New South Wales
Law Reform Commission

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100

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New South Wales
Law Reform Commission

To the Honourable Bob Debus MLC
Attorney General for New South Wales

Dear Attorney

Contempt by publication

We make this Report pursuant to the reference to this Commission dated 14 July 1998.

The Hon Justice Michael Adams
Chairperson

Professor Janet Chan

Professor Michael Chesterman

The Hon Justice Greg James

The Hon Justice Ruth McColl

June 2003

Contents

Terms of reference

On 14 July 1998, the Attorney General, the Hon J W 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:

The Hon Justice Michael Adams
Professor Janet Chan
Professor Michael Chesterman*
The Hon Justice Greg James
The Hon Justice Ruth McColl

(* denotes Commissioner-in-Charge)

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LIST OF RECOMMENDATIONS

Chapter 2

RECOMMENDATION 1 (page 44)

Liability for sub judice contempt should be retained.

Chapter 4

RECOMMENDATION 2 (page 73)

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

(a) members, or potential members, of a jury, or a witness or witnesses, or potential witness or witnesses, in legal proceedings will:

  (i) become aware of the matter; and

  (ii) recall the content of the matter at the relevant time; and

(b) by virtue of those facts, the fairness of the proceedings will be prejudiced.

RECOMMENDATION 3 (page 89)

Section 129(5)(b) of the *Evidence Act 1995* (NSW) should be amended to allow for a trial judge's decision to dismiss, or not to dismiss, a jury in a criminal trial following the publication of matter, and the reasons given for that decision, to be admissible in the related contempt proceedings, subject to s 135 of the *Evidence Act 1995* (NSW). The mere fact that the trial judge cannot be cross-examined should not be considered in itself to cause unfair prejudice to a party for the purpose of s 135. Evidence of the decision, and the reasons for the decision, should be admissible as relevant to the issue of liability for sub judice contempt, but should not be determinative of the question of liability.

RECOMMENDATION 4 (page 93)

Legislation should provide that the risk of prejudice presented by the publication of matter is not reduced by reason only that matter containing similar contents has been published on a previous occasion.

Chapter 5

RECOMMENDATION 5 (page 112)

Legislation should provide that it is a defence to a charge of sub judice contempt, proved on the balance of probabilities, that the person or organisation charged with contempt, as well as any person for whose conduct in the matter it is responsible:

(a) did not know a fact that caused the publication to breach the sub judice rule; and

(b) before the publication was made, either

  (i) took reasonable steps to ascertain any fact that would cause the publication to breach the sub judice rule; or

  (ii) relied reasonably on one or more other person to take such steps and to prevent publication of any such fact was ascertained.

RECOMMENDATION 6 (page 120)

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 the offending matter was published pursuant to an agreement or arrangement whereby the content of matter to be published by the accused was to be determined by a person or persons other than the accused or any employee or agent of the accused; and

(b) that either:

  (i) at the time of the publication, having made such inquiries as were reasonable in the circumstances, neither the accused or any servant or

agent of the accused knew or had any reason to suspect that the material to be published would comprise or include the offending matter or any like matter; or

(ii) prior to the publication, having become aware, or having reason to suspect, that the material to be published would or might comprise or include the offending matter or any like matter, the accused, or a servant or agent of the accused, took reasonable steps to endeavour to prevent such matter from being published.

RECOMMENDATION 7 (page 122)

Legislation should provide for costs penalties if a defendant does not disclose evidence of the availability of a defence under Recommendation 7 to the prosecutor within 14 days of being served with summons commencing contempt proceedings.

RECOMMENDATION 8 (page 127)

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.

Chapter 6

RECOMMENDATION 9 (page 137)

The sub judice rule should continue to apply to civil proceedings in the terms recommended in Recommendation 2.

RECOMMENDATION 10 (page 149)

Legislation should provide that, having regard to the circumstances of publication, a person or organisation that publishes material that gives rise to a substantial risk that a person of reasonable fortitude in the position of a party to civil or criminal proceedings will make a different decision in relation to those proceedings, for the reason that it vilifies the person in their character of a party to the proceedings, is liable for contempt.

"Party" in this context includes a prospective party, being a person who reasonably believes that they may become a party to the proceedings, or who is or appears to be in a position to institute the proceedings, whether or not they are minded to do so.

"Decision" in this context means a decision to institute, not to institute, to discontinue, to participate, or to participate further or to take a particular step in proceedings**.**

"Vilifies" in this context means inciting hatred towards, serious contempt for, or severe ridicule of the party through unfair comment and/or material misrepresentations of fact.

The "defences" available in other cases of sub judice contempt should be available in this case.

RECOMMENDATION 11 (page 154)

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.

Chapter 7

RECOMMENDATION 12 (page 158)

Subject to one exception relating to influence on prospective parties, the sub judice rule should not apply to a publication unless the proceedings to which it relates are pending at the time of the publication.

RECOMMENDATION 13 (page 164)

Legislation should provide that, for purposes of the sub judice rule, criminal proceedings should become pending, and the restrictions on publicity designed to prevent influence on juries, witnesses or parties should apply, as from the occurrence of any of these initial steps of the proceedings:

(a) the arrest of the accused;

(b) the laying of the charge;

(c) the issue of a court attendance notice and its filing in the registry of the relevant court; or

(d) the filing of an *ex officio* indictment.

RECOMMENDATION 14 (page 165)

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.

RECOMMENDATION 15 (page 170)

Legislation should provide that in its application to publications which create a substantial risk of prejudice by virtue of influence to witnesses in civil or coronial proceedings, the sub judice rule should apply as from the issue of a writ or summons.

In its application to publications which create a substantial risk of prejudice by virtue of influence on jurors, the sub judice rule should apply as from the time when it is known that a jury will be used in the civil or coronial proceedings.

In its application to publications which create a substantial risk of prejudice by virtue of influence on parties, the sub judice rule should apply as from the issue of a writ or summons.

RECOMMENDATION 16 (page 171)

Legislation should provide that, in its application to publications which create a substantial risk of influence on prospective parties to criminal or civil proceedings, the sub judice rule may apply even though no proceedings have commenced.

RECOMMENDATION 17 (page 180)

Legislation should provide that for purposes of determining whether there has been contempt of court on the ground of influence on jurors or potential jurors, a criminal proceeding remains "pending" and sub judice restrictions remain operative until:

(a) the verdict of the jury in the proceedings is handed down, or

(b) the making of an order, or any other event, having the effect of the offence or offences charged will not be tried before a jury, or not at all.

For purposes of determining whether there has been contempt of court because of influence on parties, witnesses or potential witnesses, a criminal proceeding remains "pending" and sub judice restrictions remain operative until the conclusion of appeal proceedings or the expiry of any period of appeal or further appeal.

Where a re-trial before a jury is ordered following a successful appeal against a conviction, the sub judice rule as it applies to all types of publications (including those that create risks of influence on a jurors, potential jurors, witnesses, potential witnesses and/or parties) begins to operate again from the time the order for a re-trial is made.

RECOMMENDATION 18 (page 181)

Legislation should provide that publications relating to civil and coronial proceedings cease to be subject to the sub judice rule when the proceedings are disposed of by judgment at first instance, settled or discontinued. The rule should become operative again only when and from the time a re-trial, or another inquest or inquiry in the case of coronial proceedings, is ordered.

RECOMMENDATION 19 (page 182)

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

Chapter 8

RECOMMENDATION 20 (page 202)

Legislation should provide that a person charged with sub judice contempt on account of responsibility for the publication of material should not be found guilty if:

(a) the material relates to a matter of public interest; and

(b) the public benefit from the publication of the material, in the circumstances in which it was published, and from the maintenance of freedom to publish such material, outweighs the harm caused to the administration of justice by virtue of the risk of influence on one or more jurors, potential jurors, witnesses, potential witnesses and/or litigants created by the publication.

RECOMMENDATION 21 (page 209)

Legislation should provide that a person charged with sub judice contempt on account of responsibility for the publication of material should not be found guilty if 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.

Chapter 10

RECOMMENDATION 22 (page 239)

A new provision should be introduced into 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 this is necessary for the administration of justice, either generally, or in relation to specific

proceedings (including 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 and oral submissions, as well as material that would lead to the identification of parties and witnesses involved in proceedings before the court. The new section should not replace the common law, and should operate alongside existing statutory provisions that restrict publication unless a successful application has been made rendering such a provision inapplicable in the circumstances. However, section 119 of the *Criminal Procedure Act 1986* (NSW), together with any other provisions contained in other statutes which give courts discretion if grounds are affirmatively made out to impose suppression orders, should be repealed.

A section should be introduced into the *Crimes Act 1900* (NSW) making breach of an order a criminal offence. The offence created by this section should be one of strict liability.

The *Evidence Act 1995* (NSW) should also expressly provide that a person with a sufficient interest in the matter should be eligible to apply to the court for the making, variation or revocation of a suppression order. The applicant for a suppression order, together with the media and anyone else regarded by the court as having a sufficient interest may be heard on the application. The same categories of persons should also be able to appeal in relation to a suppression order. Such a person, if heard previously on the original application, should be entitled to be heard on the appeal. Any other person with a sufficient interest may seek leave to be heard. An appeal against a decision should be heard by a single judge of the Supreme Court, except where a suppression order was made in the Supreme Court, in which case an appeal should be heard by the Court of Appeal.

The court should also be empowered to make an interim suppression order, having a maximum duration of seven days, before proceeding to a final determination. The court should have the power to grant subsequent interim suppression orders.

Chapter 11

RECOMMENDATION 23 (page 273)

Legislation should provide that, subject to (a) any statute, (b) any order of the court prohibiting or restricting access to the relevant document or prohibiting or postponing reporting of the proceedings, or of the relevant part of the proceedings, and (c) any objection by a party or a person having a sufficient interest, the public should have a right of access to any document in one or more of the following categories:

(1) pleadings to the extent their content is relied on in open proceedings and referred to as forming the basis of the case argued by a party;

(2) judgments and orders;

(3) documents that record what was said or done in open court;

(4) documents that were admitted into evidence in proceedings other than bail and committal proceedings and coronial inquiries;

(5) written submissions, to the extent their content is relied on in open proceedings and referred to as forming the basis of the case argued by a party; and

(6) documents recording the offences with which a person has been charged in open court.

Where an objection is made, the court must prohibit or limit access only if the person objecting establishes that a grant of access would be contrary to the due administration of justice.

In relation to all other categories of document, applications for access to a document must be made to the court in which the proceedings are taking place. The applicant must establish grounds for a grant of access.

The word "document" should be defined to mean any record of information including:

(a) anything on which there is writing;

(b) anything on which there are marks, figures, symbols or perforations having a meaning for persons qualified to interpret them;

(c) anything from which sounds, images or writings can be reproduced with or without the aid of anything else; or

(d) a map, plan, drawing or photograph.

RECOMMENDATION 24 (page 274)

The court in which the proceedings are taking place should have the power to prohibit or impose conditions on access to, or reporting of, a document referred to in

Recommendation 23, including a condition restricting the purpose for which the document is to be used.

RECOMMENDATION 25 (page 275)

Legislation should provide that, subject to any rule of common law or statute or any order of the court prohibiting or postponing reporting of the proceedings, or of the relevant part of the proceedings, the public should have the right to publish the contents of, or a fair and accurate summary of the contents of, a document referred to in Recommendation 23.

Chapter 12

RECOMMENDATION 26 (page 293)

Legislation should provide that a private person may commence proceedings for the punishment of contempt.

This is subject to two provisos.

First, the person must, prior to the commencement of such action, notify the Attorney General and the parties to the proceeding (if any) allegedly involved.

Second, the Attorney General (or the Solicitor General or Crown Advocate acting under a delegation from the Attorney General) and the Director of Public Prosecutions shall have the discretion to take over the matter and:

(a) carry on the proceeding,

(b) cause the termination of the proceeding,

(c) carry on, on behalf of the prosecution or as respondent, an appeal in any court in respect of the contempt,

(d) cause the termination of an appeal in any court in respect of a contempt,

(e) institute and conduct, on behalf of the prosecution, an appeal in any court in respect of the contempt, and

(f) conduct, as respondent, an appeal in any court in respect of the contempt.

RECOMMENDATION 27 (page 309)

The hearing and decision of an appeal against a conviction and/or sentence for criminal contempt, and of a review of a question of law submitted by the Attorney General, should be assigned to the Court of Criminal Appeal.

Chapter 13

RECOMMENDATION 28 (page 321)

Legislation should provide an upper limit for fines that may be imposed on persons convicted of criminal contempt. The maximum amount to be set in legislation should be substantially more than $200,000, the highest amount imposed so far in New South Wales in sub judice cases, to enable courts to deal with the worst class of criminal contempt cases. The legislation need not distinguish between the maximum fines that may be imposed on corporate offenders on the one hand, and individuals on the other.

RECOMMENDATION 29 (page 328)

Legislation should provide that the upper limit for a custodial sentence that may be imposed on a person convicted of criminal contempt should be 5 years.

RECOMMENDATION 30 (page 333)

Legislation should expressly provide that the various methods of and alternatives to serving custodial sentence, such as 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 for the sentencing courts to use in criminal contempt proceedings.

RECOMMENDATION 31 (page 337)

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.

RECOMMENDATION 32 (page 342)

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.

RECOMMENDATION 33 (page 343)

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.

Chapter 14

RECOMMENDATION 34 (page 363)

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.

RECOMMENDATION 35 (page 379)

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:

The application of the legislation should not be restricted to media organisations.

An order for compensation should only be made where there has been a conviction for contempt.

An order for compensation should only be made where the contemptuous publication was either the sole or a substantial cause of the trial being discontinued.

Reference in the *Costs in Criminal Cases Amendment Bill 1997* to "printed publication" and "radio, television or other electronic broadcast" should 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".

The legislation should provide that the Court, in determining the amount of any fine to be imposed and the amount of a costs order, should take account of the total sum to be paid by the contemnor.

The Court should have a discretion to order an amount which is "just and equitable in all the circumstances", providing that the amount ordered does not exceed the actual wasted costs. The legislation should provide that the matters to which the court should have regard in the exercise of this discretion should include:

(a) the financial resources of the contemnor; and

(b) the degree of culpability of the contemnor.

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.

The "legal costs" of the parties and the provision of "legal services" to the accused should include disbursements directly related to the aborted trial.

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. However, the certificate should amount to prima facie evidence of the costs, in the absence of contrary evidence produced by the contemnor.

The Attorney General's certificate of costs should include the costs claimed by the accused affected by the discontinued trial.

An order for costs which is less than the amount claimed in the Attorney General's certificate should, nonetheless, include the full amount of the accused's costs.

Chapter 15

RECOMMENDATION 36 (page 391)

A media information officer should be appointed in New South Wales with the specific function of liaising between the media and the Supreme Court (including the Court of Appeal), the Court of Criminal Appeal, the Land and Environment Court, the Children's Court, the District and Local Courts, the Coroner's Court, the Industrial Relation Commission, and the Dust Diseases Tribunal.

RECOMMENDATION 37 (page 391)

A Courts Media Committee should be established in New South Wales, comprising representatives of both the media and the courts, based on the courts media committee in Victoria.

RECOMMENDATION 38 (page 391)

There should be a protocol to the effect that, when a court makes a suppression order, the terms of that order are to be posted on the court's web page within a specified period of time.

RECOMMENDATION 39 (page 391)

The registry of the court in which a suppression order is made should make available to the public the terms of the order.

1. Introduction

- Overview of the report
- Background to the review
- What is “contempt by publication”?
- The focus of the review on “sub judice” contempt
- The Commission’s approach to reform of contempt law
- The structure of this report

OVERVIEW OF THE REPORT

1.1 This Report represents the culmination of the New South Wales Law Reform Commission's review of the law of contempt by publication. The review has primarily been concerned with one aspect of contempt by publication commonly referred to as "sub judice" contempt. It has also covered two closely associated topics: 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 court documents.

1.2 The Commission released a Discussion Paper in July 2000 ("DP 43"),[1] inviting public comment on its provisional proposals for reform of contempt law. This report contains final recommendations for reform based on additional research, submissions received in response to DP 43 and information and responses to its proposals provided in a series of consultations held by the Commission with a range of groups, organisations and individuals.[2]

BACKGROUND TO THE REVIEW

1.3 The Commission's inquiry arose out of the introduction into the New South Wales Parliament, on 14 May 1997,[3] of the *Costs in Criminal Cases Amendment Bill 1997* (NSW) ("the Bill").[4] The Bill 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 a contemptuous publication or broadcast.[5]

1.4 Although the issue of compensation by the media for the expense of an aborted trial had been previously debated in New South Wales,[6] 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

1. NSW Law Reform Commission, Contempt (Discussion Paper 43, 2000) ("NSWLRC DP 43").
2. See Appendix C and D for the list of submissions and consultations.
3. See NSW, Parliamentary Debates (Hansard) Legislative Assembly, 14 May 1997 at 8571.
4. NSWLRC DP 43 at Appendix A.
5. See ch 14 for a full discussion of the Costs in Criminal Cases Amendment Bill 1997 (NSW).
6. See United Telecasters Sydney Ltd 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.

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's comments, the trial judge considered that it was necessary to stop the trial and discharge the jury.[7] Subsequently, both Mr Laws and the radio station were found guilty of contempt and ordered to pay substantial fines.

1.5 The Bill was intended to recover for the State and the parties the costs of a trial discontinued in circumstances such as those that arose in Mr Laws's case. The Bill provided that an order for costs could be made (and only made) against a media organisation convicted of contempt in respect of the prejudicial publication or broadcast. Potentially, these costs could be extremely high.[8]

1.6 The Bill met with protest from representatives of the media, who denounced it as unfair and discriminatory.[9] The Bill also brought to light a degree of dissatisfaction with the law of contempt by publication generally. In particular, 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.

1.7 The media urged the Government to conduct further public consultation before proceeding with the Bill.[10] Parliament took no further action in respect of the Bill and it eventually lapsed when Parliament was prorogued in March 1999. In the meantime, the Attorney General, the Hon Jeff Shaw QC, MLC, requested that the New South Wales Law Reform Commission conduct an inquiry into the law of contempt by

7. See R v Connolly (NSWSC, No 70036/95, Simpson J, 27 February 1996, unreported).
8. 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 NSWLRC DP 43 at Appendix B.
9. 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.
10. See, for example, FACTS, 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, Submission (enclosing submission to the Attorney General) at 3.

publication, including the issue of recovering the costs of a criminal trial that has been discontinued because of a contemptuous publication.[11]

WHAT IS "CONTEMPT BY PUBLICATION"?

The law of contempt generally

1.8 The law of contempt aims to prevent interference with the administration of justice. It regulates a range of human activities that pose a risk of such interference, such as misbehaviour in the courtroom, disobeying court orders, and interference with parties and witnesses in court proceedings.

1.9 Traditionally, the law of contempt is divided into "civil" and "criminal" contempt.[12] "Civil contempt" is concerned with the enforcement of court orders and undertakings given to a court in civil proceedings. "Criminal contempt" is concerned with maintaining the authority and integrity of the court as a matter of public interest. It covers such conduct as misbehaviour in the courtroom and publishing material that tends to interfere with the proper administration of justice. Conduct of this nature is treated as a criminal offence and attracts criminal sanctions, most typically the imposition of a fine or a term of imprisonment.[13]

11. See Terms of Reference at xi.
12. See generally, C J Miller, Contempt of Court (2nd edition, Clarendon Press, Oxford, 1989) at 2-11; G Borrie and N Lowe, The Law of Contempt (3rd edition, Butterworths, 1996) at 3-4; Laws of Australia (Law Book Company, Sydney, 1998) Volume 10, Title 10.11, "Administration of law and justice", ch 2, "Contempt" (M Chesterman) at [4] 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).
13. See ch 13, Penalties and Remedies.

The law of contempt by publication

1.10 This review is concerned only with the area of criminal contempt that applies to publication of material that tends to interfere with the proper administration of justice, or what is termed "contempt by publication".[14]

1.11 A person may be guilty of contempt by publication if they publish material that:

- has a tendency to influence the conduct of particular pending legal proceedings, or prejudge the issues at stake in particular pending proceedings;
- denigrates judges or courts so as to undermine public confidence in the administration of justice;[15]
- reveals the deliberations of juries;
- includes reports of court proceedings in breach of a restriction on reporting; or
- discloses 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.

THE FOCUS OF THE REVIEW ON "SUB JUDICE" CONTEMPT

1.12 This review has primarily focused on 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. Such publications are said to breach the "sub judice" rule.[16] The effect of the sub judice rule is to prohibit the publication of certain information about a case that is currently being heard or is pending hearing in a court. In this report, the Commission refers to a breach of the sub judice rule as "sub judice contempt".

1.13 The review has essentially been confined to sub judice contempt for two reasons. First, because it arose out of the introduction of the Bill, which itself focused

14. 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.
15. This is known as "scandalising the court".
16. The phrase "sub judice" means "under or before a judge or court".

on publications in breach of the sub judice rule and, secondly, the Bill brought to light dissatisfaction with the law of sub judice contempt generally.

THE COMMISSION'S APPROACH TO REFORM OF CONTEMPT LAW

1.14 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, all of which recommended the retention of the sub judice rule, in some form, while at the same time recommending substantial reform.[17] DP 43 summarised the major reviews,[18] as well as referring throughout the paper to particular recommendations as they related to each issue being considered. Although these reviews are not specifically mentioned again in this report, they have informed the Commission's thinking in the review as a whole.

1.15 The Commission's aim has been 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. The Commission has concluded that codification of sub judice contempt would not achieve these aims. To codify only one aspect of contempt, leaving the common law to regulate the remaining areas, may lead to confusion and uncertainty for legal practitioners and the media. This has been the experience in the United Kingdom where the *Contempt of Court Act 1981* (UK) purports, among other things, to codify sub judice contempt but allows the rest of the law of contempt to be embodied in common law principles. Accordingly, the Commission recommends some legislative reforms, while allowing the common law to continue to develop.

1.16 The Commission is mindful that legislative changes in New South Wales to sub judice contempt will result in different rules from those found in other Australian States and territories, as well as to those which apply at the federal level. Media that publish in several States and territories may be presented with some practical difficulties, and possibly some uncertainty and confusion, in contending with the application of different laws. However, the Commission believes that the value of its recommendations in making the law of sub judice contempt in New South Wales clearer and fairer outweighs these consequences. While uniform laws for sub judice contempt would be desirable, it is for the governments of the Commonwealth, States

17. To date, only the United Kingdom has implemented legislative change: Contempt of Court Act 1981 (UK).
18. See NSWLRC DP 43 at para 1.30-1.43.

and territories to decide whether they want to take a co-ordinated approach to the reform of this area of law.[19]

THE STRUCTURE OF THIS REPORT

Part One

1.17 This Report is divided into three parts. Part One deals with the principles governing liability for sub judice contempt and contains Chapters 2-9.

1.18 Chapter 2 addresses the fundamental question of whether the sub judice principle should be abolished or retained. It evaluates the competing public interests in freedom of speech and a fair trial. It also evaluates the soundness of certain assumptions on which the sub judice rule is predicated.

1.19 Chapter 3 discusses the meaning of "publication" and "responsibility" as prerequisites for liability for sub judice contempt. In particular, it considers whether these terms should be legislatively defined. The chapter makes recommendations for a legislative formulation of the notion of "responsibility" for publication.

1.20 Chapter 4 examines the test for liability for sub judice contempt, with particular reference to the impact of publicity on criminal trials. The principal instances of prejudice discussed are influence on jurors and on witnesses (both actual and prospective). It also considers whether categories of prejudicial publications should be prescribed. It examines the relevance to liability for contempt of a trial being aborted, of pre-existing publicity and of the availability of remedial measures. An ancillary matter which the chapter looks at is the admissibility and utility of expert evidence to prove the risk of a publication prejudicing legal proceedings.

1.21 Chapter 5 discusses the relevance of fault to liability for sub judice contempt. The chapter recommends defences to a charge of contempt that take into account questions of fault and responsibility.

1.22 Chapter 6 examines the application of the sub judice rule to publications concerning civil proceedings. As well as discussing the effect of publicity on witnesses, judicial officers and juries in civil proceedings, the chapter discusses improper pressure on parties and the prejudgment principle.

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19. 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 NSWLRC DP 43 at para 10.75.

1.23 Chapter 7 discusses the time limits for liability for sub judice contempt, including whether it should continue to operate during the appeal period and, in the case of criminal convictions, during the sentencing stage. The chapter also considers whether different time rules should apply to intentional contempts.

1.24 Chapters 8 and 9 explore two grounds of exoneration that may excuse a person from liability for sub judice contempt. Chapter 8 considers whether a prejudicial publication may not be in breach of the sub judice rule if 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). The chapter considers whether any reform to this ground of exoneration is necessary or desirable. In addition, it looks at 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.

1.25 Chapter 9 considers the second ground of exoneration, namely that a charge of contempt may be defended on the basis that the prejudicial publication is a fair and accurate report of proceedings held in open court, or, possibly, a fair and accurate report of parliamentary proceedings. It considers related outstanding issues that may require reform.

Part Two

1.26 Part Two, containing Chapters 10 and 11, is concerned with issues relating to reporting legal proceedings and the open justice principle.

1.27 Chapter 10 deals with suppression orders and, in particular, the need for a clear and comprehensive regime which addresses the uncertainties surrounding various aspects of the court's powers in this area.

1.28 Chapter 11 explores the issues of public access to, and reporting on, court documents. It first considers whether there should be a public right of access to court documents and, if so, to what documents such a right should apply and what should be the parameters of the right. Secondly, it considers whether, and in what circumstances, a right of access to court documents should extend to publishing the contents of the documents.

Part Three

1.29 Part Three, containing Chapters 12, 13 and 14, deals with the procedure for prosecuting sub judice contempt, and the sanctions and remedies available, including a power to order compensation.

1.30 Chapter 12 considers procedural and jurisdictional issues in sub judice contempt prosecutions and hearings. In particular, the chapter appraises who should

initiate proceedings, whether the present summary procedure should be retained, and what is the appropriate court in which a contempt should be prosecuted or a conviction for contempt appealed.

1.31 The first section of Chapter 13 is concerned with penalties for contempt, focusing on the principal sanctions of fines and imprisonment. It examines whether legislation should prescribe a maximum penalty in relation to fines and, if so, what that maximum should be and whether a distinction should be made between individual and corporate offenders. It considers whether imprisonment should continue to be an available sanction and, if so, whether there should be a statutory maximum term. The chapter also examines other sentencing options, specifically considering corporate offenders. It also considers the creation of a registry of court outcomes of criminal contempt proceedings for sentencing purposes. The second section of the chapter examines available remedies for contempt, in particular, injunctions and damages.

1.32 Chapter 14 explores the issue of compensation for loss suffered as a result of a contemptuous publication. Specifically, this chapter considers whether the media, or any one else, should be made liable for the costs of a trial that 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) are analysed.

Part Four

1.33 Part 4 contains Chapter 15, which examines the relationship between the media and the courts. Representatives of the media suggested to the Commission that there are ways in which communication and co-operation between the media and the courts in New South Wales could be improved.[20] They cited several practical matters that, in their view, have a significant impact on their ability to report on the courts and avoid liability for sub judice contempt. In this chapter, the Commission makes recommendations for improving the media/courts relationship as a way of minimising the risk of prejudice to court proceedings.

20. See Media Liaison Officers, Consultation; TV and Radio Representatives, Consultation.

2. Should sub judice liability be retained?

- Introduction
- Freedom of speech vs due process of law
- Assumptions underlying the sub judice rule
- Alternative remedial measures
- Communication technologies
- Submissions
- The Commission’s view

INTRODUCTION

2.1 In this review of the law of sub judice contempt, the Commission has considered it necessary to re-examine whether or not the sub judice rule should be retained at all. The arguments for and against retention of the rule were discussed at length in Discussion Paper 43 ("DP 43"). These centred on two main issues.

2.2 First, the competing public interests in freedom of speech and a fair trial were considered. DP 43 argued that although freedom of expression is one of the hallmarks of a democratic society, it cannot be absolute. It is always regarded as liable to be overridden by important countervailing interests, the relevant one in this context being due process of law. Paragraphs 2.5-2.26 below summarise the debate as to what should be the proper balance between the public interests in a fair trial and free speech, and whether retention of the sub judice rule impedes or advances such balance.

2.3 Secondly, the Commission sought to evaluate the soundness of certain assumptions on which the sub judice rule is predicated. Paragraphs 2.27-2.47 below look at empirical research which tests these assumptions.

2.4 In this chapter, the sole question is whether there should by *any* sub judice rule at all. If the conclusion is reached to retain a rule in some form, the question that then arises is whether the content of the rule should be as at present or whether there should be modifications. This aspect is explored fully in later chapters.

FREEDOM OF SPEECH VS DUE PROCESS OF LAW

2.5 As outlined above, the first broad issue is whether it is possible to achieve a proper balance between freedom of speech and due process of the law in the absence of sub judice liability. The Commission takes the view that "a proper balance" does not mean each public interest is equally weighted. Rather, measures that are clearly necessary for due process of the law should take precedence over freedom of speech.

