMSO, London, Cmnd 5794, 1974) at para 132.
73. See *Criminal Appeal Act 1912* (NSW) s 10(1). The Court may extend the time within which notice of appeal, or notice of an application for leave to appeal, is required to be given: s 10(2).
74. See *Justices Act 1902* (NSW) s 122(1), 133G(1). The District Court may grant leave to appeal outside the 28 day limit, but an application for leave to appeal out of time must be made within three months after conviction or sentence: s 124(1).
75. See *High Court Rules 1952* (Cth) O 69A r 3(1).
76. See Australian Law Reform Commission, *Contempt* (Report 35, 1987) at para 309-310.

on the recommendations of the ALRC.[77] The government proposed instead that the sub judice restrictions on publications relating to criminal proceedings continue to apply after sentence and before appeal. The basis for this proposal was to protect from possible prejudice any future jury sitting in a retrial.

7.71 In the United Kingdom, the *Contempt of Court Act 1981*, which does restrict the publication of information during appellate proceedings, does not include within the sub judice period the time after sentence has been passed and before it is known whether an appeal will be made. The sub judice restrictions are only revived once notice of appeal, or an application for leave to appeal, is made.[78]

The Commission's tentative views

7.72 The end point of the sub judice period should be fixed, in the Commission's view, at the conclusion of the trial or hearing at first instance, which is usually when the jury has given its verdict or when the proceedings are terminated by other means. The sub judice rule should not continue to apply beyond this point except: (a) in a limited way until a sentence has been imposed; and (b) when a re-trial is ordered. The risk of prejudice to the proceedings, especially to the jury, ceases when the office of the jury becomes *functus officio*. At that stage the restrictions on freedom of speech imposed by the sub judice rule become unnecessary. It is, however, important to consider the positions (a) where an appeal is pending or still possible, and (b) at the sentencing stage.

7.73 The Commission is of the view that the sub judice rule should not apply during any appellate proceedings determined by judges without a jury. The Commission considers that judges, because of their training, skills and experience, are less susceptible to the risk of influence by publicity about pending appeal cases. The generally legal nature of the issues in appeal proceedings also makes the decision-making process by the judges less vulnerable to influence. The Commission sees no ground for

77. Australian Attorney General's Department, *The Law of Contempt* (Position Paper, 1992) at 5.
78. See *Contempt of Court Act 1981* (UK) s 15.

establishing restrictions on publications solely out of concern for influence on the judge, whether he or she is presiding at first instance or on appeal. The only exception to this is with respect to sentencing, which is discussed in paragraphs 7.75-7.77 below. Furthermore, although the Commission acknowledges the possibility that publicity may deter the accused from lodging an appeal, the Commission is not concerned to restrict comment on this ground in the absence of convincing evidence of cases in which parties have been deterred from appealing due to prejudicial publicity. Finally, the possibility of a re-trial is not, in the Commission's view, sufficient basis to extend the sub judice rule during the appeal proceedings. Re-trials are rarely ordered by appellate courts.[79] Moreover, comment made during the appeal proceedings is not likely to influence the jury in a re-trial because the publication would have been published a considerable time before the re-trial, with the result that any potential for prejudice is likely to be significantly diminished with the passage of time. However, if the appeal results in an order for re-trial, the law of contempt must begin to operate again because the new trial will involve a jury and witnesses who will need to be shielded from prejudicial publicity. The sub judice period for the re-trial terminates when the case is finally disposed of, such as when the jury makes its verdict.

7.74 It follows from the discussion above that, subject to an exception relating to sentencing, the sub judice rule should not apply during the period between the verdict and the commencement of appeal proceedings. The rationale for maintaining the sub judice rule during this period at common law is the possibility of an appeal being lodged and subsequently a re-trial being ordered. The uncertainty as to whether an appeal might be lodged, the infrequency of re-trials being ordered as a result of appeals and the remote likelihood that material published before appeal may cause prejudice if a re-trial were

79. The number of re-trials ordered by the Supreme Court from 1996 to 1999 is as follows: 1996 - 2; 1997 - 3; 1998 - 4; 1999 - 1: Information supplied by J Highet, Policy and Research Officer, Supreme Court (NSW) (22 February 2000).

ordered do not justify the extension of the sub judice rule during the period in question. The Commission proposes that legislation expressly state this position for clarity and certainty.

7.75 The sentencing stage may be distinguished from the appeal proceedings and, as such, merits different treatment under the sub judice rule. Unlike the highly legalistic nature of appeal proceedings, the determination of a sentence involves a strong discretionary element. It involves factual issues concerning not just the convict but also the victim, and in many cases, the community at large as well. It has been observed that while judges should be regarded as less susceptible to influence, a media campaign about the merits of a particular sentence may exert some influence, conscious or otherwise, on judicial officers passing sentence.[80] The Commission, while maintaining the view that judges are generally immune to media influence even in sentencing, is concerned that media comment about the sentencing of particular proceedings may "embarrass"[81] the sentencing judge. If, for example, a judge imposed a sentence for which the media were clamouring, there may well be a perception that he or she had been influenced by the media publicity. The Commission considers it important to maintain public confidence and respect for the independence, authority and fairness of the judiciary. Public confidence in the administration of justice may be eroded if there isa serious risk that courts appear not to be free from any extraneous influence in making decisions.[82] The Commission notes with approval the following passage from a New Zealand decision:[83]

> The Court must not only be free – but must appear to be free – from any extraneous influence. The appearance of freedom from any such influence is just as important as the reality. Public confidence must necessarily be shaken if there is the

80. Australian Law Reform Commission, *Contempt* (Report 35, 1987) at para 384.
81. See para 4.53-4.55 for a discussion on "embarrassment" of a court.
82. See *R v The Herald & Weekly Times Ltd* [1999] VSC 432; *R v The Herald & Weekly Times Ltd (No 2)* [2000] VSC 35.
83. *Attorney General v Tonks* [1939] NZLR 533 at 537 (Myers CJ).

> least ground for any suspicion of outside interference in the administration of justice. Any publication therefore that states or implies that the sentences imposed by the Court are, or may be, affected by popular clamour, newspaper suggestion, or any other outside influence is, in my opinion, calculated to prejudice the due administration of justice … If the Court imposed the [sentence demanded by media,] it might well be assumed by the readers of the paper that the Court had been influenced by the newspaper's demands. If, on the other hand, a lesser sentence were imposed, the article was calculated in anticipation to arouse resentment against the court.

7.76 There is another consideration as to why there should be some form of restriction during the sentencing stage, especially after the sentenced has been handed out. There is a risk that the sentenced offender, or the Crown law officers, may be influenced by the media reactions to the sentence in their decision whether or not to appeal the sentence. A convicted person who appeals against the sentence knows that he or she does so at the risk of having that sentence increased by the appellate court. If the convicted offender were aware that a campaign of vilification was in progress and that newspapers were urging that the sentence was inadequate, this would cause pressure not to lodge an appeal. He or she might reasonably fear that he or she would be sentenced by newspapers rather than by the court, [84] however groundless such fear might be in reality.

7.77 While the Commission considers that the broad sub judice rule should no longer apply at the sentencing stage, we propose a narrow application of the sub judice rule: namely, that legislation be adopted prohibiting the publication of an opinion about the sentence to be passed on any specific convicted offender, from the time of the laying of a charge to the final disposition of the proceeding, or while an appeal against sentence was pending.[85] This prohibition is narrower than the general sub judice

84. See *Ex parte Attorney General; Re Truth & Sportsman Ltd* [1961] SR (NSW) 484 at 496 (Street CJ, Owen and Herron JJ).

85. In this the Commission is adopting the recommendation of the Australian Law Reform Commission.

restrictions imposed by the common law as it restricts publicity concerning the sentencing only. It would allow the media to publish, for example, details of an accused's criminal history at the time of sentencing, without attracting liability, provided this did not amount to an opinion about the sentence to be passed. The restriction would also be subject to the defences available in the proposed legislation or at common law, such as the fair and accurate reporting and the public interest defences. Hence for example, a media organisation which publishes comment on the sentencing of an accused convicted of an offence involving illegal drugs, which was made in good faith in the course of a continuing public discussion on sentencing offences involving illegal drugs, may invoke the proposed public interest defence,[86] if it can prove the discussion would have been significantly impaired if the comment had not been published at the time when it was published. And of course a fair and accurate reporting of legal proceedings in which this issue was canvassed would attract the protection afforded by the fair and accurate report principle.

PROPOSAL 14

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

86. See Proposal 19.

PROPOSAL 15

Legislation should expressly provide that, subject to the proposed prohibition on publications concerning sentencing, criminal proceedings continue to be not pending for purposes of the sub judice rule: (a) during the period after the verdict (including after the sentence is handed down by the sentencing court) and before appeal proceedings are commenced; and (b) if an appeal is lodged, while the case is pending appeal.

PROPOSAL 16

Legislation should provide that criminal proceedings which have been the subject of appeal proceedings become pending again for the purposes of the sub judice rule only if an order for a new trial is made and only from the date the order is made.

Publications relating to civil proceedings

7.78 By contrast with criminal proceedings, it has been suggested[87] that civil proceedings are pending only until the time when a judgment at first instance is delivered, rather than when the time to appeal against that judgment has expired.

87. *Ex parte Dawson; Re Consolidated Press Ltd* [1961] SR (NSW) 573 at 573-574 (Street CJ). However, Justice Owen, in the same case, stated that he expressed no opinion as to whether civil proceedings were still pending before the time for appeal had expired: [1961] SR (NSW) 573 at 575. It was held in two older English cases that the sub judice period in respect of publications concerning civil proceedings ends after judgment at first instance is delivered: see *Metzler v Gounod* (1874) 30 LT 264; *Dallas v Ledger* (1888) 4 TLR 432.

7.79 It is also possible that the sub judice restrictions will cease to apply to publications concerning civil proceedings that have "lapsed" or that are not being actively pursued by the parties to the proceedings. It was suggested in an English case[88] that the mere issue of a writ may not be enough to keep the sub judice restrictions active, if no further action is taken to have the matter proceed in court, or if there is a long delay in proceeding with the matter in court. However, given the lengthy negotiations which are often involved in trying to settle civil claims out of court, it is questionable what delay would be considered long enough to establish that a matter had lapsed or was not being actively pursued for the purpose of the sub judice rule.

7.80 The Phillimore Committee in the United Kingdom recommended that sub judice restrictions for publications relating to civil proceedings should cease to apply at the conclusion of the trial or hearing at first instance,[89] and this is the situation under the *Contempt of Court Act 1981* (UK). The Act provides for the sub judice restrictions to recommence upon application for leave to appeal, or notice of such application, or notice of appeal or other originating process, and end when the appeal is disposed of, abandoned, discontinued, or withdrawn.[90]

88. See *Attorney General v Times Newspapers Ltd* [1973] QB 710 at 740 (Denning LJ). But see the decision of the House of Lords on appeal in that case, in which it was held that, on the facts of the particular case, a twelve year delay was not sufficient basis on which to conclude that the matter had lapsed: *Attorney General v Times Newspapers Ltd* [1974] AC 273 at 311 (Diplock LJ), at 301 (Reid LJ), at 306 (Morris LJ), at 317 (Simon LJ), at 324 (Cross LJ).
89. United Kingdom, Committee on Contempt of Court, *Report of the Committee on Contempt of Court* (HMSO, London, Cmnd 5794, 1974) at 55.
90. *Contempt of Court Act 1981* (UK) Sch 1[12], 1[15]. See observations in C J Miller, *Contempt of Court* (2nd edition, Clarendon Press, Oxford, 1989) at 186 about doubts as to whether these provisions apply to civil appellate proceedings.

7.81 The ALRC recommended[91] that the sub judice restrictions for publications relating to civil proceedings should relate only to cases tried by jury and should come to an end when the civil jury's verdict has been delivered.

7.82 The Irish Law Reform Commission took the view that the sub judice restrictions should not apply to civil appellate proceedings.[92]

7.83 The Canadian Law Reform Commission, in its Working Paper, expressed the view that the sub judice restrictions should apply until the time of the final judgment in a civil matter (rather than the judgment at first instance) is handed down. That is, it would apply to appeal proceedings.[93] However, in the Report, it was recommended that the sub judice restrictions apply until the matter is "adjudicated" and the trial is terminated.[94] It is not clear whether "adjudicated" means the judgment at first instance, or the judgment on appeal.

The Commission's tentative view

7.84 The Commission is of the tentative view that the sub judice restrictions for publications relating to civil proceedings should come to an end when the hearing at first instance comes to an end. In the ordinary course of events, the proceedings will be disposed of when judgment is entered. However, the proceedings may be terminated by other means, such as discontinuance. The provisions of the *Contempt of Court Act 1981* (UK)[95] which set the basic end point of the strict liability rule for civil proceedings when the proceedings are disposed of or discontinued or abandoned or withdrawn presents a good model as it provides certainty as to

91. Australian Law Reform Commission, *Contempt* (Report 35, 1987) at para 339.
92. Ireland, Law Reform Commission, *Contempt of Court* (Report 47, 1994) at para 6.14.
93. Canada, Law Reform Commission, *Contempt of Court* (Working Paper 20, 1977) at 45.
94. Canada, Law Reform Commission, *Contempt of Court* (Report 17, 1982) at 31, 54, 56.
95. *Contempt of Court Act 1981* (UK) Sch 1[12], 1[15].

when the rule ceases to operate. However, the Commission's view departs from the English Act in proposing that the sub judice rule should not apply after the conclusion of the hearing at first instance, for example during the appeal proceedings. As with criminal cases, the risks of prejudice during appeal proceedings are minimal and do not warrant the extension of the sub judice rule beyond the hearing at first instance. The only time when the sub judice rule may re-commence is if a re-trial is ordered. If this occurs, the sub judice restrictions should operate again for that period (and cease when the re-trial is concluded).

PROPOSAL 17

Legislation should provide that civil proceedings cease to become pending for purposes of the sub judice rule when the proceedings are disposed of or abandoned or discontinued or withdrawn. The proceedings should become pending again only when and from the time a re-trial is ordered.

TIME LIMITS AND "INTENTIONAL" CONTEMPT

7.85 It is worth noting the distinction which is sometimes made at common law between the time limits that apply to an unintended contempt and those relating to an intentional contempt. It has been suggested that, where a publisher intends to prejudice the administration of justice in respect of a particular case, he or she may be liable for sub judice contempt even if legal proceedings relating to that case are not yet pending or imminent.[96]

The Commission's tentative view

7.86 In Chapter 5, the Commission proposes to abolish the common law category of intentional sub judice contempt and

96. See *Attorney General v News Group Newspapers Ltd* [1988] 2 All ER 906.

instead proposes the adoption of legislation that would make it clear that mere intent to interfere with the administration of justice does not constitute sub judice contempt, in the absence of a publication which creates a substantial risk of prejudice to the administration of justice. Consequently, publication which creates a substantial risk of prejudice will be prohibited, regardless of the presence or absence of intent to cause prejudice. The aim is to apply the same criteria of liability in both situations. In like manner, the Commission is of the view that, in the absence of any sound policy reasons for a contrary position, the same time limits for liability for sub judice contempt should apply whether or not there was an actual intention to interfere with the administration of justice.

PROPOSAL 18

Legislation should provide that the same time limits for liability for sub judice contempt apply whether or not there was an actual intention to interfere with the administration of justice.

8. Publications in the public interest

- The grounds of exoneration from liability for sub judice contempt
- Overview of the public interest principle
- Operation of the public interest principle
- Operation of the principle in other jurisdictions
- The Commission's tentative view
- A "public safety" defence

THE GROUNDS OF EXONERATION FROM LIABILITY FOR SUB JUDICE CONTEMPT

8.1 A publication may have a tendency to cause prejudice to proceedings, but may be found not to amount to a contempt, on the basis that it:

- ☐ relates to a matter of public interest, or promotes the public interest in some other way (though these factors alone are not sufficient to warrant exemption from liability); or
- ☐ is a fair and accurate report of proceedings held in open court, or, possibly, a fair and accurate report of parliamentary proceedings.[1]

8.2 In this chapter, the Commission discusses the first ground of exoneration, the "public interest principle" and considers whether any reform to this ground of exoneration is necessary or desirable. In addition, we discuss whether it is desirable to introduce a separate defence of "public safety" to apply to publications in the public interest that are designed specifically to protect public safety. In Chapter 9, the second ground of exoneration, the fair and accurate reporting principle, is discussed and the current limitations on the media to publish fair and accurate reports of proceedings by the imposition of suppression orders, as well as suggestions to restrict the fair and accurate reporting principle further, are examined.

OVERVIEW OF THE PUBLIC INTEREST PRINCIPLE

8.3 A person or organisation may avoid liability for contempt for a publication that relates to a matter of public interest. In this situation, the publication is found to have a sufficient tendency to prejudice particular legal proceedings to attract sub judice

1. See *Attorney General (NSW) v John Fairfax & Sons Ltd* (1985) 6 NSWLR 695 at 714 (McHugh JA); *Hinch v Attorney General (Vic)* (1987) 164 CLR 15 at 26 (Mason CJ), at 83 (Gaudron J).

liability, but the detriment arising from this possible prejudice is outweighed by the public interest served by freedom of discussion of, and dissemination of information about, a matter of public importance.[2] For example, a publication dealing with the subject of paedophilia, in the context of an ongoing public debate about the problem of paedophilia in the community, may be found to have a tendency to interfere with particular criminal proceedings against a person accused of committing sexual offences against children. However, the court may determine that the publication does not amount to a contempt, on the ground that it relates to a matter of public interest, and the element of public interest outweighs the detriment it may cause to the criminal proceedings in question.[3]

8.4 This ground of exoneration is commonly referred to as the "public interest principle", or the *Bread Manufacturers*[4] principle, referring to the first Australian case where it was authoritatively formulated. The public interest principle may apply both to publications relating to civil proceedings and those relating to criminal proceedings.[5] It recognises that there is sometimes a greater interest which justifies a publication despite the fact that

2. See *Hinch v Attorney General (Vic)* (1987) 164 CLR 15 at 57 (Deane J).
3. This was the situation which arose in New South Wales in 1997, when the Police Minister, Mr Paul Whelan, gave a press conference on the subject of paedophilia. As a result of comments made by Mr Whelan in the press conference, two sexual offence trials were aborted. The Attorney General did not prosecute Mr Whelan for contempt, presumably taking the view that Mr Whelan's comments were made as part of an ongoing public debate of public interest, and moreover that they were not directed at particular legal proceedings: see P Akerman, "Free To Speak Up For Justice" *Daily Telegraph* (1st ed) (18 September 1997) at 11; R Morris, "Judge 'Hasty' Over Mistrial" *Daily Telegraph* (1st ed) (18 September 1997) at 8; D Goodsir, "Whelan: No Foundation for a Charge" *The Sun-Herald* (14 September 1997) at 16.
4. *Ex parte Bread Manufacturers Ltd; Re Truth and Sportsman Ltd* (1937) 37 SR (NSW) 242.
5. *Hinch v Attorney General (Vic)* (1987) 164 CLR 15.

that publication would otherwise attract sub judice liability on account of its tendency to prejudice proceedings.[6]

8.5 The main issues for discussion in a review of the public interest principle are whether the principle should exist at all, whether it is necessary or desirable to clarify its operation, as well as its scope.

OPERATION OF THE PUBLIC INTEREST PRINCIPLE

Earlier cases

8.6 The public interest principle as it operates in Australia has undergone some significant developments. As originally articulated by the High Court in the *Bread Manufacturers* decision,[7] the public interest principle appeared to be quite narrow and inflexible. It applied to publications forming part of a general, ongoing public discussion or debate, where the discussion or debate began before any particular legal proceedings had commenced. The publications were prompted by the general public discussion, rather than by particular legal proceedings, and did not refer specifically to particular proceedings. The courts applied the public interest principle in these cases on the basis that any potential prejudice which such a publication may cause to

6. See *Ex parte Bread Manufacturers Ltd; Re Truth and Sportsman Ltd* (1937) 37 SR (NSW) 242; *Hinch v Attorney General (Vic)* (1987) 164 CLR 15. See also in G Borrie, *Borrie and Lowe's The Law of Contempt* (3rd edition, Butterworths, London, 1996) at 169-170; C J Miller, *Contempt of Court* (Clarendon Press, Oxford, 1989) at 228-229; J Mo, "Freedom of Speech Versus Administration of Justice: Balancing of Public Interests in Contempt of Court Cases in New South Wales" (1992) 9 *Australian Bar Review* 215 at 217.
7. See *Ex parte Bread Manufacturers Ltd; Re Truth and Sportsman Ltd* (1937) 37 SR (NSW) 242 at 249 (Jordan CJ). See *Attorney General (NSW) v Willesee* [1980] 2 NSWLR 143; *Registrar of the Court of Appeal v Willesee* (1985) 3 NSWLR 650; *Attorney General (NSW) v John Fairfax & Sons Ltd* (1985) 6 NSWLR 695.

particular proceedings was an incidental and unintended by-product of the general public discussion of which the publications formed a part. The application of the principle was justified on the ground that the discussion of public affairs should not be required to be suspended merely because it may incidentally cause some likelihood of prejudice to the administration of justice.

8.7 The courts seemed unwilling to expand the application of the public interest principle beyond publications that fitted the description outlined above, that is, publications that arose from a general discussion, did not refer specifically to the particular legal proceedings and caused potential prejudice simply because the subject matter of the general discussion unintentionally related in some way to those legal proceedings.[8]

The Hinch case

8.8 In the only case in which the High Court has considered the public interest principle, *Hinch v Attorney General (Vic)*,[9] decided in 1987, the court expanded the scope of the principle significantly.[10] This case involved the prosecution for contempt of

8. In one case, the publication in question did relate specifically to proceedings. The application of the public interest principle in that case appeared to depend on whether the subject-matter of the publication dealt with issues of more general public concern than the particular merits of those individual proceedings: see *John Fairfax & Sons Pty Ltd v McRae* (1955) 93 CLR 351.
9. (1987) 164 CLR 15.
10. It is worth noting that the New South Wales Court of Appeal had already begun to move towards an expanded conception of the public interest principle before the *Hinch* case. In *Attorney General (NSW) v John Fairfax & Sons Ltd* (1985) 6 NSWLR 695 at 714-715, Justice McHugh considered whether the public interest principle ultimately required a balancing between competing public interests, as opposed to following a strict formulation of whether the tendency to prejudice was an incidental and unintended by-product of a general discussion. See also the decision of Justice Hope in *Registrar of the Court of Appeal v Willesee* (1985) 3 NSWLR 650 at 678-680, in which he referred to the balancing exercise required by

Mr Derryn Hinch, a well-known radio personality, and the radio station which broadcast Mr Hinch's program in Victoria. Mr Hinch gave three radio broadcasts in which he referred to a man accused of committing sexual offences against children. Mr Hinch expressed outrage that this man remained the director of a youth foundation while on bail. He also referred to the accused's previous convictions and acquittals from charges involving sexual offences against children.

8.9 In response to the contempt prosecution, it was argued on behalf of Mr Hinch and the radio station that the broadcasts related to matters of general public interest and concern and that any prejudice created was outweighed by the element of public interest. The High Court rejected this argument and found both Mr Hinch and the station guilty of contempt. The station was fined and Mr Hinch was sentenced to a short term of imprisonment.

8.10 Although it upheld the convictions for contempt, the High Court confirmed that the public interest principle may apply to publications relating to criminal proceedings and recognised that, in theory at least, it could apply to a situation such as arose in the *Hinch* case. That is, it could apply to publications which were prompted by, and which dealt specifically with, the facts of particular proceedings. It was not confined to publications relating to a general discussion, and it was not essential to the application of the principle that the potential prejudice to proceedings was fortuitous or incidental. The court emphasised instead that each case requires a balancing exercise between the competing public interests in the administration of justice and the freedom of discussion of public affairs, in order to determine whether or not a contempt has been committed. It may be that, in cases where the publication does relate to a more general discussion, and the potential for prejudice to proceedings arises as an incidental consequence of this discussion, the tendency to cause prejudice is found to be relatively small and therefore more readily outweighed by the public interest in freedom of discussion.

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the public interest principle. Justice Priestley, however, in the same case, queried whether the public interest principle required a balancing of competing interests, or the application of the principle as a matter of law (at 682-683).

8.11 The court emphasised that the earlier formulation in the *Bread Manufacturers* case was to serve as a guide to the scope of the public interest principle, rather than a definitive statement. The principle was potentially broad enough to apply to a publication relating to specific legal proceedings, if it were found that the publication dealt with a matter of sufficient public interest as to outweigh the competing interest in the proper administration of justice. However, it was noted by Justice Wilson that, when balancing the competing public interests, the court does not start with the scales evenly balanced, but tilts the scales in favour of protecting the due administration of justice.[11] The court also suggested that, at the least, it will be difficult to avoid liability on the basis of the public interest principle where the contempt is found to be intentional.[12]

Implications of the Hinch case for the public interest principle

8.12 The High Court in the *Hinch* case recognised, in theory, that the public interest principle may apply to publications relating to specific legal proceedings. However, in practice, it may prove difficult to rely on the public interest principle to argue that such publications do not amount to contempt, at least where the proceedings to which they relate are criminal proceedings.

8.13 On the facts in the *Hinch* case, the High Court appeared to accept that there was a legitimate public concern in alerting the public to a situation in which a person with the accused's history continued to hold senior office in a children's organisation. Ultimately, however, the court determined that this public interest in the particular material broadcast by Mr Hinch could not take precedence over the public interest in protecting the accused from interference with his right to a fair trial.

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11. *Hinch v Attorney General (Vic))* (1987) 164 CLR 15 at 41.
12. See *Hinch v Attorney General (Vic)* (1987) 164 CLR 15 at 52-53 (Deane J), at 69-70 (Toohey J). Justices Wilson (at 43) and Gaudron (at 86) appeared to suggest that it would be impossible to apply the public interest principle to a situation where the contempt was intentional.

8.14 The court took particular objection to the public disclosure by Mr Hinch of the accused's previous convictions and charges, and to the suggestion that the accused had committed other offences which had never been discovered or investigated.[13] It found that an implication necessarily arose from the language used in the broadcast, together with the reference to the previous convictions and acquittals, that the accused must be guilty of the offences for which he was currently charged. It was noted that a publication which suggests, either explicitly or implicitly, that an accused person is guilty or innocent of the offence for which that person is charged, will usually constitute a contempt, even if it also relates to a matter of general public concern.[14] This view conforms with previous statements of the courts to the effect that publications which disclose the previous convictions of an accused person, or imply guilt or innocence, will usually constitute a contempt, even if the publication forms part of a more general discussion of a matter of public interest.[15]

8.15 It is arguably difficult to discern from the High Court's ruling in what circumstances a publication may refer to specific criminal proceedings and yet not amount to a contempt on the basis of the public interest principle. The High Court did not give

13. See *Hinch v Attorney General (Vic)* (1987) 164 CLR 15 at 30-31 (Mason CJ); at 45-46 (Wilson J); at 58 (Deane J); at 75-76 (Toohey J). Justice Gaudron appeared to take the view that the public interest in disseminating information on child abuse, and the risk to children of abuse by a person convicted of and charged with sexual offences, could never take precedence over the public interest in protecting the administration of criminal justice (at 86-87).
14. *Hinch v Attorney General (Vic)* (1987) 164 CLR 15 at 75-77 (Toohey J), at 45-46 (Wilson J).
15. See *Attorney General (NSW) v Willesee* [1980] 2 NSWLR 143; *Director of Public Prosecutions (Cth) v Australian Broadcasting Corp* (1987) 7 NSWLR 588. But see *Attorney General (NSW) v John Fairfax & Sons Ltd* (1985) 6 NSWLR 695, in which a publication implied that a person accused of a crime had been involved in earlier criminal activity which had never been properly investigated. Although it was raised, the court found it unnecessary to consider the public interest principle, since it concluded that the publication lacked the requisite tendency to interfere with proceedings.

any clear examples of situations in which a publication may be protected in this way. Chief Justice Mason did refer to public discussion of a major constitutional crisis or an imminent threat of nuclear disaster as matters for which the public interest in freedom of discussion would override public interest in the administration of justice.[16] These would seem to be quite extreme examples, and ones which (hopefully) would not arise very often. They are not particularly helpful, therefore, in indicating when the public interest principle will protect a publication which refers to matters of a less extreme nature nor to proceedings.

8.16 Nor, it could be argued, do the facts in the *Hinch* case offer much assistance in ascertaining when a publication explicitly referring to the proceedings allegedly prejudiced is likely to be found to be in the public interest. The facts of the case were themselves quite extreme, in so far as Mr Hinch's condemnation of the accused was expressed in quite unrestrained and vehement language, and included suggestions that the accused had committed previous offences which had never been investigated. These suggestions were arguably unnecessary to fulfil the public purpose of alerting the community to the danger of child abuse. It may be questioned, however, whether the court would have been any more inclined to accept the public interest argument if Mr Hinch had merely made reference to the accused's previous convictions, without also referring to previous acquittals and suggesting that the accused was guilty both of the offences charged and of other offences.[17]

8.17 It could be argued that it was unnecessary for Mr Hinch to mention the accused's previous convictions, as he could simply have alerted the public to the danger of child abuse by reference to the current charges faced by the accused and the fact that the accused continued to hold a senior position in a children's

16. *Hinch v Attorney General (Vic)* (1987) 164 CLR 15 at 26.
17. Justice Deane, without deciding the issue, noted that reference to the accused's previous convictions on its own would have been sufficient to place the broadcast beyond justification on public interest grounds: see *Hinch v Attorney General (Vic)* (1987) 164 CLR 15 at 58.

organisation. Statements to that effect would probably not have amounted to a contempt since they were simply the bare facts of the case (provided, of course, they were not accompanied by expressions of opinion or suppositions by Mr Hinch). However, it could be argued that the reference to the accused's previous convictions was integral to the publication, in so far as its purpose was to alert the community to the dangers of a system which allowed a person facing current charges and with previous convictions to be in a position of care over children.[18] If the facts of the case had been different, for example, if the accused had been facing a current charge of fraud and it was discovered by a reporter that he had previous convictions for child sexual abuse, it may be questioned whether the court would have considered it excusable as a matter of public interest to publish information about the previous convictions for the purpose of alerting the community to the possible dangers faced by their children while the accused was on bail.

8.18 It is also difficult to determine from the *Hinch* case the degree to which intention is determinative of the availability of the public interest principle to exonerate a publisher from liability. On the facts in *Hinch*, it would appear possible to argue that the third broadcast of Mr Hinch was done with at least the knowledge that it may have a tendency to prejudice the accused's trial, given that the Attorney General of Victoria had already instituted proceedings for contempt against Mr Hinch in respect of the first two broadcasts. However, the court did not discuss the intention of Mr Hinch in considering the public interest principle, despite general suggestions that an intention to prejudice proceedings may exclude the application of the public interest principle. It remains unclear, therefore, whether material which is published with an intention to prejudice, or with the knowledge that it may prejudice, particular proceedings, could ever be found not to constitute a contempt on the basis of the public interest principle and, if so, in what circumstances.

18. This point was recognised by Toohey J in his judgment: *Hinch v Attorney General (Vic)* (1987) 164 CLR 15 at 75-76.

Subsequent cases

8.19 Cases subsequent to the *Hinch* case have reiterated the High Court's formulation of the public interest principle as requiring a balancing exercise between the public interests in freedom of discussion and the administration of justice.[19] These include the recent New South Wales Supreme Court decision in *Attorney General (NSW) v John Fairfax Publications Pty Ltd.*[20] This case confirmed that a publication may be shown to be in the public interest, so as not to amount to a contempt, even though it has a tendency to prejudice criminal proceedings.[21]

8.20 However, in respect of publications that relate specifically to the facts of a criminal trial, the courts have not provided much more guidance about when the public interest principle might successfully be applied as a ground of exoneration. The Commission is not aware of a case in which the public interest principle has been successfully argued in respect of a publication relating to the specific facts of current or pending criminal proceedings. Publications that have been found to be in the public interest have not referred specifically or in any great detail to the facts of the relevant criminal proceedings, and the courts have emphasised that the prejudicial impact of these publications was an incidental by-product of the discussion of a matter of public importance.[22]

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19. See *Director of Public Prosecutions (Cth) v United Telecasters Sydney Ltd (in liquidation)* (1992) 7 BR 364 at 371 (Kirby J), at 378 (Sheller JA); *R v Sun Newspapers Pty Ltd* (1992) 58 A Crim R 281 at 288-289 (Byrne J); *John Fairfax Publications Pty Ltd v Doe* (1995) 37 NSWLR 81 at 84 (Gleeson CJ); *R v WA Newspapers Ltd; Ex parte Director of Public Prosecutions (WA)* (1996) 16 WAR 518 at 531-539; *Nationwide News Pty Ltd; Ex parte Director of Public Prosecutions (Cth)* (1997) 94 A Crim R 57 at 62-66 (Ipp J).
20. [1999] NSWSC 318 at para 126 (Barr J).
21. *Attorney General (NSW) v John Fairfax Publications Pty Ltd* [1999] NSWSC 318 at para 126.
22. In *R v Sun Newspapers Pty Ltd* (1992) 58 A Crim R 281, the publication in question was concerned with the facts of one criminal trial, which was found to be potentially prejudicial to another criminal trial. The publication did not amount to a contempt, however, on the basis of the public interest principle, since it did

8.21 It would seem therefore that, while the courts have not ruled out the application of the public interest principle to publications referring specifically to a particular criminal trial, it will be very difficult for a publisher to argue successfully that the principle applies in that context. The courts still appear to place heavy reliance on the notion of unintended and incidental prejudice as a basis for applying the principle. In one case before the New South Wales Court of Appeal,[23] the publication in question related to the horse racing industry and allegations of race fixing, and included material obtained from a lawful telephone tap. The court took the view that these were matters of serious public interest. However, because Commonwealth legislation prohibited the disclosure of communications obtained through such telephone interceptions, the court concluded that the legislature had already given priority to the public interest in keeping such communications confidential, and it was not for the courts to permit a different public interest to prevail.

OPERATION OF THE PRINCIPLE IN OTHER JURISDICTIONS

The United Kingdom

8.22 The public interest principle forms part of the law of sub judice contempt in the United Kingdom. However, the principle theoretically operates in a more restrictive manner there than it

not refer to the second trial, and its prejudicial effect was therefore an incidental by-product of a discussion of a matter of public importance: see at 289. In *Attorney General (NSW) v John Fairfax Publications Pty Ltd* [1999] NSWSC 318, the publication in question was an expose on a man described as a new drug boss of Sydney. The man was facing drug charges at the time. However, the publication was found not to amount to a contempt on the basis of the public interest principle since it did not contain any discussion of the facts or circumstances of the charges pending against the accused: see at para 122-134.

23. See *John Fairfax Publications Pty Ltd v Doe* (1995) 37 NSWLR 81.

does in Australia. It is limited to protecting only those publications that create a risk of prejudice to proceedings as an incidental result of a discussion of matters of general public interest. That approach follows the view of the public interest principle as it was commonly articulated in the earlier Australian cases, prior to the *Hinch* case.

8.23 The public interest principle is formulated in s 5 of the *Contempt of Court Act 1981* (UK), which applies to publications made as or as part of a discussion in good faith of public affairs or other matters of general public interest. The word "discussion" has been interpreted to require an examination by argument or debate, rather than bare accusations which are not linked to a wider theme.[24] The section requires that the risk of prejudice to proceedings be "merely incidental to the discussion". This phrase has been interpreted by the courts to mean that the risk of prejudice to proceedings was no more than an incidental consequence of expounding the main theme of the publication. These requirements would seem to exclude from the protection offered by s 5 a publication such as that in the *Hinch* case, which is prompted by, and refers specifically to, the facts of particular legal proceedings.

8.24 Section 5 implements the recommendation of the Phillimore Committee.[25] This Committee expressly endorsed the Australian approach to the public interest principle as originally articulated in the *Bread Manufacturers* case, with its focus on specifically protecting publications that incidentally cause a risk of prejudice in the course of ventilation of a question of public concern. The Phillimore Committee justified the application of the public interest principle in the United Kingdom on the ground that public discussion of matters of general interest should not be suspended

24. See *Attorney General v English* [1983] 1 AC 116.
25. United Kingdom, Committee on Contempt of Court, *Report of the Committee on Contempt of Court* (HMSO, London, Cmnd 5794, 1974) at para 142. See also United Kingdom, *Parliamentary Debates (Hansard)* House of Lords, 9 December 1980 at 661; House of Lords, 15 January 1981 at 191-194; House of Commons, 2 March 1981 at 39.

because of its incidental effect on legal proceedings. Again, this would tend to suggest that the principle as it operates in the United Kingdom was not intended to protect publications that deal with the specific facts of a case.

Canada

8.25 It appears uncertain whether the public interest principle, as we commonly understand it in Australia, is available as a ground of exoneration in the Canadian common law on sub judice contempt.[26] It appears that the Canadian courts will give consideration to the public interest in the discussion of a particular matter to permit publication of material, even if it poses some risk of prejudice to proceedings.[27] However, the public interest principle as a separate ground of exoneration does not appear to be well established in Canadian law.

8.26 While it may not be certain to operate as a distinct ground of exoneration, it seems that the Canadian courts will undertake a similar balancing exercise between competing public interests when determining whether certain material should not be or should not have been published. The operation of the law on sub judice contempt in Canada must be viewed in the context of the Canadian *Charter of Rights and Freedoms*. Both the right of an accused person to a fair trial, and the right to freedom of expression, are enshrined in the *Charter*.[28] The majority of the Canadian Supreme Court has held in *Dagenais v Canadian*

26. See J P Allen and T Allen, "Publication Restrictions and Criminal Proceedings" (1994) 36 *Criminal Law Quarterly* 168 at 174-177.
27. See *Bellitti v Canadian Broadcasting Corporation* (1973) 15 CCC (2d) 300. But see *Manitoba (AG) v Radio OB Ltd* (1981) 59 CCC (2d) 477.
28. For the right of an accused to a fair trial, see s 11(d) of the *Charter*. For the right to freedom of expression, see s 2(b) of the *Charter*. However, s 1 of the *Charter* provides that these rights are subject to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Broadcasting Corp[29] that when determining whether the publication of material should be banned by a suppression order, the *Charter* requires the court to weigh up the beneficial effects of prohibiting the publication against the deleterious effects to freedom of expression in doing this. This balancing exercise requires consideration of the importance of the particular material in question. Both the right to freedom of expression and the right to a fair trial are to be given equal status in the balancing exercise. The balancing doctrine in *Dagenais* has been followed by other Canadian courts in the context of applications for suppression orders or publication bans,[30] access to documentary exhibits in criminal cases,[31] access to information held by third parties for use in trial,[32] and access to information which supported the issue of a search warrant.[33]

8.27 *Dagenais* involved an application for an injunction, as opposed to a determination about liability for contempt after publication had already occurred. In a case involving liability for contempt brought before the Supreme Court of British Columbia,[34] submissions were made concerning possible conflicts between the *Charter* rights of an accused to a fair trial and those *Charter* rights

29. (1994) 94 CCC (3d) 289 at 316-317, 327 (Lamer CJC), (Iacobucci and Major JJ concurring), Gonthier J, dissenting in part but agreed on this particular point at 350-352. Justices LaForest (at 329) and L'Heureux-Dube (at 245) dissented on grounds not relevant to this issue, but agreed that the application of contempt law requires consideration of competing public interests as enshrined in the *Charter*.
30. *Edmonton (City) v Kara* (1995) 26 Alta LR (3d) 28; *Canadian Broadcasting Corp v Giroux* (1995) 23 OR (3d) 621; *Edmonton Journal v Canada (Immigration & Refugee Board)* (1996) 106 FTR 230; *R v Khan* (1997) 117 Man R (2d) 264.
31. *R v Shearing (No 3)* (British Columbia, Supreme Court, Doc No CC960772, Henderson J, 12 February 1998, unreported); *R v Glowatski* (British Columbia, Supreme Court, Doc No 95773, Macaulay J, 4 May 1999, unreported).
32. *R v Beharriell* (1995) 103 CCC (2d) 130; *R v Keukens* (1995) 23 OR (3d) 582.
33. *Flafiff v Macdonell* (1998) 123 CCC (3d) 79.
34. *In the Matter of the Prosecution for Contempt of Court of CHBC Television and Caribo Press (1969) Ltd* (1997) 121 CCC (3d) 260.

which guarantee freedom of expression including the right of the media to gather and publish reports from courts. The court considered *Dagenais* but ruled that there was no conflict of rights in that case. Nevertheless, it did not repudiate the principles set out in *Dagenais*. Consequently, it appears that while it may not have been considered as a distinct ground of exoneration, the Canadian courts carry out a similar balancing exercise as is involved in the public interest principle in order to ascertain whether a contempt has or will occur if material is published, at least in relation to publications relating to criminal proceedings.[35] It would seem, however, that the same balancing between competing rights or interests would not be required in Canada when determining whether to prohibit publication of material relating to civil proceedings, since the same protection of the right to a fair trial in civil proceedings is not enshrined in the Canadian *Charter*.

8.28 The Canadian Law Reform Commission, in its report on contempt of court,[36] did not specifically consider the public interest principle in its review of the law of contempt.

Ireland

8.29 The Irish Law Reform Commission recommended[37] against incorporating into the law of sub judice contempt any form of the public interest principle. It took the view that the interests of persons involved in criminal or civil litigation should always take precedence over the social benefits derived from public discussion of matters of public interest. Consequently, a publication that caused a risk of prejudice should not be excused from the application of the sub judice rule simply because it dealt with a matter of public interest.

35. And the New Zealand Court of Appeal, in considering *Dagenais*, has taken the view that the principles laid down in that case apply equally to contempt proceedings: See *Gisborne Herald Co Ltd v Solicitor-General* [1995] 3 NZLR 563.
36. Canada, Law Reform Commission, *Contempt of Court* (Report 17, 1982).
37. Ireland, Law Reform Commission, *Contempt of Court* (Report 47, 1994) at para 6.25; (Consultation Paper, 1991) at 330-335.

8.30 The Irish Law Reform Commission recognised that, in rare circumstances, its approach would represent a significant restriction on freedom of discussion, but considered that this was a very small price to pay for securing justice. It should be noted, however, that the Irish Law Reform Commission recommended the inclusion of an element of intention in the law on liability for sub judice contempt, so that liability would only arise if the publisher ought reasonably to have appreciated that the publication created a risk of serious prejudice.[38] This would usually mean that a publisher would not be liable for the publication of material amounting to a general discussion of a matter of public interest, which fortuitously and unintentionally created a risk of prejudice to particular proceedings.

Australia

8.31 The Australian Law Reform Commission ("ALRC") recommended a narrower form of the public interest principle than exists at common law.[39] According to its formulation, the public interest principle would operate as a defence to a charge of contempt. In the case of publications relating to criminal proceedings, the defence would only succeed if it could be shown that the publication was made in good faith, in the course of a continuing public discussion of a matter of public affairs or otherwise of general public interest and importance (not being the matter involved in the trial), and that the discussion would be significantly impaired if the prejudicial material were not published at the time it was in fact published. In the case of publications relating to civil jury trials, the same requirements would apply, with the exception that it would need to be shown

38. See para 5.39.
39. See Australian Law Reform Commission, *Contempt* (Report 35, 1987) at para 331-332, Appendix A (*Administration of Justice (Protection) Bill 1987* (Cth) cl 27). It is worth noting that Report 35 was completed before the High Court's ruling in the *Hinch* case was handed down.

only that the discussion would be impaired, rather than significantly impaired.[40]

8.32 The approach of the ALRC would exclude from the scope of the defence the publication of material which relates to, or is prompted by, specific legal proceedings. With the condition that the publication occur "in the course of a continuing public discussion", its formulation appears to follow the earlier notion of the public interest principle as articulated in the *Bread Manufacturers* case, requiring that, at the time of the publication, the public discussion should have already commenced.

8.33 The ALRC expressly rejected a form of the public interest principle which involved a balancing of the two public interests in freedom of discussion and the administration of justice. It considered that to adopt such an approach would be to exonerate prejudice which results from careless failure on the part of the media to make themselves aware of current trials.

8.34 In considering the recommendations of the ALRC, the Victorian Law Reform Commission expressed reservations about retaining a public interest defence in any form.[41] It considered that "public interest" was a difficult concept to define or prove, and was also difficult to balance against the interests of a defendant in proceedings.

8.35 On the other hand, the Commonwealth government, in its 1991 discussion paper[42] on the recommendations of the ALRC agreed with the inclusion of some form of a public interest defence. However, it preferred an even more restrictive form of the defence than that put forward by the ALRC, proposing that the defence be available only if it be shown that the publication could not reasonably be expected to prejudice the administration of justice.

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40. Australian Law Reform Commission, *Contempt* (Report 35, 1987) at para 338, Appendix A (*Administration of Justice (Protection) Bill 1987* (Cth) cl 20(4)).
41. See Victoria, Law Reform Commission, *Comments on Australian Law Reform Commission Report on Contempt No 35* (unpublished, 3 September 1997) at para 4.1.
42. Australia, Attorney General's Department, *The Law of Contempt* (Discussion Paper, 1991) at para 39-40.

8.36 The New South Wales Law Reform Commission also considered aspects of the law of contempt by publication as part of a review of criminal procedure in New South Wales in 1987.[43] In relation to the public interest principle, some members of the Commission expressed doubt that the principle should operate to exonerate publishers from liability. They considered that the notion of "public interest" was so vague and uncertain and capable of such vastly differing interpretations that it could make the general prohibition against the publication of prejudicial material ineffective. Instead, the members proposed that the supposed public interest served by a publication should be taken into account by the prosecuting authority in determining whether to commence a prosecution for contempt. It could also be a factor for the court to consider when determining the appropriate penalty to impose following a conviction for contempt.

New Zealand

8.37 In New Zealand, the common law appears to recognise the public interest principle as a ground of exoneration from liability. The principle there operates as an element to consider in determining whether the publication amounts to a contempt, as opposed to operating as a defence. While the courts have referred to the need to balance the public interests in freedom of discussion and the administration of justice in order to determine liability for contempt, it seems that they are much more inclined to view the public interest principle as it has traditionally been viewed in Australia, before the *Hinch* case. That is, it is regarded as a ground for exonerating publications which occur in the course of ventilation of a public concern without reference to the proceedings affected by the publication.[44]

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43. See New South Wales Law Reform Commission, *Criminal Procedure: Procedure from Charge to Trial: Specific Problems and Proposals* (Discussion Paper 14, 1987) Volume 2 at para 13.77.
44. See *Solicitor-General v Wellington Newspapers Ltd* [1995] 1 NZLR 45 at 48-49 (Eichelbaum CJ), at 56-57 (McGechan J); *Solicitor-General v Radio NZ Ltd* [1994] 1 NZLR 48.

THE COMMISSION'S TENTATIVE VIEW

8.38 The Commission is of the tentative view that there is a need to formulate a new public interest defence. It shares the concerns of the ALRC that material may be dressed-up in the form of a public interest discussion to exculpate the substantial prejudice to a trial which may result from a failure on the part of the media to make themselves aware of current trials.[45] The Commission is inclined to propose a public interest defence which is narrower than the common law principle.

8.39 On one interpretation of the common law on the public interest principle, there is no contempt whenever the risk of prejudice created by the offending material is an incidental but unintended by-product of a discussion on a matter of public concern. The Commission acknowledges that when an article or radio/television program dealing with current affairs is being prepared, there may be risks of unintentional prejudice to trials of which those responsible for the publication are not aware. However, in Proposal 7, the Commission proposes a defence of innocent publication which would exonerate those responsible for the offending material, if they took reasonable steps to check whether the material may create a substantial risk of prejudice to a trial. In the circumstances, the public interest principle would only be relevant where the innocent publication defence is not available, that is, where prejudice is intended, or occurs to the knowledge of the persons responsible for the publication, or could have been discovered and guarded against if they had taken all reasonable steps to ascertain any fact that would cause the publication to breach the sub judice rule.

8.40 Another interpretation of the common law on the public interest principle requires the balancing of different interests: that is, even if the prejudice is incidental and unintended, a balancing act is required, whereby the public interest in the unprejudiced administration of justice is weighed against the public interest in

45. Australian Law Reform Commission, *Contempt* (Report 35, 1987) at para 332.

the matter under discussion when the alleged contempt occurred. The difficulty with this approach is that it involves a value judgment about which among the competing interests is paramount. This can lead to uncertainty for stakeholders, such as the media, as to when and how a discussion concerning a particular matter of public interest will be adjudged of greater importance than the interest in the fair administration of justice. Take *Hinch* and the *Bread Manufacturers* cases as examples. In *Hinch*, the High Court ruled that the public interest in knowing that a convicted child sex offender was running a youth organisation while facing fresh charges for sex offences did not justify the publication of his previous convictions. On the other hand, the New South Wales Supreme Court ruled in the *Bread Manufacturers* case that the risk of prejudice to a litigant may be required to yield to other superior considerations, in that particular case, the public discussion of the bread trade and an alleged combination to fix the selling price of bread. Comparing the result in these two cases, one could query whether in relation to the public interest in maintaining a fair administration of justice, the discussion of alleged abuses in the bread trade was of greater public interest than Mr Hinch's observations aimed at preventing the sexual abuse of children.

8.41 Finally, the Commission is of the view that the broader interpretation of the public interest principle in *Hinch* may be difficult to apply in practice. It may prove difficult to argue that publications relating to specific legal proceedings do not amount to contempt. As noted above, the situations where this could apply would be extreme and rare. Consequently, the Commission considers that any reformulation of the principle should expressly state that it will not apply to publications which were prompted by and which specifically dealt with the facts of particular proceedings.