2.6 Support for this view comes from both the weight of general opinion and from judicial authority. As to the first, the belief that the public interest in a fair trial will almost always outweigh the public interest in freedom of expression, generally goes unchallenged. It is particularly justified in relation to 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. This was emphasised by Justice Brennan in the High Court decision, *R v Glennon*:

> Free speech is not the only hallmark of a free society, and sometimes it must be restrained by laws designed to protect other aspects of the public interest. Thus the law of contempt of court seeks to strike a balance between the two competing public interests [in the integrity of the administration of justice and in freedom of expression]. … The integrity of the administration of justice in criminal proceedings is of fundamental importance to a free society. Freedom of public expression with reference to circumstances touching guilt or innocence is correspondingly limited.[1]

2.7 The Law Commission of New Zealand gave the following rationale for this position:

> When a conflict arises between a fair trial and freedom of speech, the former has prevailed because the compromise of a fair trial for a particular accused may cause them permanent harm (for example, because a conviction has been entered wrongly), whereas the inhibition of media freedom ends with the conclusion of the legal proceedings.[2]

2.8 As to the second source of support, namely, judicial authority, although freedom of expression is afforded a degree of legal protection, this is not at the cost of a fair trial. This is expanded upon in paragraphs 2.9-2.15 below.

Legal protection of freedom of expression

2.9 The High Court has considered legal protection of freedom of expression in a number of significant decisions. In *Nationwide News Pty Ltd v Wills*[3] the 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.

1. *R v Glennon* (1992) 173 CLR 592 at 611-612.
2. New Zealand, Law Commission, *Juries in Criminal Trials: Part Two* (Preliminary Paper 37, 1999) ("NZLC PP 37") vol 1 at para 289. While acknowledging the right to freedom of expression and the public interest in media reporting, the Commission stated that "there is also an overriding public interest in ensuring that the criminal justice system operates effectively and fairly": vol 1 at para 284.
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.

2.10 In *Theophanous v Herald Weekly Times Ltd*,[4] a defamation case, the Court upheld a defence that relied on the implied constitutional protection of freedom of political discussion. However, despite a wide definition of "political discussion" by three of the judges,[5] there is 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 that was guaranteed was that which was necessary to provide the democratic underpinnings for representative and responsible government. Justice Deane specifically referred to the effect on the law of contempt of an implied constitutional freedom of speech:

> nothing in this judgment should be understood as suggesting that the traditional powers of the Parliament and superior courts to entertain proceedings for contempt are not justifiable in the public interest.[6]

2.11 In *Lange v Australian Broadcasting Corporation*[7] a unanimous High Court restated the implied constitutional freedom of political communication in a narrower form than the majority had suggested in *Theophanous*. More clearly than the decision in *Theophanous*, *Lange* is an authority against the existence of a general, constitutionally guaranteed, freedom of speech.[8]

2.12 In *Attorney General (NSW) v Time Inc Magazine Co Pty Ltd*, the New South Wales Court of Appeal rejected an argument that the common law principles of contempt contravened an implied right of freedom of communication or expression. The Court held that, while it is perfectly legitimate to seek profit from providing information and entertainment to readers of newspapers and magazines, there is no right, under the *Constitution* or at common law, to do so. The Court observed that:

> [t]he common law principles … are themselves the result of a balancing of competing interests; the public interest in freedom of expression and

4. *Theophanous v Herald Weekly Times Ltd* (1994) 182 CLR 104; see also *Stephens v Western Australian Newspapers Ltd* (1994) 182 CLR 211.
5. Chief Justice Mason and Justices Toohey and Gaudron adopted the definition of "political discussion" contained in E Barendt, *Freedom of Speech* (Clarendon Press, 1985) at 152, being "all speech relevant to the development of public opinion on the whole range of issues which an intelligent citizen should think about": *Theophanous v Herald Weekly Times Ltd* at 124.
6. *Theophanous v Herald Weekly Times Ltd* at 187 (Deane J).
7. *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.
8. "[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 for by the Constitution": *Lange v Australian Broadcasting Corporation* at 561. See also *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 (Kirby J).

> the public interest in the administration of justice. Freedom of expression is not unconditional. Expression can, for legally relevant purposes, be free even though it is subject to other legitimate interests".[9]

2.13 In *John Fairfax Publications Pty Ltd v Doe*, the Court of Appeal again rejected the argument that the constitutional implied right of free communication had "abolished the longstanding protection of fair trial from unlawful or unwarranted media or other intrusion".[10] Justice Kirby stressed that:

> [i]t would be unthinkable if the beneficial development of the implied constitutional right to free communication upon certain matters integral to the political system established by the Constitution were seen … as a vehicle for destroying the essential power and duty of the courts in this country to protect the fair trial right of persons accused of crimes.[11]

2.14 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.[12]

2.15 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, among other things, for the respect of the rights or reputations of others.[13] 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".

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9. *Attorney General (NSW) v Time Inc Magazine Co Pty Ltd* (NSWCA, No 40331/94, 15 September 1994, unreported) at 10 (Gleeson CJ, with whom Sheller and Cole JJA concurred).
10. *John Fairfax Publications Pty Ltd v Doe* (1995) 37 NSWLRC 81 at 111 (Kirby P).
11. *John Fairfax Publications Pty Ltd v Doe* at 110 (Kirby P).
12. *International Covenant on Civil and Political Rights* Article 19(2).
13. *International Covenant on Civil and Political Rights* Article 19(3).

How does the sub judice rule affect the free speech/fair trial balance?

2.16 There are a number of aspects to the debate as to whether, on the one hand, the sub judice rule is needed to ensure that freedom of speech does not jeopardise a fair trial and, on the other hand, whether it restricts free speech excessively. In paragraphs 2.17-2.26 below, the Commission has considered the following questions:

- Does the sub judice rule impinge upon the principle of "open justice"?
- Would the rules of evidence be undermined if there were no sub judice rule?
- Would justice be seen to be done if there were no sub judice rule?
- Is the debate affected by the operation of time limits for, or the availability of defences to, sub judice liability?
- Is the debate based on an erroneous understanding of the role of the media?
- What weight should be given to the fact that certain publications have a particular propensity to prejudice proceedings?

Open justice

2.17 Closely linked with the right to freedom of speech is the public right to scrutinise and criticise courts and court proceedings. DP 43 discussed the operation of the principle of open justice and the effect the sub judice rule may have in limiting openness.[14]

It suggested that the sub judice rule, appropriately restricted in scope, may prevent the publication of "the most obviously prejudicial material specifically relevant to a case"[15] while still permitting reporting and discussion of court proceedings and the justice system. Proof that a publication is a fair and accurate report of what has actually taken place in open court, published in good faith, constitutes a defence to a charge of sub judice contempt.[16] In addition, where the media publishes prejudicial material relating to a current or forthcoming trial, the prosecution, in order to succeed

14. NSW Law Reform Commission, *Contempt* (Discussion Paper 43, 2000) ("NSWLRC DP 43") at para 2.16-2.19.
15. M Chesterman, *Freedom of Speech in Australian Law: A Delicate Plant* (Aldershot, Ashgate, 2000) at 286.
16. See ch 9.

in contempt proceedings, must show that the prejudice outweighs any competing public interest consideration.[17]

Rules of evidence

2.18 The function of rules of evidence was discussed in DP 43.[18] Briefly, rules of evidence ensure that the material on which the jury bases its findings of fact is relevant to the charge being heard, is not hearsay (generally speaking) and can be reliably tested in court, in the presence of the jury. As a result, the rights of an accused to a trial by jury and to be presumed innocent until proven guilty beyond reasonable doubt, are upheld. There is undoubtedly a strong argument that the sub judice rule acts as an important shield against jurors being exposed to material which the rules of evidence would otherwise keep from them. Exposure to inadmissible evidence through the media could well compromise the fairness of the trial.

Justice must be seen to be done

2.19 The justice system must not only ensure a fair trial but it must be apparent to onlookers that the trial has been fair.[19] In this way, public confidence in the administration of justice is maintained. A function of the sub judice rule is to preserve confidence in the judicial system by protecting against the appearance of decisions having been influenced by published material, rather than being impartial and based on the evidence presented in court.

Time limits

2.20 As a general rule, a publication will only constitute a contempt under the sub judice rule if it relates to proceedings which are current or pending. Assuming such time limits are retained, the sub judice rule does not operate to suppress free speech for all time but only to postpone discussion and dissemination of news until the danger of prejudicing a fair trial has passed.

Defences

2.21 In addition to the defences of "fair and accurate reporting" and "public interest", referred to in paragraph 2.17 above, the following defences to sub judice liability expand the scope of freedom of speech, while still preserving a sub judice rule.

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17. See *Hinch v Attorney General (Vic)* (1987) 164 CLR 15. See also ch 8 for a full discussion of the "public interest principle" and the relevant case law. The Commission recommends that a "public interest" defence should continue to be available, albeit in a modified form: see Recommendation 20.
18. NSWLRC DP 43 at para 2.20-2.22.
19. "Justice should not only be done, but should manifestly and undoubtedly be seen to be done": *R v Sussex Justices; Ex parte McCarthy* [1924] 1 KB 256 at 259 (Lord Hewart CJ).

2.22 ***Fault.*** In Chapter 5, the Commission recommends that a charge of sub judice contempt could be defended on the grounds of lack of relevant knowledge or control, providing reasonable steps to prevent the breach were taken.[20] The effect of this recommendation is that the law of sub judice contempt would no longer impose absolute liability. Limiting liability in this way achieves a better balance between freedom of speech and a fair trial.

2.23 ***Public safety.*** 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 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. Establishing a defence to a charge of contempt on the basis of "public safety", which the Commission recommends,[21] 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 the arguments for retaining the rule.

Circumstances where to impose liability appears unfair

2.24 In some circumstances, liability for publication may arise 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.[22] For example, it is generally no defence to show that use of an alternative remedial measure would have minimised or negated prejudicial influence.[23] Further, the actual impact of prejudicial publicity is not relevant to liability for sub judice contempt. But any unfairness can be mitigated by redefining the test for liability and/or making liability dependent on additional factors. The Commission recommends that the present common law test for liability be clarified and narrowed to require that a "substantial risk of prejudice" must be shown.[24] Replacing absolute with strict liability would also help to redress the balance.

20. See Recommendations 5 and 6.
21. See ch 8 at para 8.62-8.65 and Recommendation 21.
22. Chesterman (2000) at 281.
23. This is discussed in ch 4 at para 4.61-4.63. It has been said in some recent cases, noted in ch 4 at footnote 79, 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.
24. See ch 4 and Recommendation 2.

Commercial nature of media publishing

2.25 In the contest between freedom of speech and due process of law, it needs to be remembered that the publication or broadcast of news is often a commercial activity.[25] In *Attorney General (NSW) v Time Inc Magazine Co Pty Ltd*, Chief Justice Gleeson, although acknowledging that it is perfectly legitimate to seek profit from providing information and entertainment to the public, 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.[26]

Specific examples of media publicity

2.26 There are certain kinds of publicity that have a particular propensity to give rise to difficulties in ensuring a fair trial, and even to miscarriages of justice. These high-risk publications include material relating to identification evidence, prior criminal convictions and confessions of guilt.[27] The material often constitutes inadmissible evidence. Knowledge of a confession or a previous conviction, for example, is 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. 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.

25. See *Attorney General (NSW) v Time Inc Magazine Co Pty Ltd* (NSWCA, No 40331/94, 15 September 1994, unreported) at 11 in which Chief Justice Gleeson referred to this observation made by Chief Justice Martin in *Re The Evening News* (1880) 1 LR (NSW) 211 at 240, cited with approval by Windeyer J in *James v Robinson* (1963) 109 CLR 593.
26. *Attorney General (NSW) v Time Inc Magazine Co Pty Ltd* at 11. Similarly, in *Attorney General (NSW) v TCN Channel Nine Pty Ltd* (1990) 20 NSWLR 368 at 380, the observation was 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, 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".
27. These, and other examples, are discussed at length in DP 43 at para 2.45-2.48.

ASSUMPTIONS UNDERLYING THE SUB JUDICE RULE

2.27 The sub judice rule, in its application to publications potentially affecting juries, 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 may retain that information and 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.

Influence of media

2.28 DP 43 outlined a number of arguments for greater freedom of the press which question the influence that the media really has on public perceptions.[28] Judges sometimes refer to the wide divergence of opinions on this issue.[29] If the media's influence is not as great as is often assumed, it can be argued that there is a lesser need or no need at all to place controls on the media.[30]

2.29 The Commission acknowledges the reality 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. The Commission also acknowledges that it is difficult to identify the elements of prejudice that may have arisen from media publicity and to apply selective prohibitions to those alone.[31]

2.30 However, what the sub judice rule seeks to do is to filter out the most damaging of prejudicial effects. It seeks to ensure 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 that is presented and tested in the courtroom, judicial directions and instructions, and arguments and submissions by counsel. It seeks to suppress only that material which has a real and definite tendency, as a matter of practical reality, to prejudice legal proceedings.[32] Furthermore, as pointed out above,

28. NSWLRC DP 43 at para 2.30-2.31.
29. See, for example, *Attorney General (NSW) v John Fairfax & Sons Ltd* (1985) 6 NSWLR 695 at 699 (Samuels JA).
30. The empirical research that seeks to measure media influence is examined at para 2.31-2.47.
31. See Australian Law Reform Commission, *Contempt* (Report 35, 1987) at para 281; see also D Howitt, "Pre-trial publicity: the case for reform" (1982) 2 *Current Psychological Reviews* 311.
32. This is in accordance with the present common law test. On the Commission's recommended reformulated test, the sub judice rule would prevent publication of material which creates a substantial risk of prejudice.

suppression is for a limited time only and liability for contempt is only sheeted home where any of the grounds of exoneration are not available.

Empirical research regarding juries

Current Australian research

2.31 In Australia, the only sustained empirical research into the impact of media publicity on juries is a study of criminal jury trials in New South Wales. Its findings are published in *Managing Prejudicial Publicity*.[33] This is important research for the purposes of this Report, and therefore necessary to refer to it in detail, for a number of reasons:

- First, it is immediately relevant to New South Wales because it is in the context of this State's legal system and journalism; and the participants are inhabitants of this State.

- Secondly, the publicity that it looks at includes news and information published on the Internet, not just news disseminated through traditional media.

- Thirdly, the study employs a methodology, namely a multiple case-study approach, not used, as far as the authors are aware, in any previous investigation of the particular subject, either in Australia or overseas.[34]

2.32 ***Methodology.*** In this project, 41 criminal jury trials held in New South Wales between mid-1997 and mid-2000 were selected and the jurors, judges and principal counsel on both sides were interviewed at the conclusion of the trial:

> The interviewees were asked about their impressions of how prejudicial media publicity associated with the trial might have affected the perceptions of the jurors and the verdicts reached. They were also asked about a number of associated matters, such as what in their view were the principal issues for determination by the jury and what steps, if any, were taken within the trial process to prevent or mitigate any prejudice potentially arising from publicity. Independent research into

33. M Chesterman, J Chan and S Hampton, *Managing Prejudicial Publicity* (Justice Research Centre, Law and Justice Foundation of NSW, 2001). The project leader is the Commissioner in charge of this reference on Contempt by Publication, but the Commission was not involved in the project.
34. The report compares the strengths and weaknesses of various methodologies and puts forward the advantages of the case-study approach: Chesterman, Chan and Hampton at para 81-88.

the scale and nature of the media publicity associated with each trial was also carried out.[35]

2.33 ***Jury recall of publicity.*** The study found that the level of recall of pre-trial publicity appears less than counsel and trial judges assume.[36] In cases where at least one juror recalled reports of the alleged offence, the incidence of recall of reports of the arrest or any pre-trial proceedings was distinctly lower. Jury recall is most frequently of general features of the relevant publicity rather than precise details. However, the level of recall becomes greater where the accused is well known in the community, for reasons other than being charged with the crime; or where the offence is committed in the area where the jurors live.[37] A considerable proportion of cases given substantial pre-trial media publicity fall into these two categories. For this reason, the otherwise comparatively low level of recall should not dictate a reformulation of the law of contempt.

2.34 ***Influence of publicity on jurors.*** In 38 of the trials that were attended by specific publicity, only 4% of jurors considered that this publicity may have influenced them and only 7% considered that it may have influenced their fellow-jurors.[38]. These claims of relative immunity from the influence of publicity were scrutinised with reference to a number of other factors relating to each trial. These factors included the quality of the jury's verdict. In this context, a "safe" verdict was one which the trial judge, defence counsel and prosecuting counsel considered justifiable on the evidence; an "unsafe" verdict one which two or more of the trial judge, defence counsel or prosecuting counsel considered not to be supported by the evidence; and a "possibly unsafe" verdict one which counsel on the losing side considered not to be supported by the evidence.

- The verdicts were safe in 30 trials. The authors concluded that in some of these it is likely, or at least possible, that publicity determined the verdict and that in others publicity, while not determining the verdict, exerted an influence on one or more individual jurors.[39]

35. Chesterman, Chan and Hampton at xi.
36. Chesterman, Chan and Hampton at xiv.
37. See Chesterman, Chan and Hampton at para 184.
38. The equivalent figures for generic publicity were slightly higher: Chesterman, Chan and Hampton at xv and para 228-229. "Generic publicity" has been defined as "media coverage that does not specifically relate to a defendant's case, but is of such pervasiveness that it paints a defendant with an incriminating and indelible brush": J C Doppelt, "Generic prejudice: how drug war fervor threatens the right to a fair trial" (1991) 40 *American University Law Review* 821 at 822.
39. In 12 of these trials, the verdict was at odds with the tenor of publicity; the authors have concluded that "[i]t seemed likely in six of these, possible in a

- In two trials, the verdicts were unsafe and in line with the tenor of surrounding publicity. It seemed likely in one of these, an acquittal, and possible in the other, that publicity determined the verdict.[40]

- In eight trials, the verdicts were possibly unsafe and in line with the tenor of surrounding publicity. It seemed likely in one of these that publicity determined the verdict.[41]

2.35 The authors comment that this is the closest that any of the trials came to being a wrongful conviction brought about by the influence of publicity. It was possible in another three that publicity determined the verdict and possible in another two that publicity exerted an influence on one or more individual jurors.[42]

2.36 The authors point out that, "given that high-profile trials were selected for study, the proportion in which the verdict was considered likely to have been 'publicity-driven' rather than based on the evidence was relatively small".[43] There were only three trials, constituting 8%of the sample.

2.37 The other positive aspects of the conclusions reached should be noted. One is that in a significant number of the trials studied (12, representing 30%), the verdict reached was in opposition to the tenor of the publicity, and was a "safe" verdict.[44] Even losing counsel considered it acceptable on the evidence. The other is that, while in some of these trials individual jurors appeared to have been influenced by the publicity, this influence was overridden by discussion of the evidence with their fellow-jurors. These jurors ultimately concurred in a "safe" verdict which contradicted the tenor of the publicity.[45]

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further one, and unlikely in the remaining five, that publicity, while not determining the verdict, exerted an influence on one or more individual jurors"; in the remaining 18 trials, it seemed likely in one of these and possible in a further three, that publicity was determinative of the verdict; it seemed likely in a further five, possible in a further two, and unlikely in the remaining seven, that publicity, while not determining the verdict, exerted an influence on one or more individual jurors: Chesterman, Chan and Hampton at xvii-xviii.

40. Chesterman, Chan and Hampton at xvii.
41. Chesterman, Chan and Hampton at xvii.
42. Chesterman, Chan and Hampton at xvii.
43. Chesterman, Chan and Hampton at xx.
44. See Chesterman, Chan and Hampton at para 300-309.
45. See the cases discussed in Chesterman, Chan and Hampton at para 304-309.

2.38 The authors concluded from their research that New South Wales jurors demonstrate a relatively satisfactory level of resistance to publicity.[46] They attribute this to five principal causes.[47] Briefly, three of these causes are that: jurors often believed that newspaper coverage of their trial was inaccurate and/or inadequate;[48] most juries scrutinise the evidence carefully, so that any influence exerted by publicity is overridden; and juries often demonstrate a high level of independence, so that they do not simply cave in to media pressure.

2.39 It is the other two of the five identified causes that are most critical to determining whether sub judice liability should be retained:

- First, the sub judice rule ensures that "jurors are normally not exposed either (a) to pre-trial specific publicity which is both intensely prejudicial in content and published close to the time of commencement of the trial, or (b) to publicity during the trial which is intensely prejudicial".

- Secondly, on account of the limits imposed by the sub judice rule on the content and timing of publicity, "jurors overall are not likely to recall pre-trial specific publicity, even in general terms, let alone in detail."[49]

2.40 The authors ultimately, and significantly, conclude that the "relatively positive conclusions [of their research] do not provide justification for wholly or substantially dismantling legal restrictions on publicity for criminal cases, because they presuppose the existence of these restrictions".[50] They consider, however, that the research does provide grounds for making some changes to the content and the application of the sub judice doctrine generally. These are in the direction of making the doctrine less restrictive of freedom of speech.[51]

Other studies

2.41 DP 43 examines a large body of empirical research that attempts to assess the extent of the media's influence and, in particular, the effect of publicity on the outcome of a trial.

The Commission concluded that the studies looked at could not reliably be used to

46. However, the study found that different juries achieve markedly different levels of success in resisting the influence of highly prejudicial publicity, such as disclosing of prior convictions: Chesterman, Chan and Hampton at para 343.
47. These are set out at xxi-xxii: Chesterman, Chan and Hampton.
48. Chesterman, Chan and Hampton at para 236-243.
49. Chesterman, Chan and Hampton at xxi.
50. Chesterman, Chan and Hampton at xxii.
51. See M Chesterman, "Contemporary issues in the law of contempt", paper presented at the *19th Annual Conference of the Australian Institute of Judicial Administration* (21-23 September 2001, Hobart).

support or rebut assumptions underlying the rationale for the sub judice doctrine. There were three main reasons for this. First, the studies fell almost equally into opposite camps in the conclusions they reached. Secondly, their outcomes, within each camp, were often ambiguous. Thirdly, the methodology used had a number of limitations.[52]

2.42 Recent research conducted in New Zealand, England and America is examined in paragraphs 2.43-2.47 below.

2.43 ***New Zealand.*** The New Zealand Law Commission ("NZLC") conducted research into the effects of pre-trial and trial publicity on juries in the course of its review of juries in criminal trials.[53] The study found that only 19% of jurors said they recollected pre-trial publicity but there was much greater awareness of publicity during the trial. "While there were only 20 cases (42%) in which one or more jurors saw or heard publicity during the trial, there were in total 106 jurors (34%), including all or most in 15 out of the 20 cases, who did so."[54] However, of those who were aware of publicity, only two jurors acknowledged that the pre-trial publicity had affected them and none acknowledged that the publicity during the trial had affected them. The NZLC noted the limitations of jurors self-reporting media influence as they would be reluctant to admit that they had not followed judicial instructions to ignore publicity. As well, they may have been unaware of any biases or preconceptions arising from such publicity, or, if aware, may have believed that they had set them aside.[55]

2.44 The NZLC concluded from the research that "jurors are not generally affected by the current level of pre-trial or during-trial publicity".[56] However, the NZLC rejected a view put forward by the Newspaper Publishers' Association that the research demonstrated that jurors were able to put publicity out of mind and that it lent support for its call for greater freedom of the press. The NZLC answered that "an increase in the current level of publicity could mean a greater impact and a different result".[57] It went on to say:

> … it can be assumed that the more we permit pre-trial publicity, the more effect it will have on jurors, and the more we would move away

52. See NSWLRC DP 43 at para 2.66.
53. NZLC PP 37 vol 2 at para 7.46-7.57. The Commission selected 48 high-profile cases and interviewed 312 jurors.
54. NZLC PP 37 vol 2 at para 7.48.
55. NZLC PP 37 vol 2 at para 7.49.
56. New Zealand, Law Commission, *Juries in Criminal Trials* (Report 69, 2001) ("NZLC Report 69") at para 467. In fact, the Commission said that this was "the only conclusion".
57. NZLC Report 69 at para 467. The Commission did note, however, that "a change of venue can reduce that effect".

> from the current low-impact position. This does not appear to the Commission to be a desirable development. [58]

2.45 ***England.*** The serious risk of prejudice attaching to publicity concerning prior criminal convictions has been substantiated by recent empirical research in England. A study of the effects of revealing a prior conviction to a simulated jury produced results indicating that evidence of previous convictions can have a significant prejudicial effect, especially where there is a recent previous conviction for a similar offence.[59] This was so even though no information about the previous conviction other than the nature of the offence was provided, and where there was only one previous conviction.[60] The author of a paper examining the research concluded that "the results indicate that the information evokes stereotypes of typical criminality, and that caution over revealing a defendant's criminal record is well justified."[61]

2.46 ***America.*** The effect of pre-trial publicity on jury verdicts was examined in an American study of 23 articles published between 1966 and 1997.[62] The articles were chosen on the basis that each of them tested the hypothesis that jurors exposed to negative pre-trial publicity will produce higher percentages of guilty verdicts than jurors exposed to more neutral pre-trial publicity. The authors counted 44 tests of the hypothesis in the 23 articles and summarised that "23 [tests] supported the hypothesis, 20 reported no significant difference at the traditional 0.05 level, and 1 produced a significant result in the opposite direction".[63] The authors commented:

> It is likely that this apparent fragmentation of the research base is what has driven some researchers to opposing conclusions about the PTP [pre-trial publicity] effect.[64]

2.47 However, the authors themselves concluded, after comprehensive analysis of the empirical research contained in the study sample, that:

> pretrial publicity has a significant effect on subjects' judgments regarding the guilt of the defendant, as evidenced by results in both

58. NZLC Report 69 at para 467.
59. S Lloyd-Bostock, "The effect on juries of hearing about the defendant's previous criminal record: a simulation study" (2000) *Criminal Law Review* 734 at 753.
60. Lloyd-Bostock at 753.
61. Lloyd-Bostock at 734.
62. N M Steblay, J Besirevic, S M Fulero and B Jimenez-Lorente, "The effects of pretrial publicity on juror verdicts: a meta-analytic review" (1999) 23(2) *Law and Human Behavior* 219.
63. Steblay, Besirevic, Fulero and Jimenez-Lorente at 220.
64. Steblay, Besirevic, Fulero and Jimenez-Lorente at 220.

> laboratory studies and community survey research … Jurors exposed to publicity which presents negative information about the defendant and crime are more likely to judge the defendant as guilty than are jurors exposed to limited PTP.[65]

ALTERNATIVE REMEDIAL MEASURES

2.48 Does the availability of "alternative remedial measures" to negate or minimise the effects of prejudicial publicity make the sub judice rule unnecessary? Alternative remedial measures which the court may adopt, either on the application of one of the parties, or in some instances of its own volition, include: ordering an adjournment or permanent stay of proceedings; ordering a change of venue; discharging the jury; allowing the defence or prosecution to object to the selection of a person as a juror; and directing the jury to disregard publicity.[66] This last remedy will now be discussed.

Judicial warnings and instructions

2.49 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.

2.50 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.[67] 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. In relation to the reporting of confessions or prior convictions, warnings from the bench are unlikely to displace the highly prejudicial effects of such material.

2.51 It also cannot be assumed, as the Australian Law Reform Commission points out, that members of a jury are wholly obedient and passive in response to

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65. Steblay, Besirevic, Fulero and Jimenez-Lorente at 228-229.
66. These and other remedies available in NSW are discussed in NSWLRC DP 43 at para 2.70-2.72.
67. J A Tanford, "The law and psychology of jury instructions" (1990) 69 *Nebraska Law Review* 71.

instructions from the bench to ignore media publicity.[68] The *Managing Prejudicial Publicity* study found that "jurors are not always docile creatures".[69] In 34 of the 41 trials studied, there was newspaper coverage of the proceedings. Despite judicial instructions, one or more members of each jury followed this coverage and in 32 of the trials it was discussed in the jury room.[70] Many of the judges and counsel interviewed in the study recognised that it is often impossible for jurors to comply fully with instructions to avoid in-trial publicity. In fact, the authors comment that "judges, counsel and others concerned with the criminal justice system may … be surprised at the extent of non-compliance with judicial directions".[71] The study also found that individual jurors or groups of jurors occasionally seek out information themselves that they believe might be relevant to their task and in doing so may consciously disobey judicial instructions.[72] Furthermore, even if the jurors themselves stay away from reports of the trial, family or friends will often tell them about the reports.

The American experience

2.52 Examining the use of remedial measures in the USA provides some insight into the effect of publicity on the fairness of trials in the absence of the sub judice rule. 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.[73]

2.53 DP 43 notes[74] that individual judges have objected to the prejudicial effects of media coverage[75] and there have been a number of reversals of convictions as a

68. ALRC Report 35 at para 285. 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: ALRC Report 35 at para 285; C Petre, "View from the jury room" *National Times* (4-10 May 1984).
69. Chesterman, Chan and Hampton at para 216.
70. Chesterman, Chan and Hampton at xiv-xv.
71. Chesterman, Chan and Hampton at para 224.
72. Chesterman, Chan and Hampton at para 214-215.
73. "Prior restraints upon expression are a far more grievous impingement on the First Amendment than are subsequent punishments" for contempt: B C Schmidt, "Nebraska Press Association: an expansion of freedom and contraction of theory" (1977) 29 *Stanford Law Review* 431 at 431.
74. NSWLRC DP 43 at para 2.78-2.81.
75. See, for example, *Stroble v California* (1952) 343 US 181 at 198.

result of pretrial publicity.[76] In one case, one of the judges 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.[77]

2.54 In *Sheppard v Maxwell*, the Supreme Court said, in relation to media publicity, that courts "must take strong measures to ensure that the balance is never weighed against the accused".[78] Justice Clark emphasised that:

> the cure [for prejudicial publicity] lies in those remedial measures that will prevent the prejudice at its inception. The courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences.[79]

2.55 The sub judice rule is not a remedial measure, but rather a preventative measure which "prevents the prejudice at its inception". If the US legal system were not constrained by the First Amendment to the *Constitution* (US), it may be that the courts would adopt a version of the sub judice doctrine to "protect their processes from prejudicial outside interferences".

2.56 It is 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.[80] It seems an incomplete and circuitous, if not contradictory, way of averting prejudicial publicity to suppress the free speech of all the participants in the trial but not the media.

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76. See *Marshall v United States* (1959) 360 US 310; *Irvin v Dowd* (1961) 366 US 717; *Rideau v Louisiana* (1963) 373 US 723; *Estes v Texas* (1965) 381 US 532; *Sheppard v Maxwell* (1966) 384 US 333.
77. *Irvin v Dowd* at 730 (Frankfurter J).
78. *Sheppard v Maxwell* at 362.
79. *Sheppard v Maxwell* at 363.
80. *Sheppard v Maxwell* at 361.

Conclusion

2.57 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 that must be borne by the State and by the accused (unless there is a grant of legal aid, which is itself a cost borne by the State). 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 substantial.[81] Remedies that 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 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 necessary dispassionate calm is also put at risk".[82]

2.58 Likewise, a change of venue to locations away from the seat of the publicity causes inconvenience and expense to many, if not all, of those involved in the trial. In highly sensational cases, the effectiveness of changing the venue would be limited if no restraints on publicity existed. In relation to trials in the USA, it has been said 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 compelled to choose between their rights to an impartial jury and a local jury".[83] Irrespective of publicity, however, it may be highly desirable anyway when to summon jurors from the immediate locality would impose intolerable pressures upon them.

2.59 Not only do the major remedial measures themselves involve increased costs and pressures, but reliance on such measures alone, rather than in conjunction with liability for contempt, can in itself place excessive pressure on jurors and witnesses, including the pressure to deliver a verdict that will be approved of by the public.

2.60 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

81. See NSWLRC DP 43, Appendix B.
82. Chesterman (2000) at 283.
83. 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.

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.[84]

2.61 The US 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.[85]

COMMUNICATION TECHNOLOGIES

2.62 In DP 43, the Commission examined the effect on the law of contempt of modern communication technologies, in particular, satellite and cable television, electronic mail and the Internet.
The increasing use of these new technologies is giving rise to new challenges in seeking to control exposure to prejudicial publicity. The challenges stem from a number of features pertaining to these media:

- an enormous volume of information, from innumerable sources, can be stored, disseminated, changed or removed rapidly;

- cable and satellite broadcasters and electronic media publishing in New South Wales may not rely on a local distributor answerable to the laws of this State;

- identifying where responsibility lies for Internet publications can be complex and uncertain.

2.63 The Commission noted that most Internet service providers ("ISPs") and Internet content hosts ("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 for sub judice contempt or even those concerning licensees of television channels would apply to ISPs and ICHs.

84. See *R v Glennon* (1992) 173 CLR 592 at para 13 (Brennan J).
85. See Chesterman (2000) at 289. This is clearly implicit in *R v Glennon* at 601-606 (Mason CJ and Toohey J), at 611-617 (Brennan J).

2.64 The *Broadcasting Services Amendment (Online Services) Act 1999* (Cth) ("Online Services Act")[86] provides prima facie protection from strict liability (civil or criminal) under State and Territory laws for ICHs and ISPs in respect of anything published by them.[87] However, it is also 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).[88]

2.65 Although the Commission supports the aims of the Online Services Act to encourage development of Internet technologies and services and to avoid unnecessary administrative and financial burdens on ISPs and ICHs,[89] the Commission recommends 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.[90] This is consistent with the framework of the *Broadcasting Services Act 1992* (Cth), as amended by the Online Services Act, whereby ISPs and ICHs are required to remove content following formal notification by the Australian Broadcasting Authority.[91] The Commission recommends that a defence be available for ISPs and ICHs charged with sub judice contempt.[92] The effect of this recommendation is that ISPs and ICHs could escape liability if they can establish that they had no control over the content placed on the Internet which contained the prejudicial material and that they either did not know the content contained the material or, having become aware of this, took all reasonable steps to prevent it being published.

2.66 In other respects, the Commission is of the view that it will generally be more appropriate for the common law to respond to the effects of the new media on the

86. The Act has come into operation as Schedule 5 of the *Broadcasting Services Act 1992* (Cth).
87. *Broadcasting Services Act 1992* (Cth) Sch 5 cl 91(1): 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; and (2) require an ISP or ICH to monitor, make inquiries about or keep records of content which it hosts or carries. 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* (25-26 October 1999, Sydney, Communications Law Centre) 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.
88. *Broadcasting Services Act 1992* (Cth) Sch 5 cl 91(2).
89. *Broadcasting Services Act 1992* (Cth) s 4(3).
90. NSWLRC DP 43 at para 5.60-5.61.
91. See generally *Broadcasting Services Act 1992* (Cth) Sch 5 Pt 4.
92. See ch 4, Recommendation 6.

conduct of fair trials on a case-by-case basis, until it becomes apparent that a legislative response is required.

2.67 As to the broad question of whether communication technologies are rendering application of the sub judice rule unworkable, the Commission believes it is too early to reach a conclusion and too early to justify abandoning the rule altogether.

SUBMISSIONS

2.68 In DP 43, the Commission reached the tentative conclusion that it is necessary for the proper administration of justice to retain the sub judice rule, subject to the reforms proposed.

2.69 The Australian Press Council ("Press Council")[93] took issue with the Commission's starting point that due process of law should take precedence over freedom of speech. The Press Council appeared to disagree with the Commission's approach both in itself and because, in the Press Council's reading of the arguments, the Commission had used "an outdated assumption" to justify its approach. The Council understood that "[the Commission did] not question the basis for the current law to assume … that, if there are media reports, 'jurors will be hindered from reaching an impartial and proper verdict'".

2.70 The Press Council argued that *Managing Prejudicial Publicity* and the research by the NZLC, referred to in paragraphs 2.43-2.44 above, "underlines the independence of thought that juries bring to their juror duties". It submitted that "[t]he evidence ought to prompt a fundamental re-think of the starting point for reform". The Press Council went on to submit that "there should be no blanket restriction on publication. Any [sub judice] law should only cover the exceptional circumstances in which restrictions should apply". Such circumstances would include "where the published material will have an effect on perceptions, eg, photographs that might affect jurors or witnesses where identification is contested".

2.71 It needs to be clarified that the assumption that media reports may influence jurors is not an assumption initiated by the Commission, and certainly not an assumption the Commission has used unquestioningly "to justify its approach". As was pointed out in DP 43[94] and in paragraphs 2.27-2.30 above, this is an assumption on which the sub judice rule is based and which the Commission sought to test.[95] The

93. Australian Press Council, *Submission*.
94. NSWLRC DP 43 at para 2.55.
95. See discussion of the empirical evidence, and case law discussing the limitations of empirical evidence, in NSWLRC DP 43 at para 2.56-2.66.

Commission's provisional view in DP 43 was that it was not possible to conclude definitively from the empirical studies either that the sub judice rule was needed to protect juries and witnesses from prejudicial media reporting, or that it was not so needed.[96]

2.72 As pointed out in paragraphs 2.38-2.40 above, while the authors of *Managing Prejudicial Publicity* concluded that New South Wales jurors demonstrate a relatively satisfactory level of resistance to publicity, they also emphasised that "the relatively positive conclusions do not provide justification for wholly or substantially dismantling legal restrictions on publicity for criminal cases, because they presuppose the existence of these restrictions".[97] Similarly, the NZLC's conclusion from its finding that the impact of media publicity is minimal was that "[t]hese results strongly suggest that the controls on media in New Zealand are sufficient to protect jurors and ensure a fair trial"[98] and that "altering the level of publicity permitted would not necessarily be beneficial".[99] This research could be interpreted, not as indicating the futility of the current laws, but as an indication that they are, in fact, working.

2.73 A collective of Australian broadcasters (the "Broadcasters") expressed the concern that the Commission's proposals "proceed from the assumption of retention of [sub judice] liability".[100] However, this submission went on to say that "the Australian media recognise that, in some circumstances, it is necessary to limit freedom of expression so as to ensure that trials, and criminal jury trials in particular, are not compromised." The Broadcasters submitted that the common law of sub judice contempt should remain in place.[101] Although this was in the context of arguing against codification of the law of contempt, the underlying premise appears to be acceptance of the retention of some form of sub judice liability.

2.74 Mr Cowdery QC, Director of Public Prosecutions,[102] the Law Society of New South Wales,[103] the Victorian Bar Council[104] and Mr Norris, Senior Solicitor, Crown Solicitor's Office[105] agreed with the Commission's proposal to retain the sub judice

96. NSWLRC DP 43 at para 2.67.
97. Chesterman, Chan and Hampton at xxii
98. NZLC PP 37 vol 1 at para 287.
99. NZLC Report 69 at para 467.
100. Australian Broadcasters, *Joint Submission* at 1.
101. Australian Broadcasters, *Joint Submission* at 2.
102. N R Cowdery QC, *Submission*.
103. Law Society of NSW, *Submission* at 2.
104. Victorian Bar Council, *Submission* at para 3-4.
105. D Norris, *Submission* at para 1. Mr Norris has responsibility for advising the Attorney General and the Supreme Court in contempt matters (pursuant to either *Supreme Court Rules 1970* (NSW) Pt 55 r 11(6) or Pt 55 r 11(1)) and prosecution proceedings, including those on behalf of registrars of the Supreme Court.

rule.

The Victorian Bar Council was "strongly of the view that the *sub judice* rule performs an important function and should be retained". It submitted:

> Experience suggests that the rule performs a valuable function in protecting the integrity of the system of justice. In particular, the rule has an important role to play in protecting public perceptions of the impartiality of the system of justice and in moderating the sometimes intense pressures upon all participants in litigation.[106]

2.75 Mr Norris expressed the view that:

> nothing in the [*Managing Prejudicial Publicity* report] suggests otherwise [than that liability for sub judice contempt should be retained]. Indeed, as that report noted, "the existing regime of publicity restrictions, under which our surveys were conducted, is an essential backdrop to our findings".[107] The report observed that the dismantling of the existing system of *sub judice* contempt could significantly affect, or even vitiate, its conclusions.
>
> There could be little doubt that the extent of prejudicial publicity would greatly increase if the *sub judice* restrictions were removed. There could even be a potential, in some cases, for deliberate campaigns by accused persons or police officers to release prejudicial material (either truthful or untruthful).[108]

THE COMMISSION'S VIEW

2.76 On further consideration of the arguments for and against retention of the sub judice liability, the Commission sees no reason to now reach a different conclusion. As was argued in DP 43, at the very least, its retention is justified to keep alleged confessions, prior convictions and photographs of the accused from jurors and witnesses. Awareness of the first two of these is difficult to put out of mind, in spite of judicial instructions and warnings, and seriously prejudicial. Contact by witnesses with photographs will undermine the reliability of identification evidence. Even in relation to less seriously prejudicial media publicity, the Commission is not satisfied that alternative remedial measures are sufficient alone, without the operation of the sub judice rule, to protect the fairness of court proceedings.

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106. Victorian Bar Council, *Submission* at para 3-4.
107. Chesterman, Chan and Hampton at para 503.
108. D Norris, *Submission* at para 2-3.

2.77 For a number of reasons, retention of the sub judice rule is compatible with the public interests in freedom of discussion and open justice. First, restrictions on publicity are for a limited time only, that is, the time during which proceedings are current or pending. Secondly, the media can perform its role of promoting discussion of courts and the justice system without publishing the most obviously prejudicial material concerning a specific case. Thirdly, the availability of a number of defences to liability maintains an acceptable balance between free speech and a fair trial.

2.78 However, it needs to be reiterated that the Commission's recommendation to retain a sub judice rule is made in conjunction with recommendations for reform to this area of law. In particular, two reforms would ensure a better balance between freedom of speech and the proper administration of justice. First, the operation of the rule should be narrowed 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".[109] Secondly, liability for sub judice contempt should depend on an element of fault.[110] These recommendations are discussed in detail in Chapters 4 and 5.

RECOMMENDATION 1

Liability for sub judice contempt should be retained.

109. See ch 4, Recommendation 2.
110. See ch 5, Recommendation 5.

3. Basic concepts: publication and responsibility

- “Publication”
- Responsibility for publication

3.1 In Discussion Paper 43 ("DP 43"), the Commission discussed the meaning of "publication" and "responsibility" as prerequisites for liability for sub judice contempt.[1] In particular, we considered whether these terms should be legislatively defined, as opposed to the current approach, which leaves the meanings to common law interpretation on a case-by-case basis. We put forward a proposal for a legislative formulation of the notion of "responsibility" for publication, and invited submissions on this formulation.[2]

3.2 The Commission now considers the arguments for and against the reforms suggested in the Discussion Paper. We discuss first the meaning of "publication" and, secondly, the notion of "responsibility" for such publication.

"PUBLICATION"

The meaning of "publication"

3.3 Liability for sub judice contempt arises on the "publication" of material that has a tendency to interfere with legal proceedings.[3] At present, "publication" is not defined in legislation, nor have the courts considered its meaning in any great detail. At the least, a "publication" in the context of sub judice contempt must usually involve a communication to more than a single individual, unlike the position in defamation law.

3.4 Publication of material attracting prosecution for contempt typically arises from the dissemination of matter by media organisations; through newspapers, radio stations, or television channels. Other forms of communication may also attract liability, if they are found to have a sufficiently public aspect, or to be made to a sufficiently wide class of people, as to have the requisite tendency to prejudice particular legal proceedings. For example, pamphlets about a particular trial could attract liability if the people receiving those pamphlets include potential jurors in the trial.[4] Although "publication" seems generally to require communication to more than one individual, a communication to a single individual may attract liability for contempt if it were foreseeable that the contents of the communication would be published to a

1. NSW Law Reform Commission, *Contempt by Publication* (Discussion Paper 43, 2000) ("NSWLRC DP 43") ch 3.
2. NSWLRC DP 43, Proposal 2, discussed at para 3.46.
3. But see D Norris, *Submission* at para 18, discussed here at para 3.7.
4. See *Registrar, Court of Appeal v Collins* [1982] 1 NSWLR 682; *Prothonotary v Collins* (1985) 2 NSWLR 549.

wider audience, such as, for example, a conversation forming part of a media interview.[5]

Discussion Paper 43: reforms considered

3.5 In DP 43, the Commission considered the merits of defining "publication" in legislation.[6] We noted that, in the United Kingdom, legislation defines "publication" for the purpose of sub judice contempt as including a communication in any form that is addressed to the public at large or any section of the public.[7] This definition seeks to distinguish communications in the public and the private arenas, and to prohibit only those communications that occur in the public arena. The English approach has attracted criticism on the basis that it is not always clear whether a communication is private, or one made to a section of the public, such as a communication that is circulated to a private club.[8] The Commission expressed a tentative view that there was no advantage in introducing a legislative definition of "publication", with the inherent risks of ambiguity and inflexibility that such an approach is likely to carry.

Consultation

3.6 Two submissions considered the issue of whether to define "publication" in legislation.[9] Both supported the Commission's tentative view that it was unnecessary and risky to attempt a legislative definition. One submission examined in detail the case law dealing with the meaning of "publication" in the context of sub judice contempt.[10] It agreed that the courts have interpreted the word generally to require a

5. See *Attorney General (NSW) v Dean* (1990) 20 NSWLR 650; *Director of Public Prosecutions (Cth) v Wran* (1986) 7 NSWLR 616.
6. See NSWLRC DP 43 at para 3.4-3.7.
7. See *Contempt of Court Act 1981* (UK) s 2(1), following a recommendation of the Phillimore Committee: United Kingdom, Committee on Contempt of Court, *Report of the Committee on Contempt of Court* (Cmnd 5794, HMSO, London, 1974) at para 75-77, 80.
8. G Borrie and N Lowe, *The Law of Contempt* (3rd edition, Butterworths, London, 1996) at 110-112. See also C J Miller, *Contempt of Court* (2nd edition, Clarendon Press, Oxford, 1989) at 144.
9. Law Society of NSW, *Submission* at 2; D Norris, *Submission* at para 17.
10. See D Norris, *Submission* at para 4-16. Mr Norris' discussion of the meaning of "publication" went beyond the case law dealing specifically with sub judice contempt. He made particular reference to the courts' approach to the word in two South Australian cases, neither of which related directly to sub judice contempt, but which instead involved consideration of the term in the context of specific legislative provisions: see *Roget v Flavel* (1987) 47 SASR 402; *Australian Broadcasting Corporation v Royal Commissioner* (1991) 56 SASR

more public aspect than simply a private communication, and concluded that the courts are likely to continue to interpret the word in a sensible manner without the need to resort to more precise definition in legislation.

3.7 This submission also questioned whether, in fact, liability for sub judice contempt does require the "publication" of material at all. It asserted that conduct might constitute a contempt whether or not it amounts to widespread publication, for example, in the case of reporters who provide material to their editors in the expectation that it will be published.[11] It is true that, in this situation, the act of providing material may attract liability without any actual dissemination of the material to a wider audience. However, liability is only triggered by a finding that the material will probably be made available to a wider audience, and to this extent liability still relies on a notion of dissemination to a wider audience. The same applies to a communication to a single individual in a media interview, where there is an expectation that the interview will later be "republished" or made available to a wider audience. It is still necessary, therefore, to give consideration to the meaning of "publication" as a prerequisite for liability.

Time and place of publication

3.8 In our discussion of the term "publication" in DP 43, the Commission gave particular consideration to defining when and where the publication of material can be said to occur, and whether these are issues that need to be clarified in legislation.[12]

3.9 It is becoming increasingly common for material to be transmitted from another jurisdiction to New South Wales. For example, a newspaper that is originally published in another state may be made available to the public of New South Wales either through newsagencies here or over the Internet, or a television program may be prepared and transmitted from another state or from another country and received by residents of New South Wales. In this situation, provided that residents of New South Wales receive the material, the common law considers that publication has occurred in New South Wales.[13] Consequently, the person or body responsible for the

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274. However, the aims of those provisions were sufficiently similar to the aims of the law of sub judice contempt that the courts' interpretation of the word would be useful in construing its meaning in the context of liability for sub judice contempt.

11. See D Norris, *Submission* at para 18.
12. See NSWLRC DP 43 at para 3.8-3.16.
13. See *Dow Jones & Company Inc v Gutnick* (2002) 77 ALJR 255, upholding *Gutnick v Dow Jones & Co Inc* [2001] VSC 305, a defamation case involving publication of material over the Internet originating from the United States of America to Victoria. The court held that, for the purpose of defamation law, the

publication will be liable for any contemptuous material contained in the publication, although it may be difficult or impossible to prosecute and impose a sentence on them if they reside and carry on business solely outside New South Wales. The Commission gave tentative support to the common law approach to determining the place of publication, and did not consider it necessary to clarify this issue in legislation. No submissions addressed the question.

3.10 The time at which material is published becomes an important issue in considering whether publication took place within the time period in which liability for contempt arises. As we discuss in Chapter 7, publication of prejudicial material will attract liability for sub judice contempt if it has a tendency to prejudice legal proceedings that are current or pending at the time of publication. Criminal proceedings are pending from the time a person is arrested for, or charged with, an offence. A publication that occurs before this event will therefore not attract liability, even if it is later found to have a tendency to prejudice particular proceedings. At common law, a publication is taken to have occurred at the time when it was first published, and every distribution or broadcast of material is then treated as a separate act of publication. Material that is first published before criminal proceedings are pending may therefore be found to be contemptuous if it is broadcast or distributed a second time within the time limits for sub judice contempt. In DP 43, the Commission formed a preliminary view that these principles are appropriate and do not need to be changed or clarified. One submission addressed this issue, and did not express any opposition to this approach.[14]

The Commission's conclusion

3.11 The Commission concludes that it is unnecessary to make any changes to the common law's interpretation of "publication". The few submissions that considered this issue reached the same conclusion as we do. No significant problems have arisen in the case law, and it is preferable to retain the flexibility provided by the common law rather than attempt to enshrine in legislation a particular definition.

publication occurred in Victoria, publication occurring where the contents of the publication are seen or heard and comprehended by subscribers of the service.

14. See D Norris, *Submission* at para 19-20.

RESPONSIBILITY FOR PUBLICATION

The common law approach

3.12 To attract liability for sub judice contempt, a person or organisation must be found to be "responsible" for the publication in question. At present, the common law is flexible in its approach to assigning responsibility: a person or organisation is generally responsible for a publication if they are in a position to exercise control over its contents, production, distribution, or broadcast.[15] Most often, it is the proprietor of the media organisation, and/or the program producer or editor, who is prosecuted for contempt. However, the common law notion of "responsibility" is broad enough to encompass a wide class of people or bodies, including journalists,[16] announcers,[17] printers,[18] and production companies.[19] While a wide class of people can in theory be liable, those at the lower end of the publishing process are not often prosecuted. Consequently, there is a relative scarcity of common law authority on the limits of their liability.

Discussion Paper 43: proposal for reformulation

3.13 In DP 43, the Commission put forward a proposal for a legislative formulation of "responsibility" to replace the existing common law principles.[20] We tentatively noted a preference at that stage for retaining the common law, but put forward the proposal as an alternative approach for consideration. The proposed formulation sought to assign legal responsibility for publication to those high up in any organisation from which the publication emerged, and to exclude from the notion of responsibility those at the lower end, such as reporters, journalists, and distributors. It assigned responsibility according to whether or not a person or organisation was in a position to:

15. See *Attorney General (NSW) v TCN Channel Nine Pty Ltd* (1990) 20 NSWLR 368 at 379; Borrie and Lowe at 375; S Walker, *The Law of Journalism in Australia* (Law Book Company, Sydney, 1989) at para 1.3.02.
16. *Registrar, Court of Appeal v John Fairfax Group Pty Ltd* (NSWCA, No 40478/92, 21 April 1993, unreported); *R v Truth Newspaper* (VSC, No 4571/93, 16 December 1993, unreported); *R v Thompson* [1989] WAR 219.
17. *Attorney General v Radio 2UE Sydney Pty Ltd* (NSWCA, No 40225/91, 40226/91, unreported); *Hinch v Attorney General (Vic)* [1987] VR 721.
18. *R v Nationwide News Pty Ltd* (VSC, No 6129/97, 22 December 1997, unreported) (liability); (VSC, No 6129/97, 18 February 1998, unreported) (penalty); *R v Truth Newspaper*. However, only costs were ordered against the printer in these cases, not penalties.
19. *Attorney General (NSW) v Willesee* [1980] 2 NSWLR 143.
20. NSWLRC DP 43, Proposal 2 at para 3.46.

- 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.

The formulation also made it clear that liability was to be as a principal, rather than according to any notion of vicarious liability.[21]

3.14 The underlying policy of the proposal was that those lower down in the hierarchy of a media organisation, such as reporters, should not be liable for contempt. One of the primary aims 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. It could therefore be argued that responsibility for a contemptuous publication should be assigned to those in positions to exercise control over the decision whether or not material is published, and the contents of that material, or to those who play a role in supervising systems to safeguard against the publication of contemptuous material. Little is gained from imposing liability on those who exercise no or little control over the decision to publish material, and the ultimate contents of that material.

3.15 It is important to consider the Commission's proposal for a reformulation of "responsibility" in conjunction with the proposal for a defence of reasonable care, which we put forward in DP 43.[22] That proposal is discussed in detail in this Report in Chapter 5. In summary, the proposed defence of reasonable care was intended to apply to those who come within the scope of the proposed reformulation of "responsibility" but who could prove, on the balance of probabilities, that they had no control of the content of the publication, and either did not know (having taken all reasonable care) that the publication contained contemptuous material and had no reason to suspect that it was likely to do so, or who became aware of such contemptuous material before publication and took reasonable steps to try to prevent the publication of the material. The aims and application of this proposed defence, as they operate in relation to the proposed reformulation of "responsibility", are referred to in the discussion below.

21. See below at para 3.32-3.33.
22. NSWLRC DP 43, Proposal 8 at para 5.38-5.41, 5.47-5.62.

The responsibility of various participants in the publication process

3.16 In DP 43, the Commission examined the responsibility of various categories of participants in the publication process.[23] We expressed tentative views on which of those participants should generally be held responsible for a contemptuous publication, and which should not, and we considered the effect of the proposed reformulation on the legal responsibility of each.

3.17 ***Media proprietors.*** Media proprietors exercise overall control over the publication process. For this reason, the Commission supported the current common law approach of holding them responsible for a contemptuous publication. The proposed reformulation of "responsibility" was similarly intended to include media proprietors within its scope. The one situation in which we considered that it might not be appropriate to make media proprietors liable for a contemptuous publication was in the case of "live" interviews. If a radio or television station broadcasts a live interview with an individual, and that individual makes prejudicial statements during the interview, it is questionable whether the media proprietor should be liable for those statements if they are unexpected and unprovoked by the interviewer.
The Commission considered that the common law was not entirely clear about the proprietor's legal responsibility in this situation, though it seemed likely, following general principles of liability for sub judice contempt, that the proprietor would be at least theoretically liable. There was one Victorian case in which the court held that a proprietor was not liable for contemptuous statements made by an interviewee in a live television interview. This was because the statements were non-responsive to the interviewer's questions and there was no reason to expect such a response.[24] The court was quick to point out, however, that it was not making a general ruling about the liability of media organisations for statements made in live interviews.

3.18 The Commission expressed the view in DP 43, that broadcasters should be exonerated from a charge of sub judice contempt if they can show that, when they became aware of the contemptuous statement, they took all reasonable steps within their means to prevent the publication of the statement.[25] While it is likely that media proprietors in the situation of live interviews would be found responsible under our proposed reformulation of "responsibility", it was our intention that the proposed defence of reasonable care would then exonerate them if they did not expect the interviewee to make the contemptuous statements and took all reasonable steps to prevent their publication. There was some concern expressed in submissions and

23. NSWLRC DP 43 at para 3.17-3.45.
24. See *Attorney General (Victoria) v Austarama Television Pty Ltd* (VSC, No 93/86, Nicholson J, 23 December 1986, unreported).
25. See NSWLRC DP 43 at para 5.53-5.54.

consultation about the Commission's approach to this situation. These are discussed in Chapter 5.

3.19 ***Editors.*** The Commission took the tentative view that persons in a position to exercise editorial control over the contents of a publication should be held liable for contempt, as they generally are at common law. As with media proprietors, the proposed reformulation of "responsibility" was not intended to alter the legal responsibility of those who exercise editorial control over the contents of a publication. The only situation in which we considered that it would be appropriate to exonerate editors was, as with media proprietors, in the case of live interviews. Our proposed defence of reasonable care was intended to cover this situation.

3.20 ***Reporters.*** As noted, the common law notion of responsibility is broad enough to include reporters within the scope of liability for sub judice contempt. It has been held in the New South Wales Court of Appeal that a reporter who prepares a report for publication is responsible for it if it is later published, although the same principle may not apply to a person who does no more than supply information to an editor or writer not for the purpose of publication but for the purpose of furnishing information.[26] The Commission expressed a preference in DP 43 towards retaining the common law approach, and holding reporters responsible if they have actually been involved in the publication process to the extent of preparing a report for publication. However, the proposed reformulation of the notion of responsibility offered an alternative approach, which would normally exclude reporters from liability for sub judice contempt, unless they could be shown to have exercised a significant degree of control over the contents of the publication. Presumably, it would usually be those in an editorial position, rather than the reporter, who would be found to meet that requirement.

3.21 ***Channels broadcasting programs under licence.*** The Commission examined the liability of subordinate television stations that receive programs under licence from a principal station. At common law, the station broadcasting the program may be held responsible for a contemptuous publication contained in the program, whether or not it had knowledge of the contents of the program, and even if it has received the program on instantaneous transmission from the principal station without any opportunity to check its contents.[27] A fairer approach may be to hold a subordinate station responsible if it were in a position to monitor and alter the contents of the program that it transmitted. This would not excuse a broadcaster from liability where it transmits contemptuous material instantaneously, if the decision to do so was a commercial decision and not an obligation, for example, under any licensing

26. *Registrar, Court of Appeal v John Fairfax Group Pty Ltd* (NSWCA, No 40478/92, 21 April 1993, unreported).
27. See *Attorney General (NSW) v Willesee* [1980] 2 NSWLR 143; see also *Registrar, Court of Appeal v Willesee* (1985) 3 NSWLR 650; *Attorney General (NSW) v TCN Channel Nine Pty Ltd* (1990) 20 NSWLR 368.

agreement. However, if the subordinate station had no opportunity and no legal entitlement to monitor and control the contents of the material that it transmitted, the Commission suggested in DP 43 that it should not be held responsible for contemptuous material that it transmits. It seems likely that the proposed reformulation of "responsibility" is broad enough to include within its scope broadcasters transmitting programs under licence, in so far as such broadcasters have control over the dissemination of such programs, and in that way may be said to authorise their publication. The proposed defence of reasonable care was therefore intended to provide a defence for broadcasters in this situation, if they could show that they did not know, having taken all reasonable care, and had no reason to suspect, that the publication contained contemptuous material. This could cover the broadcaster who does no more than relay a program from a principal station with no control over the contents of the program. Some submissions criticised the wording of the Commission's proposed defence, while supporting the spirit of the proposal. Those criticisms are discussed in greater detail in Chapter 5 of this Report.

3.22 ***Distributors of printed material.*** As with broadcasters of programs under licence, distributors of printed material may be held responsible at common law for distributing contemptuous material, even though they have no knowledge of the contents of that material.[28] In DP 43, the Commission took the view that 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. We considered that the wording of our proposed reformulation of "responsibility" was broad enough to include distributors within its scope. We therefore also proposed a defence of reasonable care. As in the case of broadcasters, this defence would excuse distributors who had no knowledge, having taken all reasonable care, and had no reason to suspect that the material they were distributing was contemptuous.

3.23 ***Vendors of printed material.*** It is unlikely that vendors of printed material would be prosecuted for a contemptuous publication. While the Commission's proposed reformulation of "responsibility" might be broad enough to include vendors within its scope, the Commission also proposed a defence of innocent distribution. This defence was intended to exonerate people low down in the publication hierarchy, such as vendors, with no editorial control over the content of a publication. This defence is discussed in Chapter 5.