8.42 As an alternative to the public interest principle found in common law, the Commission proposes a legislative provision in terms similar to those recommended by the ALRC,[46] that is, a publication should not attract liability if the following conditions are met: the publication 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 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 it was published. Under this proposal, once the publication is adjudged to be in good faith and on a matter of public affairs or general public interest, the test is whether 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. A balancing act is not required. The persons responsible for the publication will have to show that the discussion is of an issue of genuine public interest and importance, that the material in question forms an integral part of the discussion and that the discussion would suffer significantly if the publication were delayed until the risk of prejudice has ceased. As explained by the ALRC, the last requirement might exonerate a publication shortly before or during the trial where the length of the trial was a matter of months, but not where a postponement of only a few days was necessary.[47]

8.43 While the public interest principle operates, at common law, as a component of the test for liability whereby the prosecution must prove that the public interest in publishing the material in question did not outweigh the public interest in restricting publication in the interests of the proper administration of justice, the proposal would operate as a true defence. That means the burden of proof is on the defendant, to prove, on the balance of probabilities, all the elements of the defence.

46. Australian Law Reform Commission, *Contempt* (Report 35, 1987) at para 303.
47. Australian Law Reform Commission, *Contempt* (Report 35, 1987) at para 332.

PROPOSAL 19

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.

A "PUBLIC SAFETY" DEFENCE

8.44 Law reform bodies on previous occasions have considered whether it is necessary to provide in legislation for a "public safety" defence as a ground of exoneration from liability for contempt.[48] This defence would apply to situations where the media publish information that has a tendency to prejudice particular proceedings but which is in the interest of protecting public safety. For example, if a person accused of a crime is at large, it may be in the public interest to publicise the fact that that person has a history of violence and may be dangerous, and/or to

48. See United Kingdom, Committee on Contempt of Court, *Report of the Committee on Contempt of Court* (HMSO, London, Cmnd 5794, 1974) at para 143-145; Australian Law Reform Commission, *Contempt* (Report 35, 1987) at para 302, 330; Ireland, Law Reform Commission, *Contempt of Court* (Consultation Paper, 1991) at 330; (Report 47, 1994) at para 6.24.

publish a photograph of the alleged offender. Publications of these kinds would typically give rise to liability for sub judice contempt.

8.45 It is possible that a media organisation that publishes prejudicial information in the interests of public safety would be able to rely on the public interest principle, as discussed above, if it were charged with contempt. It is perhaps more likely that the prosecuting authority would choose not to prosecute for contempt at all, in the exercise of its prosecutorial discretion. The Commission is not aware of any case involving this sort of situation that has actually come before the courts for determination.

8.46 The Phillimore Committee in the United Kingdom did not consider it desirable to introduce into legislation a specific defence of this kind. It took the view that the sorts of situation attracting a "public safety" defence would rarely arise, and that it would simply lead to greater uncertainty to attempt to formulate in legislation a defence to meet these situations on the rare occasion when they did arise. The Phillimore Committee appeared to consider it more appropriate to leave considerations of public safety or benefit as a factor mitigating penalty on conviction for contempt. Consequently, there is no provision in the *Contempt of Court Act 1981* (UK) for a "public safety" defence.

8.47 The ALRC, on the other hand, recommended that legislation expressly provide for a "public safety" defence, rather than leaving the matter to the discretion of the authority responsible for prosecuting for contempt. It emphasised that the terms of the defence should be limited to protecting publications which are reasonable or desirable to facilitate the arrest of a person, to protect the safety of a person or of the public generally, or to facilitate investigations into an alleged criminal offence.[49]

49. See Australian Law Reform Commission, *Contempt* (Report 35, 1987) Appendix A (*Administration of Justice (Protection) Bill 1987* (Cth) cl 31).

8.48 The Commonwealth Government, in its 1991 Discussion Paper on the recommendations of the ALRC, expressed some support for the inclusion in legislation of a public safety defence.[50] It expressed the view that any such defence should include a requirement that the publication was believed on reasonable grounds to be necessary to protect public safety, and was authorised by a senior officer.

8.49 The Law Reform Commission of Ireland favoured the approach of the ALRC and recommended the introduction into legislation of a defence in similar terms.

The Commission's tentative view

8.50 At this stage, the Commission sees merit in providing expressly in legislation for a separate "public safety" defence to cover the situations outlined above. It is possible that the public interest principle would be interpreted broadly enough to encompass publications which arise in the interests of public safety. It is also likely that the prosecuting authority may exercise its discretion not to prosecute for this type of publication. However, the Commission takes the preliminary view that publications of this kind deserve their own separate emphasis and protection in legislation, rather than relying on prosecutorial discretion or a broad application of the public interest principle. One concern about such a defence relates to the meaning of "public safety," a term which could be interpreted in many different ways. However, the ALRC's formulation of this defence specifies that circumstances under which it applies. The narrow formulation of this defence ensures that it will not be used for purposes other than for those it was intended. The Commission therefore proposes a legislative provision in terms similar to those recommended by the ALRC.

50. Australian Attorney General's Department, *The Law of Contempt* (Discussion Paper, 1991) at para 37-38.

PROPOSAL 20

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 reasonably necessary or desirable to facilitate the arrest of a person, to protect the safety of a person or of the public, or to facilitate investigations into an alleged criminal offence. The burden of proving this should be on the defendant in contempt proceedings, to prove on the balance of probabilities.

9. The fair and accurate reporting principle

- Overview
- Possible uncertainties in the law
- Recommendations of other law reform bodies
- The Commission's tentative view

OVERVIEW

9.1 A publication will not constitute a contempt, even if it may be prejudicial to a case, if it is a fair and accurate report of proceedings that take place in open court. For example, a fair and accurate report of bail proceedings may not breach the sub judice rule, even if it contains reference to the previous convictions of the accused, if that information has been revealed in open court in the course of the bail proceedings.

9.2 The courts justify fair and accurate reporting as a ground of exoneration by emphasising the public interest in the administration of justice as an open process.[1] The principle of open justice is considered to be of vital importance, not only as a means of informing the public of the processes of the courts, but also to ensure that those processes are carried out fairly, without abuse, and are seen to be carried out fairly. This public interest is considered to be of such significance that it takes precedence over the public interest in protecting legal proceedings from possible prejudice and influence by media publicity.

9.3 For this ground of exoneration to apply, a number of conditions must apply:

(1) The report must be of proceedings which are held in open court.[2]

(2) The report must not be of material which is the subject of a suppression order[3] or which for some other reason is not permitted to be reported.

(3) The report must not relate to matters which are said in the absence of the jury (albeit in open court). Consequently, it has been held that a newspaper which reported allegations of a confession by the accused which were the subject of

1. *Ex parte Terrill; Re Consolidated Press Ltd* (1937) 37 SR (NSW) 255 at 257-258; *R v Sun Newspapers Pty Ltd* (1992) 58 A Crim R 281 at 286-287 (Byrne J).
2. *Scott v Scott* [1913] AC 417 at 452 (Lord Atkinson).
3. See Chapter 10.

arguments as to admissibility during a voir dire could not rely on the immunity.[4] However, once the jury reached its verdict, such a report would be permissible.[5]

(4) The report must not reveal any material which the trial judge has refused to allow to be put before the jury.[6]

(5) The report must be of "proceedings". This includes events occurring in the vicinity of the relevant hearing, arising out of it and directly connected with it, such as a shouted interjection by a spectator in the courtroom or a demonstration outside the court asserting strong views as to what the outcome should be.[7]

(6) The report must be presented as a report. The immunity will not apply where the fact that the relevant prejudicial statements were made during court proceedings is not mentioned.[8]

(7) The report must be fair and accurate. A report is fair and accurate if it is "one which a person of ordinary intelligence using reasonable care might regard as giving a fair summary of the proceedings".[9] A report may be unfair by virtue of its mode of presentation or its content, for example, by the inclusion or exclusion of testimony,[10] the inclusion of extraneous matters or comment,[11] or an absence of a proper balance.[12] An inaccurate report is capable of constituting a contempt.[13]

4. *R v Day* [1985] VR 261.
5. *Mirror Newspapers Ltd v Waller* (1985) 1 NSWLR 1 at 19 (Hunt J).
6. *Ruse v Sullivan* [1969] WAR 142.
7. *Ex parte Fisher; Re Associated Newspapers Ltd* (1941) 41 SR (NSW) 272 at 278-9 (Jordan CJ).
8. *R v Scott and Download Publications Ltd* [1972] VR 663 at 673 (Menhennitt J).
9. *Ex parte Terrill; Re Consolidated Press Ltd* (1937) 37 SR (NSW) 255 at 259 (Jordan CJ).
10. *Minister for Justice v Western Australian Newspapers Ltd* [1970] WAR 202 at 207 (Jackson CJ).
11. *Attorney General v Davidson* [1925] NZLR 849.

(8) The report must be published in good faith. A report is not published in good faith if it is published for its news value and in complete and serious disregard of its consequences on the trial of an accused.[14] An intention to prejudice a trial is unnecessary.[15] An unfair report[16] or a delay in reporting the proceedings[17] may be evidence of the absence of good faith.

POSSIBLE UNCERTAINTIES IN THE LAW

9.4 It may be argued that it is not always clear when a publication will constitute a fair and accurate report of proceedings. Certainly, a publication need not be a verbatim account of proceedings in order to be a fair and accurate report. A summary of a part of the proceedings may instead be sufficient.[18] There are, however, no clear guidelines on what is permissible to include and exclude from a summary of proceedings. In one case, the court pointed to the mode of presentation of the report, comments or opinions expressed by the reporter about the proceedings, and emphasis given to particular aspects of the proceedings, as factors which may affect the fairness of the report.[19] Following this reasoning, a report which recounts

12. *Minister for Justice v Western Australian Newspapers Ltd* [1970] WAR 202 at 207 (Jackson CJ).
13. *Ex parte Norton; Re John Fairfax & Sons Pty Ltd* (1952) 69 WN (NSW) 312; *R v Evening Standard Co Ltd* [1954] 1 QB 578; *R v West Australian Newspapers Ltd; Ex parte The Minister for Justice* (1958) 60 WALR 108.
14. *R v Scott and Downland Publications Ltd* [1972] VR 663 at 675 (Menhennitt J).
15. *R v David Syme & Co Ltd* [1982] VR 173.
16. *Ex parte Terrill; Re Consolidated Press Ltd* (1937) 37 SR (NSW) 255 at 259 (Jordan CJ).
17. *R v Scott and Download Publications Ltd* [1972] VR 663 at 675 (Menhennitt J).
18. See *Ex parte Terrill; Re Consolidated Press Ltd* (1937) 37 SR (NSW) 255.
19. *Minister for Justice v Western Australian Newspapers Ltd* [1970] WAR 202.

only, for example, the morning's portion of proceedings, and omits the afternoon's portion, may be seen not to constitute a fair and accurate report.[20] Similarly, it is arguable whether a report which focuses solely or primarily on the previous convictions of an accused person, as revealed in bail proceedings, would be found to be unfair.

9.5 In addition to being fair and accurate, it appears that a publication must also be shown to be in good faith in order for the publisher to be exonerated from liability. It has been suggested in a number of cases that a publication may be found to be in bad faith if it is not published contemporaneously with the proceedings to which it relates.[21] For example, a report of committal proceedings which is published one year after the proceedings and shortly before the commencement of the relevant trial has been found to be in bad faith and to amount to a contempt.[22] However, the courts have arguably not given clear guidance as to how long after proceedings a publication may occur and still qualify as a fair and accurate report in good faith.

9.6 It is also unclear whether the law on fair and accurate reporting operates as a defence to a charge of sub judice contempt, or whether, as with the public interest principle, it is a factor which is considered in determining if liability arises. If it is a defence, the burden of proving that a publication is a fair and accurate report will rest on the defendant, and will have to be proven on the balance of probabilities. If, on the other hand, it operates as a component of liability, it will be for the prosecution in contempt proceedings to prove, beyond a reasonable doubt, that the publication was not a fair and accurate report, if this issue is raised.

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20. This was a concern expressed in I Freckelton, *Prejudicial Publicity and the Courts* (Australian Law Reform Commission, Reference on Contempt of Court, Tribunals and Commissions, Research Paper 4, 1986) at 97.
21. See *Minister for Justice v Western Australian Newspapers Ltd* [1970] WAR 202; *R v Scott & Downland Publications Ltd* [1972] VR 663; *R v Sun Newspapers Pty Ltd* (1992) 58 A Crim R 281.
22. See *R v Scott & Downland Publications Ltd* [1972] VR 663.

9.7 A final issue of uncertainty is the extent to which the reporting of prejudicial material, which was contained in a document involved in court proceedings but was not actually mentioned in any open court hearing, is protected by the principle. The important determining factor is whether, under the law governing access to such documents, the reporter was lawfully entitled to view and report on the contents of the document. That issue is canvassed in Chapter 11. The proposals made in that chapter will affect the scope of the fair and accurate reporting principle.

RECOMMENDATIONS OF OTHER LAW REFORM BODIES

9.8 Both the Phillimore Committee in the United Kingdom, and the Australian Law Reform Commission ("ALRC") recommended the introduction of legislation to clarify the defence of fair and accurate report.[23] Both recommended that the legislation include a requirement that the report be not only fair and accurate, but also be published contemporaneously with, or within a reasonable time after, the proceedings to which it related. The Phillimore Committee also recommended that legislation expressly provide for the report to be made in good faith. The ALRC, on the other hand, did not consider it desirable to include a requirement of good faith in the legislative formulation of the defence. It took the view that a requirement of good faith would require a difficult and unsatisfactory inquiry into the motive or purpose behind a particular publication, which generally would have been prepared by a team of individuals within a media organisation. Moreover, it considered that the right of the media to perform their function of

23. United Kingdom, Committee on Contempt of Court, *Report of the Committee on Contempt of Court* (HMSO, London, Cmnd 5794, 1974) at para 141; Australian Law Reform Commission, *Contempt* (Report 35, 1987) at para 321-328, Appendix A (*Administration of Justice (Protection) Bill 1987* (Cth) cl 28).

reporting the operations of the courts should be absolute, and not subject to inquiries as to their motivation in reporting.

9.9 The recommendation of the Phillimore Committee was substantially adopted into legislation by s 4 of the *Contempt of Court Act 1981* (UK). However, that section does not expressly spell out whether it is to operate as a defence or an element of the offence of contempt.

THE COMMISSION'S TENTATIVE VIEW

9.10 At this stage, the Commission is not inclined to propose any changes to the common law position on the accurate and fair reporting principle. It considers that the issues mentioned above, such as whether the fair and accurate reporting principle operates as a defence or as a component of liability, what constitutes good faith and what is an accurate summary of proceedings, are best left for the courts to clarify. However, the Commission welcomes submissions on these issues and any other matter concerning the fair and accurate reporting principle.

Part Two
Reporting Legal Proceedings

10. Suppression orders

- Overview
- The concept of open justice
- Qualifications to the principle of open justice
- Existing powers to suppress publication of proceedings in New South Wales
- Suppression orders in New South Wales: issues and options

OVERVIEW

10.1 This chapter deals with an important exception to the principle of open justice, namely, the power of courts or other similar bodies to make so-called "suppression" or "non-publication" orders. This type of order will be examined within the context of various other restraints the courts may impose in order to limit the availability of information concerning judicial proceedings from the public at large. Attention will be given to the common law and statutory principles governing suppression orders in New South Wales. These will be contrasted and compared with the position in other jurisdictions with a view to recommending reform of the law in this State.

10.2 This chapter and Chapter 9 are linked in the following way. The principle discussed in Chapter 9, namely that a publication cannot attract sub judice liability on the ground of prejudice to a current or forthcoming trial if it constitutes a fair and accurate report of proceedings in open court, does not apply if the matter reported was the subject of a suppression order. It follows that its availability as a defence in contempt proceedings is reduced to the extent that courts are empowered to make suppression orders. One of the recognised grounds for such orders is in fact that reporting of the relevant material would create a risk of prejudice to some other trial.

THE CONCEPT OF OPEN JUSTICE

> Where there is no publicity there is no justice. Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity.[1]

10.3 The principle of open justice is one of the most fundamental principles of our legal system. According to this principle, legal

1. J Bentham quoted in Bowring, *Works of Jeremy Bentham* (1843) Volume 4 at 305.

proceedings are to be administered in open court unless it can be established that justice cannot otherwise be done.[2]

10.4 In the leading case of *Scott v Scott*, the public trial was said by Lord Atkinson to provide "the best security for the pure, impartial, and efficient administration of justice, the best means of winning for it public confidence and respect."[3] The principle of open justice has also achieved international recognition in article 14(1) of the International Covenant on Civil and Political Rights which provides that "everyone shall be entitled to a fair and public hearing by a competent and impartial tribunal established by law."

10.5 One aspect to the principle of open justice is that the public, including the media, should be able to attend court hearings, in addition to the parties. In this way, court proceedings are exposed to public and professional scrutiny and criticism. This tends to reduce the chance of abuse, maintain confidence in the integrity and independence of the courts, and distinguish judicial from administrative processes.[4] Other arguments that have been used to support the public administration of justice include: that openness may improve the quality of evidence; that it may induce unknown witnesses to come forward and cause trial participants to perform their duties more conscientiously; that it has a

2. *Scott v Scott* [1913] AC 417; *McPherson v McPherson* [1936] AC 177. The English authority has been reflected in Australia in cases such as *Russell v Russell* (1976) 134 CLR 495; *Tradestock Pty Ltd v TNT (Management) Pty Ltd* (1983) 50 ALR 461; *David Syme & Co Ltd v General Motors-Holden's Ltd* [1984] 2 NSWLR 294; *Re Robbins SM; Ex parte West Australian Neswpapers Ltd* (1999) 20 WAR 511. For a brief history of the principle of open justice see Kirby J in *Raybos Australia Pty Ltd v Jones* (1985) 2 NSWLR 47 at 50-53.
3. [1913] AC 417 at 463. This case concerned the power of the Probate, Divorce and Admiralty Division to hear a marriage nullity action in camera.
4. *Russell v Russell* (1976) 134 CLR 495 at 520 (Gibbs J). This case concerned the constitutional validity of certain laws relating to married persons, including s 97 of the *Family Law Act 1975* (Cth). This section provided that all proceedings in the Family Court, or in another court exercising jurisdiction under the Act (which included certain State courts) were to be held in closed court.

"therapeutic" value to the community in that it provides an outlet for concern, hostility and emotion engendered by serious crime; that it provides a form of community legal education; and that the knowledge gained by members of the public may have a deterrent effect on those who may otherwise break the law.[5]

QUALIFICATIONS TO THE PRINCIPLE OF OPEN JUSTICE

10.6 Under a system of open justice, courts are obliged to do all that they can to encourage openness of proceedings. As a society, we increasingly demand high levels of openness and accountability from our major public institutions and it is generally considered that unless there are compelling reasons to the contrary, such institutions should operate as openly and transparently as possible.[6] Nevertheless the principle of open justice is not absolute. Exceptions have been developed both by the courts and the legislature in which the requirements of justice have been deemed to override the necessity of open proceedings.

10.7 First, there is a need to control court proceedings so that disorder or over crowding will not make a proper trial difficult or impossible. The courts have long reserved a right to exclude people from court on this basis.[7] A second exception is based on the need

5. C M Branson, *Background Paper, Section 69 of the Evidence Act 1929-1982* (South Australia, Attorney General's Department, 1982) at 24. See also discussion in M McDowell, "The Principle of Open Justice in a Civil Context" (1995) 2 *New Zealand Law Review* 214 at 219-223.
6. C Lane, "On Camera Proceedings: A Critical Evaluation of the Inter-Relationship Between the Principle of Open Justice and the Televisation of Court Proceedings in Australia" (1999) 25 *Monash Law Review* 54 at 82.
7. *Scott v Scott* [1913] AC 417 at 445-446. Earl Loreburn recognised that "Tumult or disorder, or the just apprehension of it, would certainly justify the exclusion of all from whom such interruption is expected, and, if discrimination is impracticable, the exclusion of the public in general."

to be aware of the sensitivity of trial participants, some of whom may find it difficult or impossible to testify in an open court subject to free reporting. This is especially problematic in cases involving people such as child witnesses or survivors of sexual assault. Some people may also be deterred from instituting civil or criminal proceedings because they are to be held in public and will be subject to free reporting. The common law has recognised that these sensitivities may constitute valid grounds for making exceptions to the general rule of open justice.[8] Another example is litigation involving secret processes, trade secrets or other confidential information, where the effect of publicity would be to destroy the subject matter of the action.[9] Special protection from the harmful effects of publicity will sometimes also be provided to certain classes of people such as wards of the court, and the mentally ill, criminal defendants who are minors and sexual offence complainants.[10] A further exception has been developed on the basis of national security where, for example, names or operations of members of the secret service may need to be withheld from public knowledge.[11] It has also been recognised that certain forms of publicity may be seen as likely to prejudice the fairness of a trial. Restrictions have been developed in some jurisdictions, for example, on access and reporting of committal proceedings, coroner's inquests and investigative commissions.[12]

8. See for example *Scott v Scott* [1913] AC 417 at 446 (Earl Loreburn).
9. See for example *Scott v Scott* [1913] AC 417 at 437-438 (Viscount Haldane), at 445 (Earl Loreburn), at 482-483 (Lord Shaw of Dumfermline).
10. See for example *Scott v Scott* [1913] AC 417 at 437 (Viscount Haldane); at 445 (Earl Loreburn); *Raybos Australia Pty Ltd v Jones* (1985) 2 NSWLR 47 at 54; *Children (Criminal Proceedings) Act 1987* (NSW) s 10; *Crimes Act 1900* (NSW) s 77A, 78F, 578A.
11. *Attorney General v Leveller Magazine Ltd* [1979] AC 440 at 471; *Taylor v Attorney General* [1975] 2 NZLR 675; *Raybos Australia Pty Ltd v Jones* (1985) 2 NSWLR 47 at 54 (Kirby J); *Supreme Court Act 1986* (Vic), s 18, 19(a); *County Court Act 1958* (Vic), s 80, 80AA(a); *Magistrates' Court Act 1989* (Vic) s 126(1)(a).
12. See paras 10.36-10.42. See also discussion in G Nettheim, "Open Justice Versus Justice" (1985) 9 *The Adelaide Law Review* 487.

10.8 The law has developed a number of mechanisms to respond to these perceived dangers to the administration of justice which might arise from an entirely open judicial system. These mechanisms include hearing proceedings in closed court, concealing information from those present at an open court hearing, and ordering that reports of materials heard in open court be suppressed from publication.

10.9 Where there is no statutory authority to derogate from the openness principle, the common law power to do so has generally been narrowly interpreted. Restrictions to the open justice principle have been held to be unjustified, for example, on the grounds that the evidence may be unsavoury;[13] for considerations of public decency or morality;[14] the fact that publication may cause the victim, one of the parties or witnesses embarrassment, distress, ridicule or invasion of privacy;[15] or a desire to prevent damage to the reputation or business affairs of a professional person.[16] The rationale for derogations from the general openness principle was articulated by Viscount Haldane LC in *Scott v Scott*[17] as follows:

> While the broad principle is that the Courts of this country must as between the parties, administer justice in public, this principle is subject to apparent exceptions … But the exceptions are themselves the outcome of a yet more fundamental principle that the chief object of the Courts of justice must be to secure that justice is done.

13. *Scott v Scott* [1913] AC 417 at 438 (Lord Haldane); *R v Hamilton* (1930) 30 SR (NSW) 277.
14. *Scott v Scott* [1913] AC 417 at 447 (Earl Loreburn).
15. *J v L & A Services Pty Ltd (No 2)* [1995] 2 Qd R 10 at 45; *R v Tait* (1979) 24 ALR 473 at 490.
16. *Raybos Australia Pty Ltd v Jones* (1985) 2 NSWLR 47 at 58 (Kirby J); at 61-62 (Samuels J); at 63-64 (Priestly J).
17. [1913] AC 417 at 437-438. See also discussion in *Raybos Australia Pty Ltd v Jones* (1985) 2 NSWLR 47 at 54 (Kirby J).

Hearings in camera

10.10 A number of recognised exceptions to the openness principle allow a court to close the court from public access, or to sit *in camera*.

10.11 In certain cases where the administration of justice would be rendered impracticable by the presence of the public, the common law has recognised the court's power to sit in private. Such a power has been held to exist when the court exercises its parental jurisdiction over wards of the court or the mentally ill.[18] It was also recognised in *Scott v Scott* that cases may arise in which justice could not be done if it had to be done in public, for example because publicity would deter a party from seeking redress or interfere with the effective trial of the case.[19] Thus, where the effect of publicity would be to destroy the subject matter of the litigation, as in cases involving trade secrets, secret documents, communications or processes, the court has been held able to restrict public access.[20]

10.12 The exception based on the deterrent effect of publicity has been extended by analogy to cover certain circumstances of national security. If it appears that national safety will endanger the due administration of justice, for example by deterring the Crown from prosecuting in cases where it should do so, a court may sit in private. [21] Nevertheless, in most cases where it is claimed that witnesses may be deterred from giving evidence, or

18. *Scott v Scott* [1913] AC 417 at 483 (Lord Shaw of Dumferline), at 437 (Viscount Haldane), at 441 (Earl of Halsbury), at 445 (Earl Loreburn).
19. *Scott v Scott* [1913] AC 417 at 446 (Earl Loreburn).
20. *Scott v Scott* [1913] AC 417 at 441 (Earl of Halsbury), at 437 (Viscount Haldane), at 445 (Earl Loreburn), at 482-483 (Lord Shaw of Dumfermline); *Badische Anilin & Soda Fabrik v Levinstein* (1883) 24 Ch D 156; *David Syme & Co Ltd v General Motors-Holden's Ltd* [1984] 2 NSWLR 294 at 299-300 (Street J).
21. *Attorney General v Leveller Magazine Ltd* [1979] AC 440 at 471 (Lord Scarman). In this case however, instead of sitting in private the lesser device of concealing information from those in court was used. See also *Taylor v Attorney General* [1975] 2 NZLR 675.

parties from instituting or defending proceedings, or where a completely open hearing would destroy the subject matter of the litigation such as a trade secrets case, the courts have preferred, where possible, not to close the court. Instead courts have generally favoured using the lesser device of holding proceedings in open court but concealing specific information from public knowledge, by, for example, using pseudonyms or not referring openly to confidential or secret information.[22]

10.13 The power of the courts under the common law to restrict access to legal proceedings has been augmented by statutory provisions in all Australian jurisdictions. Examples include where the courts are empowered to exclude the public in the overall interests of justice.[23] Some legislation also empowers courts to restrict access in proceedings involving children[24] and sexual offences.[25] Like the common law exceptions, statutory provisions empowering courts to close proceedings to the public have been narrowly interpreted. In the words of Justice Kirby in *Raybos*

22. See discussion at para 10.15-10.18.
23. See *Federal Court of Australia Act 1976* (Cth) s 17(4); *Evidence Act 1971* (ACT) s 82, 83(2); *Magistrates' Court (Civil Jurisdiction) Act 1982* (ACT) s 178(2); *Supreme Court Act 1970* (NSW) s 80; *Supreme Court Act 1979* (NT) s 17; *Evidence Act 1939* (NT) s 57(1); *Evidence Act 1929* (SA) s 69(1); *Supreme Court Act 1986* (Vic) s 18-19.
24. Courts dealing with children in the ACT, NSW and SA are closed to the public but the media may attend: *Children's Services Act 1986* (ACT) s 169(1), 171; *Children (Criminal Proceedings) Act 1987* (NSW) s 10; *Children's Protection and Young Offenders Act 1979* (SA) s 92(2). In the NT and Victoria however children's courts are now prima facie open to the public: *Juvenile Justice Act 1983* (NT) s 22(1); *Children and Young Persons Act 1989* (Vic) s 19. In Tasmania the public may be excluded from a children's court: *Child Welfare Act* 1960 (Tas) s 17. In WA the court has the power to exclude the public from any hearing or trial relating to a child or which may prejudice the interests of a child: *Criminal Code Act 1913* (WA) s 635A.
25. *Crimes Act 1900* (NSW) s 77A, 78F; *Evidence Act 1971* (ACT) s 76D; *Evidence Act 1979* (NT) s 21A; *Criminal Law (Sexual Offences) Act 1978* (Qld) s 5; *Justices Act 1886* (Qld) s 70; *Magistrates' Court Act 1989* (Vic) s 126(1)(d); *Criminal Code Act 1913* (WA) s 635A.

Australia Pty Ltd v Jones, statutes providing exceptions "will usually be strictly and narrowly construed. Unless the derogation is specifically provided for, courts are loath to expand the field of secret justice." [26]

10.14 An order closing proceedings and restricting media access implicitly imposes a prohibition on the reporting of the proceedings themselves.[27] Any restriction resulting from an order for closure will only last as long as is necessary to protect the interests of those for whose benefit it was made.[28] However, it does not follow that the judgment and orders can also be withheld.[29] As Justice Street pointed out, "a judgment can be structured to reveal as much of what occurred as possible without destroying the secret."[30]

Concealment of information from those present at court

10.15 An important corollary of the principle of open justice is that evidence communicated to the court should be communicated publicly, and consequently be able to be reported to the public at large. In certain circumstances however, the court may restrict information by concealing it from those present in the courtroom (and hence also from the general public). For example, a court may order that the names of witnesses be withheld and pseudonyms used, or that evidence be taken in written form so that it is not

26. (1985) 2 NSWLR 47 at 55. Justice Kirby referred to the cases of *Australian Broadcasting Corp v Parish* (1980) 43 FLR 129 at 133; *Re Armstrong and State of Wisconsin* (1972) 7 CCC (2d) 331; *CB v The Queen* (1982) 62 CCC (2d) 107.
27. *Re F* [1977] 1 All ER 114 at 93-94 (Scarman LJ).
28. *Re F* [1977] 1 All ER 114 at 137 (Lane LJ); *Scott v Scott* [1913] AC 417 at 447-449 (Earl Loreburn), at 483 (Lord Shaw of Dumferline).
29. *David Syme & Co Ltd v General Motors-Holden's Ltd* [1984] 2 NSWLR 294.
30. *David Syme & Co Ltd v General Motors-Holden's Ltd* [1984] 2 NSWLR 294 at 300.

heard by the general public.[31] Often such devices will be used in order to avoid the need for the court to sit in closed session.[32] In any case, where the court has power to order a hearing *in camera*, whether at common law or by statute, it may make a lesser order designed to achieve the same results.[33]

10.16 Certain specific categories of exceptions have been developed by the common law. These are based on the principle that the order must be necessary to protect the administration of justice.[34] In the words of Justice Kirby:

> If the very openness of court proceedings would destroy the attainment of justice in the particular case (as by vindicating the activities of the blackmailer) or discourage its attainment in cases generally (as by frightening off blackmail victims or informers) or would derogate from even more urgent considerations of public interest (as by endangering national security) the rule of openness must be modified to meet the exigencies of the particular case.[35]

10.17 The categories of cases in which the court can order information to be concealed from those present at court, by way of a pseudonym order for example, are narrow but fairly well

31. *Attorney General v Leveller Magazine Ltd* [1979] AC 440 at 472 (Lord Scarman); *John Fairfax Group Pty Ltd v Local Court of New South Wales* (1992) 26 NSWLR 131; *R v Socialist Worker Printers & Publishers Ltd; Ex parte Attorney General* [1975] 1 QB 637; *Re Savvas* (1989) 43 A Crim R 331. See generally discussion in D Butler and S Rodrick, *Australian Media Law* (LBC Information Services, Sydney, 1999) at 132-135.
32. *Raybos Australia Pty Ltd v Jones* (1985) 2 NSWLR 47 at 54-55 (Kirby J).
33. *Attorney General v Leveller Magazine Ltd* [1979] AC 440.
34. *Attorney General v Leveller Magazine Ltd* [1979] AC 440 at 465 (Lord Edmund-Davies); *Ex parte Queensland Law Society Incorporated* [1984] 1 Qd R 166 at 170 (McPherson J); *Raybos Australia Pty Ltd v Jones* (1985) 2 NSWLR 47; *John Fairfax & Sons Ltd v Police Tribunal (NSW)* (1986) 5 NSWLR 465 at 476-477 (McHugh J) (Glass J concurring).
35. *John Fairfax Group Pty Ltd v Local Court of New South Wales* (1991) 26 NSWLR 131 at 141 (Kirby J).

established. Grounds which have long been recognised include situations where disclosure in a public trial would act as a deterrent to witnesses, or to the prosecution of offences. Thus the need to protect the anonymity of police informers,[36] blackmail victims,[37] extortion victims,[38] and members of national security forces[39] have been accepted as valid reasons to conceal information from those present in court. Pseudonym orders as a means of concealing information have also been made to protect accused people where their future trial on other charges might be prejudiced by such publicity.[40]

10.18 A court may also order that details of confidential information other than identities not be referred to in open court where this is necessary to secure justice. For example, if the subject matter of the case was to protect information regarding trade secrets, secret documents, communications or processes,

36. *John Fairfax & Sons Ltd v Police Tribunal (NSW)* (1986) 5 NSWLR 465 at 471-472; *R v Savvas* (1989) 43 A Crim R 331 at 335-336. See also *Cain v Glass (No 2)* (1985) 3 NSWLR 230 at 246. This case involved whether the identity of an informant was protected by public interest immunity rather than use of a pseudonym order *per se*.
37. *R v Socialist Worker Printers & Publishers Ltd; Ex parte Attorney General* [1975] 1 QB 637.
38. *John Fairfax Group Ltd v Local Court of New South Wales* (1991) 26 NSWLR 131. The use of pseudonyms for victims of extortion was accepted by the majority in *John Fairfax Group Ltd v Local Court of New South Wales* (1991) 26 NSWLR 131. Nevertheless with a strong and convincing dissent delivered by Justice Kirby, acceptance of this category as a justification for pseudonym order is not entirely settled. In that case, Justice Kirby held that the common law exception developed for blackmail cases could not be extended to extortion cases since the situations were not analogous. In the case of extortion the victim has no guilty secret which he or she is trying to conceal. As such Justice Kirby believed that it was far less likely than in blackmail cases that the prospect of publicity would deter victims from reporting the crime.
39. *Attorney General v Leveller Magazine Ltd* [1979] AC 440 at 471 (Lord Scarman); *Taylor v Attorney General* [1975] 2 NZLR 675.
40. *Re "Mr C"* (1993) 67 A Crim R 562 at 564; *Reed v Dangar* (1992) 59 SASR 487.

justice would be undermined if these details were to be heard in open court.[41]

Power to forbid publication of proceedings heard in open court

10.19 Once information is heard by those present in court, the general rule is that the wider public also has a right to be informed. The open justice principle means that it will not normally be appropriate for the court to restrain publication of such information by the media to the general public.[42] Under certain circumstances however it has been acknowledged that the interests of justice demand that such information not be made available or disseminated to the general public. Self-regulation has not proved effective in the area of court reporting, thus necessitating the intervention of the courts and Parliament.[43] Restrictions in the form of non-publication or suppression orders may therefore be imposed on the media's right to publish fair and accurate reports of what has been openly heard during court proceedings.

10.20 As shall be seen below, the common law regarding suppression orders is relatively unclear and unsettled. Legislative measures introduced in New South Wales to clarify or augment the ability of courts to make such orders are limited in scope, thereby leaving many areas to the uncertainty of the common law. The Commission is of the view that this lack of clarity and the absence of comprehensive regulation justify legislative intervention. The nature and extent of court powers to suppress publication of reports of proceedings heard in open court needs to be clarified and defined.

41. For example, see *David Syme & Co Ltd v General Motors-Holden's Ltd* [1984] 2 NSWLR 294.
42. *R v Arundel Justices; Ex parte Westminster Press Ltd* [1985] 1 WLR 708.
43. C M Branson, *Background Paper, Section 69 of the Evidence Act 1929-1982* (South Australia, Attorney General's Department, 1982) at 32.

10.21 In contrast to the law relating to suppression orders, the law applying to other ways for courts to derogate from the principle of open justice, such as by hearing proceedings in camera, or by using pseudonyms or other concealment orders, are reasonably well settled. The Commission considers that the need to clarify the law in relation to other such orders is less pressing than in the case of suppression orders. Consequently, it will not make any proposals with respect such other orders.

EXISTING POWERS TO SUPPRESS PUBLICATION OF PROCEEDINGS IN NEW SOUTH WALES

Common law powers

10.22 In *R v Clement* it was recognised that a judge could, in certain circumstances, order reports of proceedings to be postponed where such an order would be in furtherance of justice in proceedings then pending before the court.[44] This decision was approved by Viscount Haldane LC and Lord Atkinson in *Scott v Scott*,[45] but in the light of statements made in later cases it has been held that *R v Clement* does not stand as an authority for holding that an order made to protect the administration of justice is *ipso jure* binding on members of the public.[46]

44. *R v Clement* (1821) 4 B & Ald 218 at 233; 106 ER 918 at 923 (Holroyd J).
45. [1913] AC 417 at 438 and 453-454.
46. Justice McHugh in *John Fairfax & Sons Ltd v Police Tribunal (NSW)* (1986) 5 NSWLR 465 at 477 interpreted the decision in *R v Clement* as relating to an order directed to prevent publication of evidence to any potential witnesses or jurors, but doubted whether a similar finding would have been open in a case where publication would have taken place far from the actual trial and would have been unlikely to come to the attention of jurors or participants in the trial.

10.23 The general position as to whether and to what extent such a non-publication order may bind or otherwise affect non-parties to the proceedings remains unclear in New South Wales.[47] There are dicta to the effect that courts do have the power to make orders, binding on those not present at court, which prohibit or postpone the reporting of what has been heard in open court.[48] This power is said to stem from the inherent jurisdiction of superior courts to regulate their proceedings for the purpose of administering justice. The issue of whether inferior courts also hold such a power has been the subject of judicial debate in numerous cases.

10.24 Justice Mahoney in *Attorney General (NSW) v Mayas Pty Ltd*[49] was of the opinion that there was an inherent power in a magistrate to issue a non-publication order. Nevertheless, the majority stated that no such inherent power existed in the Local Court in the absence of statutory authority.[50] This latter view was followed by Justice Kirby in *John Fairfax Group Pty Ltd v Local Court of NSW*,[51] whereas the majority in that case was of the opinion that the Local Court had implied powers to make pseudonym orders when engaged in committal proceedings.[52]

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47. *Attorney General (NSW) v Mayas Pty Ltd* (1988) 14 NSWLR 342 at 348 (Mahoney J).
48. *Ex parte Queensland Law Society Incorporated* [1984] 1 Qd R 166 at 170 (McPherson J); *Raybos Australia Pty Ltd v Jones* (1985) 2 NSWLR 47 at 63 (Priestly J) which suggested that it was *probable* that the court had an inherent power to make such orders in rare situations; *John Fairfax & Sons Ltd v Police Tribunal (NSW)* (1986) 5 NSWLR 465 at 471-472 (Mahoney J); *Attorney General (NSW) v Mayas Pty Ltd* (1988) 14 NSWLR 342 at 345-347 (Mahoney J); *Re Bromfield; Ex parte West Australian Newspapers Ltd* (1991) 6 WAR 153 at 167 (Malcolm J); at 180-181 (Rowland J).
49. (1988) 14 NSWLR 342 at 346-347.
50. (1988) 14 NSWLR 342 at 358 (McHugh J) (Hope J concurring).
51. (1991) 26 NSWLR 131 at 142.
52. At 161 (Mahoney J); at 169 (Hope J). Justice Hope argued that there was a distinction between the *Mayas* case, where he had found there was no power of an inferior court to prohibit publication of evidence given in open court, and this case, in which an inferior court could order a pseudonym order to protect disclosure of

10.25 The existence of a common law power to make non-publication orders binding on persons outside the court has not yet been authoritatively decided by the courts of this State, though such a power has been doubted or denied in a number of judgments.[53] The main argument against the existence of such a power is based on the division of powers between the judiciary and the legislature. In the words of Justice McHugh:

> Courts have no general authority, however, to make orders binding people in their conduct outside the courtroom. Judicial power is concerned with the determination of disputes and the making of orders concerning existing rights, duties and liabilities of persons involved in proceedings before the courts. An order made in court is no doubt binding

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identity in the proceedings themselves. For an explanation of the distinction between inherent and implied powers in the context of a magistrate's court, see *Grassby v The Queen* (1989) 168 CLR 1 at 16-17 (Dawson J). A good summary is given of the competing positions in the judgment of Warren J in the Victorian Supreme Court case of *Herald and Weekly Times Ltd v Psychologists' Registration Board of Victoria* [1999] VSC 141.

53. *Attorney General v Leveller Magazine Ltd* [1979] AC 440; *John Fairfax & Sons Ltd v Police Tribunal (NSW)* (1986) 5 NSWLR 465 at 477 (McHugh J) (Glass J concurring). The judgment acknowledged that the court had such inherent powers to prohibit publication of evidence where necessary to secure the proper administration of justice, however it was clear to state that courts did *not* have the authority make such orders binding on persons outside the courtroom when the order was made. Nevertheless it was acknowledged that conduct outside the courtroom which deliberately frustrated such an order could constitute contempt, not because the person was actually bound by the order itself, but rather because the conduct intentionally interfered with the proper administration of justice; see also *Raybos Australia Pty Ltd v Jones* (1985) 2 NSWLR 47 at 55 (Kirby J); *Attorney General (NSW) v Mayas Pty Ltd* (1988) 14 NSWLR 342 at 355, 358 (McHugh J) (Hope J concurring); *United Telecasters Sydney Ltd v Hardy* (1991) 23 NSWLR 323 at 333-334 (Samuels J) (Meagher and Clarke JJ concurring); *Re Savvas* (1989) 43 A Crim R 331 at 334; *Re "Mr C"* (1993) 67 A Crim R 562 at 563 (Hunt J) (Smart and James JJ concurring).

> on the parties, witnesses and other persons in the courtroom. But an order purporting to operate as a common rule and to bind people generally is an exercise of legislative – not judicial – power.[54]

10.26 The weight of common law authority in NSW seems to support the position that if there is such an inherent power to make non-publication orders, it will only be binding on the parties, witnesses and other persons present in the courtroom. It cannot apply to persons outside the courtroom who have no connection with the proceedings in question. Therefore, such an order does not directly bind the media so a breach by the media will not automatically constitute a contempt of court. Nevertheless in some instances, a stranger to the proceedings may be liable for contempt of court if that person does something which frustrates or interferes with an order which was made by a court in the process of regulating its own proceedings and was designed to protect the administration of justice. In the words of Lord Edmund-Davies:

> For that [contempt of court by way of publication] to arise something more than disobedience of the court's direction needs to be established. That something more is that the publication must be of such a nature as to threaten the administration of justice …[55]

10.27 Proof of an intention to frustrate the court order is not necessary to establish liability. For a person to be guilty of contempt in such a situation it must be shown that he or she knew, or had a proper opportunity of knowing, of the existence of the order. It is not necessary that the court issue a warning or explanation concerning the order, but where none is given the purpose of the order must be clear.[56] For breach of such an order to

54. *John Fairfax & Sons Ltd v Poilce Tribunal (NSW)* (1986) 5 NSWLR 465 at 477 (Mc Hugh J) (Glass J concurring).
55. *Attorney General v Leveller Magazine Ltd* [1979] AC 440 at 465; See also *Attorney General (NSW) v Mayas Pty Ltd* (1988) 14 NSWLR 342 at 348 (Mahoney J).
56. *Attorney General v Leveller Magazine Ltd* [1979] AC 440 at 453 (Lord Diplock), quoted with approval by McHugh J in *Attorney General (NSW) v Mayas Pty Ltd* (1988) 14 NSWLR 342 at 355.

constitute contempt, it must therefore be apparent to anyone who was aware of the order that its purpose would be frustrated by the particular kind of act done by the party.[57] The law will not impose criminal liability in respect of unforeseeable consequences.[58]

Statutory powers to issue suppression orders

10.28 Statutory provisions have been enacted by the various States and Territories to make up for the lack of clear common law powers to restrict reporting of judicial proceedings. These provisions make suppression orders binding on all members of the public, the media included, even if they are not present at the proceedings. While they supplement rather than replace the existing common law with respect to suppression orders, they tend to be broader in scope.

10.29 In New South Wales, there are two types of provision dealing with suppression orders: those that create a presumption in favour of non-publication, or an outright ban of publication, and those that create a presumption in favour of openness but grant the decision-maker a broad discretion to impose such an order under certain circumstances.

Legislative provisions with a presumption of non-publication

10.30 Section 578A of the *Crimes Act 1900* (NSW) prohibits publication of any matter which would identify the complainant in prescribed sexual offence proceedings. Under certain conditions such publication will be permitted, for example, when published with the consent of a complainant over the age of 14 years or when authorised by a judge or justice who has consulted with the complainant and is satisfied that publication is in the public interest.

57. *Attorney General v Leveller Magazine Ltd* [1979] AC 440 at 473-474 (Lord Scarman); *Re F* [1977] 1 All ER 114; *Attorney General (NSW) v Mayas Pty Ltd* (1988) 14 NSWLR 342 at 350-351 (Mahoney J); at 354-355 (McHugh J).
58. *Attorney General (NSW) v Mayas Pty Ltd* (1988) 14 NSWLR 342 at 350-351 (Mahoney J), at 356-357 (McHugh J).

10.31 Under the *Evidence Act 1995* (NSW) it is unlawful to publish, without permission of the court, a question which has been disallowed because it is misleading or unduly annoying, harassing, intimidating, offensive, oppressive or repetitive, or disallowed because of the credibility rule.[59]

10.32 In adoption hearings, unless authorised by the court or other specified body, it is an offence to publish the name, or details which may lead to identification of, a prospective adoptive parent, a child available for adoption or a natural parent or guardian.[60]

10.33 Publication of any account of proceedings under the *Family Law Act 1975* (Cth), or any list of such proceedings[61] that identifies a party or witness, or a person who is related to or associated with a party to the proceedings, or otherwise concerned with the matter to which the proceedings relate, is an offence under s 121 of the *Family Law Act 1975* (Cth). The prohibition is subject to certain exceptions which include, for example, publication in pursuance of a direction of the court communication to persons for use in other proceedings,[62] in legal disciplinary proceedings, or in deciding on the availability of legal aid, and technical publications for use by a profession for example, in law reports.

10.34 Restrictions are also imposed on publication of reports of proceedings involving children. Without the consent of the Children's Court (where the child is under 16), or of the child (where over 16), publishing or broadcasting particulars which may identify a child who appears as a witness, is mentioned or otherwise involved in proceedings under the *Children (Care and*

59. *Evidence Act 1995* (NSW) s 41, 195.
60. *Adoption Act 1993* (ACT) s 97; *Adoption of Children Act 1965* (NSW) s 53; *Adoption of Children Act 1994* (NT) s 71; *Adoption of Children Act 1964* (Qld) s 45; *Adoption Act 1988* (SA) s 31; *Adoption Act 1988* (Tas) s 109; *Adoption Act 1984* (Vic) s 121; *Adoption Act 1994* (WA) s 124.
61. Except as permitted by the *Rules of Court* enacted permanent to the Act.
62. An example may be where publishing details of a kidnapped child may be necessary for the purposes of securing that child's recovery.

Protection) Act 1987 (NSW) is prohibited.[63] In criminal proceedings involving children, provisions similar to these apply, except that a court cannot consent to the publication of the child's name unless the child concurs. If the child is incapable of concurring, then the court may only consent to publication if it is of the opinion that disclosure is required by the public interest.[64]

Legislative provisions with a broad discretion to impose suppression orders

10.35 Another set of statutory provisions provide some courts and tribunals with a discretion to place limits on open and free reporting of proceedings before them.

10.36 For example, Acts establishing tribunals or commissions generally contain provisions which regulate the extent to which proceedings may deviate from the general principle of openness and what kind of restrictions, if any, may be imposed on the publication of information relating to a hearing. For example under the *Administrative Decisions Tribunal Act 1997* (NSW), the Tribunal is to conduct proceedings in public but is empowered to make orders to prohibit or restrict publication of the names and addresses of witnesses, or evidence given before the tribunal.[65] The discretion in this particular Act is broadly formulated, in that such orders may be made, either of the Tribunal's own motion or on the application of a party, by reason of the confidential nature of the evidence, or "for any other reason."

10.37 Royal Commissioners and others holding official inquiries of a similar nature are also empowered to restrict the publication of evidence.[66] The Independent Commission Against Corruption, due to its investigative rather than justice-dispensing function, is given a much greater power than courts to deviate from the

63. Section 68.
64. *Children (Criminal Proceedings) Act 1987* (NSW) s 11. See also similar provisions contained in the *Youth Offenders Act 1997* (NSW) s 65.
65 *Administrative Decisions Tribunal Act 1997* (NSW) s 75(2).
66. See *Special Commissioners of Inquiry Act 1983* (NSW) s 7 and 8; *Independent Commission Against Corruption Act 1988* (NSW) s 31.

principle of open justice.[67] The Commission may decide, with regard to the public interest, whether a hearing is to be held wholly or partly in public or private, may give directions as to who may be present, and whether closing matters are to be heard in private. Where the Commission is satisfied that it is necessary or desirable in the public interest to do so, it may also direct that certain material not be published at all, or be published in such manner and to such persons as directed.[68]

10.38 The coroner has been granted a fairly broad power under s 44 of the *Coroners Act 1980* (NSW) to prohibit publication of evidence given at an inquest or inquiry. This power may be exercised where the coroner is of the opinion that it would be in the public interest to do so, having regard to the administration of justice, national security or personal security.[69] The breadth of the provisions enable a coroner to order that evidence given at the inquest or inquiry not be published where the public interest might be adversely affected, whether or not the course of the actual inquest or inquiry might itself be compromised.[70]

10.39 Despite the broad provisions, courts have narrowly interpreted the scope of an order made in the interests of the "administration of justice". In *Mirror Newspapers Ltd v Waller*, Justice Hunt held that the common law principles applicable to the exercise of the power of a *court* to make suppression orders should be adapted and applied to the exercise of the coroner's discretion under the Act.[71] This is in accordance with the general acceptance that coroners' courts are considered inferior courts of

67. *Independent Commission Against Corruption Act 1988* (NSW) s 31.
68. *Independent Commission Against Corruption Act 1988* (NSW) s 112.
69. *Coroners Act 1980* (NSW) s 44(5), 44(6). Another power lies under s 44(2) for the coroner to order that no report of the *proceedings* be published in circumstances where a death or suspected death appears to be self-inflicted. Under s 44(2A) the coroner may also order that that identifying particulars of the person concerned or relative of that person not be published.
70. *Fairfax Publications Pty Ltd v Abernethy* [1999] NSWSC 820.
71. (1985) 1 NSWLR 1 at 20.

record for the purpose of contempt law.[72] It was held in *Attorney General (NSW) v Mirror Newspapers Ltd*[73] that orders suppressing the publication of evidence in coronial proceedings should only be made where such publication would frustrate or render impracticable the administration of justice. Such an order must be necessary to secure justice, not merely because it would be more convenient or desirable for it to be made.[74]

10.40 In criminal proceedings the source of power to issue suppression orders is s 578 of the *Crimes Act 1900* (NSW). This section confers a power on any judge to make an order forbidding publication of the evidence, or any report or account of the evidence, in proceedings before them. It expressly applies to a Justice presiding at committal proceedings.[75] However, the situation remains unclear with respect to the reporting of names or identifying particulars in committal proceedings, since such details are outside the scope of the power in s 578.[76]

10.41 On its face, s 578 appears to be limited to proceedings for specific sexual offences. Indeed there has been some confusion as to the scope of the section. In some earlier cases it has been read as applying only to the specified sexual offences listed in the section.[77] Nevertheless, the section needs to be read in conjunction with s 3 and schedule 2 to the *Crimes Act 1900*. Such a reading makes it clear that s 578 applies in relation to proceedings for all

72. *Attorney General (NSW) v Mirror Newspapers Ltd* [1980] 1 NSWLR 374; *R v West Yorkshire Coroner*; *Ex parte Smith (No 2)* [1985] 1 All ER 100.
73. [1980] 1 NSWLR 374.
74. *Attorney General (NSW) v Mirror Newspapers Ltd* [1980] 1 NSWLR 374 at 394.
75. *Crimes Act 1900* (NSW) s 578(4).
76. *John Fairfax & Sons Ltd v District Court of New South Wales* (NSW, Court of Appeal, No 436/88, 18 August 1988, unreported). Followed in *United Telecasters Sydney v Hardy* (1991) 23 NSWLR 323 at 335 (Samuels J).
77. See for example *Re "Mr C"* (1993) 67 A Crim R 562 at 563 (Hunt J); *John Fairfax Group Pty Ltd v Local Court of New South Wales* (1992) 26 NSWLR 131 at 144 (Kirby J).

offences, whether at common law or by statute, and applies to all New South Wales courts.[78]

10.42 Section 578 therefore represents a fairly broad statutory power to prohibit the publication of evidence in criminal proceedings. This power is limited to the extent that if either the accused or counsel for the Crown indicates that they want any particular matter given in evidence to be available for publication, no order prohibiting its publication is to be made.[79] Moreover, the general power to suppress publication is confined to the suppression of the evidence, or reports of the evidence. It does not extend to prohibiting, for example, the publication of names,[80] or to suppression of all mention of a case.[81] The only names that can be suppressed are those of sexual assault complainants under s 578A of the Act. Breach of an order made under s 578 may result in a conviction and a maximum fine of $2,200.[82]

SUPPRESSION ORDERS IN NEW SOUTH WALES: ISSUES AND OPTIONS

Should the courts have a general power to make non-publication orders where it is considered necessary for the administration of justice?

10.43 A non-publication or suppression order is directed at what may be published about legal proceedings outside the courtroom.

78. See *United Telecasters Sydney Ltd v Hardy* (1991) 23 NSWLR 323 at 334-335 (Samuels J).
79. *Crimes Act 1900* (NSW) s 578(1).
80. *John Fairfax & Sons Ltd v District Court of New South Wales* (NSW, Court of Appeal, No 436/88, 18 August 1988, unreported). Followed in *United Telecasters Sydney v Hardy* (1991) 23 NSWLR 323 at 335 (Samuels J).
81. *Nationwide News v District Court of New South Wales* (1996) 40 NSWLR 486.
82. See *Crimes Act 1900* (NSW) s 578(2); *Interpretation Act 1987* (NSW) s 56.

It is a preventative strategy employed by the courts, sometimes under statutory authority, designed to enhance the administration of justice. There are several fundamental premises which underlie the use of non-publication orders.[83] Essentially their function is to restrict publicity which may prejudice a fair trial or which may deter people from seeking justice or participating in its administration.

10.44 Various jurisdictions have granted courts a general power to suppress publicity where it is deemed necessary to secure the proper administration of justice.[84] The formulation of such provisions varies from jurisdiction to jurisdiction. In all states and territories other than New South Wales, they apply to both civil *and* criminal proceedings. Some jurisdictions have specifically listed additional, more specific grounds upon which such an order may be made or set out in the legislation matters which must be considered by the court in determining whether an order would be in the interests of justice.

10.45 In contrast, there is no statutory power in New South Wales to make non-publication orders in civil proceedings. In such cases in New South Wales only evidence, not the names of parties, may be the subject of a suppression order. The power under the *Crimes Act 1900* applies only to a judge at trial or to a magistrate at a committal hearing and does not cover other steps in the criminal process, for example bail applications. The authority of a court to issue a suppression order in civil proceedings, or in criminal proceedings which are outside the scope of s 578 of the *Crimes Act 1900* or where a name is sought to be suppressed, is governed by the common law. The Commission believes that legislative intervention is necessary to eliminate the uncertainty as to whether, at common law, courts can make non-publication

83. See discussion in C M Branson, *Background Paper, Section 69 of the Evidence Act 1929-1982* (South Australia, Attorney General's Department, 1982) at 30-32.

84. See for example *Evidence Act 1971* (ACT) s 83; *Evidence Act 1939* (NT) s 57; *Evidence Act 1929* (SA) s 69A; *Evidence Act 1910* (Tas) s 103A, 103AB; *Magistrate's Court Act 1989* (Vic) s 126; *Supreme Court Act 1986* (Vic) s 18, 19; *Contempt of Court Act 1981* (UK) s 4.

orders binding on persons not present in the courtroom. Section 578 also provides no guidance as to how the courts should exercise this very broad discretion to suppress the publication of evidence. There is no statutory requirement that the discretion afforded to the courts should be exercised in the furtherance of any particular interest, let alone in the interests of the administration of justice.[85] The Commission believes that legislative guidance should be provided to assist the courts in the exercise of this discretion.

10.46 It has been suggested in submissions to the Commission that greater restrictions should be imposed on the media's right to publish fair and accurate reports of court proceedings, particularly in respect of committal and bail proceedings, in order to avoid prejudice to the fair trial of accused persons.[86] The following discussion will consider whether such tighter restrictions should be imposed by the legislature, and if so, the form in which such provisions might be enacted. Attention will be given to whether the focus of the power should be to avoid prejudice to a fair trial, or whether the provision should be incorporated into a broader ground for making suppression orders where publicity would hamper the due administration of justice generally. The discussion will also draw upon some of the existing provisions in other jurisdictions, in particular those that provide more specific statutory grounds for the making of suppression orders.

Background: prejudice to a fair trial

10.47 One of the major concerns with the open justice principle is that publicity may prejudice a fair trial. In the criminal context, there is particular concern that certain material may be raised in preliminary proceedings which is later inadmissible in the substantive proceedings. If the media are permitted to report on the preliminary proceedings, there is a risk that potential jurors in the substantive proceedings will be made aware of, and be influenced by, material that is not subsequently admitted as evidence in the substantive proceedings. Arguably, this defeats the

85. *Crimes Act 1900* (NSW) s 578.
86. D Norris, *Submission* at 1; B Walker, *Submission* at 1.

fundamental purpose of the sub judice rule, which is to prevent the court, particularly jurors, from being influenced by information other than the evidence presented to them in court.

10.48 For example, in proceedings for an application for bail, previous convictions of the accused may be referred to. If the accused proceeds to stand trial, any reference in the trial to his or her previous convictions will generally be prohibited until sentencing. If there have been media reports of the bail proceedings, including reference to the previous convictions, there is arguably a risk that jurors in the trial will have been made aware of those previous convictions and be influenced by them, even though reference to them has been purposely excluded from the trial in order to avoid unfair prejudice to the accused.[87] Unless a suppression order has been made or some other reporting restriction applies, the media can defend any contempt charges for having published this prejudicial material by showing that they have merely reported open court proceedings fairly and accurately.

10.49 Sometimes evidence may also be given which is damaging to persons not party to the proceedings and who do not have an opportunity of rebuttal. Where such persons are themselves the subject of separate proceedings, this evidence may prejudice the

87. The Australian Law Reform Commission, in its report on contempt, identified three basic premises which underlie the law restricting publicity bearing on a jury trial. Firstly, that jurors should not be subject to preconceptions or prejudices which may cause them to reach their verdict other than according to the law and evidence presented to them in the courtroom. Secondly, that media publicity may have the effect of implanting such preconceptions or prejudices in the minds of jurors or potential jurors so as to impact on their decision. And thirdly that these prejudices and preconceptions may survive throughout the jury's deliberations, despite the effect of the evidence presented to them or any warning given by the judge to ignore what had been heard outside the courtroom. Australian Law Reform Commission, *Contempt* (Report 35, 1987) at para 280.

fairness of their future trial and publication may therefore need to be suppressed.[88]

10.50 It must be noted however that suppression orders are one of a number of ways in which the judiciary attempts to deal with the effects of potential or actual prejudicial publication of trial proceedings.[89]

Specific statutory provisions: publication restrictions on committal and other preliminary proceedings

10.51 Legislative provisions in Australia generally impose tighter restrictions on the reporting of committal proceedings and other preliminary hearings than they do on criminal trials. This is because the risk of prejudice to a fair trial is seen as outweighing the public's need to know what goes on at committal hearings which is merely an administrative step in the criminal process. It has been argued that publicity attaching to committals tends to over-emphasise the case of the prosecution, thereby being highly prejudicial to the accused.[90]

10.52 For example, under the Queensland *Justices Act 1886*, the place where a justice of the peace or magistrate sits for committal for trial of a person charged with an indictable offence is not deemed to be an open court. The justice or magistrate may order that only those with permission may be present if such an order is required to secure justice.[91]

10.53 Under the Western Australian provisions, strict restrictions on publication are imposed during preliminary proceedings. A defendant charged with an indictable offence may choose whether or not to have a preliminary (committal) hearing. If the

88. C M Branson, *Background Paper, Section 69 of the Evidence Act 1929-1982* (South Australia, Attorney General's Department, 1982) at 30-32.
89. See para 2.69-2.84.
90. *David Syme & Co Ltd v Hill* (Supreme Court of Victoria, Practice Court, No 4726/95, Beach J, 10 March 1995, unreported). See also discussion in D Butler and S Rodrick, *Australian Media Law* (LBC Information Services, Sydney, 1999) at 145-146.
91. *Justices Act 1886* (Qld) s 70, 71.

defendant elects not to have such a hearing, s 101C of the *Justices Act 1902* (WA) makes it an offence to make public the contents of any depositions or written statements before they are admitted into evidence or stated aloud at the trial or sentencing of the defendant. When the defendant elects to have a committal hearing, the Justices can order that in the interests of justice it is undesirable that any report of the evidence given or tendered at the proceedings be published. In that event, subsequent publication will constitute contempt.[92]

10.54 Publishing an account of a bail application, other than merely giving an account of the fact of the application and that an order has been made, will constitute an offence in Tasmania.[93] In Victoria, publication of information about directions hearings held pursuant to s 5 of the *Crimes (Criminal Trials) Act 1993* is restricted until after conclusion of the trial. This information includes: only the names of the court, judge and legal practitioners; the names, addresses, ages and occupations of the accused and witnesses; certain business information relating to the accused; the offence(s) charged; if relevant the date and place to which the proceedings are adjourned; and any bail arrangements that have been made.

10.55 A similar position is adopted in the United Kingdom where, in the absence of consent of the accused, media reports of committal proceedings are limited to publication of identifying particulars of the parties and witnesses, the offences with which the accused is charged, the court's decision regarding the committal, bail arrangements and whether legal aid was granted.[94]

92. *Justices Act 1902* (WA) s 101D; See *Re Robbins SM; Ex parte West Australian Newspapers Ltd* (1999) 20 WAR 511.
93. *Justices Act 1959* (Tas) s 37A.
94. *Magistrates' Courts Act 1980* (UK) s 8. Where there is more than one accused, or where at least one consents, publication will be permitted if the court determines that it is in the interests of justice to do so: see s 8(2), s (2A).

Fair trial as an element of the proper administration of justice: the existence of broad statutory powers to make suppression orders

10.56 In addition to these specific powers, a number of jurisdictions have enacted broader provisions formulated in general terms whereby courts (and in some cases other bodies exercising judicial power) are authorised to restrict publication of reports of civil and criminal proceedings, where it would be in the interests of, or in order to prevent prejudice to, the administration of justice.[95] In some jurisdictions, the legislation goes further to provide specific grounds (beyond the administration of justice) upon which non-publication orders may be made. These greatly expand judicial power to restrict court publicity.

10.57 The administration of justice is a very broad term, which covers the detection, prosecution and punishment of offenders.[96] Its proper administration requires not only that trials be fair, but that persons who can assist in its administration be encouraged to participate. Damaging personal publicity may have a negative effect on necessary requirements of the proper administration of justice such as the reporting of crimes, the institution of proceedings or the giving of testimony in court.[97] Publication of court proceedings may also deter law enforcement or national security agencies from giving accurate testimony, where, for example, public knowledge of the details of secret operations or agents would undermine the efficacy of the work of the agency.

10.58 The power of courts to issue suppression orders in terms of the "administration of justice" therefore incorporates both the need to prevent prejudice to a fair trial and the need to restrict publicity where this would be prejudicial to the judicial system generally because it would deter popular participation.

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95. See para 10.59-10.63, 10.65-10.67.
96. *Kalick v The King* (1920) 55 DLR 104 at 112 (Brodeur J); *David Syme & Co Ltd v X* (Vic, Supreme Court, No 4723/96, Beach J, 23 April 1996, unreported).
97. See discussion in G Nettheim, "Open Justice Versus Justice" (1985) 9 *Adelaide Law Review* 488; *David Syme & Co Ltd v X* (Vic, Supreme Court, No 4723/96, Beach J, 23 April 1996, unreported).

10.59 The level of risk of prejudice required before a court may make such an order depends upon the formulation of the particular provision. In the Australian Capital Territory for example, the power can be exercised to suppress publication of evidence where publication would be *likely* to "prejudice the administration of justice".[98] This power extends to any proceedings before the Supreme Court, the Magistrates' Court or at a coronial inquest or inquiry.[99] Names can be prohibited from publication on the even broader ground that such suppression is "*in the interests* of the administration of justice".[100]

10.60 That non-publication be merely "*in the interests of* justice" is also sufficient ground for any court to make an order prohibiting the publication of identifying particulars in the Northern Territory.[101] By contrast, evidence can only be the subject of an order where it is likely to offend against public decency. Evidence cannot be the subject of a non-publication order made in the interests of justice.[102] "Court" is broadly defined to include courts conducting preliminary proceedings as well as trials.[103]

10.61 A suppression order can be made in Tasmania on the ground that publication is *likely* to be prejudicial.[104] However, unlike provisions in the other states and territories, the only prejudice considered is prejudice to a fair trial and not to the

98. *Evidence Act 1971* (ACT) s 83.
99. *Evidence Act 1971* (ACT) s 82.
100. *Evidence Act 1971* (ACT) s 83. The provision allows for orders that suppress the publication of identifying particulars of a witness or a party, presumably including a defendant.
101. *Evidence Act 1939* (NT) s 57. The protection extends to any party or witness, or intending party or witness to the proceedings. This does not exclude the defendant: s 57(1)(b).
102. *Evidence Act 1939* (NT) s 57(1)(a).
103. *Evidence Act 1939* (NT) s 4 defines "court" as including "any Court, Judge, Magistrate or Justice, and any arbitrator or person having authority by law or by consent of the parties to hear, receive or examine evidence".
104. Under s 103A of the *Evidence Act 1910* (Tas) an order can be made if publication will "prejudice or be likely to prejudice, the fair trial of the case".

administration of justice generally.[105] "Court" is broadly defined in s 3 as including every court of the State of whatsoever jurisdiction and thus encompasses preliminary proceedings.

10.62 A narrower approach to the issue of prejudice has been adopted in Victoria. There, a suppression order on the ground of risk of prejudice may only be made by the courts where it is deemed *necessary* in order not to "prejudice the administration of justice".[106] This provision imposes a higher threshold of risk of prejudice than those discussed above, such that *likely* prejudice or the fact that such an order would be merely *in the interests* of justice generally will not be sufficient cause for an order to be made. Any order must be based on the necessity that without a publication prohibition, prejudice would result. The courts will consider prejudice not just to the particular proceedings in which the order was made, but whether allowing publication would prejudice the administration of justice in later cases. [107]

10.63 The Victorian legislation also gives courts greater scope to restrict publication of proceedings by the news media. An order

105. *Evidence Act 1910* (Tas) s 103A. The legislation does incorporate the notion of a deterrence factor in a limited class of sexual offence proceedings. There is a presumption, which may only be set aside if in the public interest, that names of complainants and witnesses involved in such proceedings will be withheld from publication. The power also extends to allow for protection from publication of the name of the accused in incest proceedings, presumably this would be because it would lead to identification of the complainant, rather than because the accused should be protected: s 103AB(2), (3). See discussion by Kirby J in *John Fairfax & Sons Ltd v District Court of New South Wales*, (NSW, Court of Appeal, No 436/88, 18 August 1988, unreported) in relation to non-publication orders of the name of the accused in incest cases.
106. *Supreme Court Act 1986* (Vic) s 18-19; *County Court Act 1958* (Vic) s 80-80AA; *Magistrates' Court Act 1989* (Vic) s126.
107. For example in the case of blackmail, in making an order in a particular case, persons who later become victims of blackmail will be encouraged to report the incident to authorities: *Herald and Weekly Times Ltd v The Magistrates' Court of Victoria* [1999] VSC 232.

can be made on the basis that that it is necessary so as not to: endanger the national or international security of Australia; endanger the physical safety of a person; offend public decency or morality; or cause undue distress or embarrassment to complainants or witnesses in certain sexual offence proceedings.[108] This power is not restricted to trials but may be exercised in any proceedings before the Supreme Court, the County Court and the Magistrates' Court.

10.64 The position adopted in the United Kingdom is similarly narrow in the sense that the court is empowered to suppress publication of reports of proceedings only where it appears necessary for avoiding a *substantial risk* of prejudice to the administration of justice. Not only must the risk of prejudice be substantial, but the court may only consider the risk in relation to the particular proceedings before the court making the order, or in any other proceedings pending or imminent.[109] The *Contempt of Court Act 1981* (UK) does not authorise the making of a suppression order in consideration of the risk to the administration of justice in unrelated or future proceedings, for example, where there is a substantial risk that publication may deter people from becoming witnesses or complainants in future, separate proceedings. If, for example, the court wished to suppress the names of blackmail victims in order not to discourage future victims from coming forward, resort lies only with the common law powers preserved under s 11 of the *Contempt of Court Act 1981* (UK). The broad definition of "court" authorises suppression orders to be made under the Act by any tribunal or body exercising judicial power of the State.[110]

10.65 In terms of the prejudice which may be caused by publication to the administration of justice, the South Australian power to issue suppression orders is rather different from the other general provisions discussed above. A risk of prejudice, no matter how substantial, will not be sufficient grounds for making

108. *Supreme Court Act 1986* (Vic) s 18-19; *County Court Act 1958* (Vic) s 80-80AA; *Magistrates' Court Act 1989* (Vic) s 126.
109. *Contempt of Court Act 1981* (UK) s 4.
110. *Contempt of Court Act 1981* (UK) s 19.

a suppression order in its own right. The "court", broadly defined to include a Justice conducting preliminary proceedings, a coroner and any person acting judicially,[111] can only make an order if satisfied that the prejudice that would occur by publication should be accorded greater weight than the public interest in the publication of court proceedings and the "consequential right" of the news media to publish it.[112]

10.66 This obligation to balance the public interest in open justice with prejudice to the administration of justice, including fair trial, was one of the amendments introduced in 1989 which were intended to make it more difficult to obtain a suppression order.[113] Other amending provisions removed the right of parties to proceedings, including criminal defendants, to apply for suppression orders on grounds of "hardship". The wording of the other ground for orders was also tightened so that courts were no longer empowered to suppress names and evidence where it appeared desirable "*in the interests* of justice" but could only do so where it would be "to *prevent prejudice* to the proper administration of justice." In drafting these amendments, the Government (according to the Attorney General) had "erred on the side of freedom of speech and publication".[114] The 1989 amendments were designed to bring an end to the period in which the openness of judicial proceedings in South Australia had been greatly eroded by an uncommon concern for the interests and

111. *Evidence Act 1929* (SA) s 68.
112. *Evidence Act 1929* (SA) s 69A(2)(a), (b). An interim suppression order can be made without inquiring into the merits of the application. However a final determination is to be made wherever practicable within 72 hours: s 69A(3).
113. The amendments were introduced by the *Evidence Act Amendment Act 1989* (SA).
114. South Australia, *Parliamentary Debates (Hansard)* Legislative Council, 15 March 1989, at 2416. For a discussion on the changes brought about by the 1989 amendments to the Act see I D Leader-Elliott, "Legislation Comment: Suppression Orders in South Australia: The Legislature Steps In" (1990) 14 *Criminal Law Journal* 86.

rights of the accused.[115] Prior to these amendments Adelaide had been labelled the "suppression capital of Australia" because of the reputation of South Australian courts for issuing suppression orders in numbers far and above those issued by the courts of other states and territories.[116] Criticism had been directed at the number of orders being made, and also at alleged anomalies in when and how such orders were applied. Criticism had also been directed at the use of suppression orders when a defendant pleaded guilty, such that restrictions to publication were being imposed on the basis of risk of prejudice to reputation not just prejudice of fair trial.[117]

10.67 Despite the narrower power given to South Australian courts since 1989 to issue non-publication orders to prevent prejudice to the administration of justice, the introduction of the ground of "undue hardship" has ensured that South Australian courts still have the broadest general power to issue non-publication orders in Australia. South Australian courts can make orders not only to prevent prejudice to the administration of justice, but also "to prevent undue hardship". Whilst undue hardship to a criminal defendant or civil litigant can no longer form the basis of an order since the 1989 amendments, such a basis may still be considered for an alleged victim of a crime, a witness, or potential witness in civil or criminal proceedings, or for a child.[118] It must be noted however, that even though the South

115. See remarks in South Australia, *Parliamentary Debates (Hansard)* Legislative Council, 15 March 1989, the Hon C J Sumner, Attorney General, Second Reading Speech at 2415 in regard to Governmental concern over the use of suppression orders based on undue hardship at the expense of open justice. See also discussion in I D Leader-Elliott, "Legislation Comment: Suppression Orders in South Australia: The Legislature Steps In" (1990) 14 *Criminal Law Journal* 86.
116. A Joyce, "South Australia: The Suppression State" [1988] *Australian Society* (May) 18 at 19.
117. A Joyce, "South Australia: The Suppression State" [1988] *Australian Society* (May) 18.
118. *Evidence Act 1929* (SA) s 69A(1). A criminal defendant or civil litigant cannot seek a suppression order on this ground, but his or

Australian legislature has provided that suppression orders can be made on the basis of individual hardship rather than in the interests of justice as a whole, the court is still obliged to balance this hardship with the principle of open justice. The court must give substantial weight to the public interest in publication and the consequential right of the news media to publish and may only make an order where the undue hardship which would result should be afforded greater weight than those considerations.[119]

10.68 In spite of the greater weight meant to have been afforded to the interests of the public and rights of the media to publish, it would seem that the breadth of the provisions and the balancing act required have allowed the courts to tip the scales towards publication restrictions. It would also appear that the reputation of Adelaide as the "suppression capital of Australia" has not changed as a result of the 1989 amendments.

10.69 In the 1998/99 year alone, a total of 181 such orders were issued under s 69A of the *Evidence Act 1929* (SA).[120] Ninety six of these orders were made on the very general ground that they were deemed "in the interests of the administration of justice", even though s 69A(1)(a) requires such orders to be made on the more rigorous ground "*to prevent prejudice* to the proper administration of justice." Another ten orders, which would come within the scope of this ground, were reported as having been made in order "to prevent possible prejudicial effect on the defendant's trial and/or to prevent disclosure of defendant's prior convictions."

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her identity may be the subject of an order if its publication may cause undue hardship to a victim, witness or child. The rationale and desirability of "undue hardship" as the basis for a suppression order will be discussed in greater depth below at para 10.88-10.90.

119. *Evidence Act 1929* (SA) s 69A(1)(b), (2).

120. South Australia, *Report of the Attorney General Made Pursuant to Section 71 of the Evidence Act 1929 Relating to Suppression Orders for the Year Ended 30th June 1999.* This total combines orders made by the Supreme Court, District Court, Magistrates Court, and other courts and tribunals. In the reported year, the Coroners Court, Youth Court and Medical Practitioners Board contributed to the number of suppression orders made under the Act.

10.70 Orders made to prevent undue hardship were also numerous. Twenty were made in favour of victims and ten to protect witnesses, plaintiffs and others named in court proceedings. Interestingly, one order was made "to prevent undue hardship to the defendant", even though the legislation does not allow for orders to be made on such a ground. Indeed, the whole purpose of the amendments to the *Evidence Act 1929* (SA), which introduced s 69A, was to put an end to applications for suppression orders by defendants relying on allegations of hardship.[121]

10.71 Forty-four orders came under the general category "to prevent publication". Since all such orders are made to prevent publication, this latter category, which accounts for a third of all suppression orders issued in the State during this period, fails to provide an adequate explanation as required by the legislation.

10.72 An attempt was made by the Commission to find comparable figures from the other State and Territory Attorney General's departments. Since no other legislation has such detailed reporting requirements, such information was not generally kept. Nevertheless representatives with whom the Commission spoke considered that the number of orders being issued annually would not compare with the South Australian figures. To give an example of the difference, the Office of the Director of Public Prosecutions of the Northern Territory provided approximate figures to illustrate that orders are not made on a frequent basis. In 1997 it was estimated that no more than six orders were made under s 57(3) of the *Evidence Act 1939* (NT), and in 1998 only two such orders were made.[122]

121. See discussion in I D Leader-Elliott, "Legislation Comment: Suppression Orders in South Australia: The Legislature Steps In" (1990) 14 *Criminal Law Journal* 86 at 87.
122. Information provided by Jenny Blokland, General Counsel to DPP, Office of the Director of Public Prosecutions, Northern Territory (16 November 1999).

Law reform options

10.73 In New South Wales there is no general statutory power authorising the courts to restrict publication of proceedings where publication may be prejudicial to a trial or to the administration of justice generally. The power contained in s 578 of the *Crimes Act 1900* (NSW) is relatively limited. First, it applies only to criminal, not civil proceedings. The section empowering a judge (or a magistrate presiding at committal proceedings) to issue a suppression order is subject to the veto power of either party. It may also only be used to suppress publication of 'evidence', and does not extend to other material which could be prejudicial to the administration of justice such as names or counsel's submissions. In addition, it cannot be invoked in other preliminary proceedings such as bail applications, where matters prejudicial to trial or to the administration of justice may also arise. Names can only be suppressed under the limited power available under s 578A which applies to complainants in relation to certain sexual offences, but not to victims of other crimes or witnesses generally.

10.74 Given that the statutory regime governing suppression orders is not comprehensive, and that the common law authority is somewhat unclear and inconclusive, there are a number of gaps and uncertainties that affect any review of the power to suppress publication of court proceedings in New South Wales. Should the rationale for any such statutory power be limited to the issue of fairness to a particular trial, or should it also relate to the broader issue of the administration of justice generally? If the latter, such a power may counter the deterrent effect that publicity may have on parties from instituting or defending proceedings, or on witnesses from giving evidence. What level of risk of prejudice must be required before a court has the authority to make an order? Or should there be an absolute prohibition on publication in certain types of proceedings, such as committals and bail applications? Should courts have a statutory power to make suppression orders in civil proceedings? Should the statute contain provisions setting out who has standing to apply for the making, alteration or revocation of non-publication orders? If so, to whom should standing be afforded and what should be the avenues of

appeal? A number of these issues have been considered by other law reform bodies.[123]

10.75 The Australian Law Reform Commission ("ALRC") in its *Contempt* report addressed the issue of prejudice in the context of the jury trial.[124] It acknowledged the risk that reports of legal proceedings may contain material that could prejudice a jury trial, and recommended that a court should have power to postpone publication of a report of any part of proceedings if it is satisfied that publication would give rise to a *substantial risk* that the fair trial of an accused for an indictable offence might be prejudiced because of the influence the publication might exert on jurors.[125] This recommendation is similar to the common law position in Canada, where bans on publication may also only be ordered to prevent a real and substantial risk, rather than a speculative possibility, to fairness of a trial.[126] The ALRC's recommendation that a substantial risk be the threshold was subsequently endorsed by the Victorian Law Reform Commission.[127] The Commonwealth government also recommended its implementation in a 1992 position paper[128] and prepared provisions on this basis for the Standing Committee of Attorneys-General in the *Crimes (Protection of the Administration of Justice) Amendment Bill 1993* (Cth). However, to date, the model Bill has progressed no further.

123. See Australian Law Reform Commission, *Contempt* (Report 35, 1987) at para 321-328; Ireland, Law Reform Commission, *Contempt of Court* (Report 47, 1994) at para 6.37-6.42, (Consultation Paper, 1991) at 343-350; United Kingdom, Committee on Contempt of Court, *Report of the Committee on Contempt of Court* (HMSO, London, Cmnd 5794, 1974) at para 134-141.
124. Australian Law Reform Commission, *Contempt* (Report 35, 1987) Chapter 6.
125. See Australian Law Reform Commission, *Contempt* (Report 35, 1987) at para 324.
126. *Dagenais v Canadian Broadcasting Corp* (1994) 120 DLR (4th) 12.
127. Law Reform Commission of Victoria, *Comments on the Australian Law Reform Commission Report on Contempt No 35* (unpublished, 1987).
128. Australia, Attorney General's Department, *The Law of Contempt: Commonwealth Position Paper* (1992).

10.76 As an alternative to recommending a general suppression power, the ALRC considered that media reports of committal proceedings should be banned outright. [129] It noted several advantages in adopting this alternative approach, including that it would save magistrates from guessing in advance the evidence that would or would not be admissible at trial, and from identifying evidence that would cause a substantial risk of prejudice. This is because the issue at committal proceedings is strictly whether or not there is a case to answer. The defendant therefore often chooses to reserve his or her defence, as he or she is entitled to do, until trial. It was also noted that the reporting of committal proceedings is usually very selective, tending to give the public, including potential jurors, a one sided view of the evidence in the case. This is because the prosecution case usually receives more coverage than the defence case, which in certain circumstances will even be reserved. In the end, however, the ALRC rejected the proposal for an outright ban. Given the importance of the public interest in ensuring that the processes of the courts remained open to scrutiny, the ALRC concluded that so long as the law provided adequate powers for magistrates at committals to make suppression orders, where appropriate, the more drastic measure of imposing an outright ban was not desirable.

10.77 On the other hand, the Irish Law Reform Commission recommended[130] maintaining an outright ban on reporting of preliminary proceedings for indictable offences, such as committal proceedings. At the time of its review, legislation already precluded such reporting.[131] The Irish Law Reform Commission considered that there had been no serious criticism of the operation of this legislation since its introduction, and that it was the only means of ensuring with absolute certainty that the media did not report on material subsequently ruled inadmissible and

129. See Australian Law Reform Commission, *Contempt* (Report 35, 1987) at para 327.
130. Ireland, Law Reform Commission, *Contempt of Court* (Report 47, 1994) at para 6.37-6.42; (Consultation Paper, 1991) at 343-350.
131. *Criminal Procedure Act 1967* (Ireland) s 17.

which proved to be prejudicial to a trial. In addition, it recommended that the courts be given a general power to suppress or postpone the reporting of matters taking place in open court. It did so on the basis, first, that the outright ban on reporting under the existing legislation did not apply to bail proceedings, and, secondly, that it may also be desirable to ban reporting of certain information revealed in substantive proceedings such as, for example, where it may impinge on separate proceedings still to be conducted.

10.78 The Criminal Law and Penal Methods Reform Committee of South Australia (the "Mitchell Committee") also recommended that unless the accused consented to publication, an outright ban should be placed on the publication of evidence or names of persons charged with either summary or indictable offences. This ban was to endure until after conviction, (or in the latter case) until after committal or conviction. The Committee also recommended that where an accused is named in a media report of a trial and that person is subsequently acquitted, there should be as prominent a publication of the acquittal.[132]

10.79 The Phillimore Committee in the United Kingdom acknowledged the risk of prejudice to the administration of justice if the media were permitted to publish fair and accurate reports of proceedings, both criminal and civil.[133] However, it emphasised the importance of the principle of open justice in determining that the media should be permitted to publish such reports. It did not make any recommendation for a legislative power to suppress reports of legal proceedings if the court considered them to be potentially prejudicial.

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132. Criminal Law and Penal Methods Reform Committee of South Australia, Third Report, July 1975, reproduced in C M Branson, *Background Paper, Section 69 of the Evidence Act 1929-1982* (Attorney General's Department, South Australia, 1982) at 33-34.
133. United Kingdom, Committee on Contempt of Court, *Report of the Committee on Contempt of Court* (HMSO, London, Cmnd 5794, 1974) at para 134-141.

10.80 Although the Phillimore Committee made no recommendation to this effect, s 4(2) of the *Contempt of Court Act 1981* (UK) introduced a general legislative power to suppress reports of proceedings where it appears necessary for avoiding a *substantial risk* of prejudice to the administration of justice in those proceedings to which the report relates, or in any other proceedings pending or imminent.[134] This provision mirrors the approach recommended by the ALRC, to the extent that it provides courts with a general power to postpone reporting of proceedings where there is a "*substantial risk* of prejudice". However, it is much broader in scope than the formulation recommended by the ALRC, in the sense that s 4(2) aims to protect against prejudice to the administration of justice generally. The section thereby allows for suppression of damaging publicity where this would deter victims and/ or witnesses from aiding in the administration of justice, in both the civil and criminal contexts. The power proposed by the ALRC was concerned only to protect influence on the jury in criminal trials. The breadth of the UK provision has meant that the section has proved controversial, attracting criticism that it is applied inconsistently, routinely, and unnecessarily.[135]

The Commission's tentative view

10.81 ***An outright ban rejected.*** At this stage, the Commission does not consider it desirable to propose a complete ban on reporting of bail and committal proceedings. It may be more straightforward to impose a complete ban, in the sense that the media would then know that they can never publish reports of such proceedings, and judges and magistrates would not be required to determine in each individual case what information may be particularly prejudicial so as to warrant prohibiting its publication. However, a complete ban on reports of such proceedings seems an unjustifiable intrusion on the right to freedom of discussion as well as an unnecessary infringement of

134. *Contempt of Court Act 1981* (UK) s 4(2).

135. See C J Miller, *Contempt of Court* (Clarendon Press, Oxford, 1989) at 332-338. For problems with the section and a general discussion, see A Arlidge, *Arlidge, Eady & Smith on Contempt* (2nd edition, Sweet & Maxwell, London, 1999) at 413-459.

the principle of open justice. In the majority of cases, the risk of prejudice to the future trial is not likely to be substantial, given that there is usually a long delay between the time of committal and bail proceedings, and the time of the trial.

10.82 There is an important public interest that preliminary hearings be heard in open court and be subject to free reporting. Even where a person is not committed for trial, issues raised at committal may provide stimulus for the matter being pursued in other ways, such as investigation by relevant professional disciplinary bodies. Suppression will obscure the question of whether some further investigation is appropriate in respect of purposes other than the imposition of criminal punishment.[136]

10.83 Even where there is no subsequent conviction, a preliminary hearing may be made for further inquiry, for example, by disciplinary committees and boards. As guilt "beyond reasonable doubt" is the burden of proof required for conviction in criminal proceedings, acquittal or discharge following a preliminary hearing may not actually constitute a finding of innocence. Further investigation may be appropriate in respect of purposes other than the imposition of criminal punishment.[137]

10.84 ***A broad power to suppress publication where there is a substantial risk of prejudice to the administration of justice.*** The Commission does acknowledge, however, that there may be cases, especially those involving particularly sensational facts or notorious personalities, in which the publication of information revealed in proceedings in open court may create a substantial risk of prejudice to subsequent proceedings. In cases such as these, it may be desirable to prohibit or postpone the publication of this information as an exception to the general principle of open justice.

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136. An example may be where a magistrate finds that there was no case to answer for a medical practitioner charged with assault, but where the activity in question may still be relevant to the Medical Tribunal or Professional Standards Committee.
137. See I D Leader-Elliott, "Legislation Comment: Suppression Orders in South Australia: The Legislature Steps In" (1990) 14 *Criminal Law Journal* 86 at 103-104.

10.85 Similarly, there may be cases in which disclosure of evidence or identities may deter people from giving evidence such as in the case of blackmail victims, police informers or security agents. This in turn will impede the proper functioning of the administration of justice. While the common law has developed exceptions to the open justice principle based on the need not to deter such witnesses, it is desirable that this be reflected in legislation to clarify that such orders are binding on the media.

10.86 However, the fact that publication of evidence or identifying particulars may be harmful to such witnesses should not be sufficient basis for an order, except in cases where such harm would itself cause prejudice to the administration of justice. The basis of any legislative power to issue suppression orders must be to secure justice rather than to address the needs of individuals involved in proceedings.[138]

10.87 It has been argued by Justice Mahoney that the law should give greater power to the courts to restrict publication which is harmful to individuals.[139] In *Nationwide News v District Court of New South Wales* he criticised the fact that the benefit of open justice was obtained at the expense of those who are injured, hurt, embarrassed and distressed by unrestricted publication. He suggested that the law should be based on an analysis of the harm to the individual by the publicity (the price paid) and whether that outweighed the public interest in the information (the benefit).[140] Even if the law was not to adopt this cost/benefit approach, Justice Mahoney suggested that the law should provide an exception to the open justice principle based on "the harm, hurt and distress that may be caused."[141]

138. See discussion in *Raybos Australia Pty Ltd v Jones* (1985) 2 NSWLR 47 at 61 (Samuels J).
139. *Nationwide News v District Court of New South Wales* (1996) 40 NSWLR 486.
140. *Nationwide News v District Court of New South Wales* (1996) 40 NSWLR 486 at 494-495.
141. *Nationwide News v District Court of New South Wales* (1996) 40 NSWLR 486 at 495.

10.88 As discussed above, "undue hardship" has been adopted by the South Australian legislature as a criterion for the making of a suppression order. Such orders may be made to prevent undue hardship to a victim of a crime, to a witness or potential witness in civil or criminal proceedings, or to a child, but cannot be made in respect of a criminal defendant or civil litigant.[142] The distinction drawn between victims, witnesses and children on one side, and parties to proceedings on the other, is based on several factors. Unlike the parties, non-parties to the proceedings have little opportunity to defend themselves in legal proceedings against any negative imputations which may arise and therefore have greater need for protection from adverse publicity. Secondly, in the interests of law enforcement, the law recognises that victims and witnesses may be unwilling to testify unless they are protected from publicity.[143] This distinction does not mean however, that the names of parties to proceedings will never be suppressed. There is no statutory impediment for the court to suppress the identity of a criminal defendant or civil litigant if this is necessary to avoid undue hardship to a victim, witness or child.

10.89 It should be noted however that although undue hardship to a criminal defendant will not be sufficient grounds for *restricting* media reports, the South Australian legislature has imposed certain reporting *obligations* on the media in order to prevent stigma to persons who have been acquitted. If the media publishes a report of proceedings against a person for an offence which identifies that person, and that person is subsequently not convicted, s 71B of the *Evidence Act 1929* (SA) requires the media to publish a fair and accurate report of the proceedings which reflects this result. Where an application has been made for the reservation of a question of law arising at the trial of a person who has been acquitted, the media cannot publish a report or statement in relation to the application or consequent proceedings

142. *Evidence Act 1929* (SA) s 69A.
143. See discussion in I D Leader-Elliott, "Legislation Comment: Suppression Orders in South Australia: The Legislature Steps In" (1990) 14 *Criminal Law Journal* 86 at 92-94.

which reveals the identity of the acquitted person without that person's consent.[144]

10.90 As mentioned above, 31 orders of the 181 issued in the year ending June 1999 were recorded as having been made on the ground of undue hardship. This figure is probably much higher in reality because of the large number of orders recorded as being made on the general basis that they were "to prevent publication". Examples of undue hardship which have formed the basis of such orders in South Australia include that publication would prejudice the business, employment or employability of a victim or witness,[145] and that publicity is likely to cause a lasting social impact, especially in cases where the victim was involved or alleged to have been involved in conduct considered repellent or morally disgusting.[146] Likely psychiatric or psychological consequences which may flow to victims or witnesses from publicity has also been held to constitute undue hardship.[147]

10.91 The Commission does not consider that hardship or embarrassment caused to an individual should of itself be sufficient cause for a suppression order to be issued. In particular situations, such as the hardship caused to sexual assault victims or in cases involving children, this consideration may be compelling. Whilst these situations should continue to be covered by specific legislation, the general rule should be that justice is administered in public view and that derogations from the principle of open justice should only be permissible under exceptional circumstances.

144. *Evidence Act 1929* (SA) s 71C.
145. *G v The Queen* (1984) 35 SASR 349 at 352. Whilst this case dealt with economic hardship of the *accused* amounting to undue hardship, the principle has been held to still apply to undue hardship as it appears in the amended s 69A of the *Evidence Act 1929* (SA), that is, applying only to witnesses and victims: *H v Director of Public Prosecutions* (SA, Supreme Court, No 6600/98, Bleby J, 11 March 1998, unreported).
146. *R v Williams* (SA, Supreme Court, No 4118/93, Debelle J, 13 August 1993, unreported).
147. See *Berezowski v Malone* (SA Supreme Court, No 2108/91, Cox J, 13 September 1991, unreported); *R v Kevin Peter Krauth* (SA, District Court, Kitchen J, 23 December 1997, unreported).

10.92 The Commission believes that such derogations should be based upon securing the needs of justice rather than the needs of particular individuals. The needs of witnesses and the accused may be accommodated to a certain extent, but only to the extent that restrictions of publicity are necessary for the administration of justice as a whole.

10.93 The Commission therefore favours a broad legislative power to restrict publicity where publication would create a *substantial risk* to the administration of justice. The fact that an order would be *in the interests* of justice generally, or that publication would be *likely* to prejudice the administration of justice, are not considered sufficient grounds for the making of an order. The risk of prejudice must be substantial, in that an order must be necessary to prevent prejudice to fair trial or to the administration of justice generally. A breach of the order should constitute a criminal offence, as is presently the case under s 578 of the *Crimes Act 1900* (NSW).

10.94 ***Power to suppress names as well as evidence.*** Under the current NSW law there is a presumption in favour of non-publication of names in a limited number of cases such as those involving children, participants in adoption and family law proceedings, or sexual offence complainants.[148] The Coroner can also suppress names as well as evidence where media reporting of such information would render impracticable the administration of justice.[149] An order made under s 578 of the *Crimes Act 1900* (NSW) operates only to suppress evidence, not names.[150] Most other jurisdictions provide a general power for suppression of

148. *Children (Care and Protection) Act 1987* (NSW) s 68; *Children (Criminal Proceedings) Act 1987* (NSW) s 11; *Adoption of Children Act 1965* (NSW) s 53; *Crimes Act 1900* (NSW) s 578A. These provisions give the courts a power to dispense with the non-publication restriction under certain circumstances.
149. *Coroners Act 1980* (NSW) s 44. See *Mirror Newspapers Ltd v Waller* (1985) 1 NSWLR 1 at 26 (Hunt J).
150. *John Fairfax & Sons Ltd v District Court of New South Wales* (NSW, Court of Appeal, No 436/88, 18 August 1988, unreported) (Kirby J) (Hope and Rogers JJ concurring). Followed by Samuels J in *United Telecasters Sydney v Hardy* (1991) 23 NSWLR 323 at 335.

publication of identifying particulars as well as evidence.[151] Even in the context of sexual offences, the New South Wales power is comparatively narrow in that only the name of the complainant may be suppressed.[152] Identifying particulars of other witnesses or the defendant can only be the subject of a non-publication order where such publication would lead to identification of the complainant.[153] Some other jurisdictions specifically provide that the publication of identifying particulars of witnesses and of defendants may also be prohibited, irrespective of whether such publication would lead to identification of the complainant.[154]

151. *Evidence Act 1971* (ACT) s 83 (evidence and names); *Evidence Act* 1939 (NT) s 57 (evidence and names); *Evidence Act 1929* (SA) s 68, 69 (evidence and names); *Magistrate's Court Act 1989* (Vic) s 126; *County Court Act 1958* (Vic) s 80, 80AA; *Supreme Court Act 1986* (Vic) s 18, 19 (report or information derived from proceedings, which includes names). The following jurisdictions are similar to New South Wales in that there is a power to suppress publication of evidence, but names can only be the subject of orders in prescribed sexual offence proceedings: *Evidence Act 1910* (Tas) s 103A (evidence and argument) s 103AB (names only for specified sexual offences); *Evidence Act 1906* (WA) s 11A (evidence only, and only in the limited circumstances of where such evidence is incriminating for the witness and may prejudice any prosecution brought against that person), *Evidence Act 1906* (WA) s 36C (name of complainant in sexual offence proceedings).
152. *Crimes Act 1900* (NSW) s 578A.
153. *John Fairfax & Sons Ltd v District Court of New South Wales* (NSW, Court of Appeal, No 436/88, 18 August 1988, unreported) (Kirby J) (Hope and Rogers JJ concurring).
154. The provisions of the following Acts all relate to the prohibition of publication of identifying particulars in specific sexual offence cases: *Criminal Law (Sexual Offences) Act 1978* (Qld) s 6, 7 (complainant, defendant); *Sexual Offences (Evidence and Procedure) Act 1983* (NT) s 6, 7 (complainant, witness, defendant); *Evidence Act 1910* (Tas) s 103AB (complainant, witness); *Evidence Act 1929* (SA) s 71A (defendant or prospective defendant, complainant); Protection of the complainant *only* is afforded in the following jurisdictions: *Evidence Act 1971* (ACT) s 76E; the *Judicial Proceedings Reports Act 1958* (Vic) s 4; *Evidence Act 1906* (WA) s 36C.

10.95 It seems incongruous that, as under the present position, a court should have the power to order suppression of publication of evidence in relation to all criminal offences, but cannot exercise the same power where it may wish to suppress publication of names. The Commission is of the opinion that the power to make suppression orders should be extended to cover material which would lead to the identification of parties and witnesses involved in proceedings, where suppression is necessary to prevent a substantial risk of prejudice to the administration of justice, either generally or in relation to specific proceedings (including the proceedings in which the order is made). Nevertheless as discussed above, other prejudice such as economic, social or professional prejudice should not be a factor for consideration. This power should not alter the special protection given by existing legislation to specified groups such as children.[155]

10.96 ***Power to apply to both civil and criminal proceedings.*** The general power to suppress evidence and names should apply to both civil and criminal proceedings, as it does in the Australian Capital Territory, the Northern Territory, South Australia, Tasmania, Victoria and the United Kingdom. If, as the Commission proposes, the basis of the power to issue suppression orders is that they must be necessary to avoid a substantial risk to the administration of justice, there would appear to be no good reason why the law should treat civil and criminal proceedings differently.

10.97 In the absence of statutory authority, the power to suppress publication of civil proceedings in New South Wales is governed by the common law. The lack of certainty about the nature and extent of this power in the common law justifies legislative clarification in this area.

10.98 Traditionally a distinction has been drawn between civil and criminal proceedings and the extent to which restrictions upon their openness should be imposed. This was based on the assumption that derogations from open justice in the criminal

155. *Children (Care and Protection) Act 1987* (NSW) s 68; *Children (Criminal Proceedings) Act 1987* (NSW) s 11; *Adoption of Children Act 1965* (NSW) s 53.

context should be more strictly controlled because the public has a greater interest and role to play in criminal proceedings. If members of the public were deterred by publicity and did not notify the commission of a crime or give testimony in court, a broader public interest was seen to be affected than if a person decided not to bring a civil action or aid in its adjudication.[156] A greater public interest was also said to arise where there is some moral component in the wrongdoer being brought to justice.[157]

10.99 Nevertheless the validity of this distinction between civil and criminal proceedings in relation to open justice has been questioned.[158] There are many civil issues such as discrimination, defamation and civil actions for assault, including sexual assault, which contain matters of great public interest and importance. The Commission is of the view that the power of courts to restrict publication in matters such as these should be based on the same grounds as in criminal matters. The public interest in the proper administration of justice is equally important in such cases, and the courts should only be able to restrict reporting of court proceedings where publication would create a substantial risk of prejudice to the administration of justice.