28. While there is no Australian authority on this point, one English case held a distributor liable for the distribution of contemptuous material: see *R v Griffiths; Ex parte Attorney General* [1957] 2 QB 192. The court in this case did emphasise that there was no other person or organisation within the jurisdiction who could be held responsible for the publication: at 204 (Goddard LCJ).

3.24 ***Private individuals.*** At common law, private individuals, who do not represent the media, may be held responsible for a contemptuous statement that they make. For example, a politician or a police officer who participates in a media interview or press conference may be held liable for a statement that is later found to have a tendency to prejudice the administration of justice.[29] The individual cannot avoid liability by relying on the editorial discretion of the media to omit prejudicial information from the published material. If it is intended or is highly likely that the media will make the statements available to the public, then the individual will be responsible for their publication.[30] 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. In DP 43, the Commission expressed no firm view in respect of the responsibility of private individuals. We saw advantages in retaining the flexibility of the common law approach, by which individuals are theoretically liable, even if they are rarely prosecuted. This allows for the exceptional case where an individual has acted with particular recklessness or carelessness in speaking to the media. On the other hand, we also saw merit in the argument that little is achieved in holding individuals responsible for the making of contemptuous statements where they have no or very little control over the publication of those statements. The proposed reformulation of "responsibility" therefore concentrated on those higher in the publication process, with the result that individuals would likely not be held liable. It is worth noting too that private individuals may be liable for contempt for the publication of material that places improper pressure on a party to litigation.[31] This aspect of sub judice contempt is discussed in Chapter 6.

Consultation

3.25 Eight groups expressed an opinion on the proposal for a legislative formulation of "responsibility". Three expressly rejected the proposal as too restrictive and inflexible, asserting that it was preferable to retain the common law.[32] They disagreed with the fundamental approach of the proposal, to exclude as a general rule those lower down in the publication hierarchy, such as reporters. It was noted that such people are rarely now prosecuted, but that the advantage of the common law was that it was sufficiently flexible to accommodate such people within the scope of

29. *Attorney General (NSW) v Dean* (1990) 20 NSWLR 650; *Director of Public Prosecutions (Cth) v Wran* (1986) 7 NSWLR 616.
30. See *R v Pearce* (1992) 7 WAR 395 at 425 (Malcolm CJ); see also *Director of Public Prosecutions (Cth) v Wran* at 627.
31. See *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2001) 188 ALR 312.
32. See N Cowdery QC, *Submission* at 1; D Norris, *Submission* at para 21-29; NSW Bar Association Representatives, *Consultation*.

"responsibility" if the circumstances of a particular case warranted their prosecution. For example, if a journalist had been specifically warned by a Crown prosecutor that publication of particular material may cause a trial to be aborted, he or she should be held liable if he or she then submits the material in question for publication.[33] Another submission, while giving general support to the approach taken in the proposal, also took the view that reporters should be held responsible for the publication of contemptuous material if they are senior and experienced.[34] One group expressed particular concern that the proposed formulation would exclude private individuals from the notion of responsibility. It was submitted that the wording of the proposed formulation was not broad enough to include individuals within the scope of "responsibility" and that individuals should be held responsible in certain circumstances.

3.26 Three groups expressed tacit support for the approach taken in the proposed reformulation, though all three considered that the proposal needed modification.[35] The ABC's Legal Services Department argued that the third element[36] of the proposed formulation was too vague and should be omitted from the formulation. Representatives of the television and radio industries considered that the proposed formulation was an improvement on the common law.[37] However, they also took the view that the last element was problematic, in so far as the word "supervise" was vague. They pointed out that there are people in the publication process who could be said to "supervise", but who do not have and are not really expected to have any knowledge of the day to day operation of the system, such as, for example, the CEO of the organisation. They suggested that the third element be modified to read "supervise and manage" to apply to people who are in fact in charge of the day to day management of the system.

3.27 There were two other groups who appeared to be supportive of the policy underlying the proposal, that is, to attach responsibility to those high up in the hierarchy of the publication process[38]. However, they appeared to go even further and assert that responsibility should be limited to the organisation itself,[39] and that the

33. D Norris, *Submission,* drew this example from *Registrar, Court of Appeal v John Fairfax Group Pty Ltd* (NSWCA, No 40478/92, 21 April 1993, unreported).
34. See Law Society of NSW, *Submission* at para 8.
35. See ABC, *Submission* at 1; Law Society of NSW, *Submission* at para 8; TV and Radio Representatives, *Consultation*.
36. The third element holds a person or organisation responsible if they are in a position to supervise a system for ensuring that material is not published that would constitute a contempt of court.
37. TV and Radio Representatives, *Consultation*.
38. Australian Broadcasters, *Joint Submission*; Australian Press Council, *Submission*
39. See Australian Broadcasters, *Joint Submission* at 2.

current proposal was far too sweeping in including within the notion of responsibility people other than the principals in the publication process.[40] One submission also expressed concern that the proposed formulation may cover regional radio and television stations that broadcast networked or syndicated programs and that are limited in their capacity to exercise control over the content of its broadcasts, and that may not have the resources to vet all material provided by a program supplier. This submission considered that it was questionable whether the defence of reasonable care, as formulated in Proposal 8 of DP 43, would apply to this situation. There was also concern that broadcasters of live-to-air radio programs may be held responsible for contemptuous statements made in those programs, presumably by interviewees, when they have limited opportunity to supervise the content of such programs.

The Commission's conclusion

3.28 On balance, the Commission concludes that it is preferable to retain the common law rather than recommend a statutory definition of "responsibility". We acknowledge that several groups in consultation, particularly representatives of the media, supported a move towards a legislative definition. However, we consider that the problems that potentially arise from fixing a definition in legislation outweigh the advantages of such an approach. While we put forward Proposal 2 as an alternative in DP 43, we did note that we were inclined at that stage towards retaining the common law.

3.29 Essentially, we have come to the view that it is not possible to formulate a statutory meaning of "responsibility" that is unambiguous and certain. For example, if the wording in Proposal 2 were adopted in legislation, dispute might arise as to the meaning of "authorise". We cannot see that any problems in the current common law approach to "responsibility" are significant enough to justify replacing it with a legislative definition that is likely to create its own uncertainty and differences of opinion as to interpretation.

3.30 One of the policies driving Proposal 2 was to encourage vigilant systems of supervision in media organisations by placing the burden of liability on staff in supervisory roles rather than on, for example, junior reporters. However, we are not convinced that more senior reporters who are experienced in court reporting should similarly be able to escape liability for contempt. We are not certain that Proposal 2 would necessarily include senior reporters within the scope of liability. This uncertainty illustrates the general potential for ambiguity arising from an attempt to formulate a concept like "responsibility" in statutory terms. We would also now be unwilling to

40. See Australian Press Council, *Submission* at 3-4.

exclude altogether private individuals from the scope of "responsibility", as Proposal 2 would appear to do, although this is a matter which could be more easily addressed by amending the wording in the proposal.

3.31 In short, we consider that the underlying policy of Proposal 2 has merit. However, we conclude that the benefits of a statutory formulation that excludes those lower down in the publishing hierarchy, such as junior reporters, are outweighed by the problems that potentially arise in its interpretation, and the inflexibility that necessarily results from an attempt to enshrine a concept like "responsibility" in legislation.

Primary versus vicarious liability

3.32 The Commission's proposed reformulation of "responsibility" made it clear that liability for sub judice contempt was as a principal and not according to any notion of vicarious liability. In DP 43, the Commission noted that it may not always be clear under the existing common law principles whether or not media proprietors and editors are liable as principals or are vicariously liable for the acts of their employees, or subordinates. At present, the distinction is not important, in so far as liability for sub judice contempt does not require a finding of fault. However, if an element of fault is introduced, as we proposed, then it becomes important to determine whether the proprietor or editor must be found to be at fault as a principal, or whether they are vicariously liable for the wrongful conduct of an employee or subordinate.
The Commission expressed the tentative view in DP 43 that liability should arise only as a principal, and that it was inappropriate and undesirable to impose vicarious liability on editors and proprietors. No submissions addressed this issue.

3.33 The Commission considers that it is not necessary to recommend legislative change to the common law. In the draft bill that is annexed, a person attracts liability for sub judice contempt if that person "publishes matter or causes matter to be published".[41] It is implicit in this wording that a person is liable as a principal if he or she participates materially in the publication. There are elements of vicarious liability in the recommended defence of no editorial control, in which knowledge of a servant or agent is treated as equivalent as knowledge of the accused.[42] Similarly, there are elements of vicarious liability in Recommendation 5, in which a person accused of contempt can seek to be excused from liability on the basis of relying reasonably on another person or persons to take reasonable steps to prevent a contempt from

41. See Appendix A, *Contempt of Court by Publication Bill 2003* (NSW) (draft bill), Pt 2, cl 7(1)(a), 8(1)(a), 9(1)(a), 10(1)(a).
42. See Recommendation 6.

occurring. Beyond this, we do not consider it necessary or desirable to recommend any legislative changes to the common law principles.

4. Prejudice to criminal proceedings

- Introduction
- Proposal 3: reformulating the “tendency” test
- Proposal 4: prescribing categories of prejudicial publications
- Proposal 5: relevance of the trial being aborted
- Proposal 6: relevance of pre-existing publicity
- Other issues arising from DP 43
- Matter that imposes improper pressure on parties

INTRODUCTION

4.1 In Discussion Paper 43 ("DP 43"), the Commission examined several aspects of the test for liability for sub judice contempt.[1] We put forward a number of proposals for legislative reform and invited submissions on these proposals. We now re-examine our proposals in light of the views expressed in consultation.

4.2 We note that this chapter focuses specifically on prejudice to criminal, as opposed to civil, proceedings. In contrast, Chapter 4 of the Discussion Paper was entitled, "Prejudicial Publications" and included a more general discussion about the test for liability for sub judice contempt. We have deferred more detailed discussion of prejudice to civil proceedings to Chapter 6 of this Report, and now look specifically at restrictions to publications relating to criminal proceedings. However, our recommendation for a reformulation of the "tendency" test, discussed in this chapter, is not limited to publications relating to criminal proceedings. In theory, it applies equally to restrict publications relating to civil proceedings, although for reasons discussed below and in Chapter 6 of this report, it will have less practical relevance to such publications.

PROPOSAL 3: REFORMULATING THE "TENDENCY" TEST

4.3 Proposal 3 of DP 43 put forward a reformulation of the existing common law test for liability for sub judice contempt, except in so far as publications imposing pressure on parties are concerned. The proposal read as follows:

> 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

1. See NSW Law Reform Commission, *Contempt by Publication* (Discussion Paper 43, 2000) ("NSWLRC DP 43") ch 4.

(b) by virtue of those facts, the fairness of the proceedings would be prejudiced.

4.4 There are several points to note about Proposal 3. First, it changes the basic test for liability from one based on "tendency" to one based on "substantial risk of prejudice". Secondly, it expressly provides for an assessment of the risk of contact and the risk of recall as separate elements of liability for the prosecution to prove. Thirdly, it applies to civil proceedings as well as criminal proceedings. Fourthly, it assumes that a publication may constitute a contempt for influencing a witness, as well as or instead of members of the jury, but that a judicial officer is not susceptible to influence for the purpose of determining liability for sub judice contempt.

4.5 It should also be noted that a publication might constitute a contempt if it is found to have a tendency to impose improper pressure on a party to proceedings.[2] While this aspect of the sub judice rule generally has greater practical application in the context of publications concerning civil proceedings, it also applies to publications concerning criminal proceedings and, in the Commission's view, should continue to do so. Proposal 3 of the Discussion Paper was not intended to affect the existing law concerning improper pressure on a party. In Chapter 6, we discuss as a separate issue the restrictions that should apply to publications that impose such pressure.

Current test for liability

4.6 The current test for liability for sub judice contempt is generally formulated in terms of "tendency".[3] 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, in order to constitute a contempt.[4] The prosecution bears the burden of proving the necessary tendency, beyond a reasonable doubt.

4.7 Liability for sub judice contempt depends on the potential effect of a publication on legal proceedings, rather than on proof of any actual effect the publication may

2. See *Harkianakis v Skalkos* (1997) 42 NSWLR 22.
3. See generally NSWLRC DP 43 at para 4.3-4.9.
4. 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 Corporation (1987) 7 NSWLR 588; Director of Public Prosecutions (Cth) v Wran (1986) 7 NSWLR 616; Attorney General (NSW) v Dean (1990) 20 NSWLR 650; Attorney General (NSW) v Radio 2UE Sydney Pty Ltd (NSWCA, No 40236/96, 16 October 1997, unreported).

have had. The court assesses the tendency of a publication to cause prejudice by examining the nature of the publication and the circumstances surrounding it, as they appeared at the time of publication. It does not have regard to later events that actually occurred following the publication. For example, in assessing whether or not a publication had a tendency to prejudice proceedings, a court would not take into account the fact that the proceedings were not in fact affected by the publication because the accused died before the trial or elected at the trial to plead guilty.[5]

4.8 The tendency test has been widely criticised for being imprecise and unclear, as well as too broad.[6] The test is said to be imprecise in so far as "tendency" is a vague and general notion on which to base criminal liability, since it is often impossible to know whether a particular statement, if published, will be found to have a tendency to prejudice proceedings. Given that sub judice contempt is generally considered to be a criminal offence, the limits of its liability 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.

4.9 It may also be argued that the test for liability is too broad in so far as it sets too low a threshold for the prosecution to prove contempt, by requiring no more than a "tendency" to prejudice. Publications may be prohibited which have a tendency to prejudice but which do not pose any serious risk to the administration of justice. The test may then be considered to tilt the balance further than is necessary to protect the fairness of legal proceedings at the expense of protecting freedom of discussion. There is also the risk that the media will be overly cautious in publishing material because they find the tendency test unclear. This, when combined with the more fundamental objection that the tendency test sets too low a threshold, may result in an unnecessary intrusion on freedom of discussion.

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5. See *Ex parte Auld; Re Consolidated Press Ltd* (1936) 36 SR (NSW) 596 at 598 (Jordan CJ); *Hinch v Attorney General (Vic)* 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 Pty Ltd* (1990) 20 NSWLR 368 at 382; *R v Glennon* (1992) 173 CLR 592 at 605 (Mason CJ and Toohey J).
6. See NSWLRC DP 43 at para 4.6-4.9; 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) ("ALRC Report 35") at para 288-295; R Pullan, "Contempt: judicial assertions but no evidence – we are ignorant about the impact of prejudicial pre trial publicity on jurors' deliberations" (1996) 34 *Law Society Journal* 48 at 49; M Chesterman, "Reforming the law of contempt" (1984) 58 *Law Institute Journal* 380 at 381.

The proposed reformulation: "substantial risk" versus "tendency"

4.10 Proposal 3 reformulated the test for liability in terms of a "substantial risk of prejudice", rather than a tendency to prejudice proceedings. In fact, several Australian judges have in the past applied the "substantial risk" formulation in determining cases of sub judice contempt.[7] Chief Justice Mason (as he then was) 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 the "tendency" formulation to be vague and uncertain, and perhaps to be seen to place too much weight on the protection of the administration of justice over freedom of speech.[8] Several common law jurisdictions have adopted some form of the "substantial risk" test in favour of the tendency test.[9] It has also been the preferred formulation of three law reform bodies who have reviewed the law of sub judice contempt, though the formulations proposed have varied in their terms from a substantial risk of prejudice, to a substantial risk of *serious* prejudice.[10]

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7. See *Hinch v Attorney General (Vic)* (1987) 164 CLR 15 at 27-28 (Mason CJ). See also, for example, *R v Day* [1985] VR 261 at 264; *Attorney General (NSW) v Radio 2UE Sydney Pty Ltd* (NSWCA, No 40762/91, 28 August 1992, unreported) at 3 (Priestley JA); *Attorney General (NSW) v Television and Telecasters (Sydney) Pty Ltd* (NSWSC, No 11752/97, Greg James J, 10 September 1998, unreported) at 13.
8. See *Hinch v Attorney General (Vic)* at 26 (Mason CJ).
9. In the United Kingdom, s 2(2) of the *Contempt of Court Act 1981* (UK) 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: 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). In Canada, the 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: 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; *R v Scozzafava* [1997] OJ No 4576 (QL) (JW Quinn J); *R v CHBC Television* (British Columbia, Court of Appeal, No 24128, 8 February 1999, unreported) (Essen JA).
10. The Australian Law Reform Commission recommended a test in terms of whether a publication creates a substantial risk that, by virtue of the influence it

4.11 It is open to question whether there is in fact any real difference in meaning between "substantial risk" and "tendency".[11] The courts have at times used both phrases interchangeably, and Chief Justice Mason considered that there might be no substantive difference between the two.[12] The case law does not provide a particularly precise definition of "tendency" in this context. The courts have noted that the degree of likelihood required by the word is not one of probability, but rather a "real possibility" of interference.[13] The High Court has said that the degree of possibility required must be more than a remote possibility that justice will be interfered with.[14] The formulation requires that the tendency be real and definite, and must exist as a "matter of practical reality". It is also worth noting that the "tendency" formulation makes no reference to any requirement for "serious" prejudice, but simply requires a tendency to prejudice, or embarrass, proceedings.

4.12 The word "substantial" in "substantial risk" would seem to require a higher degree of likelihood than one that is simply more than remote. The drafters of the *Contempt of Court Act 1981* in the United Kingdom, in adopting the "substantial risk" test as the legislative formulation for liability for sub judice contempt, certainly appeared to intend the word "substantial" to mean something which is serious, considerable, and real, imposing a high threshold on liability in order to restrict its intrusion on freedom of expression.[15] However, the English courts have since given a broader interpretation to "substantial", stating that it does not mean "weighty", but

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might exert on the court or jury, a fair trial might be prejudiced: see ALRC Report 35 at para 295. The Phillimore Committee recommended that a publication must create a risk that the course of justice will be seriously impeded or prejudiced: see United Kingdom, Committee on Contempt of Court, *Report of the Committee on Contempt of Court* (Cmnd 5794, HMSO, London, 1974) at para 113. The Irish Law Reform Commission recommended that liability arise where the proceedings will be seriously impeded or prejudiced: see Ireland, Law Reform Commission, *Contempt of Court* (Report 47, 1994) at para 19-20. See generally NSWLRC DP 43 at para 4.22-4.25.

11. See generally NSWLRC DP 43 at para 4.13-4.21.
12. See *Hinch v Attorney General (Vic)* at 26 (Mason CJ).
13. *Attorney General (NSW) v John Fairfax and Sons Ltd* (1985) 6 NSWLR 695 at 697-698 (Samuels JA).
14. *Victoria v Australian Building Construction Employees' and Builders Labourers' Federation* (1982) 152 CLR 25 at 56 (Gibbs CJ).
15. See United Kingdom, *Parliamentary Debates (Hansard)* House of Lords, 15 January 1981 at 182-184.

means "not insubstantial" or "not minimal".[16] On other occasions, it has been held that "substantial" simply excludes a risk that is only remote.[17]

4.13 Proposal 3 reflects the Commission's tentative view, stated in DP 43,[18] that the "substantial risk" test was preferable to the tendency test for determining liability for sub judice contempt. We considered that the "substantial risk" test was somewhat more precise, and therefore allowed the media to determine with a greater degree of certainty which publications would expose them to prosecution. We took the view that the "substantial risk" test required a high degree of risk in order to restrict the publication of material. This was desirable in order to ensure that the limits imposed on freedom of discussion were only as much as were truly necessary to protect the fairness of legal proceedings. While the degree of possibility that is required by the "tendency" test is unclear, the Commission certainly intended the "substantial risk" test to require something more than a risk that is not remote. While the English courts may have interpreted the "substantial risk" test as imposing a lower threshold for liability than was originally intended, the Commission was not convinced that this would be the experience in New South Wales. If all that is required by the tendency test is a risk that is more than remote, then Proposal 3 can be said, at least, to raise the bar for the prosecution to meet in proving liability for sub judice contempt.

4.14 It is also worth noting that Proposal 3 requires a substantial risk of prejudice, rather than a substantial risk of *serious* prejudice. The Commission considered both formulations, but tentatively concluded that the first was preferable to the second. We took the view that prejudice to the fairness of legal proceedings is, by its nature, serious, and in the context of a fair trial, there are not degrees of prejudice. We could not imagine a case of "trivial" prejudice, and concluded that it was superfluous to add "serious" to the proposed formulation.

Consultation

4.15 Most people in consultation supported Proposal 3, although with suggestions for some amendments. Eight groups and individuals expressed clear agreement,[19]

16. See *Attorney General v News Group Newspapers Ltd* [1987] 1 QB 1 at 15 (Donaldson MR); *Ex Parte Telegraph Group* (2001) 1 WLR 1983 (CA).
17. 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).
18. NSWLRC DP 43 at para 4.29-4.32.
19. See N Cowdery QC, *Submission* at 1; ABC, *Submission* at 1; M Sexton SC, *Submission* at 2; Victorian Bar Council, *Submission* at 2-3; Australian Press Council, *Submission* at 4; Law Society of NSW, *Submission* at para 9-11;

while two were more hesitant in their support,[20] though tending to lean in favour of the proposal rather than retaining the common law. Four were opposed to the proposal, on the basis that it was preferable to retain the common law.[21]

4.16 There was some difference of opinion about whether the term "substantial risk" did in fact set a higher standard for the prosecution to meet to prove liability for contempt than the "tendency" test in the existing common law formulation. In supporting the proposal, the Australian Press Council considered that it raised the standard from that set by the existing formulation. The government lawyers who met with the Commission, in expressing their tentative support for Proposal 3, also considered that it set a higher standard, and noted that the Commission needed to make clear whether or not this was our intention. Similarly, representatives of the New South Wales Bar Association, in opposing Proposal 3, took the view that it lifted the bar for the prosecution to meet. On the other hand, some groups and individuals opposed Proposal 3 on the basis that there was no difference between the "substantial risk" and "tendency" tests, and that it was therefore preferable to retain the existing common law formulation for the sake of certainty and uniformity with other Australian states.[22]

4.17 Those who supported Proposal 3 generally considered that it should be modified in some way. Three organisations took the view that the test should require a substantial risk of *serious* prejudice, rather than simply prejudice.[23] The Victorian Bar Council asserted that the adjective "serious" emphasises the need for considerable prejudice, without which there may in practice be more focus placed on the

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Broadcast Media Representatives, *Consultation*; Print Media Representatives, *Consultation 2*.

20. See D Norris, *Submission* at para 30-36; Government Lawyers, *Consultation*.
21. See ACT Bar Association, *Submission* at 1; NSW Bar Association, *Submission* at para 1-6; Australian Broadcasters, *Joint Submission* at para 3; NSW Bar Association Representatives, *Consultation*.
22. NSW Bar Association, *Submission* at para 1-6; Australian Broadcasters, *Joint Submission* at para 3. While they agreed with Proposal 3, representatives of the print media also expressed some concern that there was no real difference between the "substantial risk" and "tendency" tests: Print Media Representatives, *Consultation 2*. David Norris also took the view that there was no difference between the two tests, but considered that it might be good to settle on a single statutory formulation for the sake of certainty, clarity, and consistency: see D Norris, *Submission* at para 31-32.
23. Broadcast Media Representatives, *Consultation*; Print Media Representatives, *Consultation 1*; Victorian Bar Council, *Submission* at para 9-10. The Australian Press Council, in suggesting a reformulation of Proposal 3, also included reference to the fairness of proceedings being "seriously prejudiced".

assessment of risk required by the phrase "substantial risk", at the expense of proper consideration of the degree of prejudice also involved. The Director of Public Prosecutions supported Proposal 3 on the provision that, instead of a substantial risk that "the fairness of the proceedings *would* be prejudiced", there be a substantial risk that the fairness of the proceedings *could* be prejudiced. The ABC Legal Services considered that clause (a) of the proposed formulation be changed from "members, or potential members, of a jury … *could* (i) encounter the publication; and (ii) recall the contents of the publication at the material time" to "members, or potential members, of a jury … *would*" etc. Several of the government lawyers preferred the phrase "real risk" to "substantial risk". The Australian Press Council submitted that clause (b) of the proposed formulation should instead be made a third element of clause (a), as an additional element to be proven of the effect on jurors or potential jurors. The prosecution would then need to prove a substantial risk that members of a jury could "(i) encounter the publication; (ii) recall the contents of the publication at the material time; and (iii) be influenced by the publication in a way that seriously prejudiced the fairness of the proceedings".[24] The Solicitor General considered that it might be useful to add to clause (b) of Proposal 3 words such as "notwithstanding any directions that might be given by the trial judge in relation to the publication". However, several other government lawyers took the view that this qualification was already implicit in the test for liability.

The Commission's recommendation

RECOMMENDATION 2

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

(a) members, or potential members, of a jury, or a witness or witnesses, or potential witness or witnesses, in legal proceedings will:

(i) become aware of the matter; and

(ii) recall the content of the matter at the relevant time; and

(b) by virtue of those facts, the fairness of the proceedings will be prejudiced.

24. See also Print Media Representatives, *Consultation 2*.

4.18 The Commission considers that a test based on "substantive risk" is preferable to one based on "tendency" because it is more precise, clearer, and raises the threshold for liability to a level that justifies curtailment of freedom of discussion to protect prejudice to legal proceedings. The majority of people who addressed this issue in consultation supported our position.

4.19 To a large extent, Recommendation 2 reproduces the wording of Proposal 3 in DP 43. There are a couple of minor modifications that aim to make the recommendation clearer, rather than effect any substantive changes. The first of these is reference in the recommendation to the "publication of matter" and "publishing the matter". These seek to overcome any ambiguity that may have arisen from the Commission's use of the word "publication" in DP 43, which at times could be taken to refer to the published material the subject of the contempt charge, and at other times the act of publishing that material. We have also changed the wording in clause (a)(ii) from "the contents" to "the content".

4.20 There are several substantive changes appearing in the recommendation, and other matters worth noting.

4.21 First, Recommendation 2 does not exclude from the scope of liability for sub judice contempt the publication of matter that may influence civil juries in defamation proceedings. This represents a reversal of policy from that underlying Proposal 3 in the Discussion Paper, and is examined in detail in Chapter 6 of this Report.

4.22 Secondly, the recommendation refers to the substantial risk that participants in the proceedings will "become aware of" the contents of published material. Proposal 3 of DP 43 referred
to the risk that participants would "encounter" the material. The Commission prefers the phrase "become aware of" because it more clearly encompasses both a direct and indirect encounter with the contemptuous material. Jurors or witnesses may become aware of the material by reading, watching or listening to it themselves, or may be told about it by, for example, a friend, family member, or another juror. Our recommended test for liability aims to include both situations within its scope.

4.23 Thirdly, Recommendation 2 imposes liability for a substantial risk that participants "will" become aware of the material, "will" recall the contents of the material, and, consequently, that the fairness of the proceedings "will" be prejudiced. Use of the word "will" creates a higher threshold of liability for the prosecution to meet than was originally put forward in Proposal 3 of DP 43. We have come to conclusion that a high degree of probability is required in order to justify curtailment of freedom of discussion, and that the wording of Proposal 3 set the threshold for liability too low.

4.24 Fourthly, the Commission rejected the suggestion that the test should require a substantial risk of *serious* prejudice. After consideration, the Commission does not agree that the word "serious" should be added to the formulation. The threshold for liability would be too high if the prosecution were required to prove a substantial risk of serious prejudice, and it would be almost impossible to prove a substantial risk of serious prejudice beyond a reasonable doubt. We are satisfied that, in order to amount to prejudice, the potential interference with legal proceedings must be more than merely trivial interference. We note that the current "tendency" test does not refer to serious prejudice, and therefore our recommended reformulation does not lower the threshold for liability in any way.

4.25 Fifthly, we considered the suggestion of the Australian Press Council that clause (b) of the reformulation be made a third subclause of clause (a), so that the test would require a substantial risk, first, that the participants would encounter the material, secondly, would recall the content of the material, and thirdly, that the fairness of the proceedings could be prejudiced. We have not adopted this suggestion, because we do not consider that it really adds anything to the formulation, and is more a matter of form than of substance.

4.26 Lastly, it was suggested that there be a separate rule dealing with the publication of photographs of the accused. This suggestion essentially stemmed from a concern that the recommended reformulation would not be interpreted widely enough to include a substantial risk of *subconscious* recall. Clearly, the sub judice rule should prohibit the publication of photographs where there is a substantial risk that, for example, a witness will subconsciously recall a photograph from a newspaper or on television when identifying the accused. We are satisfied, however, that reference in the recommended reformulation to a substantial risk of recall is wide enough to cover both conscious and subconscious recall, and therefore there is no need for a separate rule dealing with the publication of photographs.

Proposal 3: assessing the risk of contact and the risk of recall

4.27 Proposal 3 in DP 43 required the prosecution to prove both that there was a substantial risk that jurors, or a witness, could encounter the publication, and that they could recall the contents of the publication at the material time. These two elements are expressed as separate requirements for the prosecution to prove in addition to proving the risk of influence. The current test for liability does not separate out these three elements. The court may give consideration to the likelihood of the publication coming to the attention of participants in the proceedings, as a factor that affects its

tendency to prejudice those proceedings.[25] The courts appear to place greater weight on this factor, as a possible reason for finding that the requisite tendency has not been proved, in respect of publications that occur before a trial has commenced.[26] They seem more reluctant to attach much weight to this matter as a factor reducing the requisite tendency in respect of publications occurring after a trial has commenced.[27] The findings of *Managing Prejudicial Publicity*, a Justice Research Centre Report on juries ("JRC Report") bears this out in so far as it suggests that recall of pre-trial publicity is piecemeal, whereas recall of in-trial publicity occurred for at least one juror in every case that was investigated.[28]

4.28 In DP 43, the Commission considered that it might be useful to include in the basic test for liability separate requirements to consider the likelihood of a juror's or witness' contact with the publication in question, and the risk that they would then recall that publication. We made it clear that Proposal 3 did not require proof of actual contact and recall, but simply proof of a "substantial risk" of contact and recall. In this way, we hoped to direct the courts' attention to giving express consideration to these factors in determining liability. While they may now be generally subsumed in the basic formulation for liability, there is the danger that the courts may blur these two notions if they are not explicitly spelled out as separate elements of liability.