10.100 ***Legislative provisions for standing and appeals.*** A further matter for consideration concerns who may apply for, or appeal from, or seek to revoke or vary a suppression order. The general test for standing under the common law is whether the party has a "special interest" over and above that of any member of the public generally.[159] It has been held that the media have sufficient standing to seek relief upon appeal by way of certiorari, and in appropriate cases, to seek a declaration, where invalid orders have been made which affect publication by it of

156. See discussion in G Nettheim, "Open Justice Versus Justice" (1985) 9 *Adelaide Law Review* 488 at 492-493.
157. See discussion in M McDowell, "The Principle of Open Justice in a Civil Context" (1995) 2 *New Zealand Law Review* 214 at 223-224.
158. M McDowell, "The Principle of Open Justice in a Civil Context" (1995) 2 *New Zealand Law Review* 214.
159. *Australian Conservation Foundation Inc v Commonwealth* (1980) 146 CLR 493 at 530.

proceedings.[160] The question of whether the media actually has standing under the common law to be heard on an application, and by extension, on variation or revocation of an order, is less settled.[161] It has been suggested that the media have sufficient standing, and a consequential right to be heard, where such a suppression order is valid and directly binding upon them.[162] Under the common law however, an order will only directly bind the media if it is present in court when the order is made.[163] The issue of the standing of the media to be heard on matters pertaining to suppression orders requires legislative clarification.

10.101 A detailed model standing provision is to be found in the South Australian legislation. Under s 69A(5) standing is expressly given to the media to make submissions in respect of an application for a suppression order to be made, revoked or varied.[164] This provision reflects the view that the law should be clear on whether it affords the media a right to be heard in such matters. It also recognises the gravity of a suppression order, and its power to interfere with the liberty of the media to report upon the administration of justice.[165] The legislation entitles the media, the applicant, a party to the proceedings in which the order is sought, and any person who has a "proper interest" to make

160. *Nationwide News v District Court of New South Wales* (1996) 40 NSWLR 486 at 490 (Mahoney J); *Cf Mirror Newspapers Ltd v Waller* (1985) 1 NSWLR 1 at 9; *Re Bromfield; Ex parte West Australian Newspapers Ltd* (1991) 6 WAR 153; *John Fairfax & Sons Ltd v Police Tribunal of NSW* (1986) 5 NSWLR 465; *Attorney General (NSW) v Mayas Pty Ltd* (1988) 14 NSWLR 342 at 356; *John Fairfax Group Pty Ltd v Local Court of New South Wales* (1992) 26 NSWLR 131.
161. *Nationwide News Pty Ltd v District Court of New South Wales* (1996) 40 NSWLR 486 at 490 (Mahoney J).
162. *Nationwide News Pty Ltd v District Court of New South Wales* (1996) 40 NSWLR 486 at 492 (Mahoney J).
163. See discussion in *Re Bromfield; Ex parte West Australian Newspapers Ltd* (1991) 6 WAR 153 at 168-170 (Malcolm J).
164. For a representative of a newspaper or a radio or television station: s 69A(5)(a)(iii), s 69A(6).
165. C M Branson, *Report, Section 69 of the Evidence Act, 1929-1982* (South Australia, Attorney General's Department, 1982) at 13-14.

submissions to the court. A similar standing provision was recommended by the ALRC in its *Contempt* Report. The Commission recommended that journalists and publishers, as well as others who are not merely meddling in the proceedings, should be expressly given the right to intervene in applications for suppression orders or to make applications for the lifting of such orders.[166]

10.102 The South Australian provisions give the parties with standing a right to make submissions but not a right to give evidence. Evidence may only be presented with leave of the court.[167] This provision reflects the Branson recommendations that substantial delay, inconvenience and expense could result from an intervener being given such a right to call evidence, but that the court should be able to permit the party to call evidence where it would be of assistance in reaching a proper decision.[168]

10.103 Under the South Australian Act, express provisions are also made regarding appeals against a suppression order, a decision not to make a suppression order, or the variation or revocation, or decision not to vary or revoke such an order.[169] The media is given an express right either to institute or be heard on an appeal, in addition to the original applicant, a party to the proceedings in which the order or decision subject to appeal was made, a person who was deemed by the primary court to have a proper interest, and a person who did not appear before the primary court in the application, but who is deemed to have a proper interest by the appeal court.[170] The ALRC has similarly

166. Australian Law Reform Commission, *Contempt* (Report 35, 1987) at para 488.
167. *Evidence Act 1929* (SA) s 69A(5), (6).
168. C M Branson, *Report, Section 69 of the Evidence Act, 1929-1982* (South Australia, Attorney General's Department, 1982) at 14.
169. *Evidence Act 1929* (SA) s 69A(8).
170. *Evidence Act 1929* (SA) s 69A(9). A person who did not appear before the primary court may only bring an appeal, or be heard on appeal, by leave of the appellate court. Leave will be granted if the appellate court is satisfied that the person's failure to appear before the primary court is not attributable to a lack of proper diligence: s 69A(9)(e).

recommended that a right of appeal against suppression orders and decisions not to make such orders be established for those who had been afforded standing.[171] The South Australian Act provides that an appellate court may confirm, vary or revoke the order or decision under appeal, or may substitute its own order or its decision not to make an order.[172] This power to substitute its own order for the one appealed against was also recommended by the ALRC.[173]

10.104 The Commission's tentative view is that similar provisions to those in South Australia relating to standing and appeals should be introduced in New South Wales. Express provision should be made for the media, as well as others with a special interest in the matter, to be heard by the court hearing the application before an order is made, or to apply subsequently to the court to vary or revoke the order.

10.105 The Commission is of the opinion that any party having a sufficient interest in the proceedings to accord them standing in suppression order hearings should also have a right to appeal the primary court's decision. Leave of the court should not be required for such an appeal to be heard. A person or organisation undertaking an appeal should take on the status of an intervener and as such should be in the same position in relation to costs as any other party. The potential liability for costs orders should stop litigants from instituting vexatious or frivolous appeals. Appeals of this kind should be heard by the court which ordinarily hears appeals against the final decision of the court which made (or failed to make) the order under review.

171. Australian Law Reform Commission, *Contempt* (Report 35, 1987) at para 488.
172. *Evidence Act 1929* (SA) s 69B.
173. Australian Law Reform Commission, *Contempt* (Report 35, 1987) at para 489.

PROPOSAL 21

Section 578 of the *Crimes Act 1900* (NSW) should be repealed. A new provision should be introduced in the *Evidence Act 1995* (NSW) which provides that any court, in any proceedings, has the power to suppress the publication of reports of any part of the proceedings (including documentary material), where such publication would create a *substantial risk* of prejudice to the administration of justice, either generally, or in relation to specific proceedings (including the proceedings in which the order is made). The power should apply in both civil and criminal proceedings and should extend to suppression of publication of evidence as well as material which would lead to the identification of parties and witnesses involved in proceedings before the court. As is presently the case under s 578 of the *Crimes Act 1900* (NSW), breach of an order should constitute a criminal offence. The new section should not replace the common law or existing statutory powers to restrict publication of court proceedings (other than s 578).

The legislation should also expressly provide that the media, together with others with a special interest in the matter, have standing to be heard by the court before the making of a suppression order, or to apply to the court for the variation or revocation of such an order. Any person or organisation heard by the court in relation to an order made, or not made, under the section should have a right of appeal against the court's decision. Persons or organisations that did not appear before the court in relation to the making of an order should only be able to appeal by leave of the appellate court. An appeal against a decision made under the section should be heard by the court which hears appeals against the final judgment of the court deciding the suppression order matter.

11. Access to and reporting on court documents

- The Commission’s tentative view

11.1 An important aspect of the open justice principle is the matter of access to and reporting of the contents of court documents. In this chapter, the Commission examines whether there should be a right of access to documents involved in court proceedings, which documents should be covered by such right and whether there should a right to publish the contents of these documents.

11.2 This chapter and Chapter 9 are linked in the following way. Chapter 9 deals with the principle that fair and accurate reporting of open court proceedings constitutes a defence to sub judice liability. To the extent that the media's right to report such proceedings includes a right to report on the contents of documents involved in them, the scope of the defence is enlarged.

11.3 At common law, a court file is not a public register. Access by non-parties to documents on file in a court registry is regulated by statute or by rules of court.[1] The approach regarding access to documents varies among Australian courts. In some cases, the rules provide for access as of right to the entire file,[2] whilst some rules restrict access to specific documents, for example, certain affidavits.[3] In other courts, access to a file can be secured only by leave of the court or a registrar.[4]

11.4 In New South Wales, the *Supreme Court Rules 1970* Part 65 rule 7 provides that a person who is not a party to proceedings may only obtain access to court documents relating to

1. D Butler and S Rodrick, *Australian Media Law* (LBC Information Services, Sydney, 1999) at para 4.300.
2. See, for example, *Rules of the Supreme Court 1996* (Vic) r 28.05 which provides: "When the Registry of the Court is open, a person may, on payment of the proper fee, inspect and obtain a copy of a document filed in a proceeding." *Supreme Court Rules 1997* (NT) r 28.05(1) is similarly worded; see *also Uniform Civil Procedure Rules 1999* (Qld) Ch 22 Pt 2 r 981 and *Rules of the Supreme Court 1965* (Tas) O 77 r 19, 20.
3. See, for example, *High Court Rules 1953* (Cth) O 58 r 8(2); *Federal Court Rules 1979* (Cth) O 46 r 6; *Criminal Practice Rules 1999* (Qld) Ch 12 Pt 2 r 57.
4. See, for example, *Family Law Rules 1984* (Cth) O 5 r 6.

those proceedings on leave of the court. Access will normally be granted in respect of pleadings and judgments if the proceedings to which they relate have concluded, or if they are documents that record what was said in open court or have been admitted into evidence, or relate to information that would have been heard in open court.[5] In other circumstances, access to documents should only be granted in exceptional circumstances.[6] Leave of the court is also required for access to documents relating to proceedings in the District Court[7] and the Local Courts.[8]

11.5 Generally, therefore, the media do not have any general right of access to documents kept on the court file of proceedings.[9] Nor do they appear to have any right of access to documents produced by one party to another on discovery or on subpoena, without being actually put on the court file. For a party or her/his legal adviser to disclose them to the media without the court's permission constitutes a breach of the implied undertaking not to use such documents for a "collateral purpose".[10]

11.6 There are, however, two apparent exceptions to these rules denying access. One is where the document has been admitted into evidence.[11] The other is where the contents of the document are read out or are deemed to have been read out[12] in open court.

5. *Supreme Court Practice Note 97* (9 March 1998).
6. *Supreme Court Practice Note 97* (9 March 1998).
7. *District Court Rules 1973* (NSW) Pt 52 r 3(2).
8. *Local Courts (Civil Claims) Rules 1988* (NSW) Pt 39 r 4(2).
9. See *Smith v Harris* [1996] 2 VR 335; *Ex parte Titelius v Public Service Appeal Board* (WA, Supreme Court, Full Court, CIV 1336/98, 19 May 1999, unreported).
10. *Alterskye v Scott* [1948] 1 All ER 469; *Ainsworth v Hanrahan* (1991) 25 NSWLR 155; *Hamersley Iron Pty Ltd v Lovell* (1998) 19 WAR 316.
11. *Smith v Harris* [1996] 2 VR 335.
12. See *R v Clerk of Petty Sessions; Ex parte Davies Brothers Ltd* (Tasmania, Supreme Court, No 144/98, Slicer J, 19 November 1998, unreported). In this case, the accused appeared in the Court of Petty Sessions in response to two complaints alleging indictable offences. No charges were read out in open court. The publisher of a newspaper requested details of the allegations contained in the complaints but this was refused by the court. The *Justices Act 1959*

They then become part of the proceedings and may be published by the media,[13] unless reporting is prohibited by a suppression order.

11.7 It may be questioned whether documents which are only partly read out in court, or which are not read out but merely referred to, or which are simply handed up to the judicial officer without being admitted into evidence, become part of the proceedings for the purpose of public access to them. In several cases, the courts have considered this issue in the context of documents which initiate process, such as a statement of claim in civil proceedings, or a charge or complaint in criminal proceedings.[14] It seems to be the general view that such documents, except for those parts which have been read out, do not constitute part of proceedings conducted in open court, and therefore their contents may not be published by the media.

(Tas) s 74A provides that if an accused is unrepresented, the presiding judicial officer is required to have the charges read to him, unless a written plea has already been entered. Had the accused in this case been unrepresented, the charges contained in the complaint would have been read in open court and a member of the public would have been entitled to repeat the substance of what was stated in court. The accused was, however, represented by counsel. Nevertheless, the Supreme Court of Tasmania held that "representation by counsel obviated the duty of the court to read aloud the charges preferred, but such did not make the contents of those charges confidential to the defendant. A member of the public, attending such hearing, would be entitled to be informed as to why the person charged was before the court …" The court ordered that the newspaper publisher be provided with all details of the contents of the complaints against the accused.

13. See, *Smith v Harris* [1996] 2 VR 335 at 341; *R v Clerk of Petty Sessions; Ex parte Davies Brothers Ltd* (Tasmania, Supreme Court, No 144/98, Slicer J, 19 November 1998, unreported).

14. See *Campbell v Kennedy and Others* (1884) LR 3 SC 8; *Lucas & Son (Nelson Mail) v O'Brien* [1978] 2 NZLR 289; *Smith v Harris* [1996] 2 VR 335; *R v Clerk of Petty Sessions; Ex parte Davies Brothers Ltd* (Tasmania, Supreme Court, No 144/98, Slicer J, 19 November 1998, unreported).

11.8 There is English authority to the effect that it is a contempt of court for a journalist to inspect documents on a court file without leave of the court if it was known that leave was required but not obtained, or if leave was obtained by deceit or trickery, or if, to the knowledge of the journalist seeking access, the court officer acted under a mistake that the journalist was entitled to inspect the document, although the mistaken belief was not induced by any deception.[15] However, the court was prepared to excuse the publisher from contempt due to the fact that the publisher had no intention to interfere with the administration of the course of justice, despite him having the knowledge that the published information was obtained without authorisation.[16]

THE COMMISSION'S TENTATIVE VIEW

11.9 In the Commission's view, the law should be clarified in relation to reporting on documents by the media. In accordance with the fundamental notion of open justice, the Commission considers that there should be a general public right of access to documents (including electronic material, sound or visual recordings), where those documents, or the relevant parts of them, have either (a) been admitted into evidence (as, for example, with a documentary witness statement or an affidavit), (b) been read out in open court, or (c) constitute part of the pleadings, information, indictment or summons, on which the proceedings are based. The general right of access should only arise after proceedings in open court have commenced, and should be subject to any lawful order made by the court restricting access to such documents. The law should also make it clear that there is a general right to publish the contents of, or a fair and accurate summary of the contents of, a document of a type referred to above. Again, this right should be subject to any lawful order by the court to restrict publication. If these recommendations are adopted, the Commission suggests that courts

15. *Dobson v Hastings* [1992] 2 All ER 94.
16. *Dobson v Hastings* [1992] 2 All ER 94.

establish a system to facilitate ready access by non-parties, such as media people, to the relevant court documents.

PROPOSAL 22

Legislation should provide for a general right of access to any document that is:

- **admitted into evidence in proceedings in open court;**
- **read out, or read out as to the relevant part, in open court; or**
- **a pleading relied on in a proceeding in open court.**

That right of access should be subject to any lawful order of the court restricting access to documents. The word "document" should be given the same meaning as provided for in the Dictionary to the *Evidence Act 1995* (NSW).

PROPOSAL 23

Legislation should provide for a general right to publish the contents of, or a fair and accurate summary of the contents of, a document referred to in Proposal 22. That right should be subject to any lawful order of the court prohibiting the publication of proceedings. The word "document" should have the same meaning as provided for in the Dictionary to the *Evidence Act 1995* (NSW).

Part Three

Procedure, Penalties and Remedies

12. Procedural matters

- Overview
- Instigation of proceedings
- Jurisdiction: trial
- Mode of trial
- Appeal proceedings

OVERVIEW

12.1 Sub judice contempt is treated as a criminal offence punishable by criminal sanctions such as imprisonment or fine.[1] It follows that the burden of proving liability for contempt lies with the party bringing the prosecution. Liability must be proved beyond reasonable doubt.[2] It has also been held that the *Sentencing Act 1989* (NSW)[3] applied to a sentence of imprisonment for contempt of court.[4]

12.2 However, unlike other criminal offences, contempt is an offence *sui generis* which attracts a distinctive jurisdiction and set of procedures. The procedures for prosecution and trial, as well as the powers of the courts in disposing of the matters are peculiar to this particular offence. For example, whereas the Director of Public Prosecutions (the "DPP") is generally responsible for the day-to-day prosecution of most criminal offences, it is the Attorney General who initiates and conducts prosecutions for contempt. Contempt cases are conducted summarily and, notwithstanding their criminal nature, they are dealt with as a form of civil

1. *Registrar of the Court of Appeal v Maniam (No 2)* (1992) 26 NSWLR 309 at 314 (Kirby J); *Young v Registrar of the Court of Appeal* (1993) 32 NSLWR 262 at 277 (Kirby J); *Attorney General (NSW) v John Fairfax Publications Pty Ltd* [1999] NSWSC 318 at para 20 (Barr J).
2. *Witham v Holloway* (1995) 183 CLR 525 at 550; *Harkianakis v Skalkos* (1997) 2 NSWLR 22 at 27 (Mason J).
3. The provisions of this Act have been amalgamated with those of other sentencing laws by the *Crimes (Sentencing Procedure) Act 1999* (NSW), which took effect on 3 April 2000.
4. *Young v Jackman* (NSW, Court of Appeal, No 237/80, 2 June 1993, unreported); *Attorney General (NSW) v Whiley* (1993) 31 NSWLR 314; *Wood v Staunton (No 5)* (1996) 86 A Crim R 183. See also *Registrar of the Court of Appeal v Gilby* (NSW, Court of Appeal, No 40172/91, 20 August 1991, unreported). But see contrary views in *Young v Registrar of the Court of Appeal* (1993) 32 NSWLR 262 at 288 (Handley J); *Wood v Galea* (1996) 84 A Crim R 274 at 276-277 (Hunt J).

proceeding.[5] In New South Wales, appeals from convictions for contempt are heard by the Court of Appeal, not the Court of Criminal Appeal.[6]

12.3 In this chapter, the Commission examines procedural aspects of the prosecution and hearing of sub judice contempt proceedings with particular attention to: (1) who may initiate sub judice contempt proceedings; (2) where should they be heard and decided; (3) what should be the mode of trial (specifically, whether the present summary procedure should be continued); and (4) which court should hear and decide appeals.

12.4 As noted in Chapter 1, this Discussion Paper is primarily concerned with sub judice contempt. This is mainly because the inquiry originated from the controversy arising from the *Costs in Criminal Cases Bill 1997* (NSW), which deals with matters relating to the operation of the sub judice rule.[7] This chapter, as well as the following chapter on sanctions and remedies, follows this approach by confining the discussion of issues on procedure, sanctions and remedies to issues which have a direct impact on sub judice contempt. Matters concerning civil contempt or those peculiar to other forms of criminal contempt, for example, will not be dealt with in these chapters. Nevertheless, most of the proposals in these chapters are drafted in a manner that would apply not just to sub judice contempt, but to criminal contempts in general. As the policies underlying most of the proposals on procedure, sanctions and remedies apply equally to all forms of criminal contempt, confining the proposals to sub judice contempt may lead to a situation where one set of rules applies to sub judice contempt and another governs other forms of criminal contempt. Hence, for example, Proposal 25 on the transfer of appeal

5. The High Court, in describing the nature of contempt proceedings, stated that "[n]otwithstanding that a contempt maybe described as a criminal offence, the proceedings do not attract the criminal jurisdiction of the court to which the application is made. On the contrary, they proceed in the civil jurisdiction …" *Hinch v Attorney General (Vic) (No 2)* (1987) 164 CLR 15 at 89.
6. *Supreme Court Act 1970* (NSW) s 101(5) and (6).
7. See para 1.14-1.15.

proceedings from the Court of Appeal to the Court of Criminal Appeal, if confined to sub judice contempt, would lead to a situation where a person convicted of sub judice contempt goes to the Court of Criminal Appeal to appeal the conviction, while a person convicted of another form of criminal contempt has to go to the Court of Appeal. Proposal 27 on the establishment of upper limits on prison sentences and fines, if limited to sub judice contempt, would establish certainty as to the penalties that can be imposed for sub judice contempt but would allow courts to continue to possess virtually unlimited discretion when sentencing persons convicted of other forms of criminal contempt. The decision by the Commission to draft the relevant proposals in broad terms is aimed at preventing such absurd situations. The Commission acknowledges that some of these proposals may also be appropriate to civil contempts. However, it will not endeavour to examine the effectiveness of the relevant proposals to civil contempts as this would veer too far away from its chosen path of focusing on sub judice contempt.

INSTIGATION OF PROCEEDINGS

12.5 The Attorney General has the primary responsibility at common law to protect the administration of justice by instituting proceedings, when appropriate, for the punishment of alleged contempt.[8] In *Attorney General v Times Newspapers Ltd*,[9] Lord Diplock said of the British Attorney General's role in relation to contempt of court:

> He is the appropriate public officer to represent the public interest in the administration of justice. In doing so he acts in constitutional theory on behalf of the Crown, as do Her Majesty's judges themselves; but he acts on behalf of the Crown as 'the fountain of justice' and not in the exercise of its

8. *Re Whitlam; Ex parte Garland* (1976) 8 ACTR 17 at 23 (Connor J); *United Telecasters Sydney v Hardy* (1991) 23 NSWLR 323 at 330 (Samuels J).
9. [1974] AC 273 at 311.

> executive functions. It is in similar capacity that he is available to assist the court as amicus curiae and is a nominal party to relator actions.[10]

12.6 In New South Wales, Part 55 rule 11(2) of the *Supreme Court Rules 1970* (NSW) provides that the power of the Supreme Court to direct the registrar to apply for punishment of contempt "does not affect such right as any person may have to apply by motion for, or to commence proceedings for, punishment of the contempt." Although this rule is usually cited as preserving a private litigant's right at common law to commence contempt proceedings,[11] it has been stated that it can apply equally to the right of the Attorney General to initiate such proceedings.[12]

12.7 Legislation enacted in 1998 expressly recognises the Attorney General's power to institute contempt proceedings.[13] Section 16B was added to the *Criminal Procedure Act 1986* (NSW): paragraph (1) provides that "[p]roceedings for contempt of court may be instituted in the Supreme Court in the name of the 'State of New South Wales' by: (a) the Attorney General, or (b) the Solicitor General or Crown Advocate acting under a delegation from the Attorney General."

12.8 At common law, the right to bring contempt proceedings is not exclusive to the Attorney General. A private person, a court of its own motion or the DPP may also institute such proceedings. It is apparent that s 16B of the *Criminal Procedure Act 1986* (NSW) has not modified the authority of these entities to institute contempt proceedings. Its purposes are to enable the Attorney General to delegate the function of initiating contempt proceedings to the Crown Advocate or the Solicitor General and to enable such

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10. Quoted by Justice Samuels in *United Telecasters Sydney Ltd v Hardy* (1991) 23 NSWLR 323 at 330.
11. *Ex parte Tubman; Re Lucas* (1970) 72 SR (NSW) 555; *European Asian Bank AG v Wentworth* (1986) 5 NSWLR 445 at 458-460 (Kirby J).
12. *Killen v Lane* [1983] 1 NSWLR 171 at 177-178 (Moffitt J).
13. *Courts Legislation Amendment Act 1998* (NSW) Sch 7. The Act commenced on 8 August 1998.

proceedings to be commenced in the name of the State of New South Wales.[14] Quite clearly, there was no intention to vest the relevant power exclusively in the Attorney General (or in the Crown Advocate or Solicitor General acting under a delegation from the Attorney General) because paragraph (2) of s 16B states that nothing in the section "prevents proceedings for contempt of court from being instituted in any other manner." In other words, the common law with respect to the institution of contempt proceedings is preserved.

12.9 The following sections of this chapter consider the roles of those other than the Attorney General in the instigation of sub judice contempt proceedings.

The Director of Public Prosecutions

12.10 The DPP is the main prosecution arm of the government. His or her responsibilities include instituting and conducting the prosecution of indictable offences in the Supreme Court and the District Court,[15] committal proceedings for indictable offences, proceedings for summary offences in any court and proceedings for indictable offences that may be dealt with summarily in Local Courts.[16]

12.11 The *Director of Public Prosecutions Act 1986* (NSW) ("DPP Act") is silent as to the power of the DPP to commence contempt proceedings. However, two decisions involving the DPP have examined this issue. In *Director of Public Prosecutions v Australian Broadcasting Corporation ("ABC")*,[17] the New South Wales Court of Appeal held that the Commonwealth DPP has standing to institute contempt proceedings in relation to a case

14. New South Wales, *Parliamentary Debates (Hansard)* Legislative Council, 21 May 1998 at 5012.
15. *Director of Public Prosecutions Act 1986* (NSW) s 7(1)(a).
16. *Director of Public Prosecutions Act 1986* (NSW) s 8(1).
17. (1987) 7 NSWLR 588. This has been followed in *United Telecasters Sydney Ltd v Hardy* (1991) 23 NSWLR 323.

being tried by a State court involving a federal offence. In reaching this decision, the court said:[18]

> The DPP had been validly authorised to institute prosecutions on indictment and had power to institute proceedings for the commitment of persons for trial in respect of indictable offences. Upon exercising this power the DPP is a litigant in the ensuing proceedings and prima facie is given the same right to bring proceedings for contempt to ensure the integrity of the administration of justice in respect of those proceedings as if he were a defendant in those proceedings. If the proceedings are brought in a State court then, subject to any statutory prohibition or limitation, he has the same power to bring contempt proceedings in the appropriate State court.

12.12 The second case upholding the power of the DPP to institute contempt proceedings is *The R v Pearce*,[19] a decision by the Full Court of the Supreme Court of Western Australia on s 20(2)(a) of the *Director of Public Prosecutions Act 1991* (WA) which gives the DPP the power "to 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." The court held that because the Attorney General has the power at common law to commence and carry on proceedings for contempt, it follows that the powers of the DPP of Western Australia extend to the investigation and prosecution of an offence of contempt.[20]

12.13 The decision in *Director of Public Prosecutions v ABC* was based on the principle that a party to litigation may bring proceedings in respect of a contempt alleged to prejudice the due administration of justice in relation to that litigation. If the ruling were applied to the New South Wales DPP, it would mean that the latter could institute contempt proceedings with respect to criminal proceedings to which he or she is a party. The ruling in *Director of Public Prosecutions v ABC*, however, acknowledges only

18. (1987) 7 NSWLR 588 at 596.
19. (1992) 7 WAR 395.
20. (1992) 7 WAR 395 at 409-410 (Malcolm J).

limited powers for the DPP with respect to criminal contempt proceedings. It does not recognise any power in the DPP to seek sanctions for breach of the sub judice principle with respect to civil proceedings or to criminal proceedings in which the DPP is not a party. It also may not recognise any power in the DPP to institute proceedings for another form of contempt by publication – scandalising the court – because the offending material does not relate to any pending proceedings. Consequently, the DPP may not be able to bring prosecutions for a range of contempts by publication because he or she is not a party to proceedings notwithstanding that all forms of contempts by publication are criminal offences. Because the ruling in *Director of Public Prosecutions v ABC* was based on the right of a litigant (in that case the Commonwealth DPP) to institute contempt proceedings relating to the relevant litigation, and did not consider the broader role of the DPP as one of the primary public law officers charged with the administration of criminal law, which encompasses contempt, its recognition of the DPP's role with respect to contempt has clear limits.

12.14 The ruling of the Supreme Court of Western Australia in *Pearce* confers a wider power on the DPP. It effectively treats the DPP and the Attorney General as having concurrent powers to investigate and prosecute contempt cases. The ruling in *Pearce*, however, may not apply to the New South Wales DPP because the DPP Act does not contain a provision, similar to s 20(2)(a) of the legislation in Western Australia, which expressly grants to the DPP of that state the authority to exercise any power with respect to the investigation and prosecution of offences that is vested (by statute or common law) in the Attorney General.

12.15 Section 20(1)(b) of the DPP Act gives the New South Wales DPP the power "to do anything incidental or conducive to the exercise of any functions of the Director." It may be argued that the taking of proceedings for contempt arising out of criminal proceedings initiated by the DPP is incidental or conducive to the exercise of his or her powers. This argument would probably be accepted by the courts of New South Wales. In that event, the New South Wales DPP would have the same limited power as was

confirmed for the Commonwealth DPP in *Director of Public Prosecutions v ABC*.

Legislation to make the DPP the prosecution officer for contempt cases

12.16 The current position in NSW seems therefore that the Attorney General is the main law officer charged with the prosecution of contempt cases and the DPP has this power only with respect to contempt relating to cases where the DPP is a party. One reform option is for legislation to be passed giving the DPP the day-to-day responsibility for the prosecution of criminal contempts, as the case with the Attorney General retaining residual powers, similar to the arrangement under the DPP Act.[21] This was essentially the recommendation of the ALRC ("ALRC") in its report on contempt.[22]

12.17 The main argument for such an option is that sub judice contempt is a criminal offence and as such, should be treated like all other offences, including in the way in which it is prosecuted. This would be consistent with the reforms intended when the office of the DPP was created in 1986 to vest the general day-to-day responsibility for the prosecution of serious criminal offences in a single person. The office was created to facilitate a more efficient and consistent prosecution policy and to provide for independent decision-making in the prosecution system.[23] Enabling the DPP to prosecute sub judice contempt would bring the prosecution of sub judice contempt in line with that followed for all other serious offences. Moreover, because the functions of the DPP include the formulation of guidelines with respect to the prosecution of offences,[24] giving DPP the responsibility over sub judice cases will ensure the adoption of a consistent prosecution policy for such cases, which will take into account and be uniform or at least congruous with the policy for all other offences.

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21. *Director of Public Prosecutions Act 1986* (NSW) s 27, 28.
22. Australian Law Reform Commission, *Contempt* (Report 35, 1987) at para 470.
23. New South Wales, *Parliamentary Debates (Hansard)* Legislative Assembly, 1 December 1986 at 7339.
24. See *Director of Public Prosecution Act 1986* (NSW) s 13-15.

12.18 However, sub judice contempt is a crime which pertains to the administration of justice and the Attorney General is ultimately responsible for the maintenance of the system of the administration of justice. This suggests that the prosecution of sub judice contempt cases as a means of protecting that system should be reserved for the Attorney General. The nature of sub judice contempt should not, however, necessarily exclude the DPP from prosecuting this particular offence because he or she does have the authority to prosecute certain offences designed to protect the administration of justice.[25] More specifically, conduct which constitutes sub judice contempt at common law may, at the same time, amount to the offence of perverting the course of justice under s 319 of the *Crimes Act 1900* (NSW), provided actual intent to pervert the course of justice is proved. It may be argued that it is inconsistent to make the DPP the primary prosecution officer for one offence but not for the other.

12.19 Another reason for conferring the power to prosecute sub judice contempt on the DPP is to ensure the element of independence from political influence in such prosecutions. Sub judice contempt can often have political dimensions, for example, because the alleged contemnor is a political figure, or the government of the day has a special interest in the trial because it is politically sensitive or highly controversial, or it is feared that a prosecution might not be instituted in order not to alienate a powerful media organisation or commentator. The Attorney General is an elected member of Parliament and is also a member of Cabinet (in NSW). As such, he or she exercises political functions and is therefore vulnerable to the perception that his or her decisions to prosecute alleged acts of sub judice contempt may be influenced by political considerations. In contrast, the DPP is a statutory appointee whose office was created with a view to

25. Examples of these offences include those in Part 7 of the *Crimes Act 1900* (NSW) such as the following: perverting the course of justice (s 319); corruption of witnesses and jurors (s 321); threatening or intimidating judges, witnesses, jurors (s 322); influencing witnesses and jurors (s 323); preventing, obstructing or dissuading witness or juror from attending, etc (s 325); reprisals against judges, witnesses, jurors, etc (s 326); and perjury (s 327).

insulating prosecutions from the political process and ensuring independence with respect to decisions concerning prosecutions.[26]

12.20 On the other hand, it may be argued that the DPP may also be susceptible to the perception of partiality in sub judice prosecutions. Where the DPP commenced the criminal proceedings to which the alleged contempt relates, he or she may appear to be partisan when it comes to determining whether contempt proceedings should also be commenced. For example, in a case involving statements by a police officer or one involving material published by a media organisation which are favourable to the case of the prosecution, a decision by the DPP not to prosecute may be perceived as resulting from bias.

The Commission's tentative view

12.21 The Commission is of the tentative view that there is no need to change the current position at common law, whereby the Attorney General is the main law officer charged with the prosecution of sub judice contempt cases and the DPP has power to prosecute contempts which relate to cases in which the DPP is a party. Such an arrangement recognises the complementary roles of the Attorney General as the primary officer charged with the maintenance of the due administration of the justice system and of the DPP as the primary prosecution officer of the government. Moreover, because both the Attorney General and the DPP are susceptible to accusations of partiality in sub judice contempt prosecutions, it is important to maintain the standing of both officers in such cases to ensure that where the circumstances of a case are such that one of them becomes vulnerable to perceptions of bias, the other may be relied upon to take up the prosecution. Furthermore, a system of allocating the primary responsibility for the prosecution of sub judice contempt proceedings to the DPP may result in further pressure on the resources of this office.

26. See *Price v Ferris* (1994) 34 NSWLR 704 at 707-708 (Kirby J).

Right to prosecute: private individuals

12.22 Any person may apply to the court for an order punishing a contempt, although usually the applicant is a person aggrieved by the relevant conduct.[27] In particular, any party to litigation, including a corporation, may take proceedings for contempt to protect that litigation.[28] It seems that a litigant may apply in person to the court.[29] Part 55 rule 11(4) of the New South Wales Supreme Court Rules preserves this right[30] by providing that the power of the Registrar, by order of the Supreme Court, to institute contempt proceedings "does not affect such right as any person other than the registrar may have to commence proceedings for punishment of the contempt prior to the commencement of proceedings by the registrar."

12.23 The view has been expressed that the responsibility for the instigation of contempt proceedings should be in the exclusive hands of public officers such as the Attorney General and that private persons should not have this right. In *Re Hargreaves; Ex parte Drill*,[31] where the accused, who was being tried in connection with racing fraud, moved for a writ of attachment against the editor of the newspaper which published an article about the criminal proceedings, Lord Goddard CJ declared: "I have

27. *R v Dunbabin; Ex parte Williams* (1935) 53 CLR 434 at 445 (Rich J); *European Asian Bank AG v Wentworth* (1986) 5 NSWLR 445 at 458-460; *Director of Public Prosecutions (Cth) v Australian Broadcasting Corp* (1987) 7 NSLWR 588 at 595; *New South Wales Bar Association v Muirhead* (1988) 14 NSLWR 173 at 184 (Kirby J); *United Telecasters Sydney Ltd v Hardy* (1991) 23 NSWLR 323 at 328-331 (Samuels J).
28. *Director of Public Prosecutions (Cth) v Australian Broadcasting Corp* (1987) 7 NSWLR 588 at 595-596; *X v Amalgamated Television Services Pty Ltd (No 2)* (1987) 9 NSWLR 575 at 580-581 (Kirby J), at 611-612 (Mahoney J); *United Telecasters Sydney Ltd v Hardy* (1991) 23 NSWLR 323 at 328 (Samuels J).
29. *Bevan v Hasting Jones* [1978] 1 All ER 794.
30. See *Ex parte Tubman; Re Lucas* (1970) 72 SR (NSW) 555; *European Asian Bank AG v Wentworth* (1986) 5 NSWLR 445 at 458-460 (Kirby J).
31. [1954] Crim L R 54.

said on more than one occasion that it would be a good thing if such motions were made on the application of the Attorney General. Such motion should only be made by the law officers." The 1959 report by Justice, the British section of the International Commission of Jurists, agreed with this view in order to "put an end to proceedings for contempt by the unworthy and malicious simply for the purpose of winning costs which had been so common hitherto."[32] The report also argued that confining the power to institute contempt to the Attorney General:

> is a powerful guarantee for the due administration of justice. It ensures that when a newspaper errs and the error is brought to the attention of the Attorney General proceedings can be instituted irrespective of the parties to the litigation in question, and that a responsible decision whether to prosecute or not will be taken in every case. We conclude, accordingly, that no proceedings for criminal contempt, save contempts *in facie* the court, should be instituted except by or with the consent of the Attorney General.[33]

12.24 The matter was discussed by the Phillimore Committee which concluded that the right of the individual to bring contempt proceedings should be retained reasoning that "[a]lthough contempt is a public offence in the sense of being an interference with the course of justice, it is usually private individuals who are affected by it, and if for one reason or another the Attorney General decides not to act, the individual should have the right to test the matter in the courts."[34] The Committee, however, was of the opinion that the attention of the Attorney General should be drawn to the matter before any private proceedings are begun.

12.25 The Phillimore Committee's view was not adopted when the *Contempt of Court Act 1981* (UK) was passed as its s 7 curtailed

32. L Shawcross, *A Report by Justice: Contempt of Court* (London, Stevens & Sons, 1959) at 34.
33. L Shawcross, *A Report by Justice: Contempt of Court* (London, Stevens & Sons, 1959) at 34.
34. United Kingdom, Committee on Contempt of Court, *Report of the Committee on Contempt of Court* (HMSO, London, Cmnd 5794, 1974) at para 187.

the common law right of the individual to instigate contempt cases by providing that "[p]roceedings for a contempt of court under the strict liability rule (other than Scottish proceedings) shall not be instituted except by or with the consent of the Attorney General or on the motion of a court having jurisdiction to deal with it". This section was introduced to "ensure a high degree of uniformity in decisions on whether to take proceedings".[35] As a result of s 7, if the Attorney General declines to take up a strict liability case, that fact will prevent a complainant from seeking to persuade the court that there has been a contempt. This requirement in s 7, however, applies only to publications which breach the strict liability rule. The *Contempt of Court Act 1981* (UK) expressly preserves liability at common law for contempt of court in respect of conduct intended to impede or prejudice the administration of justice.[36] Consequently, if it is alleged that *mens rea* is present and a common law contempt has been committed,[37] it appears that the consent of the Attorney General need not be obtained to instigate the contempt proceedings.

12.26 The ALRC, in its Report on Contempt, rejected the policy underlying the restriction imposed by s 7 of the *Contempt of Court Act 1981* (UK) on the right of the individual to bring contempt cases, arguing that "the accused will almost inevitably suffer in terms of delay and legal costs, and may well feel that, if the official prosecution authorities do not set contempt proceedings in motion, he or she should have the right to do so."[38] It also believed that there are sufficient safeguards against possible abuse of the right

35. See the report of the proceedings of Standing Committee A, 7 May 1981, Cols 121 ff.
36. *Contempt of Court Act 1981* (UK) s 6(c).
37. Examples of publications which may be in contempt at common law include: publication by a third party in a newspaper of material which was the subject of an injunction (*Attorney General v Times Newspaper Ltd* [1991] 2 All ER 398); publication by a magazine of articles intended to dissuade a plaintiff from continuing with litigation brought against a magazine (*Attorney General v Hislop* [1991] 1 All ER 911).
38. Australian Law Reform Commission, *Contempt* (Report 35, 1987) at para 469.

of private prosecution. Furthermore, it disagreed with the recommendation of the Phillimore Committee that the Attorney General be notified before any private prosecutions are begun.[39]

12.27 Like New South Wales, most of the other Australian states and territories preserve the right of the individual to instigate contempt proceedings.[40] Victoria, however, has revoked this right, subject to certain specific exceptions. Section 46(1) of the *Public Prosecutions Act 1994* (Vic) provides:

> Despite any provision to the contrary by or under any other Act or at common law but subject to sub-section (5), only the Attorney General may apply to a court for punishment of a person for a contempt of court.[41]

12.28 In *Broken Hill Pty Co Ltd v Dagi*,[42] where the plaintiffs in four civil proceedings issued summons in the Supreme Court of Victoria seeking orders that the defendant be punished for

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39. Australian Law Reform Commission, *Contempt* (Report 35, 1987) at para 469.
40. *Supreme Court Rules 1997* (NT) Pt 3 r 75.05; *Rules of the Supreme Court 1900* (Qld) O 84 r 5; *Uniform Civil Procedure Rules 1999* (SA) Pt 7 r 926; *Rules of the Supreme Court 1965* (Tas) O 73 r 2; *Rules of the Supreme Court 1971* (WA) O 55 r 4. There are no equivalent provisions in the Australian Capital Territory.
41. Section 46(5)(a) states that the section does not take away the right that a person may have to apply to a court for punishment for contempt of court, whether criminal or civil – (i) that involves a breach of a court order or of an undertaking given (whether expressly or impliedly) to a court; or (ii) that involves the disclosure of the fact that an offer of compromise of a claim has been made in a pending proceeding or of the terms of such an offer; or (iii) that involves an abuse of discovery or other interlocutory process; or (iv) that involves a breach by a legal practitioner of an obligation owed by the practitioner to the court; or (v) that involves aiding, abetting, counselling, procuring or inciting a breach referred to in sub-paragraph (i), (ii), (iii) or (iv). Section 46(5)(b) preserves the right of a person to apply for an injunction restraining conduct which constitutes a contempt of court. Section 46(5)(c) maintains the power of a court to deal with a contempt summarily of its own motion.
42. [1996] 2 VR 117.

contempt of court, the Court of Appeal of Victoria held that s 46(1) applies to all contempts, both civil and criminal, and in respect of both civil and criminal proceedings. The court was critical of the drafting of s 46, which created a number of problems of interpretation. Legislation was subsequently passed amending the *Public Prosecutions Act 1994* (Vic) in light of the decision in *Broken Hill Pty Co Ltd v Dagi* to clarify that s 46 applies to all forms of contempt.[43]

12.29 The reason behind the virtual abolition of the right of private litigants to move the courts for relief in respect of alleged criminal contempts is unclear because when the Victorian Attorney General introduced the *Public Prosecutions Bill 1994* (Vic) in the Victorian Parliament, she gave no explanation of the policies underlying it.[44]

12.30 The position in Victoria is more restrictive than that in the UK, where the right of an individual to commence strict liability contempt proceedings is subject to a requirement of consent of the Attorney General and where no such requirement is imposed with respect to common law contempts. By contrast, no form of contempt proceedings (including sub judice contempt), except those specified in s 46(5) of the *Public Prosecutions Act 1994* (Vic), may be commenced by an individual in Victoria, with or without the consent of the Attorney General. This position is more akin to the view expressed by Goddard CJ in *Re Hargreaves; Ex parte Drill* that the power to instigate contempt proceedings should be in the exclusive hands of the Attorney General or other law officer.[45]

12.31 There is also the position expressed in some judgments that a distinction should be made between criminal contempts that relate to criminal proceedings and those that relate to civil

43. *Law and Justice Legislation Amendment Act 1997* (Vic) s 32.
44. Victoria, *Parliamentary Debates (Hansard)* Legislative Assembly, 21 April 1994 at 1053. The debates on the bill centred on issue of the powers of the Director of Public Prosecutions *vis-a-vis* those of the Attorney General. See also the observations in *Broken Hill Pty Co Ltd v Dagi* [1996] 2 VR 117 at 130 (Winneke J).
45. See para 12.23.

proceedings. It is said that while the Attorney General should take responsibility for contempt cases relating to criminal cases, an individual who is a party to civil proceedings should have the right to move the court to punish a contempt of such proceedings. Lord Denning MR in *Attorney General v Times Newspaper Ltd*[46] and Justice Winneke in *Broken Hill Pty Co Ltd v Dagi*[47] invoked longstanding practice as the justification for retaining the right of a party to civil proceedings to commence contempt action. Lord Denning explained this distinction as follows:

> When a man is on trial in a criminal court, the Crown itself is a party. It is concerned itself to ensure the fairness of the trial. It is only right and proper that the Attorney General should take the responsibility of proceeding for contempt of court. But a civil action is different. The Attorney General will, as a rule, have no knowledge of the course of a civil action – or of any interference with it – unless it is brought to his knowledge by one of the parties to it. If the Attorney General then himself takes proceedings for contempt, it means that he is putting the authority of the Crown behind the complaint. No doubt he can do so if he thinks it proper to do so. But I venture to suggest that he should not do so except in a plain case. When the case is open to controversy or to argument, it would be better to follow the previous practice. The complainant should be left to take proceedings himself at his own expense and risk as to costs.

12.32 It appears, therefore, that based on recommendations of law reform bodies, judicial discussion and legislation in other jurisdictions there are five possible ways of dealing with the right of the individual to institute proceedings for sub judice contempt,[48] namely: (1) abolish the right of the individual to instigate sub judice contempt proceedings by providing in legislation that this power rests exclusively in a public law officer (Attorney General and/or DPP); (2) abolish this right as it relates to contempts

46. (1973) QB 710 at 737-738.
47. [1996] 2 VR 117 at 134-135.
48. The Commission must emphasise that the discussion on this matter does not include civil contempt, in respect of which there may be other ways of dealing with the issue of private prosecutions.

allegedly affecting criminal proceedings but retain it with respect to contempts allegedly affecting civil proceedings; (3) require the consent of the public law officer charged with the prosecution of sub judice contempt cases (Attorney General and/or DPP) before an individual may institute proceedings; (4) retain this right but require the individual to notify the relevant public law officer before the sub judice contempt proceedings are commenced; and (5) retain the right without restrictions.

The Commission's tentative view

12.33 The Commission is of the tentative view that the right of individuals to institute sub judice contempt proceedings should be retained irrespective of whether the alleged contempt relates to criminal or civil proceedings. The Commission acknowledges that sub judice contempt is primarily an offence aimed at maintaining the due administration of justice and the imposition of criminal sanctions is to deter conduct by bodies such as media outlets from engaging in conduct which creates a substantial risk of prejudice to the fairness of particular pending proceedings. This suggests that it is most appropriate that public officers responsible for the administration of justice, such as the DPP and the Attorney General, have the power to instigate sub judice contempt proceedings. However, parties to criminal or civil proceedings to which the allegedly contemptuous act relates have an equally compelling stake in ensuring the fairness of the trial since after all, the outcome of these proceedings will have a direct impact on them. In particular, the Commission cannot dismiss lightly the interest of the accused in securing a fair criminal trial, where his or her liberty is at stake. Even where no actual prejudice to the main proceedings is caused by the contemptuous publication, the private parties will nevertheless suffer in terms of delay and costs, and if the official prosecution authorities do not set contempt proceedings in motion, the private parties should have the right to do so.

12.34 The main reason for the view that private prosecution of contempt should be abolished or restricted by, for example, a requirement for the consent of the Attorney General is to prevent frivolous and vexatious prosecutions or those which are an abuse of the process because they have been instituted for an improper

motive.[49] However, the Commission is not aware that there is currently a problem of private parties using contempt proceedings for vexatious or harassment or other improper purposes. This is probably because the substantial costs involved in contempt litigation serve to discourage such types of prosecutions. Another deterrent is possible liability in tort for malicious prosecution[50] or for collateral abuse of legal process.[51]

12.35 Even if the problem of frivolous prosecutions does arise in the context of sub judice contempt, the Commission notes that courts have an inherent jurisdiction to prevent abuses of process both in relation to the commencement of proceedings and in relation to the conduct of pending proceedings where they are conducted in a vexatious and time wasting manner.[52] If proceedings are being pursued for an improper purpose, the court may grant a permanent stay of the proceedings.[53] The jurisdiction to grant a stay of a criminal prosecution has a dual purpose of preventing an abuse of process or the prosecution of a criminal proceeding which will result in a trial which is unfair.[54] This power of the courts at

49. See, for eg, L Shawcross, *A Report by Justice: Contempt of Court* (London, Stevens & Sons, 1959) at 34.
50. For an authority for the right of a person to seek redress for damage caused by an abuse of proceedings of a court by another person in wrongfully setting the law in motion on a criminal charge, see *Amin v Bannerjee* [1947] AC 322.
51. For illustrative cases on this form of tort, see *Williams v Spautz* (1992) 174 CLR 509; *Varan v Howard Smith Co Ltd* (1911) 13 CLR 35; *Metall v Donaldson Lufskin & Jenrett Inc* [1990] 1 QB 391 at 469.
52. *Kinnaird v Field* [1905] 2 Ch 306; *Davison v Colonial Treasurer* (1930) 47 WN (NSW) 19; *Commonwealth Trading Bank of Australia v Inglis* (1974) 131 CLR 311.
53. *Williams v Spautz* (1992) 174 CLR 509. See also *Castro v Murray* (1875) LR 10 Ex 213; *Dawkins v Prince Edward* (1886) 11 P 59 at 63; *King v Henderson* [1898] AC 270; *Re Septimus Parsonage and Co* [1901] 2 Ch 424; *Bayne v Baillieu* (1908) 6 CLR 382; *Dowling v Colonial Mutual Life Assurance Society Ltd* (1915) 20 CLR 509; *Spautz v Williams* [1983] 2 NSWLR 506 at 539.
54. *Williams v Spautz* (1992) 174 CLR 509 at 518 (Mason, Dawson, Toohey and McHugh JJ).

common law is confirmed by Part 13 rule 5 of the *Supreme Court Rules 1970* (NSW) which states that where in any proceedings, it appears to the Supreme Court that no reasonable cause of action is disclosed or the proceedings are frivolous or vexatious, or the proceedings are an abuse of the process of the court, the court may order that the proceedings be stayed or dismissed generally or in relation to any claim for relief. In addition, the Supreme Court has the authority to order that the whole or any part of a pleading be struck out if the pleading discloses no reasonable cause of action, has a tendency to cause prejudice, embarrassment or delay in the proceedings or is an abuse of the process of the court.[55] Furthermore, the Supreme Court has certain powers to deal with vexatious litigants (defined as those who habitually and persistently and without reasonable ground institute vexatious legal proceedings), such as the power to order that the vexatious litigant shall not, without leave of court, institute any legal proceedings in any court and that any legal proceedings instituted shall not be continued.[56]

12.36 The possibility that the right of individuals to institute contempt proceedings might be abused is not a sufficient argument for its abolition, given that this scarcely ever happens and that the courts have extensive powers to deal with such a situation. Nor is it necessary to introduce a consent requirement prior to the exercise of such right. It is better to leave the assessment of the merits of a prosecution or the motives behind its institution with the courts rather than requiring law officers, such as the Attorney General or the DPP to screen private prosecutions, which is unnecessary and is unduly restrictive of the right of private individuals to prosecute for sub judice contempt.

12.37 The Commission, however, would propose that a private individual who intends to initiate and maintain a prosecution for criminal contempt should notify the Attorney General and the parties to the relevant proceedings (if any).[57] The notice

55. *Supreme Court Rules 1970* (NSW) Pt 15 r 26.
56. *Supreme Court Act 1970* (NSW) s 84.
57. The contempt may not relate to particular proceedings, for example, in the case of scandalising the court.

requirement would have the desirable effect of bringing the matter to the attention of the Attorney General and, where appropriate, the State or Commonwealth Director of Public Prosecutions, without giving these public officers the power to veto the individual's right to prosecute. It would contribute towards preventing duplication of the efforts to prosecute the same offence and consequently save the resources of the stakeholders, including the prosecution authorities, the courts and the person accused of committing contempt. It would also allow better coordination of efforts between individuals and law officers, should the latter choose to be involved. It would, for example, enable the Attorney General to intervene in the proceedings, if he or she decides it appropriate to do so. Finally, the Commission notes that under the *Supreme Court Rules 1970* (NSW), if the Supreme Court through the registrar prosecutes for contempt on referral by individuals, the registrar must notify the Attorney General.[58] There is no policy reason why the relevant public law officers should be notified when the court prosecutes the contempt but not when a private individual does so.

PROPOSAL 24

The *Supreme Court Rules 1970* (NSW) Part 55 rule 11 should be amended to require that a private individual who applies to the court to commence proceedings for criminal contempt shall, prior to such application, notify the Attorney General and the parties to the proceedings (if any) allegedly involved.

58. Pt 55 r 11(6).

Right to prosecute: the courts

12.38 The courts may act on their own motion to deal with cases on contempt,[59] including contempt by publication.[60] This has been described as an exceptional power, to be invoked sparingly and only in clear cases.[61] The departure from ordinary safeguards in such proceedings, where the court is essentially both accuser and adjudicator, is justified by the overriding public interest in the safeguarding of the administration of justice from interference by swift deterrent action by the court itself.[62]

12.39 Part 55 rule 11(1) of the *Supreme Court Rules* 1970 (NSW) provides that "[w]here it is alleged, or appears to the court on its own view, that a person is guilty of contempt of the court or of any other court, the court may, by order, direct the registrar to apply by motion for, or to commence proceedings for, punishment of contempt." For the purposes of this rule, the Crown Solicitor acts as solicitor for the registrar and briefs counsel, in accordance with long accepted practice which predates the *Supreme Court Act 1970* (NSW).[63] Although the proceedings remain technically the proceedings of the court in which the court's officer is responsible for the giving of relevant instructions, the proceedings are conducted in a practical sense in the same way as if initiated by the Attorney General.[64]

12.40 It has been held that a person does not, by this rule, have a right to apply to the court requesting it to commence and maintain proceedings for criminal contempt. The commencement of such

59. *European Asian Bank AG v Wentworth* (1986) 5 NSWLR 445 at 458-460 (Kirby J); *New South Wales Bar Association v Muirhead* (1988) 14 NSWLR 173 at 184 (Kirby J); *United Telecasters Sydney Ltd v Hardy* (1991) 23 NSWLR 323 at 328-331 (Samuels J).
60. *R v Fletcher; Ex parte Kisch* (1935) 52 CLR 248 at 258 (Evatt J); *R v Dunbabin; Ex parte Williams* (1935) 53 CLR 434 at 445 (Rich J); *Registrar of the Court of Appeal v Willessee* [1984] 2 NSWLR 378.
61. *Broken Hill Pty Co Ltd v Dagi* [1996] 2 VR 117 at 178 (Phillips J).
62. *Killen v Lane* [1983] 1 NSWLR 171 at 178 (Moffitt J).
63. *Killen v Lane* [1983] 1 NSWLR 171 at 173 (Moffitt J).
64. *Killen v Lane* [1983] 1 NSWLR 171 at 173 (Moffitt J).

proceedings is entirely a matter for the court's decision taken of its own motion.[65] Hence, a party, witness, juror, a court or police officer or some other person may inform the court of an alleged contemptuous conduct but the judge may decide to do nothing because the matter is too trivial or best dealt with by a warning or the material put before him or her is unsatisfactory or because he or she considers it more appropriate that the Attorney General should initiate proceedings.[66]

12.41 Where it appears to the District Court, Local Court or any other court that a person is guilty of contempt before such court, it may refer the matter to the Supreme Court which may then exercise its power under Part 55 rule 11(1) of the *Supreme Court Rules* (NSW) to direct the Registrar to commence proceedings for contempt of court.[67]

12.42 The Rules of Court of the other Australian jurisdictions also contain provisions empowering their respective Supreme Courts to initiate contempt proceedings.[68] And in the United Kingdom and Victoria, where legislation locates the authority to initiate most forms of contempt proceedings in the Attorney General and curtails the right of the individual to do the same, the relevant laws have expressly preserved the power of the courts to initiate such proceedings on their own motion.[69]

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65. *Killen v Lane* [1983] 1 NSWLR 171.
66. *Killen v Lane* [1983] 1 NSWLR 171 at 177-178 (Moffitt J).
67. See *Re An Allegation of Contempt of Court Made by Her Honour Judge Matthews* (NSW, Court of Appeal, BC 8400372, 7 March 1984, unreported); *Re An Allegation of Contempt of Court Made by the Honourable Mr Justice Maxwell* (NSW, Court of Appeal, BC 8500884, 10 April 1985, unreported); *Varley v Attorney General (NSW)* (1987) 8 NSWLR 30.
68. See *Supreme Court Rules* (NT) r 75.07(1); *Rules of the Supreme Court* (Qld) O 84 r 1; *Supreme Court Rules* (SA) r 93.03, 93.04; *Rules of the Supreme Court* (Tas) O 73 r 1(1); *Rules of the Supreme Court* (Vic) r 75.07; *Rules of the Supreme Court* (WA) O 55 r 3. There is no equivalent provision in the Australian Capital Territory.
69. In the United Kingdom, the *Contempt of Court Act 1981* (UK) s 7 provides: "Proceedings for a contempt of court under the strict

12.43 The ALRC, in its report on contempt, recommended that courts should retain the power to initiate sub judice contempt proceedings. It stated that the exercise of official discretions to prosecute may result in variations and discrimination in prosecutions. It was of the view that one way of dealing with this problem is by maintaining alternative channels of prosecution, such as giving the court the power to initiate contempt prosecutions. It also stated that while it is unusual for the court to set criminal proceedings in motion, "it is justifiable in this instance because of the inherent link between contempt and the conduct of court proceedings."[70]

The Commission's tentative view

12.44 The Commission is of the tentative view that no change is required to the present law on the power of the Supreme Court to direct the registrar to commence proceedings for the punishment of criminal contempt, including sub judice contempt. It agrees with the view expressed by the ALRC about the need for a medium of prosecution which supplements that provided by the traditional prosecution authorities, ie the Attorney General in contempt cases and the DPP in most other offences. Where these officials fail to act on a publication which the court considers to be prejudicial to pending proceedings, the court should be in a position to commence prosecution on its own motion. Moreover, private parties affected by the prejudicial publication who are unable to convince the prosecution officers to prosecute and who may not have the resources to prosecute themselves should have the alternative recourse to the Supreme Court. Individuals who cannot afford to prosecute may request the court to do it for them.

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liability rule (other than Scottish proceedings) shall not be instituted except by or with the consent of the Attorney General or on the motion of the court having jurisdiction to deal with it." In Victoria, while the *Public Prosecutions Act 1994* (Vic) s 46(1) states that "[d]espite any provision to the contrary made by or under any other Act or at common law, only the Attorney General may apply to a court for punishment of a person for contempt of court," s 46(5) provides that nothing in the section "affects the power of a court to deal with a contempt summarily of its own motion."

70. Australian Law Reform Commission, *Contempt* (Report 35, 1987) at para 469.

The prosecution of contempt relating to a Commonwealth offence being tried in a State court

12.45 The Director of Public Prosecutions for the Commonwealth has been held to possess the power to commence proceedings in an appropriate State court for the punishment of any contempt relating to the trial of a federal offence in which he or she is the prosecuting authority.[71] This power to institute proceedings is, it would seem, concurrent with those of the Attorney General of the Commonwealth (which would seem to extend to any alleged contempts relating to federal proceedings in any court) and of the Attorney General of the relevant State.[72]

12.46 At the same time, courts have confirmed the power of a State Attorney General to prosecute contempt in relation to a suit heard by a State court under federal jurisdiction invested in that court by statute.[73] Hence, for example, the State Attorney General may prosecute the publication of material relating to pending criminal proceedings involving the importation of narcotics goods, in violation of the *Customs Act 1901* (Cth) and the *Crimes Act 1914* (Cth).[74]

JURISDICTION: TRIAL

12.47 Since its creation as a Division of the Supreme Court in 1965, the Court of Appeal has had jurisdiction under the *Supreme Court Act 1970* (NSW)[75] to hear sub judice contempt cases. Prior to the establishment of the Court of Appeal, sub judice contempt

71. *Director of Public Prosecutions (Cth) v Australian Broadcasting Corp* (1987) 7 NSWLR 588.
72. See Australian Law Reform Commission, *Contempt* (Report 35, 1987) at para 464.
73. *R v B* [1972] WAR 129.
74. See *R v David Syme & Co Ltd* [1982] VR 173, where the Victorian Attorney General's power to institute the contempt proceedings was not disputed.
75. *Supreme Court and Circuit Courts (Amendment) Act 1965* (NSW) s 2.

proceedings were heard by the Supreme Court which meant all the judges sitting together or three or more judges sitting in banc.[76] However, from 1997, this power has been transferred to the Common Law Division of the Supreme Court.[77] Consequently, sub judice contempt proceedings are now heard by a Supreme Court judge of the Common Law Division rather than by three judges of the Court of Appeal.

12.48 When the *Courts Legislation Amendment Bill 1996* (NSW) was introduced and debated in the New South Wales Parliament in 1996, the reason for the proposed change was not discussed.[78] However, it appears to be the result of the decision in the case of *Young v Registrar, Court of Appeal.*[79] In that case, the Court of Appeal discussed the provisions of the then s 48(2)(i) of the *Supreme Court Act 1970* (NSW) which assigned to the Court of

76. See *Waterhouse v Australian Broadcasting Corp* (1986) 6 NSWLR 716 at 719 to 720 (Young J).

77. In 1996, the *Courts Legislation Amendment Act 1996* (NSW) was passed amending the law by transferring to the Common Law Division of the Supreme Court proceedings for the punishment of contempt (subject to certain exceptions), including sub judice contempt: See *Courts Legislation Amendment Act 1996* (NSW) Sch 1[4], 1 [6], 1 [7]. The amendments were proclaimed to commence on 2 May 1997: see New South Wales, *Government Gazette* No 47 of 2 May 1997 at 2427.

    The *Supreme Court Act 1970* (NSW) s 53(4), as it now stands, states that "the proceedings assigned to Common Law Division include proceedings for contempt of the court or of any other court (other than proceedings referred to in subsection (3) or s 48(2)(i)). Subsection (3) of the same section assigns to each Division of the Supreme Court proceedings for the punishment of contempt but only those consisting of contempt in the face of the court in that division, disobedience of a judgment or order of the court in that division and breach of an undertaking given to the court in that division. Section 48(2)(i) assigns to the Court of Appeal proceedings for the contempt in the face of the Court of Appeal.

78. See New South Wales, *Parliamentary Debates (Hansard)* Legislative Council, 17 October 1996 at 4967, 5412; Legislative Assembly, 21 November 1996 at 6423, 6459.

79. (1993) 32 NSWLR 262.

Appeal proceedings "for the punishment of contempt of the [Supreme] Court or of any other court" (including sub judice contempt), subject to a limited right of the Court in a Division to deal with limited aspects of contempt.[80]

12.49 One of the issues raised in the case was whether the then s 48(2)(i) of the *Supreme Court Act 1970* (NSW) contravened article 14.5 of the *International Covenant on Civil and Political Rights* (the "ICCPR"), which Australia has ratified. Article 14.5 provides: "Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law." The contemnor in that case argued that because the matter was decided by the Court of Appeal as an original trial court and there is no automatic appeal to the High Court from such a decision, he was deprived of his human right of appeal as guaranteed by the ICCPR.

12.50 Justice Kirby first restated the established common law rule that international law does not form part of domestic law until incorporated by Parliament or a decision by judges but is nevertheless a legitimate and important influence on the development of common law. He then expressed the opinion that contempt is a crime within the purview of article 14.5 and that the special leave application to the High Court from the decision of conviction by the Court of Appeal is not a sufficient compliance with the review which article 14.5 of the ICCPR contemplated.[81] In reaching the latter conclusion, Justice Kirby observed that the purpose of article 14.5 is to prevent miscarriages of justice arising out of errors of law or errors of fact-finding. In the nature of the consideration of a special leave application to the High Court, it is impossible and probably inappropriate to review the facts of a criminal conviction. Because there are listed on any given day a large number of special leave applications, the High Court

80. The then s 48(4)(a) of the *Supreme Court Act 1970* (NSW) preserved the powers of the Supreme Court in a division in relation to the punishment for contempt in the face of the court in that division, disobedience to a judgment or order of the court in that division and breach of an undertaking given to the court in that division.

81. (1993) 32 NSWLR 262 at 272-280.

necessarily must have regard to the public importance and national significance of the point to be argued. If the special leave is not granted, the decision of the Court of Appeal was effectively final. In the result, Justice Kirby did not regard the review by the special leave application to the High Court as a sufficient compliance with article 14.5 of the ICCPR. However, he conceded that the ICCPR could not be invoked to invalidate s 48(2)(i) of the *Supreme Court Act 1970* (NSW).[82] He instead called for its reform by Parliament.[83]

The Commission's tentative view

12.51 A person convicted by the Court of Appeal of contempt under the former arrangement did not have an automatic right of appeal but could only apply for special leave to the High Court under s 35A of the *Judiciary Act 1903* (Cth). The jurisdiction to grant special leave is discretionary in nature and it is not sufficient for the applicant to make out a prima facie case of error.[84] Because of the number of applications for special leave, it is inevitable that a careful choice must be made having regard to the duty which the court has to develop and clarify the law. The High Court must necessarily place greater emphasis on its public role in the evolution of the law than upon the private rights of the litigants before it. The High Court will also refuse to grant special leave to appeal in criminal cases upon questions of fact.[85] Consequently, a person convicted of contempt under the former system could not have the findings of fact made by the Court of Appeal reviewed. Moreover, even when only questions of law are involved, the accused must show that there is some special feature of the case which warrants the attention of the High Court. This was, in the Commission's view, a severe restriction on the ability of a person convicted of contempt to get the conviction by the Court of Appeal reviewed by a higher court.

82. (1993) 32 NSWLR 262 at 280.
83. (1993) 32 NSWLR 262 at 286.
84. *Morris v The Queen* (1987) 16 CLR 454.
85. *Liberato v The Queen* (1985) 159 CLR 507.

12.52 On the other hand, one advantage of the prior arrangement where sub judice contempt proceedings were heard by the Court of Appeal is that three judges examined the issues. The collective wisdom of three judges may result in a fairer decision for the accused and the judgments delivered by each of the judges of appeal in each case may also contribute to the development or the better understanding of the law. The Commission is, however, not persuaded by this argument because s 101(5) and (6) of the *Supreme Court Act 1970* (NSW) confer a right of appeal to the Court of Appeal from a judgment or order of the Supreme Court in proceedings relating to contempt, other than where the proceedings resulted in the accused being found not guilty of contempt. Consequently, the accused now has open to him or her an appeal before three judges of the Court of Appeal.

12.53 The Commission is not convinced that there is a need to revert to the former arrangement as it is aware of no practical difficulties arising from the recent assignment to the Common Law Division of the Supreme Court of proceedings for sub judice contempt. Moreover, the Commission finds persuasive the concerns raised by Justice Kirby in *Young v Registrar* about the absence of an effective right of appeal under the former arrangement and its possible inconsistency with article 14.5 of the ICCPR.[86] The Commission considers it desirable to continue with the present procedure where a single judge of the Common Law Division of the Supreme Court hears and decides the case and a person who has been convicted for sub judice contempt has an automatic right to appeal the conviction. However, the Commission welcomes submissions on the matter, including any evidence about the practical workings of the new process.

86. No decision was reached on this issue in *Young v Registrar, Court of Appeal* because Justices Handley and Powell were both of the view that it was unnecessary to resolve it for purposes of that case.

MODE OF TRIAL

12.54 One of the most distinctive characteristics of the law of criminal contempt is that the offence is dealt with summarily and hence without the assistance of a jury. As Lord Justice Lindley put it in *O'Shea v O' Shea and Parnell*,[87] it is "the only offence that I know of, which is punishable at common law by summary process." Indeed in the case of contempt *in facie curiae* or in the face of the court itself, there are no formalised proceedings as the offender may be fined or committed to prison. In the case of other forms of contempt, including sub judice contempt, the proceedings are more formal. For example, such proceedings in New South Wales are commenced by way of summons.[88] Evidence in support of the charge for contempt is given by affidavit, unless the court permits it to be given in some other form.[89] Even so, such proceedings are still summary in the sense that the defendant does not have the right to a jury trial.

Historical background of the summary procedure for contempt

12.55 The leading authority for proceeding summarily in all categories of contempt (including sub judice contempt), other than contempt in the face of the court, is the case of *R v Almon.*[90] In that case, a rule *nisi* was obtained to attach Almon after he published a pamphlet containing passages critical of the conduct of Lord Mansfield, Chief Justice of the Court of King's Bench. The judgment was prepared by Justice Wilmot[91] but was never delivered because the rule *nisi* was incorrectly titled and counsel for Almon refused to consent to an amendment. Although new proceedings were begun, they were dropped following a change of government.

87. (1890) 15 PD 59 at 64; cited in G Borrie, *Borrie and Lowe's The Law of Contempt* (3rd edition, Butterworths, London, 1996) at 469.
88. *Supreme Court Rules 1970* (NSW) Pt 55 r 6(2).
89. *Supreme Court Rules 1970* (NSW) Pt 55 r 8.
90. (1765) *Wilmot's Notes* 243; 97 ER 94.
91. He later became Chief Justice of the Common Pleas.

12.56 The undelivered judgment written in 1765 by Justice Wilmot was published by his son in 1802, 37 years after the proceedings in *Almon's Case*. In response to the contention of counsel for Almon that the court should not proceed by way of attachment, but should leave the offence to be prosecuted and punished by indictment or information, Justice Wilmot wrote the following:[92]

> The power, which the courts of Westminster Hall have of vindicating their own authority, is coeval with their first foundation and institution; it is a necessary incident to every court of Justice, whether of record or not to fine and imprison for contempt to the court, acted in the face of it … And the issuing of attachments by the Supreme Courts of Justice in Westminster Hall, for contempts out of court, stands upon the same immemorial usage as supports the whole fabrick of the common law; is as much the 'lex terrae,' and within the exception of Magna Carta, as the issuing any other legal process whatsoever.
>
> I have examined very carefully to see if I could find out any vestiges or traces of its introduction, but can find none. It is as ancient as any other part of the common law; there is no priority or posteriority to be discovered about it, and therefore cannot be said to invade the common law, but to act in an alliance and friendly conjunction with every other provision which the wisdom of our ancestors has established for the general good of society. And though I do not mean to compare and contrast attachments with trials by jury, yet truth compels me to say, that the mode of proceeding by attachment stands upon the very same foundation and basis as trial by jury do – immemorial usage and practice; it is a constitutional remedy in particular cases, and the Judges, in those cases, are as much bound to give an activity to this part of it, or any violence, or abuse of the ministers, or others, employed to execute it.

12.57 The historical accuracy of this opinion has been strongly challenged in a series of articles by Sir John Fox.[93] Fox's essays

92. (1765) *Wilmot's Notes* 243 at 254; 97 ER 94 at 99.
93. J Fox, "King v Almon, 1" (1908) 24 *Law Quarterly Review* 184; "The King v Almon, 2" (1908) 24 *Law Quarterly Review* 266; J Fox, "The Summary Process to Punish Contempt, 1" (1909) 25 *Law*

reveal that although obedience to the King's writ had indeed been enforced by attachment from the earliest common law courts, no similar claim can be made with respect to criminal contempt proceedings. Fox claims that up to the early part of the eighteenth century, cases of contempt in the common law courts, when not committed by persons officially connected with the court, were dealt with through a trial in the ordinary course before a jury.[94] Strangers to the proceedings in early years were punished, even in the case of contempts in the face of the court itself, normally only after trial in the ordinary course before a jury, unless the disruptive conduct occurred in the actual view of the justices and was not serious in nature.[95] The following cases illustrate the use of the ordinary course of trial by jury in contempt cases prior to the *Almon* case[96]:

- **1313.** The defendant attacked the plaintiff in the hall of the palace of Canterbury in the presence of the Justices. A jury of law-worthy men who were in the hall was constituted. The jury found the defendant guilty and sentenced him to pay the plaintiff forty marks and to imprisonment. It was also ordered that all his lands and tenements and his foods and his chattel and his goods should be taken into the King's hand and his wife and children be ousted.[97]

Quarterly Review 238; "The Summary Process to Punish Contempt, 2" (1909) 25 *Law Quarterly Review* 354; J Fox, "Eccentricities of the Law of Contempt of Court" (1920) 36 *Law Quarterly Review* 394; J Fox, "The Nature of Contempt of Court" (1921) 37 *Law Quarterly Review* 191; J Fox, "The Practice in Contempt of Court Cases" (1922) 38 *Law Quarterly Review* 185; J Fox, "The Writ of Attachment" (1924) 40 *Law Quarterly Review* 43. See also J Fox, *The History of Contempt of Court* (Professional Books, London, 1972).

94. J Fox, "King v Almon, 1" (1908) 24 *Law Quarterly Review* 184 at 196.
95. J Fox, "King v Almon, 2" (1908) 24 *Law Quarterly Review* 266 at 266-268; J Fox, "The Summary Process to Punish Contempt, 1" (1909) 25 *Law Quarterly Review* 238 at 242-244; J Fox, "The Writ of Attachment" (1924) 40 *Law Quarterly Review* 43 at 57.
96. See also J Fox, *The History of Contempt of Court* (Professional Books, London, 1972) at 227-242 (Appendix).
97. *Thomas of Chartham v Bent of Stamford*, F W Maitland (ed), *The Eyre of Kent 6 & 7 Edward II 1313-1314* (Selden Society, 1978) Vol 1 at 185.

- **1331.** A conviction for contempt in the face of the King's Bench in Ireland was reversed by writ of error because the contempt was not tried by jury.[98]

- **1358.** The defendant seized and assaulted the plaintiff who was on her way to Westminster to prosecute a case as guardian of her son against the defendant. The jury found the defendant guilty and sentenced to imprisonment and to pay the plaintiff the amount of ten marks.[99]

- **1638.** The defendant, who openly accused the justices of high treason while the Courts of Common Pleas King's Bench, and Chancery, were sitting, was indicted and the jury of knights and esquires found him guilty.[100]

- **1680.** The defendant was convicted by a jury on an information for speaking scandalous words against Chief Justice Scroggs of the King's Bench.[101]

12.58 Fox argues that the practice of dispensing with trial by jury in contempt cases, including those which were not committed in the face of the court, originated from the Star Chamber's procedure of examination by interrogation.[102] The practice passed gradually into the common law and became more frequently used upon the abolition of the Star Chamber in 1641 and the transfer of its jurisdiction to the Court of King's Bench.[103] The process was

98. *Coram Rege Roll (M5 Edward III,1331) m 128.*
99. *Coram Rege Roll, no 390 (Hillary 1358) m 83d* in G O Sayles (ed), *Select Cases in the Court of King's Bench Edward III* (Selden Society Volume 82, 1965) Vol 6 at 118.
100. *Harrison's Case* (1638) Cro Car 504; 79 ER 1034.
101. *Radley's Case*, in *How St Tr*, vii, 701: T B Howell (ed), *A Complete Collection of State Trials and Proceedings for High Treason and Other Crimes and Misdemeanours* (London, 1816) Vol 7 at 701.
102. Fox described this procedure as follows: "The defendant was brought into court by a writ of attachment, or by an order to show cause why attachment should not issue, and was allowed to enter into a recognizance to attend and answer interrogatories with regard to the alleged contempt. If he refused to enter into a recognizance he was committed to prison, and remained there until he submitted." Fox (1972) at 71-72.
103. Fox (1972) at 70-117.

facilitated by a series of statutes conferring summary jurisdiction on the common law courts in a number of particular cases.[104] It appears, however, that the *Wilkins* case[105] in 1720 was the earliest recorded example of a libel upon a court unconnected with the service of process which was tried summarily by a common law court.[106] Subsequent cases[107] followed the summary procedure but by the time *Almon's* case came up in 1765, such procedure had only relatively recently been adopted. It is therefore appears that Wilmot J's undelivered judgment in *Almon's* case lacked sound historical basis or is at least open to question.

Summary procedure established

12.59 Despite the fact that Wilmot's undelivered judgment in *Almon's* case was a mere opinion which did not possess the binding effect of a decision, it came to be treated as the leading case on the subject. Courts in England,[108] Australia[109] and other

104. See Fox (1972) at 76-83.
105. This case is referred to in Appendix E to the Report of the Select Committee of the House of the Commons in *Sir Francis Burdett's Case* (1810) 8 How St Sr 14 at 50.
106. J Fox, "King v Almon, 1" (1908) 24 *Law Quarterly Review* 184 at 191.
107. For example, see *Anon* (1731) 2 Barn KB 43; 94 ER 345; *R v Middleton* (1723) Fort 201; 92 ER 818; *Barber* (1721) 1 Stra 444; 93 ER 624; *Wiatt* (1723) 8 Mod 123; 88 ER 96.
108. *Ex parte Martin* (1879) 4 QBD 212; *R v Gray* [1900] 2 QB 36; *R v Davies* [1906] 1 KB 32; *Morris v Crown Office* [1970] 1 All ER 1079; *Jennison v Baker* [1972] 2 QB 52; *Balogh v St Albans Crown Court* [1975] 1 QB 73.
109. *Ex parte Howe* [1828] NSWSC 55; *Re "Evening News"* (1880) 1 LR (NSW) 211; *R v Metal Traders & Employers Association; Ex parte Amalgamated Engineering Union* (1951) 82 CLR 208; *John Fairfax & Sons Pty Ltd v McRae* (1955) 93 CLR 351; *James v Robinson* (1963) 109 CLR 593; *Registrar, Court of Appeal v Collins* [1982] 1 NSWLR 682; *Gallagher v Durack* (1983) 152 CLR 238; *Fraser v The Queen (No 2)* (1985) 1 NSWLR 680; *Director of Public Prosecutions (Cth) v Australian Broadcasting Corp* (1987) 7 NSWLR 588; *The Magistrates' Court at Prahan v Murphy* [1997] 2 VR 186;

common law countries[110] have cited *Almon's* case on many occasions as authority for the summary procedure used to punish contempt.

12.60 The alternative process of trying criminal contempts on indictment has fallen into disuse[111] and the last known case in England where the procedure of indictment was used was in 1902 in the case of *R v Tibbits*.[112] In New South Wales, there is no recorded case this century of a contempt case being prosecuted on indictment.[113] In the case of *Registrar of Court of Appeal v Willesee*,[114] a case of sub judice contempt, it was contended that the proper way in which proceedings for contempt not committed in the face of the court should be prosecuted was by way of information, so that the alleged contemnor could have the benefit of trial by jury. The New South Wales Court of Appeal held that summary trial is now the ordinary and normal procedure for contempt. Consequently, the summary procedure has, for practical purposes, superseded trial by jury.[115]

12.61 The issue was also dealt with by the High Court in *James v Robinson*,[116] a case also involving sub judice contempt. Counsel for the publisher, editor and printer who were found guilty of contempt by the Supreme Court of Western Australia argued

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Broken Hill Pty Co Ltd v Dagi [1996] 2 VR 117; *Hawkesbury City Council v Foster* (NSW, Land and Environment Court, 18 December 1997, unreported); *Australian Securities & Investments Commission v Matthews* [1999] FCA 706.

110. For Canadian cases see: *Re Campbell & Cowper* [1935] 1 DLR 633; *Re Tilco Plastics Ltd v Skurjat* (1966) 57 DLR (2d) 596; *Mathieson v Mathieson* (1974) 48 DLR (3d) 94; *R v Vermette* (1987) 38 DLR (4th) 419. For Irish cases, see: *Taafe v Downes* 3 Moore PCC 36n; 13 ER 15; *Attorney General v Kissane* (1893) 32 LR Ir 220; *The State (at the prosecution of Commins) v McRann* [1977] IR 78.
111. See *R v Parke* [1903] 2 KB 432 at 442 (Wills J).
112. [1902] 1 KB 77.
113. *Registrar of the Court of Appeal v Willesee* [1984] 2 NSWLR 378 at 380 (Glass J), at 381 (Samuels J).
114. [1984] 2 NSWLR 378.
115. *Attorney General (NSW) v John Fairfax & Sons Ltd* (1985) 6 NSWLR 595 (McHugh J).
116. (1963) 109 CLR 593.

before the High Court that even if the publications amounted to contempts, the only available procedure was by way of information and indictment. The argument rested on criticisms of the undelivered judgment of Justice Wilmot in *Almon's* case. The High Court rejected the argument and held that it is futile to seek to ascertain whether the present law rests on sound historical basis because it is so firmly established that Parliament alone can effect an alteration if such is necessary.[117] Justice Windeyer[118] quoted with approval the following passage from a US case[119] where Justice Frankfurter stated:

> [t]he fact that scholarship has shown that historical assumptions regarding the procedure for punishment of contempt of court were ill-founded, hardly wipes out a century and a half of the legislative and judicial history of federal law based on such assumptions.

12.62 The Federal Court recently dismissed a motion which sought a trial for contempt to be heard by a judge and jury. The court observed that in the absence of legislative reforms, it will not depart from principles which have already been clearly laid out.[120]

12.63 More recently, the High Court rejected the argument that proceedings for scandalising the Family Court are required by s 80[121] of the Constitution to be tried by a jury and not by a judge of the Family Court alone.[122] The majority[123] of the High Court

117. (1963) 109 CLR 593 at 601-602 (Kitto J, Taylor J, Menzies J and Owen J).
118. (1963) 109 CLR 593 at 614.
119. *Green v United Sates* 356 US 165 (1958) at 189.
120. *Australian Securities & Investments Commission v Matthews* [1999] FCA 706.
121. This section provides: "The trial on indictment of any offence against any law of the Commonwealth shall be by jury, and every such trial shall be held in the State where the offence was committed, and if the offence was not committed within any State the trial shall be held at such place or places as the Parliament describes."
122. *Re Colina; Ex parte Torney* (1999) 73 ALJR 1576.
123. Gleeson, McHugh, Gummow, Hayne and Callinan JJ. Justices Gleeson, Gummow and Hayne were of the view that s 80 of the *Constitution*

adhered to the current interpretation of s 80 which states that this section is not a guarantee of trial by jury for all serious offences against a law of the Commonwealth, but applies only where there is a trial by indictment, and leaves it to the Parliament to determine whether any particular offence shall be tried on indictment or summarily.[124] Chief Justice Gleeson and Justice Gummow confirmed, in their joint judgment, that summary procedure for contempt of court is now the usual procedure:

> Although the offence of contempt by scandalising the court was originally triable on indictment, since the latter part of the 18th century, courts have adopted the general practice of punishing all contempts by summary procedure, which largely

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did not apply to the case because there was neither an offence against the Commonwealth nor an indictment. Justice McHugh was of the opinion that there was an offence against the Commonwealth because s 35 of the *Family Law Act 1975* (Cth), which gives the Family Court the same power of contempt as that possessed by the High Court, creates an offence against the Commonwealth. However, he stated that because the alleged contemnor has not been charged on indictment, s 80 of the *Constitution* had no application. Justice Callinan did not express a view as to whether there was an offence against the Commonwealth but said that the long history of summary proceedings of contempt and the ruling in *Kingswell v The Queen* (1985) 159 CLR 264 that s 80 applies only if there is a trial on indictment brought him to the conclusion that a charge of contempt of the Family Court by scandalising is not required to be tried by jury. Justice Kirby was of the opinion that there was an offence against the Commonwealth but that there was no indictment. However, he dissented from the majority view and expressed agreement with Justice Deane's construction of s 80 in *Kingswell v The Queen* that the section should apply to any "serious" offence (those punishable by a maximum prison sentence of more than one year) against a Commonwealth law. He concluded that the contempt in that particular case is an offence against a law of the Commonwealth which s 80 of the *Constitution* requires to be had on indictment and thus by jury.

124. See *R v Archdall; Ex parte Corrigan* (1928) 41 CLR 128; *R v Federal Court of Bankruptcy; Ex parte Lowenstein* (1938) 59 CLR 556; *Zarb v Kennedy* (1968) 121 CLR 283; 59 CLR 55; *Li Chia Hsing v Rankin* (1978) 141 CLR 182; *Kingswell v The Queen* (1985) 159 CLR 264.

> superseded trial by jury. Thus, in 1987, the New South Wales of Appeal said that "the proper procedure by which to prosecute criminal contempt is now by summary proceedings, and not indictment". The practice had its origin in an undelivered draft judgment of Wilmot J in *R v Almon*. The soundness of the that opinion has been subjected to scholarly criticism, but the practice is well-established, and was so at the time of Federation. In 1900 the Queen's Bench Division, in *R v Gray*, held that the publication of a newspaper article which contained scurrilous abuse of a judge was a contempt punishable on summary process. It is not necessary for present purposes to decide whether Hutley AP was strictly correct when he said, in 1984, that an indictment in respect of contempt was for all practical purposes obsolete. It is sufficient to observe that summary procedure is, and has been for at least a century, the usual procedure.[125] [Citations omitted.]

Arguments for a criminal mode of trial for sub judice contempt

12.64 The alternative to the present mode of summary procedure in *sub judice* contempt is to treat the case as a normal criminal trial by prosecuting the accused by way of indictment so that the accused can have the benefit of a trial by jury. The main arguments in support of this procedure are: (a) speed in hearing the contempt case is not always essential; and (b) certain questions of primary fact are best dealt with by a jury.

Speedy response not always essential

12.65 The rationale for summary procedure for contempt cases is that it provides a speedy and efficient means of trying contempt which the ordinary criminal process could not do.[126] Its practical

125. *Re Colina; Ex parte Torney* (1999) 73 ALJR 1576 at para 12. See also, on this point, para 125-126 (Callinan J).

126. *R v Castro* (1873) LR 9 QB 219 at 233-234; *Attorney General (NSW) v Bailey* (1917) 17 SR (NSW) 170 at 181 (Cullen J); *John Fairfax & Sons Pty Ltd v McRae* (1955) 93 CLR 351 at 370-371 (Dixon, Fullagar, Kitto and Taylor JJ); *Attorney General (NSW) v Mundey*

justification lies in the fact that in general, "the undoubted possible recourse to indictment and criminal information is too dilatory and too inconvenient to afford any satisfactory remedy."[127] This is true especially in contempt committed in the face of the court where the contemnor has to be dealt with swiftly to prevent them from further disturbing the court proceedings. Witnesses who refuse to answer questions, persons in court who interrupt the proceedings by insulting the judge, shouting or making disturbance, persons in or out of court who threaten jurors, witnesses or counsel must be punished swiftly and deterred from further interfering with the trial.

12.66 The situation with a publication which may be in breach of the sub judice rule is, however, different. The institution of contempt proceedings should be made immediately after the publication of the material which is alleged to have a substantial risk of or a tendency to cause prejudice to the pending proceedings. This is to alert the persons responsible for the publication, as well as others who are inclined to publish analogous material, of the possible harm that the publication has created and to prevent further similar publications. However, in New South Wales, while the practice has been for the contempt proceedings to be initiated as soon as practicable, the hearing is adjourned until after the conclusion of the related criminal proceedings.[128] The reason for this is that the media publicity attaching to the contempt proceedings would add to the possibility of unfair prejudice in the criminal trial.[129] If the publication has in fact caused some harm to pending proceedings by creating prejudice in the minds of the

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[1972] 2 NSWLR 887 at 912; *Balogh v St Albans Crown Court* [1975] 1 QB 73 at 91.

127. *Ex parte Mijnssen; Re Truth & Sportsman Ltd* (1956) 73 WN (NSW) 263 at 264 (Street J) quoting *R v Davies* (1906) 1 KB 32 at 41 (Wills J).

128. *Attorney General v John Fairfax & Sons Ltd* (1985) 1 NSWLR 402. This is also the practice in the ACT (see *Re Whitlam; Ex parte Garland* (1976) 8 ACTR 17) but not in Victoria (see *Hinch v Attorney General (Vic)* [1987] VR 721).

129. *Attorney General v John Fairfax & Sons Ltd* (1985) 1 NSWLR 402 at 406 (Hope J).

jurors, the hearing of the contempt case could add to or emphasise such harm. The publicity which will ensue from the hearing of the contempt case will only draw more attention to the original publication which had the risk or tendency to create the prejudice.[130]

12.67 It therefore appears that courts in New South Wales consider it more important to ensure that no further harm is caused to related pending proceedings than to determine immediately whether the sub judice rule has been breached and swiftly punishing those responsible for any breach. If harm was indeed done by the publication, a quick finding that the persons responsible for the publication were guilty of contempt will not undo the harm. Consequently, it can no longer be argued that a summary process is necessary to ensure a speedy response to sub judice contempt.[131]

Certain issues better dealt with by jury

12.68 Juries are used to assess and determine the facts in certain proceedings, especially criminal trials, because they are seen as able to do this better than a judge. The members of a jury are able to bring to their task a range of backgrounds and experiences far broader than that possessed by a judge. A group which represents a cross-section of the community with varied experiences in life and of the behaviour of people is considered better able to understand and appraise human conduct than a single judge.[132] It has been claimed that juries are effective fact-finders because: (a) a jury brings to bear on its decision a diversity of experiences; (b) a jury deliberates as a group and therefore has the advantage of collective recall; and (c) the jury's deliberative process

130. For a discussion on how the publicity surrounding the contempt proceeding may affect the related criminal proceeding, see *R v Glennon* (1992) 173 CLR 592. For a critique on this case, see A Ardill, "The Right to a Fair Trial" (2000) 25 *Alternative Law Journal* 3.

131. Australian Law Reform Commission, *Contempt* (Report 35, 1987) at para 473.

132. Criminal Law and Penal Methods Reform Committee of South Australia, *Court Procedure and Evidence* (Third Report, 1975) at 84.

contributes to better fact-finding because each detail is explored and subjected to conscious scrutiny by the group.[133]

12.69 In sub judice contempt cases, there may be issues which may be best settled by a jury. One which is usually the main issue to be resolved is whether, according to the predominant test for liability for sub judice contempt, the publication has a real and definite tendency to prejudice or embarrass particular proceedings.[134] The alternative to this so-called tendency test is the substantial risk test, which is preferred by the Commission.[135] According to this test, a publication would amount to contempt if it is shown to have a substantial risk of interference with particular legal proceedings.[136] The tendency or substantial risk is assessed objectively at the time of the publication[137] and in the light of the nature of the publication and of all relevant surrounding circumstances.[138] The whole matter must be considered, and its tendency to prejudice or embarrass must be considered as a whole.[139] The test for determining the meaning of the words alleged to constitute contempt is the effect upon an ordinary

133. Canada, Law Reform Commission, *The Jury in Criminal Trials* (Working Paper 27, 1980) at 6.
134. See para 4.3 and accompanying notes.
135. See para 4.29-4.32, Proposal 3.
136. See para 4.10 and accompanying notes.
137. *Ex parte Auld; Re Consolidated Press Ltd* (1936) 36 SR (NSW) 596 at 598-599 (Jordan J); *R v Australian Broadcasting Corp* [1983] Tas R 161 at 168 (Neasey J); *Attorney General (NSW) v John Fairfax & Sons Ltd* (1985) 6 NSWLR 695 at 711 (McHugh J); *Director of Public Prosecutions (Cth) v Wran* (1987) 7 NSWLR 616 at 626, 628.
138. *John Fairfax & Sons Pty Ltd v McRae* (1955) 93 CLR 351 at 371-372 (Dixon J, Fullagar, Kitto and Taylor JJ), at 375 (McTiernan J); *Attorney General (NSW) v John Fairfax & Sons Ltd* (1985) 6 NSWLR 695 at 697 (Glass J), at 709-712 (McHugh J); *Hinch v Attorney General (Vic)* (1987) 164 CLR 15 at 47 (Deane J); *Duff v The Queen* (1979) 28 ALR 663 at 677-678; *Waterhouse v Australian Broadcasting Corp* (1986) 6 NSWLR 733 at 735-736 (Glass J); *Director of Public Prosecutions (Cth) v Wran* (1987) 7 NSWLR 616 at 626-628.
139. *Packer v Peacock* (1912) 13 CLR 577 at 587; *John Fairfax & Sons Pty Ltd v McRae* (1955) 93 CLR 351 at 372 (Dixon, Fullagar, Kitto and Taylor JJ); *R v Crew* [1971] VR 878 at 879.

reasonable member of the community.[140] Because each juror is chosen precisely because he or she represents the views of the ordinary members of the community, it is arguable that a jury is in a better position than a judge to apply the required test and determine whether the publication, in light of all the circumstances, is likely to have a prejudicial effect on jurors hearing the case to which the publication relates to. It is significant that in the law of defamation, where the meaning of the publication is also tested by the ordinary member of the community standard, the question of whether a publication did in fact convey the meaning the plaintiff contends and whether the publication was defamatory of the plaintiff are questions of fact for the jury.[141] It may be argued that there is a greater need to use a jury to apply a similar test to a parallel issue in a sub judice contempt case because of the criminal sanction it attracts.

12.70 Another issue where jury input may be desirable concerns the element of fault. Although it is settled law that intention to interfere with the administration of justice is not an essential ingredient of liability under the sub judice rule,[142] it has likewise been ruled that intention may be relevant to liability and sentence.[143] There have, for example, been dicta which suggest that it may be open to persons responsible for an offending publication to escape liability by showing that neither they, nor any person for whose conduct they were vicariously responsible, had any knowledge or any reason to know of the existence of the

140. *R v Pacini* [1956] VLR 544 at 549 (Lowe J); *Director of Public Prosecutions (Cth) v Wran* (1987) 7 NSWLR 616 at 626; *Attorney General (NSW) v John Fairfax & Sons Ltd* (1985) 6 NSWLR 695 at 702 (McHugh J); *R v Pearce* (1992) 7 WAR 395 at 423 (Malcolm J).
141. *Jones v Skelton* [1963] SR (NSW) 644 at 651 (Lord Morris PC); *Gardiner v John Fairfax & Sons Pty Ltd* (1942) 42 SR (NSW) 171 at 172; *Consolidated Trust Co Ltd v Browne* (1948) 49 SR (NSW) 86 at 88 (Jordan J); *Stubs Ltd v Russell* [1913] AC 386 at 393 (Lord Kinnear); *Lewis v Daily Telegraph Ltd* [1964] AC 234 at 281 (Lord Devlin). See also *Defamation Act 1974* (NSW) s 7A(3)(b).
142. See para 5.1 and accompanying notes.
143. See para 5.4 and accompanying notes.

legal proceedings allegedly prejudiced.[144] Nevertheless, as discussed earlier, the law as it stands is not clear as to the exact role of fault in sub judice contempt and the Commission proposes legislative reform to make it clear that fault should be an element of liability.[145] It proposes, for example under Proposal 7, a defence that the person 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. It would be appropriate for a jury to assess the type of evidence which would be raised and tested in relation to the proposed defence.

Arguments for retaining summary procedure for sub judice contempt

12.71 Although it is universally recognised that contempt is criminal in nature, the policy justification for treating it as an offence *sui generis* lies in its nature.[146] It is the duty of judges to see that justice is administered in the courts. The imposition of this duty carries with it the power to act in protection of justice, if its fair and effective administration is threatened. Such power must encompass the authority to try summarily those accused of interfering in any manner with the administration of justice. It is therefore the peculiar character of the offence – that it strikes at the foundation of the administration of justice – which commends the summary mode of dealing with it.

12.72 It may also be argued that jury trial in sub judice cases is not appropriate because in many cases, the primary facts – the fact of publication and the pending nature of the proceedings

144. See *Ex parte Bread Manufacturers Ltd; Re Truth & Sportsman Ltd* (1937) 37 SR (NSW) 242 at 250-251 (Jordan J) (Davidson J concurring), at 254 (Bavin J); *John Fairfax & Sons Pty Ltd v McRae* (1955) 93 CLR 351 at 359 (Dixon, Fullagar, Kitto and Taylor JJ); *R v David Syme & Co Ltd* [1982] VR 173 at 179 (Marks J).
145. See Chapter 5, especially Proposals 7 and 8.
146. See *Registrar of the Court of Appeal v Willesee* [1984] 2 NSWLR 378 at 382 (Samuels J).

allegedly prejudiced – are either undisputed or are matters which the judge can very easily determine by himself or herself. Moreover, it is arguable that what constitutes prejudicial publication – publication which has a tendency to or a substantial risk of prejudice in relation to pending proceedings – has been the subject of a considerable amount of judicial interpretation and has therefore acquired a technical meaning more intelligible to judges than to jurors. Furthermore, sub judice contempt cases require a balancing of certain principles such as freedom of expression, open justice, the right to fair trial and the preservation of public confidence in the administration of justice. These are legal notions better understood by judges who are also, it may be argued, in a better position to discharge the function of achieving the right balance among these competing principles.

12.73 Some of the general criticisms of the jury system may also be used as arguments for the retention of the current procedure. First, the jury is an expensive method of trial. Not only must the twelve jurors be paid but so must the others who form the pool from which the jury is selected. Court personnel are employed to administer the jury system at all stages. Second, there exists the risk of erroneous or perverse verdicts by jury as a result of bias by one or some of the jurors or by ignorance or lack of competence by any of them. Thirdly, such a system will not contribute to the attainment of certainty and predictability in this area of law because juries give "global" verdicts without reasons. In contrast, the reasons given by judges in their judgments as to why a publication is contemptuous or not serve to guide all those who might have an interest in this area of law, including the media, parties to pending proceedings who may be subjected to media publicity, lawyers, prosecutors and other judges.

12.74 Finally, there is the argument of long-standing practice. There is no recorded case this century in New South Wales of a contempt case being tried other wise than by summary procedure. It has been used in contempt cases for such a long time now that practitioners have become accustomed to summary procedure in contempt cases without any practical difficulties.

Recommendations of other law reform bodies

12.75 In the Phillimore Report, it was stated that the "reason and justification for the use of the summary procedure is the urgency with which the conduct may need to be dealt" and it was considered that "as matter of principle the contempt jurisdiction should be invoked only where: (a) the offending act does not fall within the definition of any other offence; or (b) where urgency or practical necessity require that the matter be dealt with summarily. [T]hese principles should govern the use of this remedy."[147] However, the Committee recommended that no change be made to the procedure for contempt.[148]

12.76 The ALRC recommended that alleged breaches of the sub judice rule, like all other forms of contempt, should be referred to the ordinary criminal courts. Sub judice contempts should be indictable offences triable summarily with an option by either the prosecutor or the accused to insist on a trial by jury. If neither party wishes this, the matter should go before a magistrate for summary trial, subject to his or her being satisfied that this was appropriate in the particular case.[149]

12.77 The Canadian Law Reform Commission recommended that everyone who commits conduct which amounts to sub judice contempt would be guilty of an indictable offence but that a superior court of criminal jurisdiction sitting without a jury shall have exclusive jurisdiction to try this offence. This view was taken because "of the desirability for expeditious judicial intervention in this area."[150]

147. United Kingdom, Committee on Contempt of Court, *Report of the Committee on Contempt of Court* (HMSO, London, Cmnd 5794, 1974) at para 21.
148. United Kingdom, Committee on Contempt of Court, *Report of the Committee on Contempt of Court* (HMSO, London, Cmnd 5794, 1974) at para 183.
149. Australian Law Reform Commission, *Contempt* (Report 35, 1987) at para 476.
150. Canada, Law Reform Commission, *Contempt of Court* (Report 17, 1982) at 32.