4.29 Only two submissions gave express consideration to the Commission's proposed approach in respect of the risk of contact and the risk of recall. The Law Society agreed with the Commission.[29] Mr Norris, of the Crown Solicitor's Office, saw the formulation of these factors as specific considerations as unexceptionable, though

25. See NSWLRC DP 43 at para 4.85-4.91.
26. See *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 465 (Schiemann LJ).
27. In several cases, the court hearing the contempt charge has been provided with evidence that the jury did not, or was unlikely to have, come into contact with the offending publication, but has nevertheless found the publisher guilty of sub judice contempt: see *Registrar, Court of Appeal v John Fairfax Group Pty Ltd* (NSWCA, 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* (NSWCA, 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.
28. M Chesterman, J Chan and S Hampton, *Managing Prejudicial Publicity* (Justice Research Centre, Law and Justice Foundation of NSW, 2001) at para 508.
29. Law Society of NSW, *Submission* at para 15.

doubted that they would in fact bring about any change in the way that courts deal with contempts. He made particular reference to the difficulties that might arise in trying to prove a substantial risk of contact with Internet publications.[30]

4.30 We are satisfied that the test for liability should be reformulated to require, as separate elements, a substantial risk of encounter and of recall. We do not consider that this reformulation makes any substantive changes to the common law. It does, however, focus the court's attention on these elements as two separate elements to assess.

Proposal 3 and matter that may influence witnesses

4.31 In addition to reformulating the basic test for liability in terms of "substantial risk", Proposal 3 made it clear that published material may constitute a contempt on the basis of its potential effect on a witness, as opposed to or as well as on members of a jury. This reflects the present position at common law, which assumes that witnesses may be susceptible to influence by media publicity. There is little empirical or psychological evidence to test the validity of this assumption. The courts instead appear to draw on their own experience and assumptions about human behaviour to find contempt in cases where it is feared that publicity may influence a witness either by deterring him or her from coming forward to give evidence, or by contaminating the evidence that a witness gives.[31]

4.32 In DP 43, the Commission examined the common law's assumption about the potentially prejudicial effect of publicity on witnesses.[32] We questioned whether liability for sub judice contempt should continue to be imposed on the basis of possible influence on a witness, or whether the risk to the administration of justice in such a case did not justify retaining influence on a witness as a ground for restricting the publication of information. Previous reviews of the law of sub judice contempt have considered this issue.[33] In particular, the Australian Law Reform Commission took the view that liability for contempt should not arise from the possibility of influence on a witness, with the exception that, in criminal proceedings, the law should continue to prohibit the publication of a photograph, sketch or description of the physical attributes of a person in circumstances from which it could reasonably be

30. D Norris, *Submission* at para 50-52.
31. See NSWLRC DP 43 at para 4.36-4.39 for a discussion of the types of cases in which the courts have typically found a publication to constitute a contempt on the basis of its possible influence on a witness.
32. NSWLRC DP 43 at para 4.33-4.48.
33. See NSWLRC DP 43 at para 4.44-4.47.

inferred that the person was charged with or suspected of having committed an offence.[34]

4.33 We did refer to some general psychological studies about the malleability of memory that suggest the potential for memory to be embellished or even transformed by new information received after an event. We considered these to offer some support to restricting the publication of material that may have an effect on a witness's recollection of events.

4.34 We noted that, while contempt can still in theory arise in this context, the common law appears to have become increasingly reluctant to restrict the publication of information on the basis that it may influence a witness in civil proceedings. The courts seem now generally to place greater faith in the honesty of witnesses and the power of cross-examination to expose prejudice and inconsistencies.[35]

4.35 Contrary to the recommendations of the Australian Law Reform Commission, we tentatively concluded in DP 43 that there was sufficient reason for concern that a witness may be influenced by media publicity to justify retaining this ground of liability. We invited submissions on our tentative conclusion.

4.36 Only three submissions discussed the issue of possible influence on witnesses.[36] All three agreed that the law should continue to restrict the publication of information in this context. One submission suggested that Proposal 3 might not be appropriately formulated to deal with some forms of possible influence on witnesses. Proposal 3 requires the prosecution to prove (among other things) a substantial risk that a witness could encounter the publication in question and recall its contents at the material time. It was submitted that a publication of, for example, a photograph may contaminate a witness' testimony whether or not the witness later has any specific recollection of the publication, and that, in fact, there may be a greater risk of prejudice to a fair trial where the witness has no separate recollection of the publication and is unconsciously influenced by it. It was submitted that there should instead be a clear, general rule prohibiting or restricting the publication of film or photographs of a person charged with an offence in any circumstances, to avoid the risk of influence, or suggestion of influence, on a witness' testimony.[37]

4.37 The Commission concludes that the sub judice rule should continue to prohibit the publication of material on the basis of potential influence on a witness.

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34. ALRC Report 35 at para 391-392, 462-465.
35. NSWLRC DP 43 at para 4.34-4.35.
36. See NSW Bar Association, *Submission* at para 7-8; D Norris, *Submission* at para 37-38; Law Society of NSW, *Submission* at para 12.
37. D Norris, *Submission* at para 37-38.

Recommendation 2 reflects this. Those few submissions that addressed the issue supported our conclusion, and it could be argued from the general lack of response in submissions to this issue that it is considered not to be a contentious area. As for the suggestion regarding a separate legislative provision to deal with (subconscious) recollection through photographs, we do not consider this to be necessary, for the reasons set out above.

Proposal 3 and matter that may influence judicial officers

4.38 Recommendation 2 does not include within the scope of liability for sub judice contempt the publication of material that may influence judicial officers. This reflects the Commission's view, put forward in DP 43,[38] that the possibility of influence of a judicial officer should not generally form a basis for prohibiting the publication of material under the sub judice rule. The exception to this is the possibility of influence of a judicial officer following a guilty verdict or plea in a criminal case before sentence is handed down. We discuss our reasons for a general position regarding the possibility of influence of judicial officers, and our more specific views regarding influence at the sentencing stage, in Chapter 7 of this report.

Proposal 3 and matter prejudicing civil proceedings

4.39 Proposal 3 includes within the scope of liability for sub judice contempt publications that may influence jurors or witnesses in civil proceedings, except for jurors empanelled under s 7A of the *Defamation Act 1974* (NSW). In Chapter 6, which deals generally with the application of sub judice restrictions in relation to civil proceedings, the Commission examines the submissions received on this issue.

PROPOSAL 4: PRESCRIBING CATEGORIES OF PREJUDICIAL PUBLICATIONS

4.40 In DP 43, the Commission proposed that legislation set out a list of the types of statements that may give rise to liability for sub judice contempt.[39] Proposal 4 puts forward an illustrative list of statements that, if published, may constitute a contempt. The Commission did not intend for this list to provide the sole criterion for liability. The prosecution would need to satisfy the basic test for liability in Proposal 3 in order to prove contempt. The list of statements in Proposal 4 would provide additional

38. NSWLRC DP 43 at para 4.49-4.57.
39. See NSWLRC DP 43 at para 4.59-4.75.

guidance to the media on the types of statements that are typically considered to be prejudicial. The list would be illustrative only. That is, a statement could fall outside the categories in Proposal 4 and still constitute a contempt if it met the requirements of the basic test for liability in Proposal 3.

4.41 We considered the main purpose of our proposed list to be educative, and to provide the media with a quick reference point for examples of the types of statements that they should avoid publishing. We discussed whether it would be preferable for the list to be exhaustive. That is, a statement would only constitute a contempt if it fell within one of the categories listed (and also satisfied the basic test for liability in Proposal 3). The main advantage of an exhaustive list of statements is that it provides greater certainty and clarity for the media, since they would know that a statement falling outside one of the listed categories would not constitute a contempt. We took the view that such an approach would be too inflexible, as it might be difficult to predict and enshrine in legislation every type of statement that should properly be considered to prejudice a fair trial. There may be statements that fall outside the listed categories that are later found to be prejudicial. We also considered whether it would be preferable for Proposal 4 to provide the sole basis for liability. That is, a publication would only constitute a contempt if it fell within one of the categories listed in Proposal 4, with no additional requirement to satisfy the test set out in Proposal 3. This approach has the advantage of providing the media with greater certainty about when a publication will give rise to liability. However, we rejected it on the basis that it placed an unjustifiable restriction on freedom of discussion: a statement may fall within one of the listed categories but not pose a substantial risk of prejudice to proceedings in the circumstances of a particular case. Previous reviews have differed in their conclusions about the appropriate approach to take.[40]

4.42 We included in Proposal 4 those categories of statements that typically give rise to liability at common law. We have since analysed all prosecutions for sub judice contempt in Australia since 1980 to determine the number of cases, if any, which do not fall within one of the categories included in Proposal 4. A table with the result of our analysis is attached as Appendix E to this report. Almost all of the cases did fall within one of the proposed categories. It is also worth noting that some of the proposed categories, though not all of them, were also listed in the JRC Report as the types of information that jurors, judges, and counsel consider as possibly influencing

40. The Australian Law Reform Commission recommended that legislation prescribe, as an exhaustive list, the categories of statements to give rise to liability for contempt: see ALRC Report 35 at para 291. The Irish Law Reform Commission recommended that legislation set out the types of statements that might give rise to liability as an illustrative, non-exhaustive list: see Ireland, Law Reform Commission, *Contempt of Court* (Report 47, 1994) at para 6.9.

juries' perceptions of the trial.[41] Other categories nominated in the JRC Report that were not included within our proposed list are: sympathetic and unsympathetic depiction of the victim, and generic publicity, that is, publications that deal with broader, general social issues that have relevance to the particular trial in question.

Consultation

4.43 There was an equal division of opinion about the desirability or undesirability of including Proposal 4 in a legislative formulation of the test for liability for sub judice contempt. Four groups and individuals supported the proposal,[42] and four opposed it.[43] Those who opposed it questioned the utility of including a list in legislation of categories of statements that are already well established at common law and generally known as potentially contemptuous. It was considered that a list of categories of statements might focus attention on whether or not a statement fits within one or more of the categories, rather than on determining the more fundamental question of the likelihood of prejudice to legal proceedings.

4.44 Both those who supported Proposal 4 and those who opposed it made suggestions for changes to the proposal, in the event that the Commission were to recommend its inclusion in a legislative formulation. It was submitted that the final category listed in the proposal, that is "a photograph, sketch or other likeness of the accused, or a physical description of the accused", should be considered potentially prejudicial only in cases where the identity of the accused is or might be in issue.[44] One submission questioned the need to include "previously acquitted" in the first category of potentially prejudicial statements.[45] Another submission considered that the third and fourth categories of statements were too generally phrased, and should be redrafted in a tighter form.[46] It was argued that, in their present form, they do not give rise to serious prejudice, especially in light of the findings of the JRC Report. Similarly, another submission argued that several phrases included in the proposal were too imprecise, and needed to be clarified in order to achieve the level of certainty that was sought by including a list of statements in a legislative formulation

41. Chesterman, Chan and Hampton at para 251-265.
42. See N Cowdery QC, *Submission* at 1; ABC, *Submission* at 1; Law Society of NSW, *Submission* at para 14; Print Media Representatives, *Consultation 2*.
43. D Norris, *Submission* at para 44-45; Australian Press Council, *Submission* at para 6; Australian Broadcasters, *Joint Submission* at para 4; Broadcast Media Representatives, *Consultation*.
44. ABC, *Submission* at 1; Australian Press Council, *Submission* at 4; Print Media Representatives, *Consultation 1*.
45. ABC, *Submission* at 1.
46. Australian Press Council, *Submission* at para 6.

for liability.[47] These phrases were: "or from which it could be reasonably inferred", in the first, second and third categories,[48] "could be reasonably regarded", in the fourth category, and "illustrative", as a description of the list as an illustrative, as opposed to exhaustive, list. It was argued in consultation that the third and fourth categories of statements should be deleted altogether from the proposal.[49] One submission pointed out that the proposed list did not provide an exception for matters referred to in court proceedings.[50] One group argued that the list should be exhaustive,[51] while another submission expressed the opposing view that it should be illustrative.[52]

The Commission's conclusion

4.45 We have reached the conclusion that legislation should not prescribe categories of prejudicial material. We appreciate the educative function that such a list would serve for the media. However, on balance, we consider that such a list would be too inflexible, and would complicate the formulation for liability unnecessarily. As was made clear in consultation, the types of publicity that will typically give rise to liability for contempt are well established and generally known. It could therefore be argued that it is not really necessary to enshrine a list of this kind in legislation. As we discussed above, we consider that it would be too inflexible to prescribe an exhaustive list of categories, and to include an illustrative list may simply complicate and confuse the issue of liability more than it would clarify it.

PROPOSAL 5: RELEVANCE OF THE TRIAL BEING ABORTED

4.46 A trial judge has a discretion to dismiss a jury in a criminal trial if he or she considers that a publication concerning the trial is so prejudicial as to make the trial unfair.[53] The jury should be discharged if, in all the circumstances, this is necessary in

47. Australian Broadcasters, *Joint Submission* at para 4.
48. It was similarly argued in consultation that the phrase "or from which it could reasonably be inferred" should be deleted from the first and second categories: see Print Media Representatives, *Consultation 1*.
49. See Print Media Representatives, *Consultation 1*.
50. ABC, *Submission* at 1.
51. Print Media Representatives, *Consultation 1*. There was some support among members of this group for an illustrative list, provided that the third and fourth categories were deleted.
52. D Norris, *Submission* at para 44.
53. See NSWLRC DP 43 at para 4.92-4.104.

the interests of ensuring a fair trial.[54] Once a jury is discharged, the trial must stop, or be aborted, and usually a new trial, with a new jury, will be fixed to commence on some later date.

4.47 In Proposal 5 of DP 43, the Commission suggested that the fact that a trial judge has decided to dismiss, or not to dismiss, a jury in a criminal trial following the publication of material about that trial should be admissible in the contempt proceedings as relevant to the issue of liability for sub judice contempt. The proposal made it clear that, while this should be admissible evidence, it should not be determinative of the question of whether or not a contempt has occurred.

The current position at common law

4.48 It is unclear whether, at common law, a trial judge's decision to dismiss or not to dismiss a jury is admissible evidence in the related contempt proceedings on the question of liability for contempt, though it seems settled that it is relevant to the question of penalty once a contempt has been proven.[55] Comments in a number of Australian cases suggest that it *is* relevant to the question of liability, and that, at the least, it is relevant to determining that the tendency of the publication to interfere with the course of justice was not fanciful.[56] While such evidence may be relevant, the court hearing the contempt case certainly does not appear to consider itself bound by the earlier decision.[57]

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54. See *R v George* (1987) 9 NSWLR 527; *R v Murdoch* (1987) 37 A Crim R 118; *R v Glennon* (1992) 173 CLR 592.
55. See *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* (NSWSC, No 11752/97, Greg James J, 10 September 1998, unreported); *R v Day* [1985] VR 261.
56. See *Registrar, Court of Appeal v Willesee* (1985) 3 NSWLR 650 at 663 (Hope JA); *R v Day* at 264 (Gobbo J). But see the consideration of *R v Day* by Greg James J in *Attorney General (NSW) v Television and Telecasters (Sydney) Pty Ltd* at 9-10.
57. In *Attorney General (NSW) v John Fairfax Publications Pty Ltd* [1999] NSWSC 318 (9 April 1999) (Barr J), a trial judge had refused to adjourn the commencement of a criminal trial because of a publication in a newspaper. Evidence of the trial judge's refusal appears to have been admitted in the contempt proceedings against the newspaper, although the judge hearing the contempt charge found that the refusal to adjourn the trial was not binding on the decision in the contempt proceedings.

4.49 In one recent case in New South Wales, it was held that evidence that a trial has been aborted as a result of a publication was not relevant and was inadmissible on the issue of whether a contempt had been committed.[58] This ruling may appear to conflict with earlier cases referred to above that found such evidence to be admissible. However, one commentator has suggested that this more recent ruling should not be interpreted as a statement of a general rule, but rather a conclusion based on the particular facts of the case.[59] At the least, it may be argued that the law is uncertain on this issue, and needs to be clarified. Similarly, in other jurisdictions, there are comments in cases that suggest on the one hand that such evidence is relevant to, though not determinative of, liability,[60] and on the other hand, that there are many reasons why a publication is found to be potentially so prejudicial as to amount to a contempt while the trial to which it relates is allowed to continue.[61]

4.50 Clearly, the question whether to discharge a jury is different from the question whether a publication amounts to a contempt. The court must apply different tests in determining each question. The trial judge, in deciding whether to dismiss the jury, must consider the publication in light of the nature and circumstances of the trial. A publication that, on its own, may not be regarded as creating a high risk of prejudice to a trial, in combination with other factors, might tilt the balance in favour of dismissing the jury. The court hearing the contempt case will not necessarily consider those same surrounding circumstances when deciding whether the publication amounts to a contempt. In DP 43, the Commission acknowledged that different issues apply to the decision faced by the trial judge and the court hearing the contempt case. However, we took the tentative view that the court hearing the contempt case should be able to consider any finding by the trial judge of the effect of the publication on the trial as part of the actual circumstances surrounding the publication. The trial judge's finding should be relevant, but would not of itself prove contempt; the prosecution would still need to prove, beyond a reasonable doubt, that the publication created a substantial risk of prejudice in order to succeed in the contempt proceedings.

58. See *Attorney General (NSW) v Television and Telecasters (Sydney) Pty Ltd*.
59. Chesterman (1984) at 80.
60. See *Attorney General v Birmingham Post and Mail Ltd* [1998] 4 All ER 49 at 59 (Simon Brown LJ).
61. See *R v CHBC Television* (British Columbia, Court of Appeal, No 24128, 8 February 1999, unreported) at 75 (Esson JA).

Consultation

4.51 The majority of those who expressed a view on Proposal 5 did not agree with it. Two supported it,[62] while five opposed it.[63] Those who opposed it had various reasons for doing so. One submission argued that judges currently tend to dismiss juries even when there is a remote likelihood of a seriously prejudicial influence, and that consequently, evidence of the decision has little probative value and should not be admissible in any related contempt proceedings.[64] Others argued that different issues are involved in deciding whether to dismiss a jury and whether contempt has been committed, and questioned how, in that case, the trial judge's decision could be a relevant consideration for the judge in the contempt proceedings.[65] It was pointed out that a trial judge might decide to dismiss or not dismiss a jury for a number of reasons other than the effect of the publication. The trial judge and the judge hearing the contempt case will apply different tests and different standards of proof, and only one will hear submissions from the alleged contemnor. Yet if evidence of the trial judge's decision is admitted in the contempt proceedings, there is a risk that it will effectively determine the outcome of the contempt matter. It was also considered undesirable to allow a review in subsequent proceedings of a trial judge's reasons for dismissing or not dismissing a jury.[66]

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62. N Cowdery QC, *Submission* at 1; D Norris, *Submission* at para 53. Mr Norris' view was perhaps not completely in line with Proposal 5. He agreed that evidence that a trial judge has discharged a jury should be admissible evidence in contempt proceedings. He did not, however, address the question of whether a decision not to discharge a jury should also be considered relevant evidence.
63. ABC, *Submission* at 1; Australian Press Council, *Submission* at para 7; Australian Broadcasters, *Joint Submission* at para 5; Government Lawyers, *Consultation*; Print Media Representatives, *Consultation 1*. The Law Society was ambiguous in its view on this proposal. It stated that it agreed with the Commission on this issue, but described the Commission's position as viewing evidence of a decision to discharge a jury as relevant to the question of penalty for contempt, rather than liability. It stated that, notwithstanding a trial judge's decision to discharge a jury, the prosecution should still need to prove that a publication created a substantial risk of prejudice in order to prove contempt, but did not express a view on whether the trial judge's decision should be admissible evidence relevant to proving liability for contempt: see Law Society of NSW, *Submission* at para 15.
64. Australian Press Council, *Submission* at para 7.
65. Australian Broadcasters, *Joint Submission* at para 5; Government Lawyers, *Consultation*.
66. Australian Broadcasters, *Joint Submission* at para 5.

The Commission's recommendation

RECOMMENDATION 3

Section 129(5)(b) of the *Evidence Act 1995* (NSW) should be amended to allow for a trial judge's decision to dismiss, or not to dismiss, a jury in a criminal trial following the publication of matter, and the reasons given for that decision, to be admissible in the related contempt proceedings, subject to s 135 of the *Evidence Act 1995* (NSW). The mere fact that the trial judge cannot be cross-examined should not be considered in itself to cause unfair prejudice to a party for the purpose of s 135. Evidence of the decision, and the reasons for the decision, should be admissible as relevant to the issue of liability for sub judice contempt, but should not be determinative of the question of liability.

4.52 Despite the opposition expressed in consultation, the majority[67] of Commissioners consider that evidence should be admissible in the related contempt proceedings of a trial judge's decision to abort, or not to abort, and the reasons for that decision. We agree that different issues and considerations face the trial judge from those facing the court hearing the contempt case, and therefore that the contempt court can never be bound by the trial judge's decision. However, while this is so, both courts must consider, to some extent, the effect, if any, of the relevant publicity on the jury. Consequently, evidence of the trial judge's earlier decision, and the reasons for that decision, should be admissible in the contempt proceedings as relevant to the question of liability for contempt. Recommendation 3 goes further than Proposal 5 in so far as it expressly makes admissible the reasons for the trial judge's decision, as well as the fact that the decision was made. Once evidence is brought in of such a decision, it would be artificial not then to allow evidence of the reasons for that decision. For example, if the trial judge has taken into account considerations additional to the effect of the particular publicity, such as the general atmosphere of the trial itself, then the contempt court should be made aware of these by having access to the reasons for the trial judge's decision.

4.53 The Commission has formulated Recommendation 3 as a further exception to be inserted in s 129 of the *Evidence Act 1995* (NSW), which is a general provision excluding evidence of judicial reasons. If this recommendation is adopted in legislation, it will have implications for uniformity of evidence laws of the

67. Justice Greg James dissents from the majority's view.

Commonwealth and the state. While we acknowledge this concern, it is not something that can affect our decisions regarding reform to the law of sub judice contempt in New South Wales.

4.54 Recommendation 3 also requires considerations of unfair prejudice to be weighed in the decision whether or not to admit evidence of a trial judge's decision, according to s 135(a) of the *Evidence Act 1995* (NSW). We have specifically provided that, just because it is considered inappropriate to call the trial judge to give evidence in the contempt proceedings, that cannot be used as a basis for excluding evidence of his or her decision.

PROPOSAL 6: RELEVANCE OF PRE-EXISTING PUBLICITY

4.55 There is some suggestion that, at common law, pre-existing publicity may act to lessen the tendency of a current publication to prejudice proceedings.[68] It has been held that, where material on the same topic has been published previously, through another source, the current publication may be less likely to prejudice proceedings because its prejudicial information has already been made known to the public.[69] However, it has also been held that, as a matter of public policy, pre-existing publicity can only be relied on as a factor lessening the prejudicial effect of a current publication if the previous publication did not itself constitute a contempt.[70]

4.56 In DP 43, the Commission was concerned about the implications of the common law's approach to the relevance of pre-existing publicity. As a matter of policy, we considered that a publisher should not be able to avoid liability simply because of pre-existing publicity on the same topic, and that the law should not withdraw its protection from accused persons who, for whatever reason, attract a large amount of media publicity.
We also questioned the logic behind the assumption that the prejudicial effect of a publication was lessened by the existence of previous publicity. We suggested that, on the contrary, the existence of previous publicity might serve to reconfirm, if not heighten, in the public's mind, prejudice and suppositions that would otherwise have

68. See NSWLRC DP 43 at para 4.105-4.108.
69. *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).
70. *Director of Public Prosecutions (Cth) v Wran* (1986) 7 NSWLR 616 at 628-629.

been forgotten.[71] Our views reflected the conclusions reached by the Australian Law Reform Commission on this issue.[72]

4.57 Proposal 6 sought to clarify the law by suggesting a legislative provision to make it clear that the existence of previous publicity should not be considered as a factor lessening the risk of a current publication to cause prejudice. It is worth noting that the findings of the JRC Report support the view that pre-existing publicity may actually heighten the tendency of a current publication to cause prejudice, rather than lessen it. There was limited empirical evidence to suggest that pre-existing publicity may increase the likelihood of juror recall of a pre-trial prejudicial publication.[73]

Consultation

4.58 Five groups expressed views on Proposal 6. Three opposed it,[74] and two supported it.[75] Those who opposed it argued that it was a step backwards from the current common law position, and that it was unfair to expect a subsequent publisher to take full blame for prejudice partly arising from previous publications.
One submission, which disagreed with the proposal, did concede that it might be reasonable to hold a publisher responsible if it republishes material close to the time of the commencement of the trial to which the material relates.[76] Another submission, while supporting Proposal 6, suggested that it could be worded more precisely.[77] In its current form, it was argued that the proposal did not specifically remove the assumption of the relevance of background publicity to the liability of a specific publication. It was submitted that the proposal would better achieve its aims if it included an express requirement that the risk of prejudice presented by a publication was not to be taken to be reduced solely on the ground that a previous publication, containing similar contents, had already been made, or, alternatively, that previous

71. See *Attorney General (NSW) v TCN Channel Nine Pty Ltd* (1990) 20 NSWLR 368 (Hunt J). It was held in that case that, although in general 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": see 5 BR 10 at 20.
72. ALRC Report 35 at para 318-319.
73. JRC Report at para 509.
74. Australian Press Council, *Submission* at para 8; Australian Broadcasters, *Joint Submission* at para 6; Print Media Representatives, *Consultation 1*.
75. N Cowdery QC, *Submission* at 1; D Norris, *Submission* at para 54-55.
76. Australian Press Council, *Submission* at 8.
77. D Norris, *Submission* at para 55.

publicity must be disregarded in making an assessment of the risk of prejudice. It was noted, however, that this alternative formulation would foreclose a finding that the risk of prejudice was greater than it would otherwise be because of extensive pre-existing publicity.

The Commission's recommendation

RECOMMENDATION 4

Legislation should provide that the risk of prejudice presented by the publication of matter is not reduced by reason only that matter containing similar contents has been published on a previous occasion.

4.59 The Commission maintains the view expressed in DP 43 that a person or organisation should not be able to avoid liability for sub judice contempt for the publication of material solely because material containing similar contents has been previously published. We note that a slim majority of submissions did not agree with us, but we consider that our position is both fair and logical. We agree however that our proposal could be worded more precisely, and to this end we have reworded it as it appears in Recommendation 4.

OTHER ISSUES ARISING FROM DP 43

4.60 In DP 43, the Commission raised a couple of other issues relating to the test for liability without formulating any specific proposals for reform. These were, first, the relevance of remedial measures to liability for contempt and, secondly, the admissibility and utility of expert evidence to prove tendency or substantial risk. These issues were not widely discussed in consultation. However, for the sake of completeness, it is worth referring to them again here.

Relevance of remedial measures to liability for contempt

4.61 In DP 43,[78] the Commission considered whether the availability of remedial measures should be relevant to the question of whether a publication has a tendency to prejudice proceedings.

78. NSWLRC DP 43 at para 4.109-4.113.

By "remedial measures", we meant the measures available to minimise the possible prejudicial effect of media publicity on legal proceedings, specifically, the power of the court to order an adjournment or a change of venue, or to discharge the jury, the power of the prosecutor or defence to challenge the empanelment of jurors for cause, and directions by the trial judge to the jury to disregard publicity about the case.

4.62 The Commission discussed 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 proceedings. We noted that Australian courts do not generally recognise the availability of remedial measures as relevant to the question of liability, except for possibly the effectiveness of judicial warnings in minimising the potential prejudice of media publicity.[79] The Commission took the view that the courts should not be required to give greater weight than they already do to the availability of remedial measures in determining liability for sub judice contempt. To do so would place greater reliance on remedial measures as a means of overcoming the possibility of prejudice from media publicity, which would involve greater expense to the State and the accused, and greater delays in finalising criminal trials. It may also cause inconvenience, emotional upset, and hardship to the participants in the trial.

4.63 The Commission's view was undisputed in consultation. Only one submission expressly addressed this issue, and agreed with the Commission's approach.[80] Consequently, we see no reason to change our position.

The admissibility and utility of expert evidence

4.64 The Commission noted in DP 43[81] that the courts now appear more inclined to admit and rely on expert evidence as relevant to the question of whether a publication has the tendency, or risk, required to prove liability for contempt.[82] However, while such evidence may be more readily admitted, its utility in proving or disproving

79. See *Waterhouse v Australian Broadcasting Corporation* (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.
80. D Norris, *Submission* at para 56-57.
81. NSWLRC DP 43 at para 4.76-4.81.
82. See *Attorney General (NSW) v John Fairfax Publications Pty Ltd* [1999] NSWSC 318.

tendency or substantial risk may often be limited.
At least in a case where expert opinion is based on a survey of mock jurors, the impossibility of replicating “real-life” trial conditions may detract from the survey results as a reliable indicator of what might happen at a trial.[83]

83. Justice Barr reached the conclusion that the survey on which much of the expert opinion was based was of limited value because of the difficulties of replicating real life conditions in a mock trial. Consequently, he considered 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: see *Attorney General (NSW) v John Fairfax Publications Pty Ltd* at para 95, 102.

4.65 The Commission saw no reason in principle why expert opinion should not be admissible on the issue of the substantial risk of a publication to cause prejudice. We considered that the provisions of the *Evidence Act 1995* (NSW) relating to the admissibility of expert evidence[84] were sufficiently broad to admit expert evidence on this issue, and, consequently, there was no need to propose legislative reform.

4.66 Only one submission addressed the issue of expert evidence, and agreed with our approach.[85] We therefore do not consider it necessary to recommend any changes to the existing law regarding the admissibility of expert evidence. We do acknowledge the possibility, alluded to in the submission, that greater reliance on expert evidence in contempt cases might lead to defendants in contempt prosecutions going to great expense to call experts to attempt to define empirically the degree of risk required by a "substantial risk".

MATTER THAT IMPOSES IMPROPER PRESSURE ON PARTIES

4.67 At the beginning of this chapter,[86] we referred to another way in which liability for sub judice contempt might arise, other than from the publication of matter that creates a substantial risk of influencing jurors or witnesses. A person, or organisation, might also be convicted of sub judice contempt for publishing material that tends to impose improper pressure on a party to legal proceedings as to the conduct of those proceedings.[87] Although liability on this basis typically arises in respect of improper pressure on parties to civil proceedings, there is no reason why it should not also apply in respect of pressure on parties to criminal proceedings. A publication may tend to impose pressure on the defendant, or the Crown, to conduct their case in a particular way. Chapter 6 of this report contains the Commission's recommendation for reform, as well as a more detailed discussion of the current law in this area. While that chapter deals specifically with publications relating to civil proceedings, the recommendation makes it clear that this restriction on publishing matter has a general application, and is not limited to the publication of material relating to parties to civil proceedings.

84. See *Evidence Act 1995* (NSW) Part 3.3, especially s 79, s 80.
85. D Norris, *Submission* at para 46-49.
86. See para 4.5.
87. 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] 1 QB 710; *Hammersley Iron Pty Ltd v Lovell* (1998) 19 WAR 316.

5. Fault

- The relevance of fault to liability
- An element of fault should be required
- Possible approaches
- The Commission's proposals in DP 43
- The Commission's revised recommendation
- Fault and principles of responsibility
- Where actual intent is proven
- Attempt to commit sub judice contempt

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] But the cases do not establish this principle a one of clearly binding authority.

5.3 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

1. See, for example, R v David Syme & Co Ltd [1982] VR 173; Director of Public Prosecutions (Cth) v Australian Broadcasting Corporation (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 (NSWCA, 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 (2nd edition, 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; But see the criticisms of this approach in *Registrar, Court of Appeal v Willesee* (1985) 3 NSWLR 650 at 655 (Kirby P). There are authoritative dicta to the effect that, although intention to interfere is not a requirement, it is a relevant consideration in determining liability: For a discussion on this, see NSW Law Reform Commission, *Contempt by Publication* (Discussion Paper 43, 2000) ("NSWLRC DP 43") at para 5.4, 5.5.

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.

5.4 However, there are exceptions to this general principle.
The criminal law recognises some offences that impose "absolute liability" and others that impose "strict liability".[4] 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.
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.[5]

5.5 Following this distinction, it would appear that sub judice contempt may be an offence of absolute liability under current Australian law: that is, it may impose liability even if the publisher did not know, and could not reasonably have known, that an offence was being committed. It would follow that publishers could not escape a contempt conviction even if they made reasonable efforts to check that no proceedings were pending which might be affected by a publication.

AN ELEMENT OF FAULT SHOULD BE REQUIRED

5.6 In DP 43, the Commission took the position that it is fairer to require an element of fault than to impose absolute liability for sub judice contempt and that legislative reform is desirable to make it clear that fault is an element of liability.[6]

5.7 It argued that, 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 on one view the law currently stands, 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. A fault requirement explicitly formulated in the law would give them more incentive to be careful. They would know that if they did not take reasonable care, they could not be punished for

4. 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.
5. See NSWLRC DP 43 at para 5.8-5.14 for a more detailed discussion on these types of offences and examples.
6. See NSWLRC DP 43 at para 5.24-5.28.

contempt. Imposition of absolute liability is not the most effective means of ensuring that publishers take reasonable precautions to avoid prosecution.

5.8 There was general agreement by the media with the Commission's position on this matter during the consultation meetings.[7] There was also support in the written submissions.
The Australian Press Council expressly agreed with the proposal to introduce an element of fault.[8] The New South Wales Law Society likewise agreed with the Commission, stating that the "golden thread" of criminal liability is that there should be mens rea for any offence carrying significant punishment.[9] One submission expressed preference for the retention of absolute liability, because it provides the best protection to the administration of justice, but was nevertheless open to the introduction of a fault element through a defence of innocent publication.[10]
5.9 The Commission has found no reasons since conducting its consultations to change its position that legislative reform is desirable to introduce fault as an element of liability for sub judice contempt.

POSSIBLE APPROACHES

5.10 There are three alternative approaches that could be adopted to inject some element of fault into liability for sub judice contempt:

5.11 ***Actual intention or recklessness.*** The first is to formulate liability in a way that required the prosecution to prove that the defendant had an actual intention to interfere with the administration of justice. This approach was favoured by Justice Kirby in *Registrar, Court of Appeal v Willesee*,[11] on the basis that it conforms to ordinary principles of criminal law. A requirement of intention could include reckless indifference as to whether a publication interfered with particular proceedings.[12]

5.12 The Commission's view is that to require proof of actual intention would be to place too heavy a burden on the prosecution. Because media publications are often

7. Radio and Television Organisations, *Consultation*; Print Media Representatives, *Consultation 1*.
8. Australian Press Council, *Submission* at para 9.
9. Law Society of NSW, *Submission* at para 17.
10. D Norris, *Submission* at para 58.
11. *Registrar, Court of Appeal v Willesee* (1985) 3 NSWLR 650 at 652-658.
12. A criterion of reckless indifference would require that the defendant be able to foresee the probability that his or her act would result in interference with the administration of justice, but that he or she proceeded to publish the material without caring whether such interference might actually occur.

produced by several people (reporters, producers, editors, etc), it would be very difficult to prove the necessary intent. In addition, 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.

5.13 ***Negligence.*** Liability for sub judice contempt could be formulated in a way that would require the prosecution to prove negligence on the part of the defendant. That is, it would have to be proved 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".
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.

5.14 An 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 is a compromise between the current approach, which is open to criticism for setting too low a threshold for liability, and an approach requiring proof of actual intention or recklessness, which can be said to set too high a threshold.

5.15 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, would the courts take into account the financial and other resources available to individual publishers in determining whether they conducted a reasonable search to ensure that no proceedings were current or pending before publishing? Would it be considered reasonable for a publisher to rely on legal advice in deciding whether to publish? Would the courts take into account the particular time constraints facing the individual publisher when preparing for publication, in recognition of the practical demands that come with having to compete with other media organisations to be the first to deliver the most up-to-date information to the public?

5.16 Another 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. This is because the factual matters relevant to the issue are generally within the knowledge of the defendant. The deterrent effect of the sub judice rule might therefore be significantly diminished.

5.17 ***Defence of innocent publication.*** The third approach would be to maintain the principle that no element of fault amongst the matters to be proved by the prosecution, but to provide by legislation 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.

5.18 The 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.

5.19 The Commission considers that this may be the preferable approach to adopt.

THE COMMISSION'S PROPOSALS IN DP 43

5.20 The Commission proposed in DP 43 a defence of innocent publication that 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 developed separate proposals for each. The common underlying principle for both of them is the need to exercise reasonable care.

Proposed defence for persons responsible for the content of the publication

5.21 The Commission proposed[13] that legislation should provide that it is a defence to a charge of sub judice contempt, to be proved 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.

13. NSWLRC DP 43, Proposal 7.

5.22 The proposal implements 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. 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.

Consultation and the Commission's response

Support for the proposal

5.23 The New South Wales Law Society and the Australian Press Council both agreed with the proposal. Mr David Norris, Senior Solicitor at the Crown Solicitor's Office, also gave his approval, stating that of the possible ways of introducing a fault element canvassed by the Commission, the proposed defence of innocent publication would seem the most workable.[14] Moreover, he stated that it may provide an additional incentive to ensure that workable arrangements are made by the courts, police and prosecution authorities, like the Director of Public Prosecutions, to provide information to the media within the scope of an obligation to take reasonable steps.[15]

5.24 Mr Norris, however, warned that it would be dangerous to provide a lower threshold for establishing the defence where the resources available to the publisher are less. He argued that a publisher that is insufficiently resourced to take appropriate steps to protect the integrity of trials should not publish material that could possibly carry a risk of prejudice to trials. His comment was in response to the Commission's invitation for comments on whether it would be useful to include a specific reference to the accused's resources in the formulation of a defence of innocent publication.

5.25 The Commission's proposal is largely modelled on the formulation recommended by the Australian Law Reform Commission ("ALRC").[16] However, 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. In DP 43, the Commission took the view that it is not desirable to include a specific reference to the defendant's resources in a legislative formulation of a defence of innocent publication. It questioned the necessity or appropriateness of singling out resources in legislation as a relevant factor for the defence, but nevertheless invited submissions on this.

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14. D Norris, *Submission* at para 58.
15. D Norris, *Submission* at para 59.
16. Australian Law Reform Commission, *Contempt* (Report 35, 1987) at para 262.

5.26 Mr Norris' submission effectively supports the Commission's view. No contrary submissions were made on this particular issue. The Commission has not found any reason to change its position on this matter of the defendant's resources. The resources available to the defendant should be just one of a number of matters that the court may in its discretion take into account in determining what is "reasonable".

Opposition to the proposal

5.27 In their joint submission, the Federation of Australian Commercial Television Stations, the Federation of Australian Commercial Radio Broadcasters, the Australian Broadcasting Corporation and the Special Broadcasting Service, disagreed with the proposal.[17] They said that the media would not be able to use this defence because it would be difficult to establish that all reasonable steps were taken to ascertain any fact that would cause the publication to breach the sub judice rule. It was claimed that the defence would have very little application to media organisations, which are normally unaware of the facts surrounding particular legal proceedings.

5.28 The Commission does not accept an argument that seeks to excuse the media from an obligation to ensure that its activities do not prejudice the proper administration of justice. Media organisations are businesses operating for profit. Their profit is derived from the same activity that poses a risk to the administration of justice.
The benefits obtained from such a business should carry certain obligations and responsibilities. The Commission considers it appropriate to impose laws that require media organisations to devote resources to avoid the risk of interfering with the administration of justice.

5.29 The proposal addresses this unfairness by providing a defence to those who exercise reasonable care in the publication of material that may affect legal proceedings. It would absolve liability in at least two situations. The first is where the defendant did not know that proceedings were pending which may be affected by the publication, having taken all reasonable steps to ascertain that there were no such proceedings. The second is where the defendant knew or found out that proceedings were pending and took all reasonable care to exclude material that is likely to be prejudicial to the proceedings. The following illustrative examples are precautions that a media organisation or its relevant staff may take to avoid liability:

- actual inquiries about any pending proceedings that may be affected by material about to be published,
- maintenance of a checking system,
- seeking legal advice on which basis it believed (incorrectly) that the publication would not breach the sub judice rule, and

17. Australian Broadcasters, *Joint Submission* at 4.

- 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.

5.30 Another basis for the resistance to the proposal is the uncertainty that may arise in the consideration by the courts of what is "reasonable" for purposes of determining whether the contempt is excused under the circumstances. Both the Joint Broadcasters' Submission and the submission by the Victorian Bar Association pointed out that the defences based on reasonableness in defamation law have had an unhappy history.[18] It was contended that the experience with section 22 of the *Defamation Act 1974* (NSW) – which provides a defence of qualified privilege in circumstances where the publication of the matter was reasonable in the circumstances – suggests that it is difficult for a media defendant to rely upon a "reasonable" defence successfully.[19] Moreover, it was said that it is often difficult to identify in advance all of the factors that may be relevant to assessing "reasonableness" in a particular case.[20] The Joint Broadcasters' Submission suggested that the proposal should articulate the steps that would satisfy the reasonable requirement.[21]

5.31 The Commission recognises that there is a degree of uncertainty in any test that requires consideration of what is "reasonable", and that it will involve a value judgement by the court deciding the issue. However, it may 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 question of what is reasonable is an issue that the courts address on a regular basis, as they are elements of many criminal offences and civil causes of action.[22]

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18. Australian Broadcasters, *Joint Submission* at 4; Victorian Bar Council, *Submission* at para 18.
19. NSW Bar Association, *Submission* at para 18.
20. NSW Bar Association, *Submission* at para 18.
21. Australian Broadcasters, *Joint Submission* at 4.
22. The law contains a myriad of "reasonable" standards. In the criminal context, for example, there are objective tests of reasonable force in relation to self defence or defence of property, a reasonable mistake requirement for strict liability offences, and exemption from offences on a showing of "reasonable excuse" for what would otherwise be criminal conduct: see *Crimes Act 1900* (NSW) s 93G, 93H, 316, 545E. In the civil context the reasonable person represents the foundations of the law of negligence. Reasonable excuse, reasonable steps, reasonable time periods and reasonable notice are examples of reasonableness standards that are applied in many areas of the law.

Suggested changes to the proposal

5.32 ***Burden of proof.*** There was a suggestion during the consultations that the onus should be on the prosecution to prove that the defendant failed to take reasonable steps.[23] This is effectively a suggestion to adopt the negligence approach to sub judice contempt; that is, it would have to be proven 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.

5.33 The Commission considered and rejected this approach in DP 43, and has found no reasons to change its position. Rather than imposing positive obligations of care on the media, this approach would put the onus on the prosecution to prove that the defendant's conduct was blameworthy. The deterrent effect of the sub judice rule may be significantly diminished if this approach were adopted. It also places too heavy a burden on the prosecution.

5.34 ***Reasonable steps.*** There was a suggestion that if the proposed defence is adopted, the words "reasonable steps" should be used instead of "all reasonable steps."[24]

5.35 The Commission agrees with this suggestion. The purpose of the proposed defence is not to require the person responsible for the publication to exhaust every possible means of ensuring that the publication does not breach the sub judice rule. Rather, the defence should only require that the publisher take such steps as are reasonable in the circumstances.

5.36 ***Reliance on the reasonable steps taken by others.*** In the consultations, there was a comment that the Commission's proposal does not go far enough because it may in some situations leave some people in a media organisation without protection.[25] There was particular concern that the reforms being proposed by the Commission would require many people in a media organisation to take reasonable steps to ensure that no sub judice liability arose individually. It would seem that in some instances, an officer of a media outlet might rely on the measures that another in the organisation has already taken to ensure compliance with the law. An example given during one of the consultation meetings was that of an editor who leaves the pressroom (or broadcast room) temporarily, perhaps to perform some other duty in the organisation. He or she is still arguably responsible for supervising the publication

23. Print Media Representatives, *Consultation 1.*
24. Australian Broadcasters, *Joint Submission* at 4; Broadcast Media Representatives, *Consultation.*
25. Print Media Representatives, *Consultation 1*; Broadcast Media Representatives, *Consultation.*

and may therefore be criminally liable if the published material is subsequently adjudged to be contemptuous.[26]

5.37 If someone else has taken reasonable steps to ensure that the sub judice rule is not violated and the editor in the example relied on them, the Commission agrees that the editor should be able to invoke the proposed defence. The proposal has been revised to take into account this and similar situations.

THE COMMISSION'S REVISED RECOMMENDATION

RECOMMENDATION 5

Legislation should provide that it is a defence to a charge of sub judice contempt, proved on the balance of probabilities, that the person or organisation charged with contempt, as well as any person for whose conduct in the matter it is responsible:

(a) did not know a fact that caused the publication to breach the sub judice rule; and

(b) before the publication was made, either

(i) took reasonable steps to ascertain any fact that would cause the publication to breach the sub judice rule; or

(ii) relied reasonably on one or more other person to take such steps and to prevent publication of any such fact was ascertained.

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

5.38 In DP 43, the Commission suggested in Proposal 8 that legislation should also provide that it is a defence to a charge of sub judice contempt if the accused can show, on the balance of probabilities:

26. Broadcast Media Representatives, *Consultation.*

(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.

5.39 This proposal in DP 43 is intended to cover at least two broad classes of situations.

First group of situations where the proposed defence may be used

5.40 The first limb of the proposal, which is contained in paragraph (b)(i) of the proposal, is patterned after the defence of innocent distribution in the *Contempt of Court Act 1981* (UK) s 3(2).

5.41 ***A defence for distributors of print material.*** The primary aim is to give distributors of printed material[27] a defence to a charge of sub judice contempt. Distributors are not in any way involved in the production of the material and therefore should not be obliged to exercise the same degree of care as is expected of editors or publishers in ascertaining whether a substantial risk of prejudice to pending proceedings will result from the publication. Although they do not have control over the content of the publication, they do have control of its dissemination and therefore have the capacity, through the exercise of reasonable care, to prevent the risk of prejudice from arising. Distributors should be held responsible if at the time of the publication they had reason to suspect that contempt might arise and did not take reasonable steps to avert it.

5.42 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

27. The liability of distributors of printed material is discussed in NSWLRC DP 43 at para 3.37-3.40.

material.[28] In other words, the standard of care that is to be expected of large-scale distributors should be higher than that of newsagents and others who directly sell newspapers.

5.43 ***A defence for distributors of (or those that relay or re-broadcast) broadcast (television/radio) material.*** The proposed defence as it relates to paragraph (b)(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 that 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.[29]

Second group of situations where the proposed defence may be used

5.44 The other group of situations that Proposal 8 seeks to address is where the offending material was published through the facilities of the accused who, having become aware of the contemptuous material prior to or after its publication, could have taken steps to prevent its publication or its re-publication. This second limb of the proposed defence is contained in paragraph (ii) of the proposal. As in paragraph (i), neither the accused, nor any person for whose conduct in the matter it is responsible should have had any editorial control of the content of the offending material. The accused would only be guilty of sub judice contempt if it failed to take reasonable steps to prevent the material from being published.

5.45 ***Live interviews: media's defence for contemptuous statements made by interviewees.*** An illustrative situation is a live radio or television broadcast of contemptuous statements by interviewees or contributors.[30]

28. Miller at 302.
29. 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 do these things, the publication was not innocently disseminated.
30. See *Window v 3AW Broadcasting Co* (Vic, County Court, 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.

5.46 While the source of the prejudicial statement, eg the interviewee, should be liable for sub judice contempt, the liability of the broadcaster remains unclear at common law. The Phillimore Committee considered this issue and concluded that the editorial responsibility should remain strict in this situation.[31] 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 determination of a penalty.[32]

5.47 The Commission does not agree with this position.[33] It is not in favour of imposing liability without any element of fault.[34]
But the law should require a person to take reasonable precautions in order to avoid conviction for contempt.

5.48 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 reasonable steps within its means to prevent the publication of the statement.

5.49 Radio "talk" stations are a case in point. Most of them operate on systems that allow for delayed broadcast of an average of 7.2 seconds.[35] Such systems allow for certain words or names to be "dropped out" from the broadcast.[36] 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.[37] Under those circumstances, the radio broadcaster and others involved do indeed have the means, upon hearing the contemptuous statement, to prevent it from being broadcast. Unreasonable failure to use the mechanism would generally be construed

31. See United Kingdom, Committee on Contempt of Court, *Report of the Committee on Contempt of Court* (Cmnd 5794, HMSO, London, 1974) at para 152.
32. See United Kingdom, Committee on Contempt of Court, *Report of the Committee on Contempt of Court* (Cmnd 5794, HMSO, London, 1974) at para 152.
33. For a criticism of the Phillimore Committee's position of this issue, see Miller at 304-305.
34. See para 5.6-5.9.
35. Information provided D Bacon, Chief Executive Officer of the Federation of Australian Radio Broadcasters Ltd (4 May 2000).
36. Information provided D Bacon, Chief Executive Officer of the Federation of Australian Radio Broadcasters Ltd (4 May 2000).
37. Information provided D Bacon, Chief Executive Officer of the Federation of Australian Radio Broadcasters Ltd (4 May 2000).

by courts as a failure to exercise the reasonable care required by the proposed defence.

5.50 ***The internet: a defence for internet content hosts and internet service providers for contemptuous material posted on the internet.*** The proposed defence contained in paragraph (ii) of Proposal 8 is also intended to apply to two types of entities that play a major part in the distribution of information through the Internet. These are Internet service providers ("ISPs") and Internet content hosts ("ICHs"). An ISP is a person who gives to the public the facility to access the Internet.[38] An ICH is a person who hosts Internet content, which is information kept on a data storage device and accessed through the Internet.[39]

5.51 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[40] or even those concerning licensees of television channels[41] would apply to ISPs and ICHs.

5.52 The *Broadcasting Services Amendment (Online Services) Act 1999* (Cth) established a framework for dealing with "offensive" content on the Internet. Among its additions to the *Broadcasting Services Act 1992* (Cth) is Schedule 5, clause 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.

5.53 It has been argued that the immunity granted by clause 91 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 the clause, nor is there a limitation on the type of content applicable.[42] Consequently, even though the immunity under clause 91 is granted in the context of the regulation of "offensive" online

38. See *Broadcasting Services Act 1992* (Cth) Sch 5 cl 3.
39. See *Broadcasting Services Act 1992* (Cth) Sch 5 cl 8(1).
40. See NSWLRC DP 43 at para 3.37.
41. See NSWLRC DP 43 at para 3.33-3.36.
42. 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.

content, one commentator has agued 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.

5.54 The consequence of such a broad construction of clause 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.

5.55 The Commission agrees in principle with this interpretation of clause 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.[43]

5.56 Nevertheless, the Commission considers that where an ISP or ICH becomes aware of some contemptuous publication that 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.[44] This position is reflected in paragraph (i) of Recommendation 5.

Feedback from submissions and consultations

5.57 There was support for this proposal[45] and no significant opposition to it.

5.58 In his written submission, Mr David Norris supported the proposal but queried whether in so far as distributors are concerned, the word “publication” in the proposal refers to publication of the material by the original publisher or the act of distribution by the distributor.

43. *Broadcasting Services Act 1992* (Cth) s 4(3).
44. See generally *Broadcasting Services Act 1992* (Cth) Sch 5 Pt 4.
45. Australian Press Council, *Submission* at para 10; Law Society of NSW, *Submission* at para 16-20.

5.59 The liability for contempt of distributors is based on their act of distributing the offending material. They can only be expected to exercise reasonable care before they distribute the material and not at an earlier or any other time. Hence under the Commission's proposal, a distributor charged with contempt need to prove that he or she exercised reasonable care before distributing the material, regardless of whether or not it has be previously published by another person.

The Commission's recommendation

5.60 The Commission has found no reason to change the substance of its proposal. However, its final recommendation contains two revisions to the original proposal.

5.61 First, the words "reasonable steps" should be used instead of "all reasonable steps." This is consistent with the immediately preceding recommendation. The purpose of the proposed defence is not to make the person responsible for the publication to exhaust every possible means of ensuring that the publication does not breach the sub judice rule. The defence should only require that the publisher take such steps as are reasonable under the circumstances.

5.62 Secondly, paragraph (b)(ii) has been redrafted to cover the situation where, in a live interview situation, the interviewer anticipated or even invited (through the questions asked, for example) the interviewee to make a contemptuous statement. If the interviewer elicited or anticipated the offending statement and did not take reasonable steps to prevent its publication, then he or she cannot invoke of the defence.

RECOMMENDATION 6

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 the offending matter was published pursuant to an agreement or arrangement whereby the content of matter to be published by the accused was to be determined by a person or persons other than the accused or any employee or agent of the accused; and

(b) that either:

(i) at the time of the publication, having made such inquiries as were reasonable in the circumstances, neither the accused or any servant or agent of the accused knew or had any reason to suspect that the material to be published would comprise or include the offending matter or any like matter; or

(ii) prior to the publication, having become aware, or having reason to suspect, that the material to be published would or might comprise or include the offending matter or any like matter, the accused, or a servant or agent of the accused, took reasonable steps to endeavour to prevent such matter from being published.

Disclosure of defence

5.63 Recommendation 6 would give a defence to organisations accused of contempt if they did not have control of the content of the publication and either (a) they did not know the publication contained contemptuous material, or (b) became aware of such material and took steps to prevent it from being published. Under the Recommendation, a broadcasting station that 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, if it fulfils the requirements in (a) or (b).

5.64 In these circumstances, the defence would depend on the contractual arrangement between the provider of the program and the licensee, and its existence could be determined by an examination of such arrangement. This would be a matter of significance to the Attorney General, or other person prosecuting for contempt, in considering whether or not to commence or proceed with the prosecution. Licensees may not be prepared to reveal this or, indeed, may be contractually obliged not to reveal it.

5.65 Mr David Norris suggested legislation that would provide for costs penalties if a defendant broadcaster does not disclose evidence of the availability of a defence under Recommendation 6 to the prosecutor within a certain period of being served with summons commencing contempt proceedings.[46] This, he argues, should help prevent a prosecution proceeding to trial in ignorance of the available defence.

5.66 Mr Norris' suggestion received support from Mr Peter Berman, Deputy Senior Crown Prosecutor, who said that he does not favour criminal prosecutions being commenced when the defendant has a complete defence, which, if it had been made known to the prosecution, would inevitably have meant that no prosecution was launched. Criminal prosecutions should not be commenced on a speculative basis.[47]

5.67 The Commission agrees with the suggestion and the reasons behind it.

46. D Norris, *Submission 3* at 8.
47. P Berman, *Submission* at 1.

RECOMMENDATION 7

Legislation should provide for costs penalties if a defendant does not disclose evidence of the availability of a defence under Recommendation 7 to the prosecutor within 14 days of being served with summons commencing contempt proceedings.

FAULT AND PRINCIPLES OF RESPONSIBILITY

5.68 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.

5.69 In Chapter 3 of this Report, the Commission expressed the view that it is implicit in the draft bill annexed to this Report that a person may be liable as a principal if he or she participates materially in a contemptuous publication.[48] 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, the proposed 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 that of the reporter (as would be the case if the basis for the editor's liability were vicarious).

5.70 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"

5.71 The Commission's proposed defence of innocent publication requires particular consideration in its application to media proprietors, where the proprietor is

48. See para 3.32, 3.33.

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.

5.72 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.[49] It has been suggested that if the principle of corporate criminal liability 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.[50]

5.73 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,[51] and for representing no more than an unsatisfactory form of compromised vicarious liability.[52]

5.74 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

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49. 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* (2nd edition, Federation Press, Sydney, 1996) vol 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 and N Lowe, *The Law of Contempt* (3rd edition, Butterworths, London, 1996) at 384-385.
50. See Borrie and Lowe at 385.
51. 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.
52. B Fisse and J Braithwaite, *Corporations, Crime and Accountability* (Cambridge University Press, Melbourne, 1993) at 46-47.

exercised due diligence to avoid the criminal conduct engaged in by its director, servant or agent.[53]

5.75 In DP 43, the Commission took the view that a media organisation is liable primarily, by virtue of the fact of publication, but has a defence if the relevant employees behaved reasonably in relation to the publication and taken reasonable steps to prevent the conduct amounting to contempt. 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. To rely successfully on the proposed defence of innocent publication, the media proprietor would have to show, on the balance of probabilities, that the employees involved in the publication process and who, by the nature and functions of their position in the organisation, were charged with exercising reasonable care in ensuring that the publication did not breach the sub judice rule, in fact exercised this obligation of care.

5.76 The Commission encountered no opposition to its position on this matter.

WHERE ACTUAL INTENT IS PROVEN

5.77 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 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.[54] That approach, however, does not appear to be supported by statements in other cases.[55]

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53. 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.

54. 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 & Sons* [1980] 1 NSWLR 362 at 369; *Registrar, Court of Appeal v Collins* [1982] 1 NSWLR 682 at 691 (Moffitt

5.78 In DP 43, the Commission proposed that 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.

5.79 To the extent that there may currently exist at common law a separate offence of "intentional sub judice contempt", the Commission saw 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. Section 319 of the *Crimes Act 1900* (NSW) 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.[56]

5.80 There does not appear to be any need to retain as well a category of contempt that imposes liability upon any conduct that might conceivably affect legal proceedings if it is unaccompanied by an intention to prejudice those proceedings. It is preferable to have one form of sub judice contempt, which requires a substantial risk of serious prejudice, with a defence of reasonable care. Evidence of actual intention will then be relevant to the question of penalty, rather than liability. Where there is evidence of actual intention, without an accompanying act creating a substantial risk of serious

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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 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.

55. 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).

56. 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.

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).

5.81 There was support for the proposal in the submissions.[57]
The Commission received no opposition to it in the written submissions and during the consultation meetings.

RECOMMENDATION 8

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.

ATTEMPT TO COMMIT SUB JUDICE CONTEMPT

5.82 The discussion of intent in relation to liability for sub judice contempt raises the issue of whether or not there should be an offence of attempt to commit sub judice contempt in New South Wales.

5.83 In the New South Wales Court of Appeal, Justice Mason 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 that had a tendency to interfere.[58]
Justice 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. Justice Mason did not attempt to resolve the uncertainties in the law in this area.

5.84 These comments by Justice Mason echo suggestions by an earlier commentator that the trend in past cases represents a move by the courts towards

57. ABC, *Submission* at 2; Australian Press Council, *Submission* at para 11; D Norris, *Submission* at para 66.
58. See *Harkianakis v Skalkos* (1997) 42 NSWLR 22 at 28 (Mason P).

recognising an offence of attempted contempt.[59] The Commission is, however, not aware of any Australian case that squarely involves an attempt to commit sub judice contempt. 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.