12.78 The Irish Law Reform Commission recommended the retention of summary procedure for all forms of criminal contempt[151] in accordance with the decision in *State (DPP) v Walsh,*[152] where the Supreme Court of Ireland held that courts have jurisdiction to try charges of criminal contempt in the absence of a jury.
The majority in that case appears to have relied on the fact that there were no disputed issues of fact which required the services of a jury for determination.[153] The question still remained as to whether trial by jury would be appropriate had there been live and real issues of fact. The Irish Law Reform Commission stated that it was up to the Supreme Court to clarify the problems left unsolved by the decision. In any case, it did not see any practical difficulties in the summary procedure for contempt.[154] Moreover, it noted the danger of perverse and unreviewable acquittals inherent in the jury system, a risk it was not prepared to extend to contempt cases. [155]

The Commission's tentative view

12.79 The Commission's tentative view is that the summary procedure for sub judice contempt cases should be retained. First, the Commission is not aware of practical difficulties with the existing procedure. By now, the practice is well-established having been the only known procedure for contempt in New South Wales, at least in the last century. Consequently, judges, legal practitioners and parties are familiar with the summary procedure for contempt. There appear to be no real pressures for change. Secondly, the Commission is of the view that the special features

151. Ireland, Law Reform Commission, *Contempt of Court* (Report 47, 1994) at para 310-312; (Consultation Paper, 1991) at 417-419.
152. [1981] IR 412.
153. [1981] IR 412 at 439, 441 (Henchy J).
154. Ireland, Law Reform Commission, *Contempt of Court* (Report 47, 1994) at para 312.
155. Ireland, Law Reform Commission, *Contempt of Court* (Consultation Paper, 1991) at 417-418.

of the jury system which makes it effective for purposes of fact-finding may not be essential in sub judice cases because many of the primary facts – the fact of publication and the pending nature of the proceedings allegedly prejudiced – are usually non-controversial. Thirdly, the determination of the main issue of whether or not the publication has a substantial risk of prejudice in relation to pending proceedings has acquired a technical meaning more intelligible to judges than to jurors. Finally, sub judice contempt cases require a balancing of certain legal principles, such as freedom of expression, open justice and the right to fair trial. These are arguably better understood by judges.

APPEAL PROCEEDINGS

12.80 The legislation transferring the jurisdiction to hear proceedings for most forms of contempt from the Court of Appeal to the Common Law Division of the Supreme Court also conferred a right of appeal to the Court of Appeal from a judgment or order of the Supreme Court in a Division in proceedings that relate to contempt.[156] Previously, no such right existed. A person convicted of contempt had to seek special leave to the High Court for a review of the judgment or order of the Court of Appeal.

12.81 Consistent with the common law principle that there is no right of appeal from an acquittal in criminal proceedings, the legislation which gives a right of appeal from a judgment or order relating to contempt provides that it "does not confer on any person a right to appeal from a judgment or order of the [Supreme] Court in a Division in any proceedings that relate to criminal contempt, being a judgment or order by which the person charged with contempt is found not to have committed contempt.[157] However, the law allows the Attorney General to submit to the Court of Appeal any question of law arising from or in connection with contempt proceedings in which the person charged with

156. The *Courts Legislation Amendment Act 1996* (NSW) inserted s 101(4) to the *Supreme Court Act 1970* (NSW).
157. *Supreme Court Act 1970* (NSW) s 101(5).

contempt is acquitted.[158] This reflects the right of the Crown to seek a review of a question of law in an acquittal under s 5A(2) of the *Criminal Appeal Act 1912* (NSW). The determination of the Court of Appeal of the question submitted does not in any way affect or invalidate any finding or decision in the contempt proceedings.[159] The alleged contemnor is entitled to be heard on the question submitted.[160] The reasonable costs of legal representation of the alleged contemnor in these proceedings are to be paid by the Crown.[161] The law contains mechanisms to shield the alleged contemnor from further public scrutiny[162] by providing that the proceedings are to be held in camera[163] and prohibiting the publication of any report of submissions made in connection with these proceedings and any report of these proceedings so as to disclose the name or identity of the alleged contemnor.[164]

12.82 The Commission is not aware of any practical problems arising from the recent changes to the law with respect to appeals from judgments or orders relating to contempt. However, the Commission seeks submissions on whether the jurisdiction to hear appeals should lie with the Court of Appeal or the Court of Criminal Appeal.

12.83 It would seem that because the courts have consistently recognised that a conviction for contempt is a conviction for a criminal offence,[165] it must follow that appeals from such

158. *Supreme Court Act 1970* (NSW) s 101A(1).
159. *Supreme Court Act 1970* (NSW) s 101A(4).
160. *Supreme Court Act 1970* (NSW) s 101A(5).
161. *Supreme Court Act 1970* (NSW) s 101A(6).
162. See New South Wales, *Parliamentary Debates (Hansard)* Legislative Council, 17 October 1996 at 4969.
163. *Supreme Court Act 1970* (NSW) s 101A(7). The validity of the provisions on camera proceedings are currently being challenged before the NSW Court of Appeal.
164. *Supreme Court Act 1970* (NSW) s 101A(8).
165. See *Registrar of the Court of Appeal v Maniam (No 2)* (1992) 26 NSWLR 309 at 314 (Kirby J); *Young v Registrar, Court of Appeal* (1993) 32 NSWLR 262 at 277 (Kirby J); *Attorney General (NSW) v John Fairfax Publications Pty Ltd* [1999] NSWSC 318 at para 20 (Barr J).

convictions should be assigned to the Court of Criminal Appeal. It can be contended that the Court of Criminal Appeal would be in a better position to handle such cases because of a number of facilities provided by the *Criminal Appeal Act 1912* (NSW) such as the power to grant a new trial,[166] the power to release the appellant on bail pending the appeal,[167] and the entitlement, notwithstanding an error by the trial judge, to dismiss the appeal if it considered that "no miscarriage of justice has actually occurred".[168] The Court of Criminal Appeal's greater experience in the matter of sentencing for criminal offences may also give it some advantage where sentencing is an issue in the appeal.

12.84 The Commission's tentative view is that these considerations are compelling. It acknowledges however, that the Court of Appeal's long experience in hearing contempt proceedings, albeit at the trial stage rather than on appeal, has given it expertise on the law of contempt, including the sentencing of those guilty of contempt.

PROPOSAL 25

The hearing and decision of an appeal from a conviction for criminal contempt should be assigned to the Court of Criminal Appeal.

166. *Criminal Appeal Act 1912* (NSW) s 8.
167. *Criminal Appeal Act 1912* (NSW) s 18.
168. *Criminal Appeal Act 1912* (NSW) s 6(1).

13. Penalties and remedies

- Overview
- Fines
- Imprisonment
- Alternative sanctions
- Sequestration

OVERVIEW

13.1 This chapter is principally concerned with sanctions that may be imposed after a person is convicted of contempt of court. The main penalties for contempt of court are fines and imprisonment. However, there are no upper limits for these penalties. Theoretically, a sentencing judge may impose any amount of fine and any term of imprisonment as there is no legislation nor common law rule which puts a cap on the punishment for contempt. Additionally, the chapter discusses whether imprisonment should continue to be used as a sanction for contempt and whether legislation should provide for alternatives to a custodial sentence. Finally, the chapter looks at the remedies of sequestration, injunction and civil actions for damages as they relate to sub judice contempt.

13.2 As with the previous chapter, the proposals in this chapter are written in a manner that would cover not only sub judice contempt but criminal contempts more generally. Where a proposal on procedure and sanctions may apply to other forms of criminal contempt, the Commission has decided to extend the proposals to criminal contempts generally. This will prevent the absurdity of having special rules for sub judice contempt, only where such special treatment is not warranted and may lead to confusion.

FINES

13.3 A fine is the usual penalty courts impose in sub judice contempt cases. The court may also impose a sentence of imprisonment, in addition to or instead of a fine, when the contemnor is not a corporation,[1] although the penalty of imprisonment is rarely used in sub judice contempt. It has been observed that with respect to a body corporate which has been found guilty of contempt, such as a media proprietor, a fine is the

1. *Supreme Court Rules 1970* (NSW) Pt 55 r 13(1) provides "Where the contemnor is not a corporation, the Supreme Court may punish contempt by a fine or imprisonment or both".

appropriate penalty.[2] Nevertheless, courts may take into account the fact that the fine imposed upon a corporation in reality punishes the shareholders rather than those responsible for the contempt.[3]

13.4 Fines have been imposed on newspaper publishers,[4] radio[5] and television licensees,[6] speakers at public meetings,[7] journalists[8] and media interviewees.[9]

13.5 The Supreme Court may make an order for the imposition of a fine on terms, including a suspension of such fine.[10]

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2. *Registrar of the Court of Appeal v John Fairfax Group Pty Ltd* (NSW, Court of Appeal, No 40478/92, 21 April 1993, unreported) at 5 (Mahoney J).
3. *R v Wattle Gully Gold Mines NL* [1980] VR 622; *Hinch v Attorney General* [1987] VR 721 at 732 (Young CJ).
4. *R v West Australian Newspapers Ltd; Ex parte The Minister for Justice* (1958) 60 WALR 108; *R v Regal Press Pty Ltd* [1972] VR 67; *R v Scott and Downland Publications Ltd* [1972] VR 663; *Attorney General (NSW) v John Fairfax & Sons Ltd* [1980] 1 NSWLR 362; *Attorney General (NSW) v Mirror Newspapers Ltd* [1980] 1 NSWLR 374; *R v David Syme & Co Ltd* [1982] VR 173; *Director of Public Prosecutions (Cth) v Wran* (1987) 7 NSWLR 616; *Director of Public Prosecutions (Cth) v John Fairfax & Sons Ltd* (1987) 8 NSWLR 732.
5. *R v Pacini* [1956] VLR 544; *Hinch v Attorney General* [1987] VR 721; *Attorney General (NSW) v Radio 2UE Sydney Pty Ltd* (NSW, Court of Appeal, No 40236/96, 11 March 1998, unreported).
6. *Attorney General (NSW) v Willesse* [1980] 2 NSWLR 143; *Director of Public Prosecution (Cth) v United Telecasters Sydney Ltd (in liquidation)* (1992) 7 BR 364; *R v Australian Broadcasting Corp* [1983] TasR 161; *Director of Public Prosecutions (Cth) v Australian Broadcasting Corp* (1987) 7 NSWLR 588.
7. *Re Brookfield* (1918) 18 SR (NSW) 479.
8. *Registrar of Court of Appeal v John Fairfax Group Pty Ltd* (NSW, Court of Appeal, No 40478/92, 21 April 1993, unreported).
9. *Director of Public Prosecutions (Cth) v Wran* (1987) 7 NSWLR 616.
10. *Supreme Court Rules 1970* (NSW) Pt 55 r 13(3). For illustrations of the imposition of the penalty of fine on terms, see *Australasian Meat Industry Employees' Union v Mudginberri Station Pty Ltd* (1986) 161 CLR 98; *Registrar, Court of Appeal v Maniam (No 2)* (1992) 26 NSWLR 309.

13.6 In determining the appropriate fine to be imposed upon a person or organisation found guilty of contempt by publication through breach of the sub judice principle, the matters which the court may take into account include the following:

(1) ***Purpose of punishment.*** Deterrence is the principal justification for punishment of sub judice contempt.[11] In determining the appropriate penalty, courts are careful to ensure that it would have the effect of deterring not just the offender but others as well from committing a similar act.

(2) ***Intention.*** An intention to interfere with the administration of justice is acknowledged to be relevant to liability for sub judice contempt, though it is not a pre-requisite. It is also relevant to penalty.[12] Where the contemnor intended to influence those who heard his or her public statements, the court will fix a penalty which will reflect the seriousness of the act.[13] On the other hand, the absence of any intention to prejudice may be relevant in determining whether any penalty should be imposed, and if so, what penalty is appropriate.[14]

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11. *Director of Public Prosecutions (Cth) v United Telecasters Sydney Ltd (in liquidation*) (1992) 7 BR 364; *Attorney General (NSW) v Nationwide News Pty Ltd* (NSW, Court of Appeal, No 40141/90, 11 October 1990, unreported); *Hinch v Attorney General (Vic)* [1987] VR 721 at 731 (Young J); *Attorney General (NSW) v United Telecasters Sydney Ltd* (NSW, Court of Appeal, No 40139/90, 11 October 1990, unreported); *Attorney General (NSW) v TCN Channel Nine Pty Ltd* (1990) 5 BR 419; *Registrar of Court of Appeal v John Fairfax Group Pty Ltd* (NSW, Court of Appeal, No 40478/92, 21 April 1993, unreported).
12. *Director of Public Prosecutions (Cth) v Wran* (1987) 7 NSWLR 616; *Attorney General (NSW) v Dean* (1990) 20 NSWLR 650.
13. *Director of Public Prosecutions (Cth) v Wran* (1987) 7 NSWLR 616 at 640-641.
14. *R v David Syme & Co Ltd* [1982] VR 173 at 178 (Marks J); *Attorney General (NSW) v Radio 2UE Sydney Pty Ltd* (NSW, Court of Appeal, No 40236/96, 11 March 1998, unreported).

(3) ***Effects of the prejudicial publication.*** The potential or actual effects of the prejudicial publication are relevant to the question of penalty. The discharge of the jury, for example, although not determinative of liability for sub judice contempt,[15] has been held to be relevant to the penalty which follows a finding of guilt.[16]

(4) ***Existence of a system to prevent prejudicial publications.*** The absence or inadequacy of procedures in a media organisation to prevent the publication of prejudicial publication may aggravate the penalty.[17] The existence of such a system, as well as the adoption of more rigorous rules and procedures after the contempt proceedings were commenced to avoid a repetition, may induce the court to be lenient in fixing a penalty.[18]

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15. In the following cases, the jury trial was aborted as a result of the publicity but the contempt proceedings failed: *Registrar, Court of Appeal v Willesee* (1985) 3 NSWLR 650; *R v Sun Newspapers Pty Ltd* (1992) 58 A Crim R 281; *Attorney General (NSW) v Television and Telecasters (Sydney) Pty Ltd* (NSW, Supreme Court, No 11752/97, 10 September 1998, unreported). See also M 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.
16. *Attorney General (NSW) v John Fairfax & Sons Ltd* (NSW, Court of Appeal, No 371/87, 21 April 1988, unreported); *R v Thompson* [1989] WAR 219 at 225 (Wallace J); *Director of Public Prosecutions (Cth) v United Telecasters Sydney Ltd (in liquidation*) (1992) 7 BR 364. Contrast *Hinch v Attorney General (Vic)* [1987] VR 721 at 731 (Young CJ), at 748 (Kaye J).
17. *R v David Syme & Co Ltd* [1982] VR 173 at 182 (Marks J); *Harkianakis v Skalkos* (NSW, Court of Appeal, No 40514/96, 15 October 1997, unreported) at 6-9 (Mason J); *Attorney General (NSW) v Radio 2UE Sydney Pty Ltd* (NSW, Court of Appeal, No 40236/96, 11 March 1998, unreported) at 22-26 (Priestly J), at 6-11 (Powell J).
18. See, for example, *Director of Public Prosecutions (Cth) v United Telecasters Sydney Ltd (in liquidation)* (1992) 7 BR 364.

(5) ***Legal Advice.*** A media organisation will often have to rely on legal advice on whether or not to publish certain material. A decision not take legal advice when the nature of the publication makes it obvious that it would constitute serious contempt could be considered an aggravating circumstance.[19] On the other hand, if legal advice was taken, the nature of that advice is highly relevant. If the advice was to the effect that it was "safe" to publish the material, the court will consider this a mitigating factor.[20] However, if the advice was not to publish or that there was a risk in publishing, a subsequent decision to publish in the face of that advice may be seen as an exacerbating factor.[21]

(6) ***Size of the business and financial circumstances of the defendant.*** The size of the contemnor's business is relevant not only to the objective seriousness of the offence but also to the size of the financial penalty to be imposed in aid of deterrence.[22] The court is entitled to take into account the fact that the business of the contemnor is one of large size and substantial assets and that a fine that might be appropriate for an individual may be inadequate for an organisation of such size and assets.[23] However, it has been said that it is not the function of the court to impose a penalty that would put a company out of business or produce liquidation.[24] Moreover, evidence of dire financial

19. *Director of Public Prosecutions (Cth) v Wran* (1986) 7 NSWLR 616 at 642.
20. *R v Australian Broadcasting Corp* [1983] TasR 161 at 178-180 (Neasey J); *Director of Public Prosecutions (Cth) v United Telecasters Sydney Ltd (in liquidation*) (1992) 7 BR 364 at 374 (Kirby J).
21. *Attorney General (NSW) v Mirror Newspapers Ltd* [1980] 1 NSWLR 374 at 390; *Attorney General (NSW) v Time Inc Magazine Co Pty Ltd* (NSW, Court of Appeal, No 40331/94, 21 October 1994, unreported).
22. *Attorney General (NSW) v TCN Channel Nine Pty Ltd* (1990) 5 BR 419.
23. *Registrar of the Court of Appeal v John Fairfax Group Pty Ltd* (NSW, Court of Appeal, No 40478/92, 21 April 1993, unreported).
24. *Attorney General v Mayas Pty Ltd* (NSW, Court of Appeal, No 174/83, 28 March 1984, unreported).

circumstances of the corporate wrongdoer could possibly justify leniency.[25]

(7) ***Plea of guilty.*** The fact that the contemnor acknowledged the contempt and thereby spared the Attorney General and the community the additional cost of a trial mitigates the seriousness of the contempt.[26] However, this consideration becomes less significant if the concession was not made until shortly before the hearing was fixed to commence.[27] Conversely, a plea of not guilty by the accused may aggravate the penalty because "this necessarily diminishes whatever weight manifestations of contrition might have had in his favour."[28]

(8) ***Apology.*** The offer of an apology and an undertaking not to repeat the offence will mitigate the offence.[29] The apology must manifest contrition on the part of the contemnor; it must be sincere and not given grudgingly.[30] An expression of contrition may be rejected as a mitigating circumstance if the accused pleaded not guilty.[31]

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25. *Director of Public Prosecutions (Cth) v United Telecasters Sydney Ltd* (NSW, Court of Appeal, No 40139/90, 11 October 1990, unreported); *Director of Public Prosecutions (Cth) v United Telecasters Sydney Ltd (in liquidation*) (1992) 7 BR 364 at 375 (Kirby J).
26. *Attorney General (NSW) v TCN Channel Nine Pty Ltd* (1990) 5 BR 419.
27. *Director of Public Prosecutions (Cth) v United Telecasters Sydney Ltd* (NSW, Court of Appeal, No 40139/90, 11 October 1990, unreported).
28. *Director of Public Prosecutions (Cth) v Australian Broadcasting Corp* (1987) 7 NSWLR 588 at 615.
29. *Attorney General (NSW) v Macquarie Publications Pty Ltd* (1988) 40 A Crim R 405 at 410 (Kirby J); *Attorney General (NSW) v Time Inc Magazine Co Pty Ltd* (NSW, Court of Appeal, No 40331/94, 21 October 1994, unreported).
30. *Attorney General* (NSW) *v Mirror Newspapers* (1980) 1 NSWLR 362 at 391.
31. *Attorney General (NSW) v Radio 2UE Sydney Pty Ltd* (NSW, Court of Appeal, No 40236/96, 11 March 1998, unreported).

(9) ***Prior record.*** As with any criminal offence, the contemnor's prior record is relevant, particularly insofar as any previous convictions for contempt are concerned. A good record, such as no prior convictions, will invariably be taken into account in the contemnor's favour,[32] while a bad record may show that the offence was not aberrant. In one case, the fact that it was the first offence of the media organisation was held to be a mitigating factor.[33] When the same media organisation was convicted a second time, the court, after noting the number of years which have elapsed since it was first licensed and the thousands of hours of broadcasts it must have made during that time, considered that two convictions for sub judice contempt was a good record, and accordingly took this factor into account as a mitigating circumstance.[34]

Creation and maintenance of official records of contempt convictions

13.7 Information about an offender's record of criminal conviction is regularly used by courts in sentencing. The Director of Public Prosecutions relies on the Police Service which maintains a Criminal Histories System on offenders who have been dealt with by a court following an arrest.[35] The Department of Corrective Services and the Department of Juvenile Justice also maintain information about criminal histories but only in a limited way. The Department of Corrective Services holds information, in its Offender Records System, about offenders sentenced to prison, while

32. *Director of Public Prosecutions (Cth) v Australian Broadcasting Corp* (1987) 7 NSWLR 588 at 615; *Hinch v Attorney General* [1987] VR 721 at 752 (Kaye J); *Attorney General (NSW) v Macquarie Publications Pty Ltd* (1988) 40 A Crim R 405 at 410 (Kirby J); *Attorney General (NSW) v Time Inc Magazine Co Pty Ltd* (NSW, Court of Appeal, No 40331/94, 21 October 1994, unreported).
33. *Director of Public Prosecutions (Cth) v United Telecasters Sydney Ltd* (NSW, Court of Appeal, No 40139/90, 11 October 1990, unreported).
34. *Director of Public Prosecutions (Cth) v United Telecasters Sydney Ltd (in liquidation*) (1992) 7 BR 364 at 376 (Kirby J).
35. New South Wales, Attorney General's Department, *Criminal Records Act 1991* (Discussion Paper, 1998) at 6. See also Royal Commission into the New South Wales Police Service, *Final Report* (1997) Vol 2 at para 7.182-7.184.

the Department of Corrective Services maintains records, in its Juvenile Index System, of court outcomes concerning youth offenders.[36]

13.8 There is no statutory basis for the Police Service, the Department of Corrective Services and the Department of Juvenile Justice to create and maintain records of criminal histories. The Attorney General's Department, in a Discussion Paper published in 1998 on the *Criminal Records Act 1991* (NSW),[37] proposed that legislation be introduced to recognise the right of these agencies to create and maintain criminal histories.[38] It was further recommended that the proposed legislation should cover the use of and access to criminal history information.[39] The proposals have not yet been implemented by the Government.

13.9 At present, there is no formal central registry of court outcomes in contempt prosecutions. The Crown Solicitor's Office relies on its own files to obtain information on prior convictions for contempt, for the purpose of assisting the sentencing court by identifying any relevant previous convictions.[40]

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36. New South Wales, Attorney General's Department, *Criminal Records Act 1991* (Discussion Paper, 1998) at 6.
37. This Act limits the effect of a person's conviction for a relatively minor offence (sentences for up to six months imprisonment) if the person completes a crime-free period (ten years, except in the case of an order of the Children's Court where the period is three years). On completion of the period, the conviction is regarded as spent. If a conviction of a person is spent, (a) the person is not required to disclose information about the spent conviction, (b) a question concerning the person's criminal history is taken to refer only to convictions which are not spent, and (c) in the application to the person of provision of an Act, a reference in the provision to a conviction or the person's character or fitness is not to be interpreted to include a spent conviction.
38. New South Wales, Attorney General's Department, *Criminal Records Act 1991* (Discussion Paper, 1998) at 7.
39. New South Wales, Attorney General's Department, *Criminal Records Act 1991* (Discussion Paper, 1998) at 7.
40. D Norris (Senior Solicitor, Crown Solicitor's Office), *Letter to the Executive Director of the NSW Law Reform Commission* (29 October 1999) at 2.

13.10 The Commission considers that there is a need to establish a formal system that would allow the prosecution and courts to determine accurately of an accused's past conduct involving contempt of court. A formal registry is desirable to facilitate a closer scrutiny of the type of information created and maintained. It would also promote consistency in the information recorded. The Commission considers it important that the use of such information be limited to sentencing and bail proceedings.

13.11 As to which agency should be invested with the authority to maintain the registry, the basic principle with respect to offences generally is that authorities involved with prosecution, specifically the police, maintain records of prior convictions and the Director of Public Prosecutions brings those records to the court for sentencing purposes. If they do not provide evidence of prior convictions, the court proceeds on the basis that there are none. The Commission is of the view that the same approach should apply to criminal contempt: that is, the Attorney General, as the authority responsible for bringing prosecutions, should maintain and bring forward evidence of relevant past convictions.

PROPOSAL 26

The Attorney General should create and maintain a registry of court outcomes of criminal contempt proceedings. The information in the registry should be used only for sentencing purposes.

Establishing upper limits for fines

13.12 The main issue with respect to fines as a form of penalty in sub judice contempt cases is whether or not there is a need to provide a statutory maximum penalty.

13.13 At common law there is no upper limit on the fine that can be imposed. It has, however, been suggested that this rule is not absolute because the safeguards expressed in the Tenth Article of the *Bill of Rights 1688* (Eng) against the imposition of cruel or

unusual punishment or "excessive fines" operate to limit the court's powers in relation to the imposition of penalties for contempt.[41]

13.14 The Phillimore Committee examined the issue of upper limits. It took the view that courts must be able to impose a penalty which will be an effective punishment to an individual or organisation with substantial assets and also operate as a deterrent to others. The Committee noted that there must be scope for a heavier penalty for repeated offences. It recommended that there should continue to be no limit upon fines which may be imposed for contempt by the superior courts. The *Contempt of Court Act 1981* (UK) followed this recommendation, imposing no upper limit upon the amount of a fine that can be ordered by a superior court.

13.15 The Australian Law Reform Commission ("ALRC"), in its Report on Contempt,[42] recognised the strong deterrent effect of the absence of an upper limit for fines as it prevents a media organisation from engaging in a "cost-benefit exercise" in the publication of prejudicial material. It also noted the desirability of giving courts flexibility in fixing the amount of the fine including a power to take into consideration the contemnor's financial resources. Nevertheless, it recommended the adoption of an upper limit (without specifying an amount) as it considered that unlimited penalties are not a desirable feature of the criminal law.

13.16 The 1991 Position Paper published by the Federal Attorney General's Department on the ALRC's Report on Contempt supported the recommendation on the establishment on upper

41. *Registrar v Maniam (No 2)* (1992) 26 NSWLR 309 at 314 (Kirby J) citing *Smith v The Queen* (1991) 25 NSWLR 1. Compare with *La Trobe University v Robinson and Pola* [1973] VR 682 where the Supreme Court of Victoria held that the *Bill of Rights 1688* (Eng) did not take away the right to issue a writ of attachment in respect of a contempt of court, and indefiniteness of detention is inherent in the use of that writ.
42. Australia, Law Reform Commission, *Contempt* (Report 35, 1987) at para 482.

limits on sanctions.[43] The draft bill prepared by the Federal Government in 1993, but not introduced into Parliament, specified that the maximum amount of a fine which may be imposed on the offences contained in the bill must be 60 penalty units for a natural person and 300 penalty units for a body corporate.

The Commission's tentative view

13.17 The Commission agrees with the recommendation of the ALRC that there should be an upper limit on fines that can be imposed. Sub judice contempt should be in line with most other offences for which penalties have ceilings. Establishing a maximum amount for the fine which may be imposed ensures certainty for those most likely to have to deal with the principles of sub judice, such as media practitioners, about the possible penalty, if such principles are breached.

13.18 The Commission has not formed a position as to a specific maximum fine for sub judice contempt and it welcomes submissions on this matter. In setting the maximum fine for sub judice contempt, it is important to remember that the primary function of a penalty for sub judice contempt is to deter the accused and others from violating the sub judice rule. To achieve this purpose, the maximum penalty should not be too low as to deprive courts of the flexibility required to impose a fine that is appropriate according to the circumstances. The maximum fine should be sufficient to deter corporate entities from flouting the sub judice rule.

13.19 In sub judice contempt convictions in New South Wales between 1980 and 1999, the highest fine which a New South Wales court has imposed on a corporate offender has been $200,000.[44] This amount has been imposed in four cases in the last nineteen

43. Australian Attorney General's Department, *The Law of Contempt* (Position Paper, 1991) at para 56-57.
44. See Appendix C. For a comparison of penalties imposed in the different Australian states for sub judice contempt, see R Williams, "Contempt of Court: Prejudicing the Administration of Justice" [1995] *Gazette of Law and Journalism* (No 30) 2.

years.[45] The second and third highest fines imposed have been $120,000[46] and $100,000,[47] respectively. Apart from the fines imposed so far in New South Wales, guidance may also be had from other legislation that imposes fines on bodies corporate. For example, the *Trade Practices Act 1974* (Cth) imposes the fine of $200,000 on companies that breach most of the provisions of its Part 5 (Consumer Protection)[48] and $750,000 or $10,000,000 for breaches of the provisions of Part 4 (Restrictive Trade Practices).[49]

13.20 The Commission also seeks submissions on whether there should be a difference in the maximum fine that can be imposed on bodies corporate as opposed to that which may be meted out to individual offenders, such as journalists, radio announcers, editors or individuals interviewed by the media. The fines imposed on bodies corporate are generally higher than those on individuals on the basis that the former are in a far superior financial position than the latter. An amount which is sufficient to have a deterrent

45. *Director of Public Prosecutions (Cth) v Wran* (1986) 7 NSWLR 616; *Attorney General (NSW) v Amalgamated Television Services Pty Ltd* (1990) 5 BR 396; *Attorney General (NSW) v Nationwide News Pty Ltd* (NSW, Court of Appeal, 40141/90, 11 October 1990, unreported); *Attorney General (NSW) v Radio 2UE Sydney Pty Ltd* (NSW, Court of Appeal, No 40236/96, 11 March 1998, unreported). The second and third cases belong to the so-called "Paul Mason cases" as they related to the media coverage of the criminal trial of Paul Mason for murder.
46. *Attorney General v Australian Broadcasting Corp* (NSW, Court of Appeal, No 40136/90, 11 October 1990, unreported). This is one of the "Paul Mason cases".
47. *Director of Public Prosecutions (Cth) v Australian Broadcasting Corp* (1986) 7 NSWLR 588; *Attorney General v Time Inc Magazine Co Pty Ltd* (NSW, Court of Appeal, No 40331/94, 15 September 1994, 21 October 1994, unreported).
48. *Trade Practices Act 1974* (Cth) s 79.
49. *Trade Practices Act 1974* (Cth) s 76(1A). $750,000 applies to violations of the provisions on boycotts affecting trade and commerce (s 45DB) and those involving the prohibition on contracts, arrangements or understandings affecting the supply or acquisition of goods or service (s 45E or 45EA). $10,000,000 applies to any other violation of the provisions of Part 4.

effect on an individual may not have the same effect on a corporate offender, while a fine appropriate to a body corporate may be excessive if imposed on an individual. However, the Commission notes that there may be instances when the financial resources of an individual media personality are such that a court may be justified in imposing an amount which is comparable to those imposed on bodies corporate.[50] The Commission further notes that as a matter of practicality, fines imposed on individuals who work in the media are generally paid by the media organisations that employ them. In such a situation, the fine, regardless of the amount, may not have a direct impact on the individual offender. Such an arrangement undermines the desired deterrent effect on the individual offender. However, imposing a large amount of fine on the individual may influence the employer organisation to ensure the maintenance of a system to prevent the commission of the offence by its employees.

50. In *Attorney General (NSW) v Radio 2UE Sydney Pty Ltd* (NSW, Court of Appeal, 40236/96, 11 March 1998, unreported), Justice Meagher expressed the minority view that the appropriate fine on Mr Laws was $250,000 which was the same amount of fine which Radio 2UE Pty Ltd was ordered to pay. Justice Meagher reasoned: "As far as the second opponent (Mr Laws) is concerned, the fine should likewise be $250,000. To fine him $20,000 (or even $50,000) is ludicrous. It is the equivalent of a slap on the wrist. It would operate as a deterrent neither to him nor to anyone else. It would not hurt him. It is about the amount he would spend on a small cocktail party: it is a cost he would not feel. It would not pay for a fraction of the costs of the aborting of one trial and recommencing another. I regret to have to say so in plain language, but in my view it would a reproach to the court and an insult to the public. It would be a reproach to the court, because it is the court's duty to make appropriate, and risible, orders. It would be an insult to the public, because the public would think that if you are rich and powerful enough you can get away with anything." Justices Priestly and Powell held that the appropriate penalty for Mr Laws was $50,000. This is the highest fine for sub judice contempt imposed on an individual in New South Wales and is higher than the fines imposed on corporate offenders in a number of other cases: See Appendix C.

IMPRISONMENT

13.21 Imprisonment has always been available as a sanction in cases of contempt. At common law, the maximum period of imprisonment to be imposed by a superior court is unlimited,[51] although it is arguable that the unexpressed limits derived from constitutional principles prevent the imposition of an excessive term of imprisonment if this amounts to a cruel and unusual punishment.[52]

13.22 Although there is no limit on the length of the sentence which could be ordered, the practice is to fix the term of the imprisonment when it is imposed.[53] In New South Wales, it has been held that the *Sentencing Act 1989* (NSW) applies to the sentencing of a person for contempt and consequently, the court may either impose a fixed term[54] for the imprisonment or impose a minimum and additional term.[55]

13.23 In New South Wales, the Supreme Court has the power to suspend the execution of a sentence of imprisonment imposed for contempt. The *Supreme Court Rules 1970* (NSW) Part 55 r 13(3) allows the court to "make an order for punishment on terms,

51. *Registrar v Maniam (No 2)* (1992) 26 NSWLR 309 at 314 (Kirby J); *Attorney General (NSW) v Whiley* (1993) 31 NSWLR 314 at 320. See also *Gallagher v Durack* (1983) 152 CLR 238 at 249 (Murphy J).
52. See *Registrar v Maniam (No 2)* (1992) 26 NSWLR 309 at 314 (Kirby J) citing *Smith v The Queen* (1991) 25 NSWLR 1. See also *Gallagher v Durack* (1983) 152 CLR 238 at 249 (Murphy J).
53. *Attorney General (UK) v James* [1962] 2 QB 637 at 641 (Goddard CJ). This was not always the case at common law. The early practice of the Court of Chancery in England, for instance, was to commit for an indefinite period leaving applications for release to be made until the contempt was considered to be purged. A contemnor would generally be regarded as having "purged" the contempt upon compliance with the relevant order of the court, or expression of contrition or when the contemnor was thought to have been sufficiently punished: See *Re The Bahama Islands* [1893] AC 138 at 145.
54. *Registrar of the Court of Appeal v Gilby* (NSW, Court of Appeal, No 40172/91, 20 August 1991, unreported).
55. *Attorney General v Whiley* (1993) 31 NSWLR 314.

including a suspension of punishment or a suspension of punishment in case the contemnor gives security in such manner and in such terms as the court may approve for good behaviour and performs the terms of the security."

13.24 The Supreme Court of New South Wales has the power to discharge a contemnor before the expiry of the term of the imprisonment.[56] The power to discharge will normally be exercised only where there has been some change in the circumstances since the sentence was imposed.[57] For example, this power may be exercised where the contemnor has purged his or her contempt[58] or where no good purpose will be served by further detaining the contemnor.[59]

13.25 A decision to imprison a contemnor and the decision as to the duration of the imprisonment should give proper weight to all relevant circumstances, particularly the culpability of the contemnor, the prejudicial effect of the conduct on the administration of justice and the need to deter the contemnor and others from repeating the same conduct.[60] Where persons other than the contemnor have published the contemptuous material but have not been prosecuted, this may be taken into account.[61]

13.26 While imprisonment is an available sentence in contempt by publication, it is not often invoked.[62] Australian courts have occasionally imposed prison sentences on persons found guilty of

56. *Supreme Court Rules 1970* (NSW) Pt 55 r 14.
57. *Young v Registrar of the Court of Appeal* (1993) 32 NSWLR 262.
58. *Crowley v Brown* [1964] 1 WLR 147; *Gray v Campbell* (1830) 1 Russ & M 323; 39 ER 124; *Hall v Etches* (1817) 1 Russ & M 324; 39 ER 125.
59. *Re Barrel Enterprises* [1972] 3 All ER 631.
60. *Durack v Gallager* (1982) 44 ALR 272 at 286-287 (Northrop J); *Director of Public Prosecutions (Cth) v John Fairfax & Sons Ltd* (1987) 8 NSWLR 732 at 741-742 (Kirby J).
61. *Gallagher v Durack* (1983) 152 CLR 238; *Attorney General (NSW) v Mundey* [1972] 2 NSWLR 887.
62. A similar prudence in the use of this penalty is shown in other jurisdictions: See G Borrie, *Borrie & Lowe's The Law of Contempt* (3rd edition, Butterworths, London, 1996) at 527-528.

contempt by scandalising.[63] In the only recorded Australian case of imprisonment for breach of the sub judice principle, an important factor which the trial judge considered was the fact that the contemnor, a radio compere, continued to publish the offending material on two occasions after having been warned not to do so by the Solicitor-General.[64] While the term of imprisonment was reduced on appeal from six weeks to twenty-eight days, the Full Court of the Supreme Court of Victoria nevertheless found a custodial sentence to be appropriate in that case. It is considered that because no other sentence would adequately mark the seriousness of the offence and at the same time act as a deterrent to the contemnor and to others engaging in trial by media in this country.[65]

Retaining imprisonment as a penalty but imposing an upper limit

13.27 There are two issues with respect to the penalty of imprisonment. The first is whether this should continue to be a sentencing option in sub judice contempt cases. The second is whether, if it does, there is a need to set an upper limit on the period of imprisonment.

13.28 The Phillimore Committee did not consider the first issue but recommended the adoption of a maximum term for sentences of imprisonment. It suggested a period of two years as a maximum term that superior courts could impose in contempt cases.[66] It gave two reasons for recommending the imposition of a maximum limit. The first stems from the fact that a summary procedure is used for contempt, and it would be anomalous if a person could be given a heavier penalty for conduct which is dealt with on summary process than he or she could be given after a conviction on trial by

63. See, for example, *R v Foster; Ex parte Roach* (1951) 82 CLR 587 (sentence of six months); *Durack v Gallagher* (1982) 65 FLR 459 (sentence of three months – appeal against conviction dismissed: *Gallagher v Durack* (1983) 152 CLR 238).
64. *Attorney General v Hinch* (Vic, Supreme Court, No 90/86, Murphy J, 22 May 1986, unreported).
65. See *Attorney General v Hinch* [1987] VR 721 at 733 (Young CJ).
66. UK, Committee on Contempt of Court, *Report of the Committee on Contempt of Court* (HMSO, London, Cmnd 5794, 1974) at para 199-205.

indictment for the same behaviour. Secondly, it observed that a serious contempt might also constitute an offence under the general criminal law. Where considerations of urgency were not present in a case, the Committee approved of the practice of dealing with such a case by criminal proceedings. A limitation on sentencing powers for contempt would reinforce this practice.

13.29 Effect was given to the Phillimore Committee's recommendations by the *Contempt of Court Act 1981* (UK) s 14(1) which provides that in England and Wales, the maximum term of imprisonment on any one occasion is two years in the case of superior courts and one month in the case of inferior courts.

13.30 A few years after the report of the Phillimore Committee came out, the Criminal Law and Penal Methods Reform Committee of South Australia also recommended that "all committals to prison for contempt should be for fixed terms, save that the court should always retain power to release a person who has purged his contempt or should be released for any other reason."[67] This recommendation has not been implemented.

13.31 The Law Reform Commission of Canada, in its Report on Contempt of Court, decided that the maximum sentence for the indictable offences it was proposing should be two years.[68] It mentioned a study of Canadian case law which showed that sentences for contempt rarely exceeded two years imprisonment. It also cited the recommendation of the Phillimore Committee. In addition to the recommendation of the Law Reform Commission of Canada, it was stated in *R v Cohn*[69] that no Canadian case was cited where a final sentence for contempt exceeded two years. A bill[70] was introduced in 1984 in the Canadian Parliament to implement the recommendations of the Law Reform Commission,

67. South Australia, Criminal Law and Penal Methods Reform Committee, *The Substantive Criminal Law* (Report 4, 1977) at para 3.12(d).
68. Canada, Law Reform Commission, *Contempt of Court* (Report 17, 1982) at 36.
69. (1984) 15 CCC (3d) 150.
70. *Criminal Law Reform Act, 1984, Bill C-19*, 32nd Parliament, 2nd session, 1983-1984 (1st reading 7 February 1984).

including the establishment of a maximum sentence of two years for the proposed statutory offence which would have been the equivalent of the common law offence of sub judice contempt. The bill was not adopted by the Canadian Parliament.

13.32 The ALRC, in its Report on Contempt,[71] expressed the view that there is only a residual role for imprisonment. It considered imprisonment to be an undesirably harsh measure in cases where the offending publication was the outcome of inadvertence or recklessness only. On the other hand, if a deliberate or reckless contempt is committed by an employed journalist, the likelihood that the fine will be paid by the employer undermines the effectiveness of the fine as a penalty. The ALRC stated that imprisonment should only be available where it is established that the relevant defendant acted with *mens rea*. It did not, however, recommend a formal provision to this effect in view of possible complications it would have on the trial procedure.

13.33 The ALRC also recommended the adoption of an upper limit for imprisonment as a sanction for contempt by publication but did not specify a figure as to what the maximum term of imprisonment should be. The 1991 Position Paper published by the Federal Attorney General's Department on the ALRC's Report on Contempt supported the recommendation on the establishment of upper limits.[72] The draft bill prepared by the Federal government in 1993, but which was not introduced in Parliament, specified that the imprisonment which may imposed for the offences contained in the bill must be for a fixed term and must not exceed a period of one year.

The Commission's tentative view

13.34 The Commission shares the view of the ALRC that imprisonment as a sanction should be retained. While it is a harsh penalty when a prejudicial publication is the result of inadvertence or carelessness, imprisonment may be appropriate when the

71. Australian Law Reform Commission, *Contempt* (Report 35, 1987) at para 481-482.
72. Australian Attorney General's Department, *The Law of Contempt* (Position Paper, 1991) at para 56-57.

breach of the sub judice principle is deliberate or the result of recklessness on the part of an individual as to the consequences of the publication.[73] The fact that a penalty of fine is usually paid by an employer corporation undermines the effectiveness of this form of penalty and courts must have imprisonment as an option to deter a breach of the sub judice principle which is intentional or reckless.

13.35 The Commission considers however that an upper limit must be established for the penalty of imprisonment. The penalty for sub judice contempt should be in line with other criminal offences for which the courts' power of sentencing has been limited in almost every sphere to a maximum by legislation.[74] The Commission has no firm proposal as to the specific maximum period. The penalty of penal servitude for fourteen years for the statutory offence of perverting the course of justice,[75] which theoretically could apply to a breach of the sub judice principle if there is an intent to pervert the course of justice, seems excessive to the Commission, especially in cases where summary procedure is utilised. Instead, the Commission notes that the maximum custodial period imposed in convictions for sub judice contempt and criminal contempts does not normally exceed two years.[76] In England for example, two years is the maximum custodial

73. In *Attorney General (NSW) v Radio 2UE Sydney Pty Ltd* (NSW, Court of Appeal, 40236/96, 11 March 1998, unreported), Justices Meagher and Powell expressed the view the that had Mr Laws intended to interfere with the course of justice or had he been guilty of recklessness in the relevant sense, a custodial sentence would have been appropriate.
74. See, however, *Verrier v Director of Public Prosecutions* [1986] 2 AC 195 where it was held that the length of the term of imprisonment for a common law misdemeanour was not limited to a maximum but was at large and in the discretion of the court.
75. *Crimes Act 1900* (NSW) s 319.
76. In *R v Cohn* (1984) 15 CCC (3d) 150, the Ontario Court of Appeal observed that there does not seem to be a case where the final sentence in a criminal contempt case has exceeded two years. See also *R v Lamer* (1973) 17 CCC (2d) 411 which contains a survey of sentences which have been imposed in contempt cases in Canada, England and the United States up to 1973.

period for contempt of court committed in superior courts.[77] Two years was also the recommendation of the Law Reform Commission of Canada. On the other hand, the draft bill entitled *Crimes (Protection of the Administration of Justice) Amendment Bill* (Cth) prepared by the Federal government in 1993 specified a period of one year. The Commission further notes that in the only sub judice contempt case in Australia where imprisonment was used,[78] the court imposed a term of imprisonment for twenty-eight days.[79]

PROPOSAL 27

Legislation should provide appropriate upper limits on prison sentences and fines which may be imposed on persons convicted of criminal contempt.

ALTERNATIVE SANCTIONS

13.36 In addition to, or as alternatives to, the traditional penalties of imprisonment and fine, courts have, in a number of contempt by publication cases, reprimanded the offender,[80]

77. *Contempt of Court Act 1981* (UK) s 14(1).
78. The term of imprisonment imposed at first instance was for six weeks but this was reduced on appeal to twenty-eight days: See *Attorney General v Hinch* (Vic, Supreme Court, No 90/86, Murphy J, 22 May 1986, unreported); *Attorney General v Hinch* [1987] VR 721.
79. See also *R v Foster; Ex parte Roach* (1951) 82 CLR 587 (sentence of six months); *Durack v Gallagher* (1982) 65 FLR 459 (sentence of three months – appeal against conviction dismissed: *Gallagher v Durack* (1983) 152 CLR 238). However, while these cases involved contempt by publication, the contempt committed was scandalising the court and not sub judice contempt.
80. *R v West Australian Newspapers Ltd; Ex parte The Minister for Justice* (1958) 60 WALR 108 (the editor of the newspaper was

accepted an apology[81] made to the court and/or required the offender to pay an amount by way of costs.[82] In some of these cases, these alternative forms of punishment were deemed sufficient to justify the non-imposition of the formal penalties of fine and/or imprisonment.[83]

13.37 For offences generally, the law provides alternatives to the penalty of imprisonment such as community service orders,[84] good behaviour bonds,[85] dismissal of charges and conditional discharge of the offender,[86] deferral of sentencing for rehabilitation,[87] and suspended sentences.[88] The law also provides alternatives to traditional full-time detention in prisons through schemes such as periodic detention[89] and home detention.[90] In addition, parole is available to offenders sentenced to prison which allows them to be

censured but the corporate proprietor of the newspaper was fined for the breach of the sub judice principle).

81. See, for example, *R v Gray* [1900] 2 QB 36.
82. *Attorney General (NSW) v Mundey* [1972] 2 NSWLR 887; *Attorney General (NSW) v Dean* (1990) 20 NSWLR 650.
83. See, for example, *Attorney General (NSW) v Mundey* [1972] 2 NSWLR 887; *Attorney General (NSW) v Dean* (1990) 20 NSWLR 650.
84. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 8; formerly governed by the *Community Service Orders Act 1979* (NSW).
85. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 9 and Pt 7. These provisions give statutory basis to the common law power – commonly known as the "Griffiths Remand" (see *Griffiths v The Queen* (1977) 137 CLR 293) – to release an offender pending sentence in order to assess the offender's behaviour and capacity for rehabilitation before imposing sentence.
86. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 10 and Pt 8; formerly governed by the *Crimes Act 1900* (NSW) s 556A.
87. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 11; formerly governed by the *Crimes Act 1900* (NSW) s 558.
88. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 12. This section reintroduces the power of courts to order suspended sentences which has not been available in New South Wales since 1974.
89. *Crimes (Sentencing Procedure) Act 1999* (NSW) Pt 5; formerly governed by the *Periodic Detention of Prisoners Act 1981* (NSW).
90. *Crimes (Sentencing Procedure) Act 1999* (NSW) Pt 6; formerly governed by the *Home Detention Act 1996* (NSW).

discharged from custody prior to the expiry of the maximum term of imprisonment, provided that they agree to abide by certain conditions, with the intention that they serve some portion of their sentence under supervision in the community and subject to recall for misconduct.[91]

13.38 One issue for consideration in this reference is whether the sentencing options available in criminal offences generally may be exercised in criminal contempt cases, and if not, whether they should be.

13.39 In New South Wales, the Court of Appeal has decided in *Attorney General (NSW) v Whiley*[92] that the *Sentencing Act 1989* (NSW)[93] applies to a sentence of imprisonment for contempt of court for the purposes of imposing minimum and additional terms.[94] This decision was followed in *Young v Jackman*.[95] In *Whiley,* the Court of Appeal reasoned that contempt is not one of the categories of cases which are excluded from the operation of the Act. The court observed that the legislative intention behind the Act was to create a code in respect of the procedures to be followed where a person is sentenced to imprisonment by a court. Finally, the court noted the strong policy reasons for applying the Act to

91. See New South Wales Law Reform Commission, *Sentencing* (Report 79, 1996) at para 11.1.
92. (1993) 31 NSWLR 314.
93. The provisions of this Act have been repealed and re-enacted by the *Crimes (Sentencing Procedure) Act 1999* (NSW), see particularly Pt 4.
94. The practice of imposing minimum and maximum terms has been abolished. Instead, a sentencing court is now required to first set the term of the sentence and then set a non-parole period for the sentence, which is the minimum period for which the offender must be kept in detention in relation to the offence: *Crimes (Sentencing Procedure) Act 1999* (NSW) s 44.
95. (NSW, Court of Appeal, No 237/80, 2 June 1993, unreported). But see contrary view as to the application of this Act in contempt cases in *Young v Registrar of the Court of Appeal* (1993) 32 NSLWR 262 at 288 (Handley J). See also *Wood v Galea* (1996) 84 A Crim R 274 at 276-277 where Justice Hunt said that *Attorney General v Whiley* should be reconsidered but that he was nevertheless bound by the Court of Appeal's decision in that case.

contempt cases, including providing consistency in sentencing, giving the offender the opportunity to have parole and serve part of the sentence in the community, and providing a more flexible approach to sentencing which will take into account the interests of both the community and the offender. As a result of the Court of Appeal decisions that the *Sentencing Act 1989* (NSW) applies to contempt cases, parole is available to a contemnor who has been sentenced to imprisonment.

13.40 Following these decisions, the Supreme Court (Administrative Law Division) imposed fixed terms of imprisonment pursuant to s 6 of the *Sentencing Act 1989* (NSW) in a contempt case.[96]

13.41 In contrast to these decisions, the Court of Appeal held that it does not have any express power to impose an obligation of community service under the *Community Service Orders Act 1979* (NSW) in a case involving contempt of court.[97] The court stated that "[a]lthough punishment for contempt of court in criminal in nature, it derives from the inherent power of the Supreme Court. It therefore does not attract the express statutory provisions relating to community service."[98]

13.42 The situation with respect to other sentencing options, such as probation, good behaviour bonds, home detention and periodic detention, remains unclear as courts have not had the opportunity to consider whether the statutes or common law that govern them would allow the courts to use those sentencing options for persons found guilty of criminal contempt.