5.85 In England, attempt to interfere with the course of justice was mentioned as early as 1837,[60] but it was in the case of *Balogh v St Albans Crown Court* where Lord Justice Lawton appeared to have assumed the existence of such an offence. However, Lord Justice Stephenson did not share this view, stating that "contempt of court is a misdemeanour at common law, but I doubt if an attempt to commit a contempt is punishable as such."[61]

5.86 A Canadian case discussed the possibility that such an offence exists,[62] although there was no finding of an offence of attempted contempt in that case.

5.87 The Commission does not make any recommendation to reform this area of law. It is prepared to allow the law in this area to develop through the common law.

59. 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.
60. See *Re Ludlow Charities, Lechmere Charlton's Case* (1837) 2 My & Cir 316, 40 ER 661.
61. *Balogh v St Albans Crown Court* [1975] 1 QB 73 at 87.
62. See *Canadian Broadcasting Corporation v Keegstra* (1986) 35 DLR (4th) 76.

6. Publications relating to civil proceedings

- Overview
- Effect of publicity on witnesses, judicial officers and civil juries
- Effect of publicity on parties
- The prejudgment principle

OVERVIEW

6.1 In theory, the sub judice rule is as much concerned with preventing prejudice to civil proceedings as to criminal proceedings. In reality, however, publications concerning civil cases do not often attract liability for contempt and the sub judice rule has less practical importance in this context.[1]

6.2 There are two main reasons for this. First, civil proceedings are usually determined by a judge, magistrate or coroner, without a jury. A publication will not usually be considered to have a tendency to prejudice legal proceedings in cases heard by a judicial officer alone if the only basis for possible prejudice is the potential for influencing the judicial officer.[2] This is because it is now generally assumed that judicial officers will not be adversely influenced or affected by publicity about a case as they have experience and training in making decisions on the evidence presented in court. This assumption is examined below. Secondly, 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.

6.3 Under existing law, a publication relating to civil proceedings may amount to contempt in three sets of circumstances. These are where the publication:

- has the potential to prejudice a juror or witness; or
- places pressure on a party to litigation to discontinue or compromise that party's action or defence; or
- prejudges the issues at stake in particular proceedings.

6.4 This last ground of contempt, prejudging issues at stake, 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 to cause prejudice to specific proceedings. It is concerned with ensuring that media publicity does not compromise the general administration of justice, as distinct from administration of justice in a particular case, by usurping the courts' role and undermining public

1. This is also true of summary hearings by a magistrate, appellate proceedings, and coronial inquests.
2. See, for example, Civil Aviation Authority v Australian Broadcasting Corporation (1995) 39 NSWLR 540; Waterhouse v Australian Broadcasting Corporation (1986) 6 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; compare X v Amalgamated Television Services Pty Ltd (No 2) (1987) 9 NSWLR 575 at 590 (Kirby J).

confidence in the court system. The operation of the prejudgment principle in Australia is unclear. It is discussed in paragraphs 6.53-6.64 below.

6.5 This chapter reviews 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 continuing to apply the sub judice rule to these proceedings.

EFFECT OF PUBLICITY ON WITNESSES, JUDICIAL OFFICERS AND CIVIL JURIES

Witnesses

6.6 Liability for sub judice contempt may be imposed, at least in theory, on the basis of possible influence on a witness. This is discussed in Chapter 4 at paragraphs 4.31-4.37.[3] In DP 43, the Commission reached the tentative view that there were sufficient grounds for concern about the effects of media publicity on a witness, whether in criminal or civil proceedings, to justify imposing sub judice restrictions to protect against a substantial risk of such influence.[4] The Commission acknowledged that, in practice, the courts may 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.[5] However, the Commission proposed that the possibility of there being a substantial risk of prejudice in extreme cases justified retaining influence on a witness in civil proceedings as a possible ground of liability.[6]

3. See also NSWLRC DP 43, ch 4 at para 4.33-4.57.
4. NSWLRC DP 43, ch 4 at para 4.48.
5. See *Victoria v Australian Building Construction Employees' and Builders Labourers' Federation* (1982) 152 CLR 25 at 59 (Gibbs CJ), at 103 (Mason P), 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 NSWLRC DP 43 at para 4.34-4.35.
6. NSWLRC DP 43, Proposal 3 reflects the position that sub judice law should continue to impose liability for a publication relating to civil proceedings on the basis of potential influence on a witness (or potential witness).

Judicial officers

6.7 In DP 43, the Commission proposed that the law should not impose liability for sub judice contempt on the basis of possible influence on a judicial officer, in either criminal or civil proceedings.[7] This view accords with the current common law trend. However, the potential for a publication to cause "embarrassment" to a judicial officer needs to be considered separately from possible influence on a judicial officer.[8] 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.[9] Although the common law is not entirely clear in this area, the Commission made no proposals for change, with one exception. That exception relates to the sentencing stage of criminal proceedings and is discussed in Chapter 7 at paragraphs 7.55-7.70.

Civil juries

6.8 Theoretically, 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. However, the use of juries in civil proceedings is far more limited than in criminal proceedings. Although certain parts of defamation proceedings in the Supreme Court *must* be heard by a jury,[10] and in some circumstances the courts have the power to order a jury hearing,[11] most civil proceedings in the Supreme and District Courts are heard by judge alone.[12] Further, the *Courts Legislation Amendment (Civil Juries) Act 2001* (NSW) amends both District and Supreme Court legislation to the effect that civil actions in both these courts are to be tried without a jury unless the Court otherwise orders.[13] Given the limited role now played by juries in civil proceedings, there is a real question as to whether there is sufficient justification for continuing to restrict publications that may influence a civil jury.

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7. NSWLRC DP 43 at para 4.49-4.52.
8. See NSWLRC DP 43 at para 4.53-4.55.
9. See the cases referred to in NSWLRC DP 43 at para 4.54.
10. Proceedings on a claim in respect of defamation in which there are issues of fact must be tried by a jury unless otherwise ordered: *Supreme Court Act 1970* (NSW) s 86. However, the jury's role is limited: see para 6.11-6.12.
11. *Supreme Court Act 1970* (NSW) s 85; *District Court Act 1973* (NSW) s 76A.
12. See *Supreme Court Act 1970* (NSW) s 85(1); *District Court Act 1973* (NSW) s 76A(1).
13. Specified aspects of defamation proceedings in the Supreme Court in which there are issues of fact are to continue to be tried with a jury: *Courts Legislation Amendment (Civil Juries) Act 2001* (NSW) Sch 2, s 86.

Juries in civil proceedings generally

6.9 In DP 43, the Commission considered features of civil jury trials that may support the exclusion of such proceedings from the operation of the sub judice rule. First, rules of evidence in civil proceedings are generally not as stringent as those in criminal proceedings in excluding evidence where its prejudicial effect is considered to outweigh its probative value. Therefore, there is less danger in civil trials that a jury will be made aware of information through the media that has been kept from them by the court. Secondly, in a civil trial, unlike most criminal trials receiving media attention, a person's liberty is not in question. These factors arguably provide more room to compromise between the competing public interests in a fair trial and freedom of discussion.

6.10 However, the Commission was persuaded 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. The Commission's tentative conclusion was that the sub judice rule should apply equally to prevent publications that prejudice civil proceedings as it does to prevent prejudice to criminal proceedings.

Juries in defamation proceedings

6.11 On the other hand, in DP 43, the Commission considered that defamation proceedings merited different treatment and that the restrictions imposed by the sub judice rule out of concern to prevent influence on a jury should not apply in cases where the jury is to be empanelled under s 7A of the *Defamation Act 1974* (NSW) ("Defamation Act").[14]

6.12 The Commission's reasons for this position related to the greatly restricted role of juries in defamation proceedings instituted after 1 January 1995. Pursuant to s 7A of the Defamation Act,[15] 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. A judge alone first determines whether the matter is reasonably capable of carrying the imputation pleaded by the plaintiff and whether the imputation is reasonably capable of being defamatory of the plaintiff. If the plaintiff succeeds in this preliminary hearing, only then will a jury be empanelled to determine whether the matter complained of in fact carries the imputation pleaded and whether the

14. NSWLRC DP 43, Proposals 3 and 13.
15. Section 7A was inserted by the *Defamation (Amendment) Act 1994* (NSW) Sch 1[2]. See *Courts Legislation Amendment (Civil Juries) Act 2001* (NSW) s 86.

imputation is in fact defamatory of the plaintiff.[16] In deciding these questions, the jury, in theory at least, takes no account of the actual or deserved reputation or credibility of any of the parties. Furthermore, the jury does not determine whether the defendant has established any defence, nor any questions relating to the amount of damages.

Submissions

6.13 The Law Society of New South Wales and Mr David Norris, Senior Solicitor, Crown Solicitor's office, agreed with the Commission's tentative conclusion that the sub judice rule should continue to apply to civil proceedings.[17] As additional comment, Mr Norris questioned from when such liability should run, "for example, in relation to inquests where a jury may be required, but rarely in fact is."

6.14 The Australian Broadcasting Corporation[18] and a collective of Australian broadcasters (the "Broadcasters")[19] submitted that the sub judice rule should not apply to civil proceedings without a jury.

6.15 Mr Michael Sexton SC, New South Wales Solicitor General, submitted that "even in those few remaining civil cases which are tried by a jury, it is not easy to imagine a set of circumstances where any problem caused by pre-trial publications could not be redressed by the trial judge during the course of proceedings."[20]

6.16 Other barristers noted that trials involving civil juries are disappearing but argued that it is still important to maintain the sub judice restrictions when they occur.[21] Mr Henric Nicholas QC, barrister, expressed the view that "in defamation proceedings, the effect of the prejudicial material on witnesses is still important". He argued that there is no justification for distinguishing between civil (including defamation) cases and criminal jury trials.[22]

16. Probably also whether publication by or on behalf of the defendant has been proved.
17. Law Society of NSW, *Submission* at para 22; D Norris, *Submission* at para 69.
18. ABC, *Submission* at 2.
19. Australian Broadcasters, *Joint Submission* at 9.
20. M Sexton SC, *Submission* at 2.
21. Mr R Campbell, *Consultation*.
22. Mr W H Nicholas QC, *Consultation*.

Conclusion

6.17 The Commission has considered the arguments for and against retention of the sub judice rule in relation to publications which may influence witnesses, judicial officers and juries in civil proceedings, and the views expressed to it in submissions and consultations. The Commission is persuaded that the sub judice rule should apply equally to prevent publications that may influence juries and witnesses in civil proceedings, as it applies to criminal proceedings. As publications concerning civil proceedings heard without a jury may exert an influence on witnesses, or potential witnesses, causing prejudice to the proceedings, it is proper that the sub judice rule should apply to all civil proceedings, not just those heard before a jury.

6.18 Furthermore, although the use of juries in civil proceedings is becoming increasingly limited, they will still be used in some defamation proceedings and in proceedings where the court is satisfied that it is in the interests of justice for them to be tried before a jury. In such cases, there is the potential for media publicity to result in significant interference with the administration of justice.

6.19 It should also be borne in mind that the Commission recommends that restrictions on publications which may influence a jury should apply only from the time when it is known that a jury will be used in the civil or coronial proceedings.[23] In this way, the interference with freedom of speech is kept to the minimum necessary to protect the due administration of justice

6.20 The Commission has reconsidered its proposal in DP 43 for treating defamation proceedings heard before a jury differently from other civil jury trials. It now believes that the same restrictions should apply to all civil jury hearings. Notwithstanding the jury's reduced role in defamation hearings, the potential for media publicity to impede a fair hearing, of both the plaintiff's claim to have been defamed, warrants application of the sub judice rule.

6.21 However, for the reasons set out in Chapter 4,[24] the law should not impose liability for sub judice contempt on the basis of possible influence on a judicial officer.

RECOMMENDATION 9

The sub judice rule should continue to apply to civil proceedings in the terms recommended in Recommendation 2.

23. See ch 7, Recommendation 15.
24. See para 4.38.

EFFECT OF PUBLICITY ON PARTIES

6.22 A publication may constitute contempt if it tends to impose improper pressure on a party to civil proceedings as to the conduct of those proceedings. In particular, a publication may exert undue pressure on a party to discontinue or settle a claim which he or she has instigated or is defending.[25] 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.[26]

6.23 This restriction on publications that exert undue pressure on parties, although primarily applicable to civil proceedings, applies also to criminal proceedings.[27]

6.24 DP 43 explained that case law has adopted various approaches to defining what may amount to improper pressure, with the result that it is difficult to distil any clear majority view as to the material that it is permissible to publish.[28] As was pointed out by Justice Mason in *Harkianakis v Skalkos*,[29] it is a difficult area, where clarity is lacking.

6.25 In the United Kingdom, three different approaches for defining the parameters for permissible comment were suggested by the House of Lords in the leading English authority, *Attorney General v Times Newspaper Ltd*, commonly referred to as the *Sunday Times* case.[30] One of them, the approach put forward by Lord Reid in the *Sunday Times* case, was adopted by the court in *Commercial Bank of Australia Ltd v*

25. See *Attorney General v Times Newspapers Ltd* [1973] QB 710; *Commercial Bank of Australia Ltd v Preston* [1981] 2 NSWLR 554; *Harkianakis v Skalkos* (1997) 42 NSWLR 22; *Hamersley Iron Pty Ltd v Lovell* (1998) 19 WAR 316; *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2001) 188 ALR 312.
26. See *Harkianakis v Skalkos*.
27. See ch 4 at para 4.67.
28. 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 (Mason P). See also *Duff v Communicado Ltd* [1996] 2 NZLR 89 (Blanchard J), discussed in NSWLRC DP 43 at para 6.28.
29. *Harkianakis v Skalkos* at 27 (Mason P).
30. *Attorney General v Times Newspapers Ltd* [1974] AC 273. See NSWLRC DP 43 at para 6.21 for a discussion of the different approaches.

Preston.[31] In that case, Justice Hunt held that a publication will only amount to a contempt by reason of pressure on a party if it has a tendency to influence a party and contains misrepresentations of the facts, and/or consists of intemperate opinion or discussion.[32] According to this formulation, if the publisher actually intended to influence a party in the conduct of proceedings, liability for contempt would arise whether or not the publication was accurate and/or temperate.

6.26 However, the Court of Appeal in *Harkianakis v Skalkos*,[33] did not follow the principles set down by Justice Hunt in *Commercial Bank of Australia Ltd v Preston.* Justice Mason adopted a test put forward by Justice Deane in *Australian Building Construction Employees' and Builders' Labourers' Federation v The Commonwealth*, namely, that the publication must have a tendency "to disparage or vilify a party … because he is a litigant … or because of the litigation or allegations made in it".[34] Justice Beazley concurred in this aspect of the court's decision in *Harkianakis*. The court held that the prosecution must establish either an intent to deter the litigant from initiating, continuing or discontinuing litigation,[35] or that the publication has, as a matter of practical reality, the impugned tendency to deter.[36]

6.27 Although both Justice Mason and Justice Powell invoked the distinction between "proper" and "improper" pressure,[37] little guidance was 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 referred to the means that the court in *Meissner v The Queen*[38] identified as being improper, including the application of force, intimidation and financial inducement motivated by the private concerns of the payer. He also pointed 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

31. *Commercial Bank of Australia Ltd v Preston* [1981] 2 NSWLR 554.
32. See *Commercial Bank of Australia Ltd v Preston* at 561 (Hunt J).
33. *Harkianakis v Skalkos*.
34. *Australian Building Construction Employees' and Builders' Labourers' Federation v The Commonwealth* (1981) 53 FLR 396 at 401-402 (Deane J) reiterated in *Hinch v Attorney General (Vic) (No 2)* (1987) 164 CLR 15 at 54-55 (Deane J); see also *Hamersley Iron Pty Ltd v Lovell* (1998) 19 WAR 316.
35. See also *Hamersley Iron Pty Ltd v Lovell*. In that case, there was an express finding of intent to deter.
36. *Harkianakis v Skalkos* (1997) 42 NSWLR 22 at 42 (Mason P).
37. *Harkianakis v Skalkos* at 32 (Mason P), at 63 (Powell J).
38. *Meissner v The Queen* (1995) 184 CLR 132 at 142-143, 158-159.

improper. As well, the mere fact that something lawful is threatened does not preclude it from being improper pressure.[39]

6.28 In *North Australian Aboriginal Legal Aid Service Inc v Bradley*, Justice Wilcox emphasised that it is not contemptuous merely to comment upon a pending court case or to impugn the motives of a litigant. In His Honour's words:

> "[more] than this is required. One example of the "something more" is when the comment is of such a nature, and is made in such circumstances, that it has a clear tendency to deter a litigant from continuing to prosecute or defend the case, or to dissuade potential witnesses from giving evidence."[40]

6.29 Justice Mason, in *Harkianakis v Skalkos*, explained that the reason why the law is concerned to distinguish between proper and improper pressure is that 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 proper administration of justice need to be balanced.[41] 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."[42]

6.30 In *Vajda v Nine Network Australia Ltd*, Justice Brownie found that a comment made by the defendant that "it would be funny, if after this [the plaintiff] still feels like suing", did not constitute improper pressure, being "no more than a comment made by a stranger to the principal litigation in the course of a public debate".[43]

6.31 In order to assess what conduct may amount to improper pressure, the courts have, in some instances, explicitly distinguished between pressure imposed privately and pressure imposed publicly. Lord Diplock did this in the *Sunday Times* case. He held that a publication would impose improper pressure if it subjected a party to

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39. *Harkianakis v Skalkos* at 30 (Mason P). See also *Attorney General v TCN Channel Nine Pty Ltd* (1990) 5 BR 10 at 29 (Hunt J): "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."
40. *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2001) 188 ALR 312 at para 82.
41. *Harkianakis v Skalkos* (1997) 42 NSWLR 22 at 37 (Mason P), citing Lord Reid in *Attorney General v Times Newspapers Ltd* [1974] AC 273.
42. *Hinch v Attorney General (Vic) (No 2)* (1987) 164 CLR 15 at 76 (Toohey J), adopted by Justice Mason in *Harkianakis v Skalkos* at 38 (Mason P).
43. *Vajda v Nine Network Australia Ltd* [2001] NSWSC 840 at para 26.

"public obloquy".[44] In *Attorney General v Hislop*,[45] another leading English case, Lord Justice Parker stated that it was clear from the speeches in the *Sunday Times* case that "there is a difference between private pressure, whether by an opposing litigant or a third party, and publication to a wide section of the public". However, His Lordship went on to say "that so far as the latter is concerned, the mere fact that the publication will exert pressure will not suffice to constitute the publication as contempt so long as it consists of no more than fair and temperate criticism".[46] Lord Justice McCowan held that there was "all the difference in the world" between a private discussion between lawyers and an opposing litigant and holding that litigant up to "public obloquy in terms neither fair nor temperate but of abuse".[47]

6.32 In *Resolute Ltd v Warnes*, the Full Court of the Supreme Court of Western Australia also drew a distinction between private and public pressure. Justice Ipp noted that "warnings expressed by one litigant to another about the extent of costs that are being incurred and the likelihood of their recovery have always been legitimate weaponry in litigation negotiations".[48] Justice Ipp held that some of the warnings or threats made by the respondent in that case gave rise to private pressure to discontinue litigation.
In relation to those, his Honour was not satisfied beyond reasonable doubt that they were made improperly. However, other publications to persons not involved in the litigation, applying pressure on the applicants publicly, were held to be improper and amount to contempt.

6.33 The Australian Law Reform Commission, ("ALRC") in its report on contempt, took the view 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.[49] It pointed out that there already existed two criminal offences in relation to interference with civil proceedings (or, for that matter, criminal proceedings) where actual intention must be proved. These were perverting the course of justice and attempting to pervert the course of justice.[50] 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.

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44. *Attorney General v Times Newspapers Ltd* [1974] AC 273 at 313.
45. *Attorney General v Hislop* [1991] 1 QB 514. See also *Willshire-Smith v Votino Bros Pty Ltd* (1993) 41 FCR 496.
46. *Attorney General v Hislop* at 527.
47. *Attorney General v Hislop* at 535.
48. *Resolute Ltd v Warnes* [2000] WASCA 359 at para 35.
49. Australian Law Reform Commission, *Contempt* (Report 35, 1987) at para 399.
50. *Crimes Act 1900* (NSW) s 319.

6.34 There is one other point of ambiguity 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 in *Harkianakis v Skalkos*, Justice Mason expressed a preference for the latter approach[51] and Justice Powell, dissenting on a finding of contempt, stated that the proper test was to look objectively at the effect of the publication on the litigant.[52] In *Resolute Ltd v Warnes*, Justice Ipp noted that there was no evidence before the Court as to the ability of the applicant to withstand pressure and, on that basis, approached the matter "as if [the applicant] were a litigant of 'ordinary' fortitude".[53] It is uncertain from this whether the Court would have taken a different approach had there been evidence before it of the applicant's ability to withstand pressure. Similarly, in *Attorney General v Hislop*, there was said to be no real evidence as to the plaintiff's fortitude and therefore no alternative but to consider the matter on an objective basis. However, Lord Justice Nicholls stated that, even if there had been evidence that the plaintiff was unusually tenacious, and unlikely to be deterred from continuing, that would not have precluded a finding of contempt. His Honour emphasised that:

> [p]art of the mischief of this particular type of contempt is the impact which publication of articles of this nature can be expected to have on other litigants.[54]

6.35 In preliminary proceedings before Justice Bell in the matter of *Vajda v Nine Network Australia Ltd*, Her Honour interpreted the trend of authority as being in favour of an objective test.[55]

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51. *Harkianakis v Skalkos* (1997) 42 NSWLR 22 at 29-30 (Mason P, Beazley J concurring). In the New Zealand case, *Duff v Communicado Ltd* [1996] 2 NZLR 89 (Blanchard J), the court took 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.
52. *Harkianakis v Skalkos* at 66 (Powell J).
53. *Resolute Ltd v Warnes* [2000] WASCA 359 at para 18.
54. *Attorney General v Hislop* [1991] 1 QB 514 at 532 (Nicholls J).
55. *Vajda v Nine Network Australia Ltd* [2000] NSWSC 873 at para 14. Her Honour noted that in G Borrie and N Lowe, *The Law of Contempt* (3rd edition, Butterworths, London, 1996) the authors express a preference for an objective test and note that "the disadvantage of a subjective test is that it increases the uncertainty of the law in an area where uncertainty has a restrictive effect on freedom of speech": at 209.

6.36 The approach of Justice Wilcox to this issue in *North Australian Aboriginal Legal Aid Service Inc v Bradley* is ambiguous. On the one hand, after referring to the two alternatives put forth by Justice Mason, His Honour said that he had "looked at the position of the North Australian Aboriginal Legal Aid Service [("NAALAS")] itself, rather than taken the hypothetical litigant of ordinary fortitude" in order to determine the tendency of the defendant's comments to apply improper pressure.[56] On the other hand, His Honour went on to say:

> However, I do not think it makes any difference if the other alternative is adopted. The hypothetical litigant must surely be the one that shares the major characteristics of the actual litigant. I have not relied on evidence as to any actual reaction within NAALAS to [the defendant's] comments.[57]

6.37 In other words, it appears that His Honour was in fact looking objectively at the effect that the defendant's comments would have on a litigant in the particular circumstances of the case. These included the following: the defendant was the Chief Minister and Attorney General of the Northern Territory; the plaintiff was dependent on government funding and could be abolished by the government; the defendant suggested that the plaintiff's action was a waste of taxpayer's money and destructive of the Chief Magistrate's position and the judicial system generally. In this situation, there was no evidence of, nor need to examine, the fortitude of the plaintiff specifically. The publication had a tendency to impose improper pressure on any plaintiff in NAALAS's position to discontinue litigation. However, it is not entirely clear from his Honour's comments that His Honour holds the objective test to be the proper test, and would apply such a test in all cases.

DP 43

6.38 In DP 43, the Commission did not reach a firm view on whether the law should provide protection against pressure on parties in civil proceedings, although it was inclined to think it should. DP 43 called for submissions on whether it is desirable to impose liability for sub judice contempt in this situation, and, if so, whether the applicable common law should be clarified and/or modified by statute. DP 43 outlined three options for imposing liability:

1. 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

56. *North Australian Aboriginal Legal Aid Service Inc v Bradley* at para 78.
57. *North Australian Aboriginal Legal Aid Service Inc v Bradley* at para 78.

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.

2. 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.[58]

3. Liability could be imposed 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. This is in substance the current law in New South Wales, as set out by the majority of the Court of Appeal in *Harkianakis v Skalkos*.[59]

6.39 Consideration could be given to attempting to define in legislation, or at least give some guidance on the meaning of, "improper" pressure. If this is not done, option 3 would be adopted by simply leaving the issue to the common law.

6.40 DP 43 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 criminal offences, namely, perverting, or attempting to pervert, the course of justice.[60] 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.

Submissions

6.41 Mr Norris submitted that it would be "appropriate to adopt the approach of Mason P in *Harkianakis*".[61] In other words, the test of improper pressure should be

58. This was the formulation put forward in *Duff v Communicado Ltd* [1996] 2 NZLR 89 (Blanchard J).
59. *Harkianakis v Skalkos* (1997) 42 NSWLR 22 (Mason P, with Beazley J agreeing).
60. *Crimes Act 1900* (NSW) s 319.
61. Mason P in *Harkianakis v Skalkos* (1997) 42 NSWLR 22 at para 42 citing Deane J in *Hinch v Attorney General (Vic) (No 2)* (1987) 164 CLR 15 at 54-55.

that laid down by Justice Deane in *Australian Building Construction Employees' and Builders' Labourers' Federation v The Commonwealth*[62] and reiterated by His Honour in *Hinch v Attorney General (Vic) (No 2)*[63] 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". In Mr Norris's view, this provided consistency with other forms of contempt and had the advantage of not requiring legislative change. However, he queried how "improper pressure" could be defined.[64]

6.42 Mr Sexton, SC, the New South Wales Solicitor General, criticised the three different approaches formulated in the *Sunday Times* case as being unclear and unsatisfactory. He made the point that the great majority of media publications critical of one party to litigation might be expected to be directed at large corporations (from either the public or private sector) and are therefore "unlikely to be intimidated by opinions expressed in the media, not least because they have large public relations departments with which to respond". He concluded that "the limited utility of this category of contempt has to be weighed against its potential to inhibit discussion of what are usually matters of public interest." He also pointed out that legislation would be necessary if this category of contempt were to be removed, although care would need to be taken to ensure that there is no overlap with the provisions in the *Crimes Act 1900* (NSW) on perverting the course of justice.[65]

6.43 The New South Wales Bar Association submitted that "the common law should remain unmodified by statute and allowed to develop on a case by case basis" for the reason that "the common law gives the judge the flexibility necessary for the proper determination of such cases".[66]

6.44 The Victorian Bar Council submitted that there seems to be an increasing tendency for litigants, particularly in civil proceedings, to use media publicity to their advantage in placing pressure on other parties to litigation: "this impression may be based upon only anecdotal information, however it is an impression that is reinforced by the concerns of clients." It submitted that there are strong reasons to retain the application of the sub judice

62. *Australian Building Construction Employees' and Builders' Labourers' Federation v The Commonwealth* (1981) 53 FLR 396 at 401-402 (Deane J).
63. *Hinch v Attorney General (Vic) (No 2)* at 54-55 (Deane J).
64. D Norris, *Submission* at para 70.
65. M Sexton SC, *Submission* at 3.
66. NSW Bar Association, *Submission* at para 17.

rule to civil proceedings, in view of "the effects that media 'firestorms' can have".[67] In the Council's view, the Commission's first option for imposing liability is the most desirable on the basis that "it is clearly preferable to afford the rule some reasonable predictability of operation, whilst at the same time limiting its ambit to the most serious of cases".[68] Nonetheless, it believed that some modifications to this option are desirable.
It submitted that "liability should attach to cases where a publisher is 'shown' to have intended to impose pressure on a party to withdraw from, or settle, litigation, or to vilify a person or organisation in their capacity as litigant."[69]

6.45 The Law Society was of the opinion that the test should be whether a publication carries a substantial risk of imposing improper pressure on a party. It considers the Commission's third option "the most appropriate and most consistent with principles enunciated elsewhere in [DP 43]".[70]

Conclusion

6.46 The Commission has concluded that, first, in the interests of the proper administration of justice, litigants, as well as prospective litigants, need to be protected from publicity that unfairly inhibits their access to the justice system and unfairly inhibits how they choose to conduct or participate in legal proceedings. Secondly, there should be legislative clarification and reform of the common law approach to this issue.

6.47 After carefully considering the submissions to DP 43 and reviewing the case law in this area, the Commission has formulated a recommendation that incorporates elements of all three options put forward in DP 43. The Commission's recommended formulation imposes liability for contempt if a person or organisation publishes material that gives rise to a substantial risk that a party to proceedings will make a different decision in relation to those proceedings, for the reason that it vilifies a person in their character as a party to the proceedings.

6.48 This recommendation hinges on the "vilification" of the litigant, drawing on the judgments of Justice Mason in *Harkianakis* and Justice Deane in *Hinch v Attorney General (Vic) (No 2)*. This in turn entails the published material having contained unfair comment and/or material misrepresentation of fact. The key element in the legislative provision needs to be the effect (or likely effect) the publication has on the

67. Victorian Bar Council, *Submission* at para 12.
68. Victorian Bar Council, *Submission* at para 13.
69. Victorian Bar Council, *Submission* at para 14.
70. Law Society of NSW, *Submission* at para 23.

audience (namely that it will think significantly less of the litigant in some way), which thereby gives rise to the risk that the litigant will feel pressured. In other words, three dramatis personae are necessary: the publisher; the litigant; and the audience. The reason for this is that this reference is confined to contempt by publication, which concerns the effect on the public of a publication. Where there is private pressure exerted on a litigant contempt may still arise, but not by virtue of the potential impact of public opinion on his or her conduct.