13.43 The New South Wales Parliament recently passed legislation repealing and re-enacting in three main Acts the provisions of the various statutes dealing with the sentencing of

96. *Wood v Staunton* (1996) 86 A Crim R 183.
97. *Registrar, Court of Appeal v Maniam (No 2)* (1992) 26 NSWLR 309.
98. *Registrar, Court of Appeal v Maniam (No 2)* (1992) 26 NSWLR 309 at 319 (Kirby J).

offenders and the administration of sentences.[99] They have not, however, clarified the application of the various sentencing options to criminal contempt. Section 4 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) provides for a maximum penalty of 5 years for most offences for which no penalty is provided by or under that Act or any other Act. This section, however, was not intended to apply to common law offences such as contempt.[100]

13.44 It may be argued that there is no need to adopt legislation to make the various sentencing options, such as community service, home detention, periodic detention and suspended sentence, applicable to criminal contempt. Two reasons may be suggested. First, the inherent power of superior courts to punish contempt of court give them broad discretion in the imposition of penalties. The power of courts to impose the informal penalties of censure, apology and costs, discussed above, illustrate this flexibility in the imposition of penalties. It has also been observed that the power of the Supreme Court under *Supreme Court Rules 1970 (NSW)* Part 55 r 13 to impose the penalties of fine and imprisonment and to impose conditions on those penalties is not exhaustive but merely demonstrative.[101] Hence, for example, although it was conceded that courts do not have the express power to issue a community service order under the *Community Service Orders Act 1979* (NSW), they may impose an obligation of community service as a condition for suspending the operation of a fine which would otherwise be imposed.[102]

13.45 Secondly, the *Supreme Court Rules 1970 (NSW)* Part 55 r 13(3) provides: "The court may make an order for punishment on terms, including a suspension of punishment or a suspension of punishment in case the contemnor gives security in such manner

99. See the *Crimes (Sentencing Procedure) Act 1999* (NSW), the *Crimes (Administration of Sentences) Act 1999* (NSW) and the *Crimes Legislation Amendment (Sentencing) Act 1999* (NSW).
100. D Norris "Contempt in the Face of the Court: Compensation Court" (Unpublished paper, 2000) at para 4.2.
101. *Registrar, Court of Appeal v Maniam (No 2)* (1992) 26 NSWLR 309 at 314 (Kirby J).
102. *Registrar, Court of Appeal v Maniam (No 2)* (1992) 26 NSWLR 309.

as the court may approve for good behaviour and perform the terms of the security." This provision may very well be construed by courts to allow them to issue sentences that are effectively the equivalent of suspended sentences, probation orders, or conditional bonds. Moreover, it may even be interpreted more broadly by the courts to allow them to impose conditions on how the penalty of imprisonment should be served, for example by issuing custodial sentences which amount to home detention orders or periodic detention orders.

The Commission's view

13.46 The range of sentencing options available to crimes in general should be available for the courts to utilise in criminal contempt proceedings. The aim of these sentencing options is to give flexibility to the sentencing courts to allow them to achieve the purposes of penal sanctions, primarily the rehabilitation of the offender but also deterrence of the commission of crimes not just by the particular offender but by others as well. It also allows courts to spare an offender from the brutalising and oppressive effects of penal institutions. Moreover, these alternative sentencing schemes relieve some pressure on the prisons system. The Commission considers that the same policy considerations underlying the "alternatives" to imprisonment apply equally to criminal contempt cases. Parole for example is, subject to certain exceptions,[103] an integral part of a custodial sentence for crimes generally. It mitigates the harshness of the sentence by reducing the time a prisoner spends in custody and is part of the continuum of punishment of the offender. A person convicted of criminal contempt and sentenced to imprisonment should, like any other offender meted with a custodial sentence, have the benefit of mitigating effects of parole. Home detention is also appropriate because while it deprives the offender of liberty and thus serves the deterrence goal, it provides a cheaper alternative to full time imprisonment and spares the offender the ordeal and contamination of prison. Although criminal contempt is a grave offence because it is an affront to the proper and efficient administration of justice, the offender, by such offence alone, does

103. See *Crimes (Sentencing Procedure) Act 1999* (NSW) s 45, 46.

not pose an unacceptable threat to the public safety as to make home detention not viable. Periodic detention and community service may also be applicable and more appropriate for persons convicted of criminal contempt because these sentencing options still register disapproval of the offender's behaviour without the negative effects of full-time imprisonment. They allow the offenders to compensate the damage which their behaviour might have inflicted on the community without having to give up employment or have their domestic relations severely disrupted.

13.47 The Commission acknowledges that courts have demonstrated a flexibility in sentencing persons found guilty of contempt of court and it is quite possible that the Supreme Court's powers under its rules to punish criminal contempt may continue to be construed broadly by them. However, the Commission is of the view that sentencing of criminal contempt should not be left to common law where the nature and direction of its development is uncertain. It considers that legislation is required to expressly empower courts with more options when sentencing persons convicted of criminal contempt. Legislation which would apply the current sentencing options to contempt would afford those convicted of criminal contempt the same options as those convicted of other crimes. Such legislation would create certainty for the courts, the accused and their advocates about the availability of alternative sentencing options which might be more appropriate than the traditional ones, such as imprisonment. It would also establish consistency so that when the courts use their power to hand out these alternative sentences, they will have to abide by the criteria set by Parliament rather than relying on their broad discretionary sentencing powers at common with respect to contempt.

13.48 The Commission notes that a large number of those convicted of sub judice contempt are corporations rather than individuals. This means that certain sanctions, in particular imprisonment and its alternatives (eg, home detention, periodic detention, etc), will not be appropriate. Special consideration needs to be given as to the most appropriate alternative sentencing options for corporate offenders. However, the Commission has a current reference on sentencing and one of the topics to be examined is sentencing of corporations. It may be sufficient to

state, at this stage, that the Commission considers criminal contempt to be an appropriate area in which to explore new techniques of punishing corporations when it prepares its report on corporate sentencing.

PROPOSAL 28

Legislation should expressly provide that the various alternatives to and methods of serving a custodial sentence, including community service orders, good behaviour bonds, dismissal of charges and conditional discharge of the offender, deferral of sentencing, suspended sentences, periodic detention orders, home detention orders and parole, are available in criminal contempt proceedings.

SEQUESTRATION

13.49 Another remedy which may be available in contempt proceedings is the writ of sequestration. This is a method of enforcing judgments or orders which require a person: (a) to do an act within a specified time; or (b) to do an act forthwith or forthwith upon a specified event; or (c) to abstain from doing an act.[104] Historically, it is an old weapon of the Chancery Court to compel a party's obedience to mesne process or a decree and used for the purpose of enforcing compliance with such processes or

104. The *Supreme Court Rules 1970* (NSW) Pt 42 r 6 provides that sequestration applies: "(a) where – (i) a judgment requires a person to do an act within a time specified in the judgment; and (ii) he refuses to do the act within that time or, if that time has been extended or abridged under Part 2 rule 3, within that time as so extended or abridged; and (b) where a judgment requires a person to do an act forthwith or forthwith upon a specified event and he refuses to do the act as the judgment requires; and (c) where – (i) a judgment requires a person to abstain from doing an act; and (ii) he disobeys the judgment". See also Pt 44 r 3 which provides that a writ of sequestration shall not be issued without the leave of the court.

decrees rather than to punish disobedience.[105] It is coercive or compensatory in nature rather than punitive.[106]

13.50 Sequestration is a process of the law of contempt,[107] and as such, the writ is normally available as a means of enforcing a coercive order against someone who has committed contempt by disobeying the order.[108] It only lies against a person actually in contempt.[109] The *Supreme Court Rules 1970* (NSW) confirm the availability of this remedy in contempt proceedings by providing that where the contemnor is a corporation, the court may punish contempt by sequestration.[110]

13.51 A writ of sequestration is directed to named sequestrators who are required to take possession of the contemnor's property and to retain it until the contempt has been purged and the court has made appropriate orders.[111] The writ binds real and personal property from the time it is issued.[112] It places property belonging to the contemnor temporarily into the hands of sequestrators who,

105. *Australian Consolidated Press Ltd v Morgan* (1965) 112 CLR 483 at 498 (Windeyer J).
106. *Australian Consolidated Press Ltd v Morgan* (1965) 112 CLR 483 at 501 (Windeyer J).
107. *Pratt v Inman* (1889) 43 Ch D 175 at 179 (Chitty J).
108. G Borrie, *Borrie & Lowe's The Law of Contempt* (3rd edition, Butterworths, London, 1996) at 606.
109. *IRC v Hoogstraten* [1984] 3 All ER 25. But see *Webster v Southwark LBC* [1983] QB 698 where it was held that a writ of sequestration might lie to enforce compliance by a local authority with its obligations, under the law relating to elections, as defined in a declaratory order. This was despite the fact that the parties had not been in contempt of that order. This judgement has, however, been said to be questionable: G Borrie, *Borrie & Lowe's The Law of Contempt* (3rd edition, Butterworths, London, 1996) at 606.
110. *Supreme Court Rules 1970* (NSW) Pt 5 r 13(2).
111. See generally *Australian Consolidated Press Ltd v Morgan* (1965) 112 CLR 483 at 498-501 (Windeyer J); *Con-Mech (Engineers) Ltd v Amalgamated Union of Engineering Workers (Engineering Section)* [1973] ICR 620 at 627 (Donaldson J); *Trade Practices Commission v C G Smith Pty Ltd* (1978) 30 FLR 368 at 379 (Bowen CJ).
112. *Dixon v Rowe* (1876) 35 LT 548.

in the case of land, manage the property and receive the rents and profits.[113] The legal effect of sequestration has been explained by the High Court as follows:

> [W]hen the property of the contemnor is actually sequestered and held under sequestration it is not confiscated. The contemnor is deprived of the enjoyment of his rents and profits for the duration of the sequestration; but he does not forfeit the property in them. When whatever is considered necessary to clear the contempt has been done, the sequestration is discharged by order of the court: and the sequestrators must then give up possession on having their costs and expenses. As it is put in *Bacon's Abridgment* under "Sequestration", "Then whoever hath been seized shall be accounted for and paid over to him (the party whose property was sequestered). However, the courts have the whole under their power, and may do therein as they please and as shall be most agreeable to the justice and equity of the case." Sometimes it may be appropriate that the proceeds of the sequestration, or part thereof, should be applied to the discharge of an equitable obligation, as for example by a direction that equitable debts, the non-payment of which had led to the sequestration, be first paid out of the fund; or that the fund be applied so far as necessary in reparation of the damage caused by the contemnor's disobedience.[114]

13.52 By its nature, the writ of sequestration is available only for a civil contempt, ie disobedience of, or non-compliance with, a judgment or order of the court, and not for a criminal contempt.[115] The question then arises as to the relevance of this remedy to sub judice contempt, which is a form of criminal contempt. It would appear that while sequestration may not be available as a primary penalty in sub judice contempt proceedings,

113. G Borrie, *Borrie & Lowe's The Law of Contempt* (3rd edition, Butterworths, London, 1996) at 606.
114. *Australian Consolidated Press Ltd v Morgan* (1965) 112 CLR 483 at 501 (Windeyer J).
115. J Jacob, "Sequestration for Contempt of Court" (1986) 39 *Current Legal Problems* 219 at 220; C O'Reagan, "Contempt of Court and the Enforcement of Labour Injunctions" (1991) 54 *Modern Law Review* 385 at 388.

it may still be relevant in the following situations: (1) to enforce a fine imposed as a penalty for sub judice contempt; and (2) to enforce an injunction issued in connection with sub judice contempt proceedings.

13.53 A writ of sequestration may be issued to enforce a fine imposed on a finding of contempt. For example, in *Australasian Meat Industry Employees' Union v Mudginberri Station Pty Ltd*,[116] the Federal Court issued an interlocutory injunction to restrain a union and its officers from, among other things, imposing a ban on the provision of goods or services to the employer company and from maintaining a picket line in the vicinity of the workplace. When the union and its officers wilfully disobeyed the interlocutory injunctions, the Federal Court issued another order which required the union and its officers to pay fines. Because neither the injunction order nor the subsequent order for fines were complied with, the Federal Court issued a writ of sequestration against the union to enforce the order for fines. The High Court upheld the sequestration order stating:

> Having regard to the important public interest which the armoury of remedies available to a superior court is designed to serve, there is no reason in principle why the undoubted power to order the sequestration of assets of a contemnor should not be employed to aid the effectiveness of other remedies to which resort may have been had.[117]

13.54 The writ of sequestration in *Mudginberri* was issued in the context of a civil contempt,[118] but the Commission finds no cogent reason why the writ should not be available to enforce a fine imposed in a criminal contempt, such as sub judice contempt. The order for the fine must, however, require its payment within a specified time, or forthwith (or forthwith upon a specified event).[119] Consequently, in imposing a fine in sub judice contempt cases,

116. (1986) 161 CLR 98.
117. (1986) 161 CLR 98 at 115 (Gibbs CJ, Mason, Wilson and Deane JJ).
118. The High Court in this case discussed the difficulties in the classification between civil and criminal contempts: see (1986) 161 CLR 98 at 106-113 (Gibbs CJ, Mason, Wilson and Deane JJ).
119. *Supreme Court Rules 1970* (NSW) Pt 42 r 6.

it may be wise for judges to order its payment forthwith or within a specified time[120] to allow for the issue of a writ of sequestration, should the contemnor defy the order imposing the fine.

13.55 The writ may also be relevant in sub judice contempt where an injunction has been issued to restrain the publication of material which would be in breach of the sub judice principle or which would be a repetition of such breach. Disobedience of such an injunction would be a breach of an order requiring a person to abstain from doing an act under *Supreme Court Rules 1970* (NSW) Part 42 Rule 6, which could, therefore, attract the issue of a writ of sequestration.

13.56 The Commission, however, notes that sequestration is a most drastic remedy and courts are reluctant to issue the writ except in the clearest cases. Sequestration lies at the top end of the scale of severity in the means by which courts can enforce their orders.[121] In *Quality Pizzas v Canterbury Hotel Employees' Industrial Union v Industrial Union*,[122] the New Zealand Court of Appeal observed that sequestration:

> is both drastic and blunt in its operation. It may also have devastating consequences on innocent third parties – as it would have had here on the employees of the company if the sequestration had continued in is simple custodial form- and that is obviously a powerful consideration militating against the making of an order.

120. In *Attorney General (NSW) v Radio 2UE Sydney Pty Ltd* (NSW, Court of Appeal, No 40236/96, 11 March 1998, unreported) the contemnors were ordered to pay the fines imposed within 28 days.
121. *Howitt Transport v Transport and General Workers' Union* [1973] ICR 1 at 11 (Donaldson J). See also *Showeering Ltd v Fern Vale Brewery* [1958] RPC 462.
122. [1983] NZLR 612 at 617-618 (Richardson J).

Injunctions

13.57 An injunction to restrain an actual or threatened contempt of court may be granted by a superior court which has power both to punish and to issue injunctions.[123] An injunction is an order of the court which, in the context of sub judice contempt, would restrain the publication of allegedly prejudicial material.

13.58 The jurisdiction of courts to issue injunctions in the context of contempt by publication is used very sparingly. Two of the reasons for this reluctance were explained by an English Court [124] thus:

> Where the contempt would consist of impeding or prejudicing the course of justice, [an injunction] will rarely be appropriate for two reasons. The first is that the injunction would have to be very specific and might indirectly mislead by suggesting that other conduct of a similar, but slightly different, nature would be permissible. The second is that it is the wise and settled practice of the courts not to grant injunctions restraining the commission of a criminal act – and contempt of court is criminal or quasi-criminal – unless the penalties available under the criminal law have proved to be inadequate to deter the commission of the offences.

13.59 The difficulty in determining in advance what kind of public comment on pending proceedings will create a substantial risk that the course of justice will be prejudiced is another reason why injunctions are granted only in exceptional circumstances.[125]

13.60 An injunction, in sub judice contempt proceedings, is usually an order to restrain the publication and distribution of the prejudicial material. However, it may also require the publisher to retrieve copies of the magazine which have already

123. *Victoria v Australian Building Construction Employees' and Builders' Federation* (1982) 152 CLR 25 at 42 (Gibbs J).
124. *P v Liverpool Daily Post and Echo Newspaper Plc* [1991] AC 370 at 381-382 (Lord Donaldson MR).
125. *P v Liverpool Daily Post and Echo Newspaper Plc* [1991] AC 370 at 425 (Lord Bridge of Harwich).

been released.[126] Moreover, if it is proper to seek an injunction against a threatened contempt, there is no reason why there should not be an application for an injunction to restrain a repetition of an already committed contempt, if there is a real danger of repetition.[127]

13.61 An application for an injunction may be made to the Supreme Court,[128] which has jurisdiction to punish sub judice contempt. It would appear that although sub judice contempt proceedings are assigned to the Common Law Division of the Supreme Court, an application for an injunction in connection with such proceedings may be lodged with other Divisions, for example with the Equity Division.[129]

13.62 In proceedings for an injunction to restrain an apprehended contempt, the instigating party must prove the relevant matters on the balance of probabilities. This adoption of the civil standard of proof for injunction proceedings is well supported by authority.[130] But it has also been said that the standard should be taken to vary according to the importance of the matters in issue, including, for instance, the seriousness of the alleged contempt and, in case of contempt by publication, the gravity of

126. *Attorney General (NSW) v Time Inc Magazine Co Pty Ltd* (NSW, Court of Appeal, No 40327/94, 7 June 1994, unreported).
127. See, for example, *Hardy v United Telecasters Ltd* (1989) 4 BR 347; *Doe v John Fairfax Publications Pty Ltd* (1995) 125 FLR 372.
128. In contrast, it has been held that a judge of the District Court does not have power to order the prior restraint of a threatened contempt: *United Telecasters Sydney Ltd v Hardy* (1991) 23 NSWLR 323.
129. *Waterhouse v Australian Broadcasting Corp* (1986) 6 NSWLR 716 at 718-721 (Young J).
130. *Waterhouse v Australian Broadcasting Corp* (1986) 6 NSWLR 716 at 735 (Glass J); *Attorney General (NSW) v TCN Channel Nine Pty* (1990) 5 BR 10 at 13 (Hunt J). For a discussion of the difference between the standard of proof in a civil proceeding to restrain threatened conduct which would amount to sub judice contempt and a criminal proceeding for the punishment of past contempt, see *Hinch v Attorney General (Vic)* (1987) 164 CLR 15 at 50-52 (Deane J).

the consequences if an injunction is granted – namely, a prior restraint upon freedom of speech.[131]

13.63 An applicant for an injunction on grounds of an apprehended contempt must identify with reasonable precision the material to be covered by the injunction. This does not, however, necessarily entail submitting to the court a draft or other version of the precise publication.[132] He or she must also satisfy the court that the essential ingredients of the alleged contempt would be present if the material were published and that the contempt would be of sufficient seriousness to justify departing from the general principle that a prior restraint on a publication is regarded as "inimical to the institutions of a free society".[133]

13.64 In addition, where an injunction being sought is an interlocutory one, the applicant must satisfy the normal equitable requirements that the degree of probability of success at trial is sufficient to warrant preservation of the status quo by the injunction, and that the inconvenience to the applicant resulting from refusal of the injunction would outweigh the hardship that would be caused to the respondent through an injunction being granted.[134]

13.65 It is accepted that the Attorney General has standing to seek an application for an injunction to restrain the publication of

131. *Attorney General (NSW) v TCN Channel Nine Pty Ltd* (1990) 5 BR 10; *Attorney General (NSW) v Time Magazine Co Pty Ltd* (NSW, Court of Appeal, No 40327/94, 7 June 1994, unreported) at 6 (Kirby J).
132. *Hardy v United Telecasters Ltd* (1989) 4 BR 347; *John Fairfax Publications Pty Ltd v Doe* (1995) 37 NSWLR 81.
133. *Waterhouse v Australian Broadcasting Corp* (1986) 6 NSWLR 733 at 735 (Glass J); See also *Commercial Bank of Australia Ltd v Preston* [1981] 2 NSWLR 554 at 566 (Hunt J); *National Mutual Life Association of Australia Ltd v General Television Corporation Pty Ltd* [1989] VR 747 at 760 (Ormiston J); *Marsden v Amalgamated Television Services Pty Ltd* (NSW, Court of Appeal, No 40229/96, 2 May 1996, unreported).
134. *Commercial Bank of Australia Ltd v Preston* [1981] 2 NSWLR 554; *Attorney General (NSW) v TCN Channel Nine Pty Ltd* (1990) 5 BR 10; *Marsden v Amalgamated Television Services Pty Ltd* (NSW, Court of Appeal, No 40229/96, 2 May 1996, unreported).

prejudicial material.[135] Nevertheless, a private individual who is deemed to have a sufficiently proximate interest may also apply.[136] Such a person must have some special interest over and above that enjoyed by all members of the public in the due administration of justice.[137] The most obvious example of a private citizen who has a special interest is somebody who is an accused.[138] By contrast, it has been held that a witness, who attends the proceedings out of a sense of public duty and whose obligation is to give his evidence fairly and truthfully, does not have an interest sufficient to seek injunctive relief in relation to the broadcast of a television program.[139]

13.66 Despite the fact that a private individual has standing to apply for an injunction to restrain an anticipated (or the likely repeat of a) breach of the sub judice principle, the view has been expressed that it is preferable for the Attorney General to be the moving party in such applications, even when the threatened breach would create a risk of prejudice to civil, not criminal, proceedings. The Supreme Court of New South Wales has stated that:

> The Attorney General is an appropriate plaintiff to such a application. He acts in the public interest to uphold the administration of justice: *Regina v Duffy* [1960] 2 QB 188 at 192; *Attorney General Times Newspapers Ltd* [1974]

135. *Attorney General (NSW) v TCN Channel Nine Pty Ltd* (1990) 5 BR 10 at 16 (Hunt J).
136. *Waterhouse v Australian Braodcasting Corp* (1986) 6 NSWLR 716 at 720 (Young J); *Doe v John Fairfax Publications Pty Ltd* (1995) 125 FLR 372 at 384 (Spender J). For English cases, see *Peacock v London Weekend Television* (1985) 150 JP 71; *Leary v BBC* (English Court of Appeal, 29 September 1989, unreported); *P v Liverpool Daily Post and Echo Newspaper Plc* [1991] 2 AC 370.
137. *Leary v BBC* (English Court of Appeal, 29 September 1989, unreported).
138. See, for example, *Waterhouse v Australian Broadcasting Corp* (1986) 6 NSWLR 716 at 720; *Hardy v United Telecasters Ltd* (1989) 4 BR 347; *Doe v John Fairfax Publications Pty Ltd* (1995) 125 FLR 372 at 384 (Spender J).
139. *Leary v BBC* (English Court of Appeal, 29 September 1989, unreported).

> AC 273 at 293-294. 30, 311, 314, 321, 326; *Attorney General v News Group Newspapers Ltd* [1987] QB 1 at 16. As the cases make it clear, it is preferable that he should usually be the moving party in such applications, so that no suggestion can fairly be made that the purpose of an application by a party to the litigation alleged to have been affected by the publication is simply to prevent the disclosure of embarrassing (but not prejudicial) facts.[140]

The Commission's views on standing to apply for injunctions

13.67 The Commission supports the rule that private individuals who possess a sufficient interest should be able to apply for an injunction to restrain the publication of material which would be in breach of the sub judice principle. The Attorney General may refuse to act to restrain such publication and a private individual, such as the accused, should be allowed to make the application for an injunction. The accused in criminal proceedings, for example, should have a remedy to stop the publication of prejudicial material which could potentially result in the trial being aborted, delay the resolution of the criminal charge against him or her, prolong his or her incarceration and add to the costs of the proceedings. Such a person should not have to rely on the Attorney General to prevent the publication of material which could jeopardise the proceedings to which he or she is a party to.

13.68 The Commission is of the view that the right of private individuals to apply for injunctions should not be subject to a consent requirement by the Attorney General for the same reasons that such requirement should not be imposed on the right of individuals to commence sub judice contempt proceedings, discussed in Chapter 12.[141] First, the Commission is not aware that there is a current problem of private parties abusing this privilege by, for example, applying for injunctions to prevent the disclosure of embarrassing but not prejudicial information. Secondly, the Commission considers that, even if such cases do arise, this is a matter which courts are well suited to understand

140. *Attorney General (NSW) v TCN Channel Nine Pty Ltd* (1990) 5 BR 10 at 16 (Hunt J).
141. See para 12.34-12.36.

and have sufficient powers to deal with. It is for the courts and not for the Attorney General to decide whether or not an application has merit or was made simply for an improper purpose.

13.69 The Commission considers also that a private individual who intends to apply for an injunction to stop the publication of material which would be in breach of the sub judice principle or which would be a repetition of such a breach, should notify the Attorney General, and, if the material relates to criminal proceedings, the relevant Director of Public Prosecutions. This is consistent with the Commission's Proposal 24. The reasons for Proposal 24 concerning the need for coordination of efforts in the prosecution of the same act of contempt and prevention of waste of resources[142] apply equally to the need for individuals to notify the relevant public law officers before they apply for an injunction. As with Proposal 24, the notice requirement for injunction applications by individuals does not give the Attorney General or the Director of Public Prosecutions the right to veto the application.

13.70 The Commission is also of the view that legislation should be adopted to allow the Director of Public Prosecutions to apply for injunctions in relation to sub judice contempt. The Director of Public Prosecutions has the power at common law to prosecute sub judice contempt. The Commission considers it useful for the DPP to possess an ancillary power to deal with an apprehended commission or an anticipated repetition of such offence. If both the Attorney General and the Director of Public Prosecutions have power to institute and maintain sub judice contempt proceedings at common law, there is no sound policy reason why they both should not be able to apply for injunctions with respect the same matter. Where, for example, the DPP has instituted sub judice contempt proceedings and the accused is planning further publication of the prejudicial material, the DPP should have authority to apply for an injunction instead of relying on the Attorney General to do it.

142. See para 12.37.

13.71 Consistent with its general position in favour of locus standi for parties to the relevant proceedings, the Commission considers that the Commonwealth Director of Public Prosecutions should also have the power to apply for injunctions to stop an apprehended contempt where the relevant proceedings in question (including those heard in state courts) involve prosecution for a Commonwealth offence. However, any legislation on this matter is a matter for the Commonwealth government to consider. In relation to Proposal 30 below, the Commission intends that the proposal would be confined to sub judice contempt and should not authorise the Director of Public Prosecutions to apply for injunctions with respect to other forms of criminal contempts like scandalising the court. This is because the Director of Public Prosecutions only has standing to prosecute contempts allegedly affecting criminal proceedings by virtue of his or her position as a party to the proceedings.[143]

PROPOSAL 29

Legislation should provide that a private individual who intends to apply for an injunction to stop an apprehended criminal contempt shall, prior to such application, notify the Attorney General and the parties to the proceedings (if any) allegedly involved.

PROPOSAL 30

Legislation should provide that the Director of Public Prosecutions may apply for an injunction to restrain the publication of material relating to criminal proceedings which would be in breach of the sub judice principle or which would be a repetition of such breach.

143. *Director of Public Prosecutions v Australian Broadcasting Corp* (1987) 7 NSWLR 588. See also the discussion in para 12.10-12.15.

Civil action for damages

13.72 It seems that at common law an action for damages does not lie for contempt as such, except in relation to damages for the costs incurred by the failure of a witness to comply with a subpoena to attend a court.[144] The leading authority on the unavailability of this remedy in contempt is the English case of *Chapman v Honig*.[145] The decision is based upon the notion that the court's jurisdiction in contempt is concerned with a wrong against the administration of justice rather than against an individual.[146] However, in *United Telecasters Sydney Ltd v Hardy*, the New South Wales Court of Appeal suggested that the law might recognise an action on the case for damages for the loss suffered by an accused, where the criminal proceedings are aborted as result of publications which breached sub judice principle. Justice Samuels discussed the tort of collateral process, which he described as a "public wrong in the sense that the administration of justice was abused" and proceeded to suggest that the law can grant remedy for damage inflicted on parties by contemnors:

> [I]n the case of contempt of court, the interference with the administration of justice is a public wrong. Provided a victim of contempt can prove that he suffered actual damage as a result of the contempt, it may well be arguable that the generative forces of the law which rose to meet the problem of abuse of court processes can accommodate the challenge of remedying damage inflicted by contemnors. Contempts by the media are an increasingly common problem in the administration of criminal justice, and a common consequence is the need to abort trials. An accused who is not legally aided must bear his costs of the trial. He thus incurs a substantial loss because of the wrong of a third party; and the same

144. *Roberts v J F Stoen Lighting and Radio Ltd* (1945) 172 LT 240.
145. [1963] 2 QB 502. See discussion in *United Telecasters Sydney Ltd v Hardy* (1991) 23 NSWLR 323 and in A Arlidge, *A Arlidge, D Eady and A T H Smith on Contempt* (2nd edition, Sweet & Maxwell, London, 1999) at 883-884.
146. A Arlidge, *A Arlidge, D Eady and A T H Smith on Contempt* (2nd edition, Sweet & Maxwell, London, 1999) at 880.

> might be said of legal aid services. This loss must been seen in its typical context, namely, that it is likely that an accused will have to face a new trial and new costs. The accused must retain legal representation in the interim until his new trial, and bear the costs occasioned by delay. It might be said that to deny him an action on the case would be to leave him uncompensated for his substantial loss, a loss for which he was in no way responsible. For these reasons, it is, I think, fairly open to argue, by analogy with the tort of collateral abuse of process, the law in such circumstances should recognise an action on the case to recover damages for loss occasioned to an accused by a criminal contempt of court occasioning the need for a pending trial to be aborted.[147]

13.73 The claims for reparation and damages in that particular case were nevertheless dismissed by the Court of Appeal because they were conveyed by way of summons rather than through a statement of claim. The claims for reparation and damages were therefore not properly argued in that case and it remains to be seen whether in a proper case, a court would award damages for the loss suffered by an accused, where the criminal proceedings are aborted as result of publications which breached sub judice principle.

13.74 In light of the apparent lack of remedy for damages for loss resulting from sub judice contempt, the *Costs in Criminal Cases Amendment Bill 1991* (NSW) was introduced. This bill and the broader issue of compensation for loss suffered as a result of contemptuous publication will be examined in greater detail in the next chapter.

147. *United Telecasters Sydney Ltd v Hardy* (1991) 23 NSWLR 323 at 346-347. Justices Clarke and Meagher agreed with Justice Samuels' judgment.

14. Payment for costs of aborted trials

- Existing powers to order compensation
- Overview of the Costs in Criminal Cases Amendment Bill 1997
- Justifications for a power to order compensation
- Arguments against a power to order compensation
- The Commission's view
- Criticisms of the Bill
- Formulation of a power to order compensation

14.1 This chapter examines the issue of compensation for loss suffered as a result of a contemptuous publication. Specifically, this chapter considers whether it is desirable to order the media to pay for the costs of a trial which is aborted because of a contemptuous publication, and, if so, how a power to order costs should be formulated. As part of this discussion, the provisions of the *Costs in Criminal Cases Amendment Bill 1997* (NSW)[1] ("the Bill") are analysed.

EXISTING POWERS TO ORDER COMPENSATION

14.2 It is doubtful whether the courts in New South Wales currently have any power to order payment of compensation for the costs of legal proceedings which are discontinued because of a contemptuous publication.

14.3 There has been some suggestion in the past that a civil cause of action is available at common law to recover damages for loss occasioned by a trial which is discontinued as a result of a contemptuous publication.[2] However, the issue has never been

1. This Bill lapsed on 3 February 1999 when the Legislative Council was prorogued.
2. See *United Telecasters Sydney Ltd v Hardy* (1991) 23 NSWLR 323 at 340-347 (Samuels J) (Clarke and Meagher JJ concurring). See also *Astro Exito Navehacion SA v WT Hsu (The "Messiniaki Tolmi")* [1983] 1 QB 666 at 671, in which Justice Mustill noted that it is at least arguable that there exists a civil cause of action to recover damages for an act amounting to a contempt of court: see also *Chapman v Honig* [1963] 2 QB 502 at 519-520 (Pearson LJ). However, see the interpretation of Justice Mustill's comments by Justice Samuels in *United Telecasters Sydney Ltd v Hardy* (1991) 23 NSWLR 323 at 342. Justice Samuels concluded that these comments did no more than support the proposition that an act constituting a contempt may also amount to a tort or a breach of contract, in which case damages may be recoverable not for the loss occasioned by the contempt but by the damage sustained because of the tort or breach of contract. In an earlier English case, *Weston v Courts Administrator of the Central Criminal Court* [1976] 2 All

finally resolved, and there does not appear to have been any recent attempt to bring an action in this situation.[3]

14.4 It is possible that a Federal court has statutory power to order payment of compensation (or "reparation", as it is termed in the Federal legislation), for a contemptuous publication which affects proceedings before a Federal court, as opposed to a State court. This power is derived from s 21B of the *Crimes Act 1914* (Cth). Section 21B provides, among other things, that a person who is convicted of an offence against a law of the Commonwealth may be ordered by the court:

> … to make reparation to the Commonwealth or to a public authority under the Commonwealth, by way of money payment or otherwise, in respect of any loss suffered, or any expense incurred, by the Commonwealth or the authority, as the case may be, by reason of the offence; or
>
> … to make reparation to any person, by way of money payment or otherwise, in respect of any loss suffered by the person as a direct result of the offence.

14.5 It was suggested in one case that s 21B may possibly be relied on to order payment of reparation in respect of a contempt relating to a Federal court, but that it did not provide a State court with the power to make such an order, even if the State court were exercising Federal jurisdiction.[4] It is unlikely that a contempt

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ER 875, Lord Stephenson had commented at 883 that a contempt is not punishable by payment of costs. That case was not, however, concerned with contempt by publication.

3. In *United Telecasters Sydney Ltd v Hardy* (1991) 23 NSWLR 323, the NSW Court of Appeal acknowledged the possibility of a cause of action arising from loss sustained as a result of a trial aborted because of a contemptuous publication. The Court, however, refused to consider the merits of such a claim in the particular case before it until it was pleaded in a statement of claim. It directed the party seeking relief to proceed by way of statement of claim, since the party had not done so. The action does not appear to have been proceeded with following this judgment of the Court.
4. See *United Telecasters Sydney Ltd v Hardy* (1991) 23 NSWLR 323 at 338-339 (Samuels J).

prejudicing Federal proceedings being tried in a State court would be an "offence against a law of the Commonwealth", as the relevant contempt principles are State laws.[5]

14.6 It is arguable that the *Victims Compensation Act 1996* (NSW) ("Victims Compensation Act") may provide a statutory source for ordering those convicted of contempt to pay compensation. Section 77B of the Victims Compensation Act states, among other things, that if a person is convicted of an offence, the court may direct that a specified sum be paid out of the property of the offender to an "aggrieved person". An "aggrieved person" is defined in s 77A to include a person "who has sustained loss through or by reason of" the offence for which the offender is convicted. It is not clear whether "loss" could be interpreted to cover pecuniary loss suffered by reason of a trial which is aborted because of a contemptuous publication. Although the statutory scheme for compensation established by the Victims Compensation Act is for victims of violence, the alternative scheme which the Victims Compensation Act establishes, under which a court may order the person it finds guilty of a crime to pay compensation to any victim of the crime, is not limited to crimes of violence.[6] As far as the Commission is aware, however, this legislative provision has never been relied on to ground a claim for compensation for the costs of an aborted trial following a conviction for sub judice contempt.

OVERVIEW OF THE COSTS IN CRIMINAL CASES AMENDMENT BILL 1997

14.7 In light of the apparent lack of existing powers to order compensation in sub judice contempt cases, the Bill was introduced with the aim of empowering courts to require media proprietors and other persons in charge of a media business to pay

5. See *Re Colina; Ex parte Torney* (1999) 73 ALJR 1576.
6. See the objects of the *Victims Compensation Act 1996* (NSW) as articulated in s 3; see Part 4 (Compensation Awarded by Court), especially Division 2 (Compensation for Loss).

compensation for the costs of a criminal trial.[7] Under the framework provided by the Bill, there are three conditions which must be met before an order for compensation may be made. First, legal proceedings must have been discontinued solely or mainly because they were affected by a publication by the media. Secondly, the legal proceedings affected must have been criminal proceedings before a jury. Thirdly, a charge of contempt must have been proven against the media proprietor or other person in charge of the media business, although it is not necessary that that person actually be convicted of contempt.[8]

14.8 Publications which could attract a costs order under the Bill are confined to a "printed publication circulated to the public", or a "radio, television or other electronic broadcast to the public". An order to pay costs may be made against the proprietor or other person (or corporation)[9] in charge of the business or other undertaking responsible for the printed publication or broadcast.

14.9 The Bill vests the power to order payment of costs in the Supreme Court ("the Court"). The Court has a discretion whether or not to make an order. The costs that may be recovered under the Bill consist of the legal costs of the parties to the discontinued proceedings, the costs to the State in the provision of legal services to the accused, the costs to the State in respect of the conduct of proceedings (including the salaries of judicial officers and other court officers and staff, fees paid to legal practitioners and jurors, and expenses paid to witnesses and jurors), and costs of any other class prescribed by regulation.[10] It is questionable whether the "legal costs" of the parties and the provision of "legal services" to

7. See para 14.13.
8. See *Costs in Criminal Cases Amendment Bill 1997* (NSW) Sch 1 cl 14(4).
9. Under s 21 of the *Interpretation Act 1987* (NSW), reference in an Act to a "person" includes reference to a corporation (unless otherwise stated).
10. No regulation was drafted, or at least no draft regulation was made publicly available for discussion, prior to the Bill lapsing.

the accused include disbursements, such as payment to expert witnesses and the cost of transcripts.[11]

14.10 The Bill provides that an order by the Court to pay costs may be made only on application by the Attorney General. Any such order must be made in favour of the Attorney General, for the benefit of the persons specified in the application. Such persons could be the accused in the discontinued proceedings, the State, and/or any other person, or a person within a class, prescribed by regulation. The Attorney General may provide the Court with a certificate setting out the relevant costs as they apply to each person. However, if it decides to make an order for payment of costs, the Court may order payment of an amount that is less than or equal to (but not more than) the amount specified in the certificate. The Attorney General must distribute any costs recovered on an application to the persons and in the amounts specified in the Court's order.

14.11 Under the Bill, proceedings to determine an application for costs against a person or organisation may be made any time after proceedings have commenced for contempt against that person or organisation, but must be made within three years from the conclusion of those contempt proceedings. Proceedings to determine an application for costs are civil. Any order made by the Court on an application is enforceable as a civil debt. Failure to comply with a costs order does not itself constitute contempt of court.

14.12 As noted in Chapter 1, the introduction of the Bill caused some controversy, and was strongly condemned by representatives of the media. The arguments in favour of a power to order compensation and the arguments against such a power are outlined below. Criticisms of the Bill itself are also examined in this chapter.

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11. One submission pointed out that it is unclear whether s 8(c) would extend to the salaries and other expenses of police witnesses, and that, it being appropriate that these costs should be included, the legislation should be clear on their inclusion: New South Wales Crown Solicitor's Office, *Submission* at 5.

JUSTIFICATIONS FOR A POWER TO ORDER COMPENSATION

14.13 The primary purpose of the Bill was to introduce a scheme for compensating those who suffer loss as a result of a contemptuous publication, in the specific context of a criminal trial which is aborted because of media publicity. As the Minister for Police stated when introducing the Bill in Parliament:

> Why should the community have to bear the economic losses which have been caused by the contemptuous actions of the media? The introduction of a scheme to recover costs from contemnors will make it easier for innocent parties to recoup their losses and – by sending a message to the hip pocket of potential media contemnors – hopefully encourage more responsible media reporting.[12]

14.14 The notion of ordering offenders to make reparation to those who have suffered loss as a result of their criminal conduct is not unprecedented. Indeed, there is arguably a general trend in the criminal justice system toward recognising loss suffered by victims and making offenders accountable in a practical way for the consequences of their actions. This trend is reflected in the various legislative provisions which now exist to order compensation and restitution by offenders to their victims, such as the provision for the restitution of stolen or embezzled property,[13] or the provisions in the Victims Compensation Act and the *Crimes Act 1914* (Cth) for the payment of compensation by an offender to his or her victim, as discussed in paragraphs 14.4-14.6 above.[14]

12. New South Wales, *Parliamentary Debates (Hansard)* Legislative Assembly, 15 May 1997 at 8571.
13. See *Crimes Act 1900* (NSW) s 438.
14. Reparation may also be made by means of diversionary schemes which operate as alternatives to the traditional sentencing process, such as community-based victim/offender mediation, or as a condition to a police caution.

14.15 Reparation is properly viewed as something which is ancillary to sentencing, and which does not form part of the sentence itself.[15] Whereas the focus of sentencing is on the offender, with its aims (among others) to punish and deter, the focus of reparation is on the victims of crime, and providing them with a means of obtaining some practical relief for their loss, which relief is not generally provided by the sentencing process.

14.16 If sub judice contempt is to be treated as a criminal offence, or as imposing criminal liability, then there is justification for providing a means for those who suffer loss as a result of that contempt to recover compensation for their loss. While there may not be a direct "victim" of a contempt in the same way as there is a victim of, for example, an assault or a theft, there are often people who suffer financial loss following a contemptuous publication. The clearest example of this is the situation dealt with by the Bill, where a criminal trial must be discontinued because of media publicity, and the parties in the trial suffer the wasted expense of an aborted trial, as well as, potentially, the additional expense of a new trial. It may be questioned why, in this situation, the parties should not be compensated by the offender, consistent with the general trend of compensating victims of crime.

14.17 The expense incurred by aborting a trial is usually substantial. The daily cost of running a case in court is high. Appendix B sets out estimates of the cost of running a criminal jury trial in the District and Supreme Courts (since these are the types of proceedings most likely to be aborted as a result of media publicity). Based on these estimates, the cost of running a criminal jury trial in the Supreme Court is approximately $6,011 per day, and in the District Court it is approximately $4,526 per day. These figures include the cost of salaries for judicial officers and other court staff (as apportioned for a daily figure), but exclude the

15. See Australian Law Reform Commission, *Sentencing* (Report 44, 1988) at para 142; Victoria, Law Reform Committee, *Restitution for Victims of Crime: Final Report* (PP 96, 1994) at xviii; New South Wales Law Reform Commission, *Sentencing* (Discussion Paper 33, 1996) at para 10.27-10.30, (Report 79, 1996) at para 13.2. See also *Davies v Taylor* (1996) 140 ALR 245.

cost of legal representation and other services such as the Police and Corrective Services (where the accused is in custody). The Public Defenders' costs are estimated to be $845 per day. The cost of legal representation for a legally aided accused is estimated at $3,420 per day in the Supreme Court and $2,268 per day in the District Court.[16] The costs borne by an accused who is not legally funded could well be higher than these figures.

14.18 It has been suggested that it is becoming an increasingly common problem that trials are aborted because of media publicity, therefore warranting the introduction of a means to recover the considerable wasted expense.[17] However, that suggestion has been strongly disputed by others, particularly by the media.

14.19 As noted above, while sentencing aims at deterrence, compensation is designed to remedy losses. However, having said that, there is an element of deterrence in the existence of a power in the courts to order compensation. This is relevant in the context of trying to ensure that the expeditious finalisation of a trial is not jeopardised by contemptuous publications. If a trial is aborted, there is the risk that witnesses may not be able to be found at a later date, including an accused's exculpatory witnesses. There is also the possibility that clear recollections of events will deteriorate. As well, the public interest in the due administration of justice is frustrated.

16. The average length of a criminal trial in the District Court (State-wide) in 1998 was 5.3 days and in the Sydney region was 8.4: see NSW District Court, *Annual Review 1998* at 4. In the Supreme Court no estimate of the average length of a criminal trial has been made.
17. See *United Telecasters Sydney Ltd v Hardy* (1991) 23 NSWLR 323 at 347 (Samuels J); New South Wales, *Parliamentary Debates (Hansard)* Legislative Assembly, 15 May 1997 at 8572.

ARGUMENTS AGAINST A POWER TO ORDER COMPENSATION

14.20 The Commission has received a number of submissions addressing the issue of compensation for the cost of an aborted trial following a contemptuous publication. The majority of these submissions were made on behalf of media groups, and expressed strong opposition to the introduction of a power to order compensation. They focused particularly on the provisions of the Bill. The principal arguments against a power to order compensation, as articulated in the submissions, are summarised below.

Double punishment

14.21 The usual sanction imposed by the sentencing court for sub judice contempt is a fine, for which there is no statutory limit and which can be substantial.[18] It was submitted that to order media organisations to pay for the cost of an aborted trial, in addition to paying what could well be a large fine, would be to punish the offender twice for the same offence.[19] The financial burden placed on the organisation as a result could be enormous.

14.22 The concern regarding double punishment is heightened in light of the particular framework for ordering compensation established by the Bill. The Bill allows for an application for compensation for costs to be made separately from, and potentially

18. It was submitted that fines imposed in New South Wales for sub judice contempt tend to be much larger than those generally imposed in other Australian jurisdictions: R Williams, "Contempt of Court: Prejudicing the Administration of Justice [1995] *Gazette of Law and Journalism* (No 30) 2 at 4.
19. Federation of Australian Commercial Television Stations, *Submission 1* at para 3.2; John Fairfax Publications Pty Limited and News Limited, *Joint Submission to Attorney General* at para 1.2; SBS Corporation, *Submission* at 2. See also M Chesterman, "Costly Terminations" [1997] *Gazette of Law and Journalism* (No 45) 5 at 6.

three years after, proceedings to determine liability and penalty for contempt.[20] Consequently, at the sentencing stage, when determining the appropriate sanction to impose, or, in most cases, the appropriate amount for a fine, the court will not necessarily be in a position to take into account the fact that the media organisation will also be ordered to pay for the cost of an aborted trial. Moreover, the fact that the publication has caused a trial to be aborted may be considered by the sentencing court as an aggravating factor which increases the amount of the fine to be imposed.[21]

14.23 While the Bill provides that the Court, when making an order for compensation, may order payment of an amount of money which is less than that specified in the application by the Attorney General, the Bill does not expressly set out factors for the Court to consider in determining the appropriate amount to order. This contrasts with the approach taken towards ordering compensation in the Victims Compensation Act[22] and the *Crimes Act 1914* (Cth),[23] both of which set out factors for the court to consider in determining the sum of compensation to be paid.

20. See *Costs in Criminal Cases Amendment Bill 1997* (NSW) Sch 1 cl 9(2). It has been submitted that it would be preferable for an application for costs to be brought and dealt with at the same time as the penalty phase of the contempt proceedings: New South Wales Crown Solicitor's Office, *Submission* at 6.
21. See *Attorney General (NSW) v John Fairfax & Sons Ltd* (NSW, Court of Appeal, No 371/87, 21 April 1988, unreported); *R v Thompson* [1989] WAR 219 at 225 (Wallace J); *Director of Public Prosecutions (Cth) v United Telecasters Sydney (in liquidation*) (1992) 7 BR 364; *Attorney General (NSW) v Northern Star Ltd* (NSW, Court of Appeal, No 40259/94, 14 October 1994, unreported). Contrast *Hinch v Attorney General (Vic)* [1987] VR 721 at 731 (Young CJ), at 748 (Kaye J).
22. Section 73.
23. Section 16A.

14.24 It was submitted that a further consequence of punishing the media twice for a contempt was that the State would recover twice over the amount of money lost from an aborted trial.[24] The money from a fine would pass into Consolidated Revenue for the State, and most of the money obtained from an order to pay compensation for an aborted trial would also pass to the State. The State would therefore be in a position to profit unfairly from the large financial burden imposed on the media. It was argued that if there is concern to reimburse the State and individuals for the expenses of an aborted trial, then the money levied from a fine should be able to be applied to compensate individuals who have been financially disadvantaged as a result of media publicity.

14.25 To some extent, the argument about "double punishment" misconceives the different purposes served by the imposition of a fine and an order for compensation. A fine is imposed as part of the sentencing process whereas compensation is an order which is ancillary to sentencing. The focus of sentencing is on the offender, with its aim being to punish the offender for breaking the law by, in this context, the imposition of a financial sanction. The focus of compensation is on those who have suffered loss as a result of another's criminal conduct, with its aim being to provide a means of recovery for that loss. Punishment and compensation are not mutually exclusive: a person convicted of, for example, theft, does not generally escape sentencing even if that person has restored the stolen property to its owner. Furthermore, while it is true that money raised from a fine will go to the State, that does not mean that that money will be applied to reimburse those State bodies that have suffered direct financial loss from an aborted trial.

14.26 However, there is also merit in the argument that the framework provided by the Bill may give rise to an unfair outcome. The fact that the Bill allows for sentencing and determination of an application for compensation to occur at separate times may make it difficult for the sentencing court to take into account a compensation order as a factor mitigating penalty, whereas, in the

24. Federation of Australian Commercial Television Stations, *Submission 1* at para 3.2; SBS Corporation, *Submission* at 2.

Commission's view, this factor should be relevant to determining an appropriate fine. The Commission acknowledges that there is a risk that if the court considers the possibility of a compensation order as a mitigating factor, thus reducing the fine, and no application for compensation is subsequently made, the offender is unfairly released from paying the full penalty.

14.27 Conversely, if legislation is enacted giving the Court the power to order compensation, it is the Commission's tentative view that the Court should be able to take into account the amount of any fine imposed on the offender by the sentencing court. Although the Bill appears to provide the court with a discretion to order a sum which is less than the amount specified in the application for compensation, the proposed legislation does not spell out that the court may, or should, take into account the penalty imposed on the offender.

14.28 While these measures would alleviate the risk of the Bill both appearing to impose, and in reality imposing, "double punishment", the Commission appreciates the concerns expressed and welcomes further submissions.

Unnecessary legislation

14.29 It was submitted that the incidence of trials which are aborted because of media publicity is very low and that it is therefore not warranted to introduce a scheme to recover costs, and certainly not one as draconian as that provided for in the Bill.[25]

25. Australian Broadcasting Corporation, *Submission to the Attorney General* (20 September 1997) at 1; Federation of Australian Commercial Television Stations, *Submission 1* at para 4.2; John Fairfax Publications Pty Limited and News Limited, *Joint Submission to Attorney General* at para 1; SBS Corporation, *Submission* at 1.

14.30 It is true that the incidence of aborted trials due to contemptuous media publications is not high.[26] However, the fact that a legislative power may only rarely need to be invoked does not in itself provide good reason why the power should not exist at all. As pointed out above, the losses arising from an aborted trial can be enormous. If it is ultimately concluded that it is proper for the offending media organisation, or individual, to bear the losses resulting from its contempt, then a power to order compensation should be available, regardless of the rarity of its exercise.

Deterrence

14.31 It was submitted that, if the main purpose of introducing a costs power is to deter the media from publishing material which might be contemptuous, then the existing unlimited powers to

26. Professor Chesterman has examined the criminal cases in Australia since 1980 in which the jury has been discharged because of prejudicial publications and/or the publishers have been found guilty of contempt. He identified 21 such cases, of which 11 were "convergence cases", that is, both the jury was discharged and there was a conviction for contempt: M 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 at 72-73. The Director of Public Prosecutions has advised the Commission that in the two year period between November 1996 and November 1998, three trials prosecuted by the DPP were aborted. The Supreme Court has a record of two further trials which were aborted because of prejudicial publications. In the following recent contempt proceedings, the related criminal trials were aborted as a result of prejudicial publications: *Attorney General (NSW) v John Fairfax & Sons Limited* (NSW, Court of Appeal, No 371/87, 21 April 1988, unreported); *Director of Public Prosecutions (Cth) v United Telecasters Sydney (in liquidation*) (1992) 7 BR 364; *Attorney General (NSW) v Northern Star Ltd* (NSW, Court of Appeal, No 40259/94, 14 October 1994, unreported); *Attorney General (NSW) v Radio 2UE Sydney Pty Ltd* (NSW, Court of Appeal, No 40236/96, 11 March 1998, unreported); *Attorney General (NSW) v Television and Telecasters (Sydney) Pty Ltd* (NSW, Supreme Court, No 11752/97, 10 September 1998, unreported).

punish for contempt by way of a fine and/or imprisonment are sufficient to meet this purpose.[27]

14.32 The Commission does not agree that the main purpose of introducing a costs power is to deter the publishing of contemptuous material. The purpose of imposing a penalty on the offender in contempt proceedings is to punish. The objectives of punishment are traditionally stated as being retribution, deterrence, rehabilitation and incapacitation.[28] To this list, the Commission would add denunciation. But these objectives do not include reparation. An order to pay compensation is an order requiring the offender to indemnify the "victim" (which in this case includes, or may be confined to, the State) for the injury caused as a result of the offender's conduct.[29] Hence, the sentencing of an offender and the imposition of an order for compensation fulfil two separate objectives, the former including the element of deterrence and the latter, principally, making reparation.

No element of fault

14.33 It was submitted that it is unfair to impose an order to pay compensation for an offence which requires no element of blameworthiness on the part of the offender.[30]

14.34 As discussed in Chapter 5, it is not necessary to prove any element of intent or fault in order to establish liability for

27. SBS Corporation, *Submission* at 2.
28. See New South Wales Law Reform Commission, *Sentencing* (Discussion Paper 33, 1996) at para 3.2.
29. See New South Wales Law Reform Commission, *Sentencing* (Discussion Paper 33, 1996) at para 3.21.
30. Australian Broadcasting Corporation, *Submission to the Attorney General* (20 September 1997*)* at 1; David Syme & Company Limited, *Submission* at para 9; Federation of Australian Commercial Television Stations, *Submission 1* at para 4.2; John Fairfax Publications Pty Limited and News Limited, *Joint Submission to Attorney General* at para 5; SBS Corporation, *Submission* at 2; S Walker, *Submission* at para 2.

contempt. Consequently, a media organisation could potentially be ordered to pay a very substantial amount of money as compensation for an aborted trial after committing a contempt which it did not intend to commit and, in some circumstances, could not reasonably have been expected to avoid. Of particular concern was the situation of live broadcasts, such as radio broadcasts.[31] It was submitted that radio news services are often syndicated throughout New South Wales and other states, so that a regional broadcaster has no control over the content of a national news program prepared by a program supplier which is broadcast live. Nevertheless, a broadcaster in this situation could face an order to pay a large financial sum by way of compensation if it broadcast contemptuous material causing a trial to be aborted, even if it was not in a position to prevent the broadcast.

14.35 It could be argued that the potential for unfairness is increased by the framework for compensation envisaged by the Bill, which provides that an order for costs may be made in respect of a person against whom a charge of contempt is "found proven".[32] An order may therefore be made where there is no conviction for contempt, provided that the charge of contempt is proven. This would cover the situation where, for example, the court finds that, technically, a charge of contempt against a person is proven, but, in its discretion, determines not to convict that person of contempt because the contempt was unintended or was understandable in the circumstances. According to the Bill, a person in this situation could still be subject to an order to pay the costs of an aborted trial, even though the court finds that he or she should not, in the circumstances, be convicted of contempt.

14.36 The primary justification for introducing a power to order compensation in respect of contempt is that sub judice contempt imposes criminal liability for which, consistent with the general trend in the criminal justice system, it is appropriate to compensate its victims. That argument is weakened, however, by

31. See, however, Proposal 8 and accompanying discussion.
32. See proposed s 7(2)(a) in the *Costs in Criminal Cases Amendment Bill 1997* (NSW) Sch 1[6].

the fact that, in several respects, sub judice contempt operates inconsistently with general principles of criminal law. One of the most significant inconsistencies is that it requires no form of fault as an element of liability. As argued in Chapter 5, the Commission considers that unfairness can arise from the absence of any requirement for fault. That unfairness is increased if compensation is ordered based on the current principles of liability. However, the Commission has made proposals to introduce an element of fault into liability for sub judice contempt.

14.37 The Commission proposes that a defence to a charge of sub judice contempt should be available on the basis that the person or organisation charged with the contempt did not know a fact which was the cause of the publication being in breach of the sub judice rule, and took all reasonable steps to ascertain any such facts.[33] Moreover, it proposes a defence if the accused can show that (a) it had no control of the content of the offending material and: (i) at the time of the publication, it 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) it 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.[34] If liability were formulated according to these proposals, then the assertion of unfairness in respect of a power to order compensation would be significantly diminished.

14.38 Potential for unfairness would be further diminished if the Bill is amended so that the power to order compensation arises only when there has been a conviction for contempt. This is discussed in paragraph 14.44 below.

33. See Proposal 7 and accompanying discussion.
34. See Proposal 8 and accompanying discussion.

Exercise of the discretion to abort a trial

14.39 Several submissions expressed concern that the decision to abort a trial, on which an order for compensation would depend, is ultimately a matter for the discretion of the individual trial judge.[35] There is generally no avenue for questioning the appropriateness of that decision (as opposed to the decision *not* to abort a trial). The divergence between cases in which a trial is aborted because of a publication and cases in which no liability for contempt is found, or vice versa, may suggest some inconsistency in judges' approaches to determining the risk of prejudice to a jury as a result of media publicity.

14.40 It was also submitted that judges in general appear to have little faith in the ability of juries to understand and follow proper instruction, and that, if the courts were given the power to order payment from the media for the costs of an aborted trial, trial judges would be more willing to abort trials in the knowledge that it could be the media, and not the State, that would be required to pay for the expense.

14.41 Although there is good reason to approach the exercise of a discretion which may give rise to a liability for costs with caution, in this case, there are a number of factors which arguably allay the concerns raised in submissions. First, while it is true that it is ultimately a matter for the trial judge whether or not to abort a jury trial, there are established principles which guide the exercise of that discretion.[36] The trial judge should only discharge the jury if she or he considers it necessary to do so in the interests of

35. Australian Broadcasting Corporation, *Submission to the Attorney General* (20 September 1997) at 1; John Fairfax Publications Pty Limited and News Corporation, *Joint Submission to Attorney General* at para 2.6; SBS Corporation, *Submission* at 2.

36. The courts have emphasised that the decision to discharge a jury because of media publicity is one for the trial judge to make, taking into account the atmosphere of the trial and the nature and extent of the publicity. See *R v George* (1987) 9 NSWLR 527 at 532-534 (Street CJ) (Yeldham and Finlay JJ concurring); *R v Smith* [1982] 2 NSWLR 608.

ensuring a fair trial. The courts have noted that jurors are capable of putting publicity out of their minds and of adjudicating fairly and impartially, and that trial judges should not be encouraged to discharge juries merely because some prejudicial material has been published, if appropriate directions can cure any possible prejudice.

14.42 The possibility that the costs of an aborted trial will be recovered from a media organisation is not a factor which can properly be taken into account in the exercise of the discretion to discharge. At any rate, the trial judge should realise that he or she is not in a position to speculate as to whether or not the Attorney General is likely to prosecute for sub judice contempt and to apply for an order for compensation.

14.43 Secondly, the Commission is not aware of any evidence to support the perception that judges mistrust the capabilities of juries, nor any real basis for such a view. It seems to be an overly cynical concern that judges would base a decision to abort a trial principally on pecuniary issues. Trial judges would almost certainly have in mind other serious effects of an aborted trial pertaining to hardship and inconvenience to the defendant and witnesses, the eroding of memories, possible loss of evidence, difficulty finding witnesses at a later stage and frustration of the public interest in speedy justice.

14.44 Thirdly, the discharge of a jury would not automatically trigger a power to order costs. The power to order costs would arise only where, on the present formulation in the Bill, a charge of contempt has been proven, or, if the Commission's proposal is accepted, there is a conviction for contempt. Moreover, if it is concluded that a decision to abort a trial should not be admissible evidence in the contempt hearing, this would place further distance between the decision to abort and the proof of, or conviction for, contempt.

14.45 Fourthly, it will not be enough that the prejudicial effect of media publicity is one of a number of reasons for discharging the jury. It will have to be the sole or main reason (if the Bill as presently drafted is passed) or the sole reason (if this is thought to be a better test).

Restriction on freedom of discussion

14.46 It was submitted that a power to order compensation for the cost of an aborted trial would represent a significant restriction on freedom of discussion.[37] The amount of money involved is potentially so substantial as to discourage the media from reporting at all on criminal proceedings for fear of attracting such an order. This would, it was argued, produce a "chilling effect" on media coverage of legal proceedings, and would significantly obstruct access by the public to information about the courts. In this way, freedom of discussion about our legal system would be greatly inhibited, which in turn would be detrimental to the efficient working of our democratic society. Furthermore, a costs power could have particularly harsh consequences on small, regional media groups, and may have the potential of putting such groups out of business. This would have the undesirable effect of limiting the diversity of media publications and, consequently, narrowing access by the public to information about the courts and court proceedings.

14.47 The law on sub judice contempt inherently involves a balancing exercise between the right to a fair trial and the right to freedom of discussion. This is examined in detail in Chapter 2. In the Commission's view, the Bill, as currently formulated, does represent a potentially significant intrusion on freedom of discussion, to the extent that it provides for the possible imposition of an extremely large financial burden on media proprietors. However, that does not mean that a scheme for compensation, formulated in different terms, could not be more successful in achieving a proper balance between the rights to a fair trial and freedom of discussion, by ensuring that the impact of a compensation order on freedom of discussion is not excessive.

37. Australian Broadcasting Corporation, *Submission to the Attorney General* (20 September 1997) at 1; David Syme & Company Limited, *Submission* at para 9; Federation of Australian Commercial Television Stations, *Submission 1* at para 4.2; John Fairfax Publications Pty Limited and News Limited, *Joint Submission to Attorney General* at para 5; SBS Corporation, *Submission* at 2; S Walker, *Submission* at para 2.

For example, there could be a statutory cap on the total amount of money that may be ordered by way of compensation, and/or legislation could expressly provide that the court ordering compensation take into account the financial resources of the defendant. The Commission invites submissions on these possible measures.

14.48 Other measures that would alleviate restrictions on freedom of speech, and which the Commission proposes, are to require the court to consider the amount of any fine which has been imposed by the sentencing court, to introduce an element of fault into liability for sub judice contempt[38] and to reformulate the test for liability from one of "tendency" to prejudice to one of "substantial risk" of prejudice.[39]

Inconsistency with other jurisdictions

14.49 It may also be argued that if a power to order compensation were introduced in New South Wales, it would serve only to place New South Wales at odds with the approach taken in other Australian jurisdictions and, indeed, in the rest of the common law world, while doing nothing to clarify the anomalies surrounding the law of sub judice contempt.

14.50 It is true that, with one exception, no other common law jurisdiction provides for a power to order compensation for the cost of a trial which is aborted because of a contemptuous publication. As is the position in New South Wales, courts in other jurisdictions may take into account the fact that a trial has been aborted as an aggravating factor in sentencing the offender for sub judice contempt.[40] However, considerations to that effect occur

38. See Chapter 5.
39. See Chapter 4.
40. In a number of cases in Canada, it has been noted that a person or organisation convicted of sub judice contempt can be made to pay part of the costs thrown away because of the contempt, whether they be costs arising from an aborted trial, or, for example, the costs

as part of the sentencing process, which, as noted, is different and serves a different purpose from a process to compensate those who suffer loss as a result of the contempt.

14.51 In Pennsylvania, in the United States of America, legislation appears to provide for a civil action for damages to be brought against a person responsible for a publication that tends to bias the public or participants in proceedings in respect of those proceedings.[41] However, this legislative provision has not been interpreted by the courts as creating a statutory cause of action. Instead, it is considered simply to permit recourse to any cause of action which may exist at common law, which is probably none.[42]

Recommendations of law reform bodies

14.52 The American Bar Association considered the issue of compensation for contempt in 1966 and recommended that an accused person be entitled to reimbursement for additional legal fees and other expenses where a mistrial or a change of venue has been granted or a conviction set aside because of a contemptuous statement.[43] It made this recommendation on the basis that it was only just that the person responsible for the additional expenses be required to reimburse the accused. However, instead of a scheme for compensation or a civil cause of action, it recommended that a court imposing a fine for contempt be authorised to order that all or part of the proceeds of the fine be applied to reimburse the accused.

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involved in adjourning proceedings to reduce the potential prejudice from a contemptuous publication. However, it is clear that repayment for those costs is made by way of the imposition of a fine, as a sanction, rather than through an order for compensation: see *R v Chek TV Ltd* (1987) 30 BCLR (2d) 36; *R v Societe de Publication Merlin Ltee* (1978) 43 CCC (2d) 557 at 564 (Mayrand J).

41. 42 Pa Stat Ann s 4135. See generally H C Griffin, "Notes: Prejudicial Publicity: Search for a Civil Remedy" (1967) 42 *Notre Dame Lawyer* 943, especially at 953.
42. *Larsen v Philadelphia Newspapers Inc* 543 A 2d 1181 (1988) at 1190-1191 (Popovich J) (Kelly J concurrring).
43. American Bar Association, Advisory Committee on Fair Trial and Free Press, *Standards Relating to Fair Trial and Free Press* (American Bar Association Project on Minimum Standards for Criminal Justice, 1966) at 154-155.

14.53 The Australian Law Reform Commission considered the issue of compensation for loss arising from a contemptuous publication.[44] It supported the notion of providing a means to compensate parties in a criminal jury trial where the jury is discharged because of the publication. However, it emphasised that any power to order compensation in these circumstances should be carefully defined and limited to cases where there has been an actual conviction for contempt, and the publication in question was the cause of discharge of the relevant jury. It considered that a court making an order for compensation should be able to order an amount that is just and equitable, without necessarily constituting the full amount of costs incurred by the discharge of the jury.[45]

14.54 The introduction of a compensatory remedy for contempt was also considered by the Attorneys General of New South Wales, Queensland and Victoria in 1990[46] and, subsequently, by the Commonwealth government.[47] The Attorneys General discussed the possibility of creating a civil cause of action by way of a tort for damages to apply to the situation where criminal proceedings are aborted or delayed because of a prejudicial publication. The Commonwealth government discussed the option of a civil remedy as well as the option of a compensatory order as an adjunct to criminal proceedings, as suggested by the Australian Law Reform Commission. While no final conclusion or

44. See Australian Law Reform Commission, *Contempt* (Report 35, 1987) at para 485.
45. The Australian Law Reform Commission did not ultimately consider it necessary to recommend the introduction of a statutory provision to give effect to this proposal. It took the view that an order for compensation (or reparation) could be made under the existing s 21B of the *Crimes Act 1914* (Cth) if, as it recommended, contempt by publication in respect of Federal Court proceedings were recast as a series of offences against a Commonwealth statute.
46. See Attorneys General of New South Wales, Queensland and Victoria, *Reform of Defamation Law* (Discussion Paper, 1990).
47. Australia, Attorney General's Department, *The Law of Contempt* (A Discussion Paper on the Australian Law Reform Commission's Report No 35, 1991) at para 81.

recommendation was made by either the State or Commonwealth governments, the question of compensation was given serious consideration.

14.55 While it is true that no common law jurisdiction has a power to order compensation for sub judice contempt in the circumstances provided for in the Bill, it is an issue which has been debated in Australia and overseas for some time. Law reform bodies and governments have shown support for the notion of introducing a statutory power, in various forms, to require payment of compensation for wasted expenses resulting from a contemptuous publication.

THE COMMISSION'S VIEW

14.56 At present, the Commission is inclined to support, in principle, enactment of a power to order costs where a trial is discontinued because of a contemptuous publication or broadcast. However, as set out above, there are a number of arguments against such a power which require careful consideration, and on which the Commission invites further submissions.

14.57 If a power to order costs were enacted, it would be essential to carefully define its scope and application. The Commission's present view is that the formulation of the power in the Bill is not satisfactorily drafted so as to ensure that it does not pose an unjustifiable intrusion on freedom of discussion, nor give rise to injustice. Criticisms of the Bill itself, as opposed to the notion of a compensatory power in principle, are discussed below.

CRITICISMS OF THE BILL

14.58 A number of submissions objecting to the introduction of the Bill in actual fact relate to the way in which the power is presently formulated in the Bill rather than being arguments against a power to order compensation in principle.

Losses not referable to the offence

14.59 It was argued that certain costs involved in hearing a criminal trial, such as salaries for judicial officers and other court staff, cannot really be regarded as wasted costs where that trial is aborted, since they are costs which the State is obliged to pay in any event.[48] They do not therefore represent a loss referable to any particular trial for which compensation should be granted.

14.60 As it is presently drafted, the Bill allows for the costs which can be ordered to include the cost of remuneration of judicial and other officers and other staff. The Commission appreciates the concern expressed in the above argument. It could be counter-argued that the judicial and other court staff could have been employed on hearing another case if it were not for the time wasted by the necessity to abort the trial. However, that does not get away from the fact that the salaries are an ongoing State expense, regardless of the particular case being heard.

14.61 The Commission is inclined to the view that, rather than not enacting a power to order compensation at all, the legislation could restrict compensation to expenses directly referable to the trial in question. It is a common function of a court making an order for damages or compensation to assess the nature and amount of loss and damage arising directly from the defendant's conduct and for which the defendant should be liable. The Court, in ordering a media organisation to pay the costs of an aborted trial, would be exercising the same function it is called on to exercise in most litigation coming before it, making assessments as to what is the actual loss arising from the contempt and what is a fair and proper amount for which the offender should be liable.

48. Federation of Australian Commercial Television Stations, *Submission 1* at para 3.1.

Discrimination against the media

14.62 It was submitted that a power to order the media to pay the costs of an aborted trial in terms provided for in the Bill is discriminatory.[49] It singles out the media when there are others who also commit contempt by publication. In some instances, it is those others who are primarily responsible for the contempt, and the media unintentionally also attracts liability by publishing the contemptuous statements of those others.

14.63 For example, a politician may utter contemptuous statements in a media interview which is broadcast live, and the media organisation broadcasting the interview may not be able to prevent the broadcast of those statements. The effect of a power such as that provided for in the Bill is that the politician would escape an order to pay the costs of a trial which is aborted because of his or her statements, but the media organisation that broadcast those statements may be ordered to pay.

14.64 It was suggested that the underlying assumption in singling out the media to pay compensation is that the media consist of large, profit-making organisations with more than enough money to meet the substantial costs of an aborted trial. This assumption, it is argued, is inaccurate, and is an improper basis on which to single out the media to pay such costs.

14.65 It was proposed in one submission that the application of the Bill should not be confined to the media.[50] Instead, any power to order compensation for the costs of an aborted trial should apply to any individual or organisation found liable for sub judice contempt. The Commission is inclined to agree that it is unfair to

49. Australian Broadcasting Corporation, *Submission to the Attorney General* (20 September 1997) at 1; David Syme & Company Limited, *Submission* at para 6; Federation of Australian Commercial Television Stations, *Submission 1* at para 4.1; John Fairfax Publications Pty Limited and News Limited, *Joint Submission to Attorney General* at para 1.3; SBS Corporation, *Submission* at 1; S Walker, *Submission* at para 1.
50. S Walker, *Submission* at para 1.

make the media the sole targets of an order to pay compensation and has tentatively concluded that any legislation which establishes a scheme for compensation should apply to any individual or organisation found guilty of sub judice contempt if that contempt necessitates the discontinuance of the trial.

Other issues raised in submissions

14.66 One submission objected to the Bill's provision that a certificate from the Attorney General would be conclusive evidence of the costs of the aborted trial.[51] Although it could be argued that this is an efficient way of providing the court with information about the costs, the Commission recognises that the qualifier "conclusive" may be cause for concern. The Commission is of the provisional view that the party against whom a costs order is to be made should be able to challenge the accuracy of the contents of the certificate. The procedure for doing so may be similar to lodging an application to have a Bill of Costs taxed, or it may be preferable to have the certificate examined by the Auditor General. The Commission would welcome submissions on the practical administration of a challenge to an Attorney General's certificate.

14.67 It was also submitted that the definition of "publication" in the Bill may not cover cable television transmission or transmission to subscribers to diffusions services, since these services use a transmission path provided by material substances. It may be preferable to retain the same definition of publication that is used to impose liability for contempt.

14.68 In relation to the law of contempt, "publication" has not been clearly defined at common law and yet no real controversy or uncertainty appears to have so far arisen as a result. As outlined in Chapter 3, the Commission cannot at this stage see any advantage in introducing a legislative definition of the term

51. SBS Corporation, *Submission* at 2; See *Costs in Criminal Cases Amendment Bill 1997* (NSW) s 10(3).

"publication", with the inflexibility and ambiguity in interpretation which this is likely to bring, on which to test sub judice liability. If liability for a costs order is to arise because a "publication" which has been proved to be contemptuous, or, on the Commission's proposal, for which there has been a conviction for contempt, necessitated discharging the jury, it should not be necessary to give a descriptive definition of "publication" in the compensation legislation. Nothing more is achieved but, on the contrary, it introduces ambiguity and possible conflict with the law of contempt. The Commission proposes that reference in the Bill to "printed publication" and "radio, television or other electronic broadcast" be omitted and that "publication" for the purposes of the legislation simply be defined to mean a "publication in respect of which a conviction for contempt has been entered".

14.69 It was submitted that the reference in s 7 to the discontinuance of criminal proceedings was insufficiently clear because it is arguable that "criminal proceedings" remain extant notwithstanding that a jury may be discharged.[52] This submission pointed out that "in some cases a proposed hearing date must be vacated in advance because of prejudicial publicity, or a trial may be adjourned prior to the jury being empanelled". The suggestion is made that the legislation clarify the definition of "discontinued" and the Commission invites submissions on this point.

FORMULATION OF A POWER TO ORDER COMPENSATION

14.70 In the following paragraphs, the Commission has identified some considerations in relation to formulating a power to order compensation that require further thought. There are also, in addition to criticisms raised in submissions, some areas which are not, in the Commission's view, satisfactorily drafted in the Bill.

52. New South Wales Crown Solicitor's Office, *Submission* at 4.

Criminal compensation scheme or civil action in tort?

14.71 Clause 14(2) of the Bill provides that "proceedings for the hearing and determination of the application [for costs] are in the nature of civil proceedings, whether they form part of the proceedings at which a person is tried for contempt or not". This is not, of course, the same as providing for a separate action in tort. Rather, the Bill contemplates a scheme for compensation as an adjunct to a criminal offence.

14.72 The main advantage of enabling an action in tort to be brought for compensation is that the availability of the remedy would not depend on a prosecution being brought for contempt or on a conviction for contempt. However, as noted above, one of the criticisms of the Bill is that, by providing that an order for costs may be made where there is proof of contempt, but not necessarily a conviction, there is the potential for unfairness. The Commission is proposing that an order for costs should not be made unless there has been a conviction for contempt.

14.73 Allowing for a civil action to be brought for compensation has other significant disadvantages. As it would involve proceedings which are separate from a criminal prosecution for contempt, it would become possible for one court to find that a contempt has not been proven beyond a reasonable doubt (the criminal burden of proof), but in the civil action, a contempt may be found on the balance of probabilities. Aside from this inconsistency, it is arguably undesirable that a tendency to, or risk of, prejudice could be found proven merely on a balance of probabilities as this would impact upon freedom of discussion.

14.74 At this stage, the Commission is of the view that a power to order costs should not be formulated in terms of a tort. The Commission proposes no change to the Bill in this regard.

When should the Supreme Court have power to order compensation?

14.75 The Bill provides that the Court may make an order for costs where proceedings are discontinued "solely or mainly" because of a contemptuous publication or broadcast. The issue which arises is whether this is a reasonable test or whether, as some submission have argued, the test should be that the effect of the contemptuous publication was the *sole* reason for discontinuing the trial.

14.76 It could be counter-argued that a "sole reason" test is somewhat restrictive, considering that the decision to abort because of publicity must be made in the context of the general atmosphere of the trial. One possible resolution of this issue is to include in the legislation a provision that an order for costs be made for an amount that is just and equitable. This would give the Court the flexibility to order the contemnor to pay a reduced amount if there were factors in addition to the contemptuous publication or broadcast which caused the trial to be aborted. Admittedly, the practical reality may be that the weight to be given to various factors is difficult to determine, unless the trial judge has enunciated his or her reasons for deciding to discharge the jury. The Commission is inclined to the view that there should be a "just and equitable" qualification in the legislation, but invites further submissions on this issue.

14.77 As noted above, the Commission proposes that the power to order compensation should only arise where there has been a conviction for contempt.

14.78 The Bill only applies to the discontinuance of criminal proceedings before a jury. An issue which needs to be considered is whether application of the legislation should be widened to apply to circumstances where the commencement of a criminal trial is delayed because of publicity, where a change of venue is granted or where a conviction is subsequently overturned, and a retrial ordered, because of prejudicial reporting. It could be argued that there is no longer the necessary causation between the prejudicial

reporting and the expenses incurred in appeal proceedings and a retrial, given the intervening "error" of the trial judge in not aborting the trial.

14.79 The Commission's tentative view is that the compensatory power should not apply to civil jury proceedings.

Discretionary nature of the power

14.80 The Bill, in providing that the Court "may" make a costs order, formulates the power as a discretionary one. The Commission believes this to be desirable and does not propose any change to this. The issue which arises here is whether legislation should include guidelines as to the factors which ought to be taken into account in the exercise of the discretion to make a costs order. For example, it may be reasonable for the Court to be able to take into account a contemnor's ability to pay, and the financial hardship which may result from a costs order. This would address the concerns of smaller media organisations whose viability may be threatened by an order against them. As well, in the absence of consideration of financial hardship, it may be thought unrealistic to extend the application of legislation to individuals who have limited ability to pay the costs of an aborted trial.

14.81 As discussed above, the Commission is proposing that one of the matters that the Court should be able to take into account is the amount of any fine ordered by the sentencing court to be paid by the contemnor.

Amount of compensation

14.82 The Bill gives the Court the discretion to order an amount less than or equal to the amount specified in the certificate tendered by the Attorney General, setting out the costs that relate

to the discontinued proceedings.[53] There is no discretion to order a greater amount nor what the Court might determine to be a "reasonable" amount. The question to consider is whether legislation should give the Court a discretion to order an amount that is "just and equitable in all the circumstances". If so, as discussed above, the Commission invites submissions on whether legislation should include guidelines as to how the Court's discretionary powers are to be exercised.[54] The Commission proposes that the Court ought to be able to take into account any amount paid by the contemnor by way of a fine. Other factors which legislation could direct the Court to consider in determining what is just and equitable include the financial hardship that would arise from the imposition of an order for a certain amount and any reasons in addition to the contemptuous publication or broadcast for deciding to discontinue the trial. The Commission notes that both the *Crimes Act 1914* (Cth) and the Victims Compensation Act include provisions setting out factors that the court must take into account in the exercise of its discretion.

Nature of losses

14.83 The Bill provides for compensation for economic loss but not for compensation for other types of losses, or even injuries, such as emotional and physical injury where the accused must spend longer time in prison waiting for a retrial. This gives rise to a question whether compensation should extend beyond the costs thrown away in discontinuing proceedings. Although it may be difficult to quantify losses for physical and emotional injury, the Victims Compensation Act provides a precedent which could be followed.

14.84 The Commission is inclined towards the view that the accused should be able to apply for compensation for any emotional or physical injury directly arising from the discontinuance of

53. Section 11(3).
54. This approach is supported by the New South Wales Crown Solictor's Office: New South Wales Crown Solicitor's Office, *Submission* at 6.

proceedings, such as distress resulting from extended custody or even from an assault which may take place in prison during the extended custodial period, providing the accused is ultimately acquitted or given a non-custodial sentence. If the accused is convicted and sentenced to a term of imprisonment, he or she is compensated by having the sentence reduced to take into account time already spent in custody pending the trial and retrial. The same legislative maximum amount for compensation for emotional and physical injury as is prescribed in the Victims Compensation Act should be prescribed in the Bill.

14.85 However, the Commission does not think it is appropriate to allow witnesses also to be able to claim compensation for any emotional distress caused by the discontinuance of a trial, such as having to wait a longer time to give evidence or having to give evidence for a second time.

Liability to pay compensation

14.86 Under the Bill, an order for costs may only be made against the proprietor or person in charge of a business or other undertaking responsible for the contemptuous publication or broadcast.[55] The scheme therefore does not apply to individuals, including individual journalists or editors. As discussed in paragraphs 14.62-14.65, this has been criticised by media organisations as amounting to discrimination against them. The Commission has tentatively concluded that any legislation which establishes a scheme for compensation should apply to any individual or organisation found guilty of sub judice contempt if that contempt necessitates the discontinuance of the trial.

Timing of proceedings and standing

14.87 The Bill allows for the hearing of the costs application to occur separately from, and up to three years after the conclusion

55. Section 7(2).

of, the hearing of the charge of contempt,[56] but it also envisages that the costs application can form part of the contempt proceedings.[57] The Commission considers that it is desirable to include this provision that the two proceedings can occur together. The advantage of hearing the contempt charge and the costs application at the same time is that the court imposing the penalty is in a position to take into account the application for compensation and the appropriate costs order, and thus the penalty and costs award can be made compatible. There is also the savings in costs from the one court hearing both proceedings. However, it is not essential that both should be heard together. The sentencing judge could receive evidence of the likelihood of there being a subsequent application for costs as a factor to take into account in determining the appropriate penalty.

14.88 The Commission is presently of the view that an individual, such as the accused in the substantive trial, should have standing to apply for compensation. The Commission presently sees no reason why the Attorney General should be able to take over the application, although he or she could receive notice and could seek to be joined as a co-claimant.[58]

PROPOSAL 31

The *Costs in Criminal Cases Act 1967* (NSW) should be amended to enable the Supreme Court to make an order for costs against a publisher of material, in contempt of any court at which a criminal trial is held before a jury, if the publication causes the discontinuance of the trial.

56. Section 9(2).
57. Section 14(2).
58. One submission considered that, as contempt proceedings are brought in the name of the State of New south Wales, it may be appropriate for the State to be the moving party in an application for costs: New South Wales Crown Solicitor's Office, *Submission* at 5.

PROPOSAL 32

The amending legislation should substantially be in the form set out in the *Costs in Criminal Cases Amendment Bill 1997* (NSW) but with the following modifications:

(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 *Costs in Criminal Cases Amendment Bill 1997* to "printed publication" and "radio, television or other electronic broadcast" be omitted. "Publication" for the purposes of the legislation should be defined to mean a "publication in respect of which a conviction for contempt has been entered".

(4) An order for compensation should be made only where a trial is discontinued "solely" because it has been affected by a contemptuous publication or broadcast.

(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 cost 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.

(8) In ordering a sum for compensation, the Court should be able to consider the amount of any fine ordered by the sentencing court to be paid by the contemnor.

(9) The accused should be able to apply for compensation for any emotional or physical injury directly arising from the discontinuance of proceedings. The same legislative maximum amount for compensation for emotional and physical injury as is prescribed in the Victims Compensation Act should be prescribed in the legislation.

(10) Where the Attorney General attaches or tenders a certificate setting out the costs that relate to the discontinued proceedings, the party against whom a costs order is to be made should be able to challenge the accuracy of the contents of the certificate.

PROPOSAL 33

In determining the amount of any fine to be imposed on a defendant found guilty of sub judice contempt, the sentencing court should be able to take into account, as a mitigating factor, the likelihood that an order for compensation will be made.

QUESTIONS FOR FURTHER DISCUSSION

Q14.1 Should legislation contain guidelines for the exercise of the Court's discretion to make an order for costs?

Q14.2 If so, should guidelines include that the Court ought to take into account the contemnor's ability to pay and whether there were any other factors leading

to the decision to discharge the jury? What other guidelines should be included in the legislation.

Appendices

- Appendix A
  Costs in Criminal Cases Amendment Bill 1997
- Appendix B
  Costs of a day in court
- Appendix C
  Table of penalties
- Appendix D
  List of submissions

APPENDIX B: COSTS OF A DAY IN COURT

Supreme Court – criminal trial†

COSTS	$ PER DAY
Judge	
Judge	1004
Pay Roll Tax	64
Personal Accident	10
Pension Scheme Accrual	404
Long Service Leave	45
Fringe Benefit Tax	28
TOTAL JUDGE SALARY AND ONCOST	1,555
Support Staff	
Associate	239
Tipstaff	162
Pay Roll Tax	26
Workers Compensation	401
Leave Loading	5
Long Service Leave	14
Superannuation	76
TOTAL SUPPORT STAFF AND ONCOST	923
Court Attendant	
Court Attendant	111
Pay Roll Tax	7
Super Basic Benefit	6
TOTAL COURT ATTENDANT AND ONCOST	124
Security	
Security Sheriff's Officer (Snr Sgt Year 2)	217
Pay Roll Tax	17
Worker Compensation	11
Leave Loading	3
Long Service Leave	8
Superannuation	41
TOTAL SECURITY AND ONCOST	297
Reporting Service Bureau	
Court Reporter	310
Pay Roll Tax	20
Workers Compensation	3
Leave Loading	4
Long Service Leave	11
Superannuation	59
Total Reporting Service Bureau (one court reporter)	407
TOTAL REPORTING SERVICE BUREAU (TWO REPORTERS REQUIRED)	814
TOTAL DIRECT SALARIES AND ONCOST	3,713

COSTS	$ PER DAY
Administrative Support Costs	435
Corporate Overhead	53
TOTAL INDIRECT SALARIES AND ONCOST	488
Other	
Jurors (12 jurors at $93 per day)	1,116
Witnesses (one ordinary at $73 per day; one expert at $145 per day)	218
TOTAL OTHER††	1,334
MAINTENANCE AND WORKING EXPENSES	476
TOTAL COST OF A DAY IN COURT	6,011

† These figures exclude the following: Legal Aid; Public Defenders; Corrective Services; Director of Public Prosecutions (including Crown Prosecutors); Legal Counsel; Police Service; opportunity cost of a day in court; and depreciation.

†† These figures are estimates only.

District Court – criminal trial†

COSTS	$ PER DAY
Judge	
Judge	874
Pay Roll Tax	56
Personal Accident	9
Pension Scheme Accrual	351
Long Service Leave	39
Fringe Benefit Tax	27
TOTAL JUDGE SALARY AND ONCOST	1,356
Support Staff	
Associate	232
Pay Roll Tax	15
Workers Compensation	2
Leave Loading	3
Long Service Leave	8
Superannuation	41
TOTAL SUPPORT STAFF AND ONCOST	301
Court Attendant	
Court Attendant	111
Pay Roll Tax	7
Super Basic Benefit	8
TOTAL COURT ATTENDANT AND ONCOST	126
Security	
Security Sheriff's Officer (Snr Sgt Year 2)	217
Pay Roll Tax	17
Worker Compensation	10
Leave Loading	3
Long Service Leave	8
Superannuation	41
TOTAL SECURITY AND ONCOST	296
Court Monitor	
Monitor	169
Pay Roll Tax	13
Workers Compensation	2
Leave Loading	2
Long Service Leave	6
Superannuation	32
Total Court Monitor (one monitor)	224
TOTAL COURT MONITOR (TWO MONITORS REQUIRED)	448
TOTAL DIRECT SALARIES AND ONCOST	2,527

COSTS	$ PER DAY
Administrative Support Costs	341
Corporate Overhead	60
TOTAL INDIRECT SALARIES AND ONCOST	401
Other	
Jurors (12 jurors at $93 per day)	1,116
Witnesses (one ordinary at $73 per day; one expert at $145 per day)	218
TOTAL OTHER††	1,334
MAINTENANCE AND WORKING EXPENSES	264
TOTAL COST OF A DAY IN COURT	4,526

† These figures exclude the following: Legal Aid; Public Defenders; Corrective Services; Director of Public Prosecutions (including Crown Prosecutors); Legal Counsel; Police Service; opportunity cost of a day in court; depreciation; accommodation (not provided for in Law Courts contribution) and courtroom/chambers (estimate 110 square metres at $600 per square metres per year).

†† These figures are estimates only.

Local Courts†

COSTS	$ PER DAY
Magistrate	
Magistrate	563
Pay Roll Tax	36
Workers Compensation	6
Leave Loading	8
Long Service Leave	25
Superannuation	107
TOTAL MAGISTRATE SALARY AND ONCOST	745
Court Attendant	
Court Attendant	111
Pay Roll Tax	7
Workers Compensation	1
Long Service Leave	4
Super Basic Benefit	8
TOTAL COURT ATTENDANT AND ONCOST	131
Court Monitor	
Monitor	136
Pay Roll Tax	11
Workers Compensation	1
Leave Loading	2
Long Service Leave	5
Super Basic Benefit	10
TOTAL COURT MONITOR (ONE MONITOR)	165
TOTAL DIRECT SALARIES AND ONCOST	1,041
Administrative Support Costs	1477
Corporate Overhead	50
TOTAL INDIRECT SALARIES AND ONCOST	1527
MAINTENANCE AND WORKING EXPENSES	298
TOTAL COST OF A DAY IN COURT	2,866

† These figures exclude the following: Legal Aid; Public Defenders; Corrective Services; Director of Public Prosecutions (including Crown Prosecutors); Legal Counsel; Police Service; opportunity cost of a day in court; depreciation; and accommodation.

Public Defenders†

COSTS	$ PER DAY
Public Defender	
Public Defender	522
Pay Roll Tax	34
Workers Compensation	5
Leave Loading	7
Long Service Leave	24
Superannuation	101
TOTAL SALARY AND ONCOST	693
Administrative Support Costs	
Administrative Staff	48
Pay Roll Tax	3
Leave Loading	1
Long Service Leave	2
Superannuation	9
TOTAL ADMINISTRATIVE SUPPORT COSTS	63
CORPORATE OVERHEAD	2
MAINTENANCE AND WORKING EXPENSES	87
TOTAL COST OF A DAY IN COURT	845

† These figures exclude depreciation and court accommodation.

APPENDIX C: TABLE OF PENALTIES[1]

Sub Judice Contempt Cases in NSW: 1980-1999

NO	CASE	DATE	PREJUDICIAL MATERIAL	PENALTY AND COSTS
1	Attorney General (NSW) v John Fairfax & Sons Ltd [1980] 1 NSWLR 362	8 May 1980	Article in *The Sun* newspaper containing an allegation that a person charged with murder has made an admission of guilt	$10,000 plus costs (publisher)
2	Attorney General (NSW) v Mirror Newspaper Ltd [1980] 1 NSWLR 374	8 May 1980	Article in *The Daily Telegraph* containing a statement of a witness prepared for the Luna Park coronial inquest, published before the witness had been called to give evidence	$10,000 plus costs (publisher)
3	Attorney General (NSW) v Willesee [1980] 2 NSWLR 143	11 August 1980	Television telecast concerning the death of a prison warden which referred to the prior crimes of the man charged with the murder while the trial was pending	$2,000 plus costs (broadcaster or licensee of the TV channel) $1,000 plus costs (company which produced the TV program) $2,000 plus costs (managing director of the company producer and compere and person in control of the program)
4	Attorney General (NSW) v Mayas Pty Ltd (NSW, Court of Appeal, No 174/83, unreported)	28 March 1984	Article in a country newspaper, the *Moree Champion,* referring to past criminal conduct of two persons charged with armed robbery	$5,000 plus one-half the costs (publisher)
5	Director of Public Prosecutions (Cth) v Wran (1986) 7 NSWLR 616	8 December 1986 (liability) 12 March 1987 (penalty)	Article in *The Daily Telegraph* reporting the statement of then Premier Neville Wran expressing his belief in the innocence of Justice Lionel Murphy in respect of a criminal charge	$200,000 plus costs (publisher) $25,000 plus costs (Wran)

1. This table was prepared with the invaluable assistance of Mr David Norris, Senior Solicitor, New South Wales Crown Solicitor's Office.

NO	CASE	DATE	PREJUDICIAL MATERIAL	PENALTY AND COSTS
6	Director of Public Prosecutions (Cth) v Australian Broadcasting Corporation (1986) 7 NSWLR 588	8 December 1986 (liability) 12 March 1987 (penalty)	Television broadcast in ABC's "The National" program made on the eve of committal proceedings against Justice Lionel Murphy referring to the "Age tapes" as revealing that "Justice Murphy had made improper overtures on behalf of a Sydney solicitor, Mr Morgan Ryan"	$100,000 plus costs (broadcaster) $2,000 plus costs (editor)
7	Director of Public Prosecutions (Cth) v John Fairfax & Sons Ltd (1987) 8 NSWLR 732	29 May 1987	Article in the *Sun Herald* containing the alleged criminal record of an accused, other prejudicial material about him including judicial comments adverse to him and a photograph of him "leaving court"	$5,000 plus costs (publisher) No penalty for editors and author but they were ordered to pay costs
8	Attorney General (NSW) v John Fairfax & Sons Ltd (NSW, Court of Appeal, No 371/87, unreported)	21 April 1988 (liability) 24 June 1988 (penalty)	Article in *The Sun* newspaper which referred to the accused as a "prison escapee" during his trial, with others, for the murder of Anita Cobby	$20,000 plus costs (publisher)
9	Attorney General (NSW) v Macquarie Publications Pty Ltd (NSW, Court of Appeal, No 430/87, unreported)	11 July 1988	Article in the *Daily Liberal*, a newspaper in the Dubbo District, containing the name, previous criminal record and photograph of an accused	$10,000 plus costs (publisher)
10	Attorney General (NSW) v Dean (1990) 20 NSWLR 650	11 October 1990	Statement of a police officer made in a press conference suggesting that the person charged with murder was guilty of the charges and had confessed to them	No penalty but the police officer was ordered to pay the costs
11	Attorney General (NSW) v TCN Channel Nine Pty Ltd (1990) 20 NSWLR 368 (liability); (1990) 5 BR 419 (penalty)	31 August 1990 (liability) 11 October 1990 (penalty)	Television story on *TCN9 Evening News* showing a film footage of an accused, in relation to three murder charges, with the police at the murder scenes and disclosing confession by the accused, including an interview with a police officer to the effect that the accused had confessed	$75,000 plus costs (broadcaster)

NO	CASE	DATE	PREJUDICIAL MATERIAL	PENALTY AND COSTS
12	Attorney General (NSW) v Amalgamated Television Services Pty Ltd (1990) 5 BR 396	11 October 1990	Television story on *Channel 7 Evening News* showing a film footage of an accused, in relation to three murder charges, with the police at the murder scenes and disclosing confession by the accused, including an interview with a police officer to the effect that the accused had confessed; interview with accused asking whether he had any messages for family of two of the victims	$200,000 plus costs (broadcaster)
13	Attorney General (NSW) v Australian Broadcasting Corporation (NSW, Court of Appeal, 40136/90, unreported)	11 October 1990	Television story on ABC's regular news broadcast showing a film footage of an accused, in relation to three murder charges, with the police at the murder scenes and disclosing admission of guilt by the accused	$120,000 plus costs (broadcaster)
14	Attorney General (NSW) v United Telecasters Sydney Ltd (NSW, Court of Appeal, 40139/90, unreported)	11 October 1990	Television story on *Ten Evening News* showing a film footage of an accused, in relation to three murder charges, with the police at the murder scenes and disclosing confession by the accused, including an interview with a police officer to the effect that the accused had confessed	$75,000 plus costs (broadcaster)
15	Attorney General (NSW) v Nationwide News Pty Ltd (NSW, Court of Appeal, 40141/90, unreported)	11 October 1990	Newspaper article published in the *Daily Mirror* and two articles in the *Daily Telegraph* from two different editions. The articles contained disclosure of confession by the accused and other statements to police, photographs of him, statements that he was being questioned by police for other murders	$200,000 plus costs (publisher)
16	Director of Public Prosecutions (Cth) v United Telecasters Sydney Ltd (in liquidation) (1992) 7 BR 364	28 February 1992	Television program on arranged marriages broadcast by Channel Ten which contained prejudicial information about an accused charged with violation of the *Migration Act 1958* (Cth) broadcast during his trial	$20,000 plus costs (broadcaster)

NO	CASE	DATE	PREJUDICIAL MATERIAL	PENALTY AND COSTS
17	Attorney General v Radio 2UE Pty Ltd (NSW, Court of Appeal, 40225/91 and 40226/91, unreported)	28 August 1992 (liability) 19 March 1993 (penalty)	Two broadcasts on Radio 2UE, made during the trial of an accused on a charge of conspiracy to pervert the course of justice, which created a real risk that a juror on the trial would believe that the main witness for the prosecution had committed perjury and the accused was being falsely accused of having done things which he had not done	$75,000 plus costs (broadcaster) $2,000 plus costs (announcer)
18	Registrar of the Court of Appeal v John Fairfax Group Pty Ltd (NSW, Court of Appeal, 40478/92, unreported)	21 April 1993	Article in the *Sun Herald* newspaper which attacked the credibility of a defence witness in a criminal trial for attempting to pervert the course of justice	$75,000 plus costs (publisher) $1,000 plus costs (journalist)
19	Attorney General (NSW) v Northern Star Ltd (NSW, Court of Appeal, 40259/94, unreported)	14 October 1994	Article in *The Northern Star*, a regional newspaper printed in Lismore and circulated in the district to such towns as Ballina, published during a trial for armed robbery and kidnapping which referred to the accused's record of past conviction and escape from custody, as well as to the extraordinary security measures at trial	$20,000 plus costs (publisher)
20	Attorney General (NSW) v Time Inc Magazine Co Pty Ltd (NSW, Court of Appeal, 40331/94, unreported)	15 September 1994 (liability) 21 October 1994 (penalty)	Article in a magazine, *Who Weekly,* which contained a photograph of Ivan Milat, accused of several murders	$100,000 plus costs (publisher) $10,000 (editor)
21	Registrar of the Court of Appeal v John Fairfax Group Pty Ltd (NSW, Court of Appeal, 40250/94, unreported)	21 October 1994 (liability) 23 February 1995 (penalty)	Article in the *Sun Herald* newspaper disclosing that a person accused of conspiracy to rob an Armaguard van was recently convicted in respect of an armed robbery of an Armaguard van	No penalty Publisher ordered to pay costs

NO	CASE	DATE	PREJUDICIAL MATERIAL	PENALTY AND COSTS
22	Harkianakis v Skalkos (1997) 42 NSWLR 22 (liability); (NSW, Court of Appeal, 40514/96, unreported) (penalty)	25 June 1997 (liability) 15 October 1997 (penalty)	Article in the *Greek Herald* newspaper which accused the Archbishop of the Greek Orthodox Church, who was then a plaintiff in defamation proceedings, of having a hobby of pressing charges to claim the properties of his compatriots, of using the courts to ruin people, etc	$2,000 (author of the article and managing director of the proprietor) $1,000 (proprietor of newspaper) No order as to costs
23	Attorney General (NSW) v Radio 2UE Sydney Pty Ltd & John Laws (NSW, Court of Appeal, 40236/96, unreported)	3 October 1997 (liability) 11 March 1998 (penalty)	Radio broadcast made by a radio announcer, while a man was on trial for murder in Sydney, the announcer naming the accused and stating that the accused was "absolute scum" and was guilty of murder with which he was charged. Announcer wrongly believed accused's plea of guilty to manslaughter had been accepted	$200,000 (broadcaster) $50,000 (announcer) The broadcaster and announcer were ordered to pay costs assessed at $60,000

APPENDIX D: LIST OF SUBMISSIONS

SBS Corporation (22 October 1997)

David Syme & Company Limited (30 January 1998)

Judith Walker, General Manager Legal and Copyright, Australian Broadcasting Corporation (8 September 1998)

David Norris, Senior Solicitor, Crown Solicitor's Office (15 September 1998) *Submission 1*

Sally Walker, Hearn Professor of Law, Law School, The University of Melbourne (16 September 1998)

School of Communication, Charles Sturt University (22 September 1998)

Bret Walker, SC (2 October 1998)

Federation of Australian Commercial Television Stations (20 October 1998) *Submission 1*

David Norris, Senior Solicitor, Crown Solicitor's Office (29 October 1999) *Submission 2*

Federation of Australian Commercial Television Stations (2 November 1998) *Submission 2*

Craig Burgess, Lecturer in Journalism, Department of Mass Communicaiton, Faculty of Arts, The University of Southern Queensland (3 November 1998)

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