6.49 The Commission does not recommend attempting to define "improper pressure" in legislation for the reason that this may result in unnecessary restriction and/or uncertainty. Rather, the Commission's formulation defines "vilification" and encapsulates generally the concept of improper pressure.

6.50 The Commission has concluded that in the amending legislation being recommended, "vilifies" should be defined as "incites hatred towards, serious contempt for, or severe ridicule of". This is the formula used in s 20C of the *Anti-Discrimination Act 1977* (NSW) as part of the definition of racial vilification. In accordance with the arguments made earlier in this chapter, this formulation focuses on the feelings towards the actual or prospective litigant that the relevant publication stirs up within the community. In addition to harmful defamatory imputations, it includes abuse and ridicule of a serious nature (which will not necessarily have defamatory content).[71] It also has the significant advantage of enabling the court, in contempt proceedings, to rely on the decisions interpreting s 20C of the *Anti-Discrimination Act 1977* (NSW) for assistance in interpreting this "improper pressure" provision.

6.51 The Commission has concluded that mere intention to "vilify" a litigant or prospective litigant, without the publicity actually giving rise to a substantial risk that a litigant or prospective litigant of reasonable fortitude in that situation would be deterred, should not amount to contempt. However, pursuant to the Commission's recommended provision, it would not be necessary to prove an intention to deter the litigant or prospective litigant for liability to arise. Proof of such an intention would be a relevant factor in determining the appropriate sentence once the publisher had been found guilty of contempt.

6.52 Liability should 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. Additionally, all other defences available in cases of sub judice contempt should be available in this case.

71. See *R v D & E Marinkovic* [1996] EOC 92-841.

RECOMMENDATION 10

Legislation should provide that, having regard to the circumstances of publication, a person or organisation that publishes material that gives rise to a substantial risk that a person of reasonable fortitude in the position of a party to civil or criminal proceedings will make a different decision in relation to those proceedings, for the reason that it vilifies the person in their character of a party to the proceedings, is liable for contempt.

"Party" in this context includes a prospective party, being a person who reasonably believes that they may become a party to the proceedings, or who is or appears to be in a position to institute the proceedings, whether or not they are minded to do so.

"Decision" in this context means a decision to institute, not to institute, to discontinue, to participate, or to participate further or to take a particular step in proceedings.

"Vilifies" in this context means inciting hatred towards, serious contempt for, or severe ridicule of the party through unfair comment and/or material misrepresentations of fact.

The "defences" available in other cases of sub judice contempt should be available in this case.

THE PREJUDGMENT PRINCIPLE

Overview

6.53 The prejudgment principle, while not concerned to prevent prejudice to particular proceedings, is nonetheless regarded as an aspect of the sub judice rule. Its more general goal is to prevent the media from usurping the role of the courts, undermining public confidence in the court system, and deterring future litigants, by engaging in "trial by media". Hence, 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.[72]

6.54 Because the prejudgment principle does not require proof of a tendency to prejudice the trial of a particular case (meaning, usually, prejudicing a jury), it predominantly operates to restrict publications relating to civil proceedings. In theory, the prejudgment principle may also operate to restrict publication of material relating to appeals (civil or criminal).

6.55 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.

6.56 The prejudgment principle was established in England in the *Sunday Times* case.[73] In that case, the House of Lords granted an injunction to restrain the publication of an article relating to an action for negligence brought against a drug company, 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.

6.57 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 in it,[74] although no Australian case has established liability for contempt on this ground alone. Other judges have expressed doubt that the principle does, or should, apply to restrict publications under Australian law.[75] In the United

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72. See, for example, *Attorney General v Times Newspaper Ltd* [1974] AC 273: An article which claimed that a drug company had been negligent in selling an unsafe drug, published while there were proceedings pending before a court for an action in negligence against that company, was held to have prejudged the issues at stake and was held to be in contempt.
73. *Attorney General v Times Newspaper Ltd*. This case is discussed in detail in NSWLRC DP 43 at para 6.41-6.44.
74. 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) (No 2)* (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).
75. See *Victoria v Australian Building Construction Employees' and Builders Labourers' Federation* at 96 (Mason P); *Civil Aviation Authority v Australian Broadcasting Corporation* (1995) 39 NSWLR 540 at 553-560 (Kirby J): Justice

Kingdom itself, the courts have not applied the prejudgment principle since the *Sunday Times* case[76] and have expressed serious doubts about it.[77] Legislation was introduced to reverse the House of Lords' decision,[78] although it is not clear whether it succeeded in doing this.[79]

DP 43

6.58 In DP 43, the Commission expressed a concern that application of the prejudgment principle in contempt law unacceptably impinges on freedom of expression. The Commission proposed that 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.[80]

Kirby suggested that it could be in breach of Australia's international obligations to respect the right of freedom of expression (see *International Covenant on Civil and Political Rights*, Art 19) and may be inappropriate in light of our implied constitutional right to freedom of political discussion. Justice Kirby doubted whether the prejudgment principle is essential to the protection of the capacity of courts effectively to discharge their functions: at 558. Justice Sheller suggested that the principle should be very closely confined if it were to operate at all: at 573-574.

76. See *Schering Chemicals Ltd v Falkman Ltd* [1982] 1 QB 1; *Re Lonrho Plc* [1990] 2 AC 154.
77. *Re Lonrho Plc*.
78. 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.
79. 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 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 Borrie and Lowe at 117-121.
80. NSWLRC DP 43, Proposal 10.

Submissions

6.59 The Australian Broadcasting Corporation, the Australian Capital Territory Bar Association, the Broadcasters, the Australian Press Council, the Law Society of New South Wales, Mr Norris, and Mr Sexton all agreed with the Commission's proposal.[81]
6.60 Mr Michael Martin, Acting Head, Legal Services, Australian Broadcasting Corporation[82] also agreed "wholeheartedly" with the Commission's proposal but added that it "may not sit consistently with what the Commission has said re sentencing." However, the Commission would see no serious contradiction between rejecting the prejudgment principle in its broad terms and favouring a distinctly narrower principle dealing only with the impact on parties or witnesses of media comments regarding the sentence to be imposed on an individual offender.

6.61 Mr Norris stated[83] that he regards "the prejudgment principle as put to bed in this State by [*Civil Aviation Authority v Australian Broadcasting Corp*[84]]". Mr Sexton, SC, in noting that the concept of contempt by prejudgment is essentially confined to civil cases, submitted that it "never … had any utility in cases presided over by a judge alone (now the great majority of civil cases)".[85] He also submitted that it can be argued that the notion of contempt by prejudgment is inconsistent with the implied freedom of communication identified in the *Constitution* by the High Court in *Lange v Australian Broadcasting Corporation*.[86]

Conclusion

6.62 The Commission is, like others, concerned that application of the prejudgment principle in contempt law unacceptably impinges on freedom of expression. Its

81. ABC, *Submission* at 2; ACT Bar Association, *Submission*; Australian Broadcasters, *Joint Submission* at 9; Australian Press Council, *Submission* at 6; Law Society of NSW, *Submission* at 8; D Norris, *Submission* at para 72; M Sexton SC, *Submission* at 2.
82. M Martin, Acting Head, Legal Services, Australian Broadcasting Corporation, *Consultation*.
83. D Norris, *Submission* at para 72.
84. *Civil Aviation Authority v Australian Broadcasting Corporation* (1995) 39 NSWLR 540.
85. M Sexton SC, *Submission* at 2.
86. *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

operation curtails "free public discussion of topics of general concern",[87] even though no potential for actual damage to a particular case can be identified.

6.63 The Commission agrees with the majority judgment of the European Court of Human Rights in *Sunday Times v United Kingdom* that courts cannot operate in a vacuum and that, accordingly, there cannot be a complete ban on prior discussion of disputes outside the courts.[88]

6.64 The Commission is also persuaded by the weight of opinion in favour of ruling out operation of the prejudgment principle in contempt law and of making this clear in legislation.
The conclusions reached by other law reform bodies[89] and the approaches of other common law jurisdictions[90] support this stance. It is, furthermore, desirable that legislation remove the current uncertainty of the common law.

RECOMMENDATION 11

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.

87. *Schering Chemicals Ltd v Falkman Ltd* [1982] 1 QB 1 at 30 (Lord Justice Shaw).
88. "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 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": *Sunday Times v United Kingdom* (1979) 2 EHRR 245 at 280.
89. These include the Australian Law Reform Commission, the Phillimore Committee in the United Kingdom and the Irish Law Reform Commission: see NSWLRC DP 43 at para 6.50-6.53.
90. See NSWLRC DP 43 at para 6.48-6.49.

7. Time limits on sub judice liability

- Overview
- Starting point for sub judice contempt:
  when legal proceedings are pending
- Identifying when proceedings are no longer “pending”: fixing appropriate end points for
  sub judice restrictions
- Time limits and “intentional” contempt

OVERVIEW

7.1 This chapter makes recommendations on the period when the sub judice rule should operate, that is, when it should begin and when it should end for publications that relate to criminal, as well as civil and coronial proceedings. It also looks at whether the sub judice rule should continue to operate during the appeal period, and in the case of criminal convictions, during the sentencing stage. Finally, the chapter deals with the issue of whether different time rules should apply to intentional contempts.

7.2 The Commission's recommendations require, generally speaking, that the relevant legal proceedings be "pending" for purposes of the law on sub judice contempt. It emphasises that this is a necessary but not sufficient condition for the sub judice restrictions to be operative. The question whether a sub judice restriction is in fact operative depends on (a) whether the proceedings are criminal on the one hand, or civil or coronial on the other; and (b) whether the restrictions in question seeks to protect jurors, or a witness or a party from a risk of influence. Depending on the answer to these two questions, a restriction will have its own starting point(s) and end point(s).

STARTING POINT FOR SUB JUDICE CONTEMPT: WHEN LEGAL PROCEEDINGS ARE PENDING

7.3 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.

7.4 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).

The sub judice rule should not start when the related legal proceedings are merely "imminent"

7.5 In DP 43, one issue was identified with respect to the commencement period of the sub judice rule: namely, whether or not the operation of the rule should be advanced to the period when proceedings are merely "imminent".

7.6 In England, the common law allowed for liability for sub judice contempt to begin when legal proceedings are imminent.[1] "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 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.[2]

7.7 The Commission expressed the view in DP 43[3] that the sub judice rule should not commence from the time the proceedings are "imminent". The exceptional power of courts to try contempt cases without jury and impose penal sanctions is aimed at ensuring that legal proceedings over which they have control receive a fair trial. Where the proceedings have not in fact commenced, which is the case when the proceedings are merely "imminent", such an extraordinary power should not be available, except in one situation noted below.

7.8 This is the situation of a publication which might influence the conduct of a prospective litigant. 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 trial.

7.9 Moreover, the courts in England did not develop a clear and settled test as to the meaning of "imminent".[4] As the Phillimore Report declared, "there is no way of knowing what period the word 'imminent' is intended to cover."[5] The uncertainty for the media in determining at what time proceedings may be considered "imminent" would impose too severe a restriction on freedom of discussion. The media may, for example, become reluctant to report on police activities if it were thought that they might attract contempt liability for doing so.

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1. 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).
2. See *R v Parke* [1903] 2 KB 432 at 437 (Wills J): "It is possible very effectually to poison the fountain of justice before it begins to flow."
3. See NSW Law Reform Commission, *Contempt by Publication* (Discussion Paper 43, 2000) ("NSWLRC DP 43") at para 7.37, 7.38.
4. See NSWLRC DP 43 at para 7.37, 7.38.
5. United Kingdom, Committee on Contempt of Court, *Report of the Committee on Contempt of Court* (Cmnd 5794, HMSO, London, 1974) at para 117.

7.10 The Commission notes that the *Contempt of Court Act 1981* (UK) does not adopt the test of imminence. Under this Act, proceedings must be "active" in some sense before the restrictions under it can apply.[6]

7.11 There was support from the submissions[7] to the Commission's position on this issue. The Commission concludes that generally speaking the sub judice rule should not commence from the time the proceedings are merely "imminent".

RECOMMENDATION 12

Subject to one exception relating to influence on prospective parties, the sub judice rule should not apply to a publication unless the proceedings to which it relates are pending at the time of the publication.

Starting point for publications relating to criminal proceedings

7.12 In relation to criminal proceedings, it has been said that the sub judice period commences from the time the processes of law has been set in motion for bringing an accused person to trial and a court has become "seised" of the matter.[8] At the time of the publication of DP 43, the methods by which criminal proceedings may be initiated in New South Wales were through:[9]

1. arrest without a warrant;
2. the laying of a charge;
3. the laying of the information and either the issue of summons to appear or issue of a warrant of arrest; and
4. the presentation of an *ex-officio* indictment by the Director of Public Prosecutions or the Attorney General.

7.13 The Commission proposed in Proposal 11 of DP 43 that the occurrence of any of these methods of initiating criminal proceedings should make the proceedings

6. *Contempt of Court Act 1981* (UK) Sch 1.
7. Australian Broadcasters, *Joint Submission* at 11.
8. *Packer v Peacock* (1912) 13 CLR 577 at 586. See also NSWLRC DP 43 at para 7.7.
9. *R v Hull* (1989) 16 NSWLR 385 at 390. See also NSWLRC DP 43 at para 7.7-7.14.

"pending" for the purpose of commencing the operation of the sub judice rule.[10] However, it took the position that the sub judice rule should not commence from the issue of a warrant for arrest.[11] The main reason for this is that there may be a significant time lapse between the issue of a warrant and an actual arrest. Since the period between an arrest and a trial is 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.

7.14 There is also a concern for the undue restriction on the freedom of the media to report on the events if a warrant is not executed for a long period, or not at all. If the person named in a warrant, for example, were never found, the media would continue to be restricted with regard to what could be published for as long as the warrant existed.

Recent change in the law

7.15 The *Criminal Procedure Amendment (Justices and Local Courts) Act 2001* (NSW) will, when it commences, abolish the laying of an information as a way of commencing criminal proceedings.[12] In lieu of this procedure, the new law provides that criminal proceedings will be taken to have commenced through the issue of a court attendance notice and the filing of a notice in the registry of the relevant court.[13] Generally, it will be police officers or other public officers who will be authorized to commence proceedings in this manner.[14] However, a private individual may also use this method to commence a private prosecution.[15] The new law is intended to simplify the procedure for commencing criminal prosecutions. Police or other relevant public

10. See NSWLRC DP 43 at para 7.8-7.10, 7.13-7.14, 7.34, 7.35 for a detailed examination of the relevant case law and reasons why the Commission took this position.
11. For a discussion of the case law that deals with the issue of whether or not the issue of a warrant of arrest comes within the sub judice period, see NSWLRC DP 43 at para 7.11-712.
12. The Act will repeal the provisions of the *Justices Act 1902* (NSW) on laying an information and add new provisions to the *Criminal Procedure Act 1986* (NSW). The relevant provisions the *Criminal Procedure Amendment (Justices and Local Courts) Act 2001* (NSW) have not yet commenced at the time of this Report.
13. *Criminal Procedure Act 1986* (NSW) s 47-54, s 172-181.
14. *Criminal Procedure Act 1986* (NSW) s 48, s 173.
15. *Criminal Procedure Act 1986* (NSW) s 49, s 174. If a private individual wants to commence criminal prosecution by issuing a court attendance notice, the notice must be signed by a court registrar, who must not sign if there are grounds for doing so, for example if the notice does not disclose grounds for the proceedings.

officers will be able to issue and serve a court attendance notice on the accused on the spot. [16] Previously, they had to attend a court registry to swear an information and then wait while the magistrate considered issuing a summons or warrant.

7.16 Proposal 11, now Recommendation 13 below, has been revised to reflect the changes to the law. It now includes the issue of court attendance notices and their filing in the registry of the relevant court as one of the means of commencing the sub judice rule for criminal proceedings. The reference in the original proposal to the laying of an information has been removed.

7.17 In cases where police or other public officers believe that the defendant's appearance can only be ensured by the issue of a warrant of apprehension, the new law provides new procedures for doing this. This can be done generally through an application for a warrant after the issue of a court attendance notice. In this situation, the criminal proceedings have commenced (through the issue of court attendance notice and its filing in the court registry) by the time the warrant is issued.

Scope of this recommendation

7.18 This recommendation applies to the restrictions on publicity imposed by the sub judice rule in so far as they seek to prevent influence being exerted on jurors or on witnesses or on the parties to the criminal proceeding.

Submissions

7.19 There was general support in the submissions for the Commission's views and proposal on the commencement period for sub judice contempt in criminal cases. For example, the New South Wales Director of Public Prosecutions[17] and the Australian Broadcasting Corporation[18] agreed with Proposal 11.

7.20 Others were supportive but suggested modifications to the proposal. In the Joint Broadcasters' Submission, it was suggested that paragraph (a) of Proposal 11 should read "arrest, whether with or without a warrant." The aim of the suggestion is to clarify the Commission's position that the issue of a warrant of arrest does not make proceedings pending for purposes of the commencement of the sub judice rule.

7.21 Mr David Norris made a similar suggestion to the Joint Broadcasters' Submission that paragraph (a) of Proposal 11 should read "arrest with or without

16. NSW, *Parliamentary Debates (Hansard)* Legislative Assembly, 4 December 2001, the Hon R J Debus, Attorney General, Second Reading Speech at 19429.
17. N Cowdery QC, *Submission* at 1
18. ABC, *Submission* at 2.

warrant" to better reflect the Commission's view that the issue of a warrant for arrest does not trigger the sub judice rule.[19]

7.22 There was one submission that disagreed with Proposal 11. The Australian Press Council objected to the proposal stating that the Commission's definition of proceedings pending is far too sweeping and that the restrictions of the sub judice rule should only start to apply when the criminal matter has been set down for hearing.

The Commission's response to the submissions

7.23 ***The starting point must cover pre-trial publicity.***

The Commission does not agree with the comments made by the Australian Press Council. Since one of the aims of sub judice contempt is to protect the fairness of criminal proceedings, it makes sense for the sub judice rule to begin from the time the criminal process is first set in motion against a person. The courts should be given the power to protect the integrity of the proceedings from the moment they are initiated.

7.24 The suggestion by the Australian Press Council that the sub judice rule should only begin from the time the criminal case is set down for hearing ignores the possible impact of pre-trial publicity once the trial has commenced. Pre-trial publicity usually occurs at the time of the commission of the offence, when a person is arrested or charged with the offence, and/or at the preliminary proceedings, such as the committal or bail application hearings.

7.25 While a recent study on juries in New South Wales suggests that the incidence of jury recall of pre-trial publicity is generally low,[20] it also found that that there are categories of cases where such recall is higher.[21] It was found, for instance, that jurors were more likely to remember pre-trial publicity where the accused is independently well known in the community,[22] or if the offence occurred in the neighbourhood where they lived.[23] If the Australian Press Council's suggestion were adopted, some significant situations where prejudicial pre-trial publicity might be recalled by the jurors would not be covered by the sub judice rule. For example, the publication of the criminal history of a well-known person, where the publication was made at the time when he is arrested for another crime, would not be prohibited under the Australian Press Council's suggestion, even though this kind of publicity might well be recalled by jurors during the trial.

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19. D Norris, *Submission* at para 78.
20. M Chesterman, J Chan and S Hampton, *Managing Prejudicial Publicity* (Justice Research Centre, Law and Justice Foundation of NSW, Sydney, 2001) at para 168-201.
21. Chesterman, Chan and Hampton at para 183-201.
22. Chesterman, Chan and Hampton at para 186-187.
23. Chesterman, Chan and Hampton at para 189.

7.26 The Commission's proposal will cover the types of cases identified in the jury study where jury recall of pre-trial publicity is likely to be comparatively high. No doubt the proposal will also cover cases outside this category. But the important point to remember is that the commencement of sub judice restrictions would not have the consequence that all prejudicial publications relating to the proceedings would automatically be held in contempt under the Commission's recommendations. The fundamental criterion recommended in Chapter 4, namely that there must be a substantial risk of serious prejudice, must still be satisfied.
Other things being equal, the closer in point of time that a publication is to the commencement of the restriction, the less likely it would be held in contempt. The study of New South Wales juries suggest that prejudicial publications made at the time of an arrest or charge may in some cases create the requisite risk.
But because the period between this event and the time of the trial is generally quite substantial, it is only in a small minority of cases that this risk will be held to arise.

7.27 ***Arrest with or without a warrant.*** The Commission agrees with the observation in the Joint Broadcasters' Submission and in Mr Norris' submission that the phrase "arrest without a warrant" in Proposal 11 does not reflect the Commission's position that the issue of a warrant of arrest does not trigger the sub judice restrictions. To address this issue, the recommendation below refers merely to the arrest of the accused.

RECOMMENDATION 13

Legislation should provide that, for purposes of the sub judice rule, criminal proceedings should become pending, and the restrictions on publicity designed to prevent influence on juries, witnesses or parties should apply, as from the occurrence of any of these initial steps of the proceedings:

(a) the arrest of the accused;

(b) the laying of the charge;

(c) the issue of a court attendance notice and its filing in the registry of the relevant court; or

(d) the filing of an *ex officio* indictment.

Extradition and return to jurisdiction
7.28 The commencement of the sub judice period in relation to accused persons located outside of New South Wales remains uncertain. There are no Australian precedents on this issue.

7.29 In DP 43, the Commission proposed[24] 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. On the other hand, where the accused is overseas, the Commission proposed that the criminal proceedings be treated as pending from the making of the order for the extradition of the accused.

The arrest overseas should not make proceedings pending because overseas extradition proceedings can be said generally to take longer than interstate extradition. By the time a trial commenced in New South Wales, the publicity would have likely been spent. An alternative starting point for cases involving overseas extradition is the time when the extradition hearing commences. However, the time frame for this would vary from country to country and could not be easily defined 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.[25] 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 any earlier publicity.

7.30 In one of the consultations with the media, there was general support for the Commission's proposal.[26] It was agreed that there is a need for legislation to create certainty on this question.

The Australian Broadcasting Corporation, in its written submission, also agreed with the proposal.[27]

7.31 There were no submissions opposing or suggesting changes to the proposal.

RECOMMENDATION 14

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.

24. NSWLRC DP 43, Proposal 12.
25. For a comprehensive examination on Australian law, policy and practice on extradition arrangements with other countries, see Australia, Parliamentary Joint Standing Committee on Treaties, *Extradition – A Review of Australia's Law and Policy* (Report 40, 2001).
26. Radio and Television Organisations, *Consultation*.
27. ABC, *Submission* at 2.

Starting point for publications relating to civil proceedings

Prejudice to jurors and witnesses

7.32 With respect to publications that may create risks of influence on juries and witnesses, the Commission proposed in DP 43, Proposal 13 that the starting point for publications relating to civil proceedings should be the time of the setting down of the matter for hearing. This is different to the recommended starting point for publications relating to criminal proceedings, which is from the time of commencement of such proceedings. 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.[28]

7.33 ***Cases where jury trial is not certain to occur until after at the time of the setting of the matter for hearing.*** DP 43 in para 7.46 considered possible situations where at the time of the setting of the matter for hearing, jury trial is not contemplated or is uncertain. In such situations, Proposal 13 provided that the restrictions imposed by the sub judice rule should occur only from the time when it is known that a jury trial will occur.

7.34 ***Defamation proceedings.*** Proposal 13 contained a proviso excluding defamation proceedings from its application. This reflected an earlier proposal in the DP to exclude defamation proceedings from the coverage of the sub judice rule.[29] However, in the light of the Commission's decision in this Report to retain the status quo with respect to defamation proceedings (that is, they should be subject to the sub judice rule)[30] the proviso in Proposal 13 has been removed. The Commission's recommendations on time limits for the sub judice rule as they apply to civil proceedings apply equally to defamation proceedings.

7.35 ***Prejudice to witnesses.*** Since the publication of DP 43, the Commission has reconsidered its view with respect to publications that create a risk of prejudice to witnesses. In a trial, case preparation often takes place long before the case is set down for trial. Witnesses therefore commit themselves to accounts of events which may well be influenced by the inappropriate publicity and be unable or unwilling to tell the truth when the case is heard. Consequently, the Commission has decided to

28. NSWLRC DP 43 at para 7.44.
29. NSWLRC DP 43, Proposal 3.
30. See para 6.20 of this Report.

recommend that with respect to publications that may create risks of prejudice to witnesses, the sub judice rule should start from an earlier time – from the issue of a writ or summons, rather than from the setting down of the matter for hearing.

Influence on parties to civil proceedings

7.36 In Proposal 13 of DP 43, the Commission proposed that in the case of a publication that tends to impose improper pressure on parties to civil proceedings, the sub judice period should commence 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.

Submissions and the Commission's response

7.37 Proposal 13 did not receive a great deal of comment in the submissions or during the consultation meetings. The Australian Press Council supports the Commission's proposal.[31]

7.38 Mr Norris, in his written submission, raised the issue of when coronial proceedings become pending. He expressed the view that "given that the requisition of a jury is relatively unusual, contempt by reason of influencing a jury [in a coronial inquest] should only apply once a request for a jury has been made under the section 18 of the Coroners Act."[32]

7.39 The Commission found these comments to be helpful. DP 43 did not discuss directly the commencement period for the sub judice rule with respect to coronial proceedings. There was an underlying assumption in DP 43 that coronial inquests and inquiries, because they were not criminal in nature, belong to the same category as civil proceedings. However, the nature and purpose of coronial proceedings are different to those of civil proceedings. Unlike civil cases, coronial proceedings do not settle rights between parties but are inquisitorial in nature. [33] In a coronial inquest, the coroner or jury must find, if possible, the identity of the deceased person, the date and place of death and the manner and cause of death. In a coronial inquiry, which is a proceeding that relates to a fire or explosion, the coroner or jury shall make a finding as to the date and place and circumstances of the fire or explosion.[34] A coroner or a jury may make such recommendations as they consider necessary or desirable to

31. Australian Press Council, *Submission* at para 15.
32. D Norris, *Submission* at para 80.
33. *McKerr v Armagh Coroner* [1990] 1 All ER 865.
34. *Coroners Act 1980* (NSW) s 22(2).

make in relation to any matter connected with the death, suspected death, fire or explosion with which an inquest or inquiry is concerned.[35]

7.40 Because of their investigative nature, there are no parties to coronial proceedings.[36] Consequently, in this context, there would not be a concern that a publication may have a tendency to pressure a party to discontinue or settle proceedings. The doctrine on improper pressure on parties, which forms an aspect of the sub judice rule for civil proceedings, has no application in coronial proceedings.

7.41 There need also be no concern that a publication may have the tendency to influence the coroner, if the proceedings are heard by a coroner without a jury.[37] In Chapter 4, the Commission reached the conclusion that the law should not impose liability for sub judice contempt on the basis of possible influence on a judicial officer,[38] including a coroner. This is consistent with the common law, which holds that a publication will not usually be considered to have a tendency to prejudice the administration of justice if the only basis for possible prejudice is the potential for influencing the coroner.[39] The law should therefore focus on influence on jurors and witnesses as grounds for imposing sub judice liability in coronial proceedings.[40] The time limits should necessarily also reflect these concerns.

7.42 The provision in Proposal 13 of DP 43 making the starting point of the sub judice rule from the time of the setting of the matter for hearing should also apply to coronial proceedings.
The same reasons given for civil proceedings apply to coronial proceedings and need not be repeated here.[41] The relevant provision of the proposal of DP 43, now contained in Recommendation 15 of this Report, has been amended to expressly cover coronial proceedings.

35. *Coroners Act 1980* (NSW) s 22A.
36. *McKerr v Armagh Coroner*.
37. An inquest or inquiry shall be held before a coroner with a jury if the Minister or State Coroner so directs. An inquiry may also be held before a coroner with a jury if a relative of the deceased (or secretary of any organisation of which the deceased was a member) so requests. Except in these cases, an inquest or inquiry shall be held before a coroner without a jury: *Coroners Act 1980* (NSW) s 18.
38. See para 4.4, 4.38.
39. *Civil Aviation Authority v Australian Broadcasting Corporation* (1995) 39 NSWLR 540 at 549-550 (Kirby P).
40. See Recommendation 2.
41. See para 7.32.

7.43 Mr Norris suggested that contempt by reason of influencing a jury in a coronial inquest should only apply once a request for a jury has been made under the section 18 of the *Coroners Act 1980* (NSW).[42] Proposal 13 contains a proviso that the restrictions on publication which the sub judice principle imposes out of concern to prevent influence on a jury should apply only from the time when it is known that a jury will be used in the proceedings. This proviso was made to address cases where trial by jury is not ordered or contemplated at time of the setting of the matter for hearing.

Mr Norris's comment relates to a similar situation that may occur in a coronial inquest.[43] The relevant proviso in Proposal 13 of DP 43, now contained in Recommendation 15, should be sufficient to address this concern but has, nevertheless, been revised to expressly cover coronial proceedings.

RECOMMENDATION 15

Legislation should provide that in its application to publications which create a substantial risk of prejudice by virtue of influence to witnesses in civil or coronial proceedings, the sub judice rule should apply as from the issue of a writ or summons.

In its application to publications which create a substantial risk of prejudice by virtue of influence on jurors, the sub judice rule should apply as from the time when it is known that a jury will be used in the civil or coronial proceedings.

In its application to publications which create a substantial risk of prejudice by virtue of influence on parties, the sub judice rule should apply as from the issue of a writ or summons.

42. D Norris, *Submission* at para 80.

43. A relative of a person who died or is suspected of having died or the secretary of an organisation of which that person was a member may request that the inquest be held before a coroner with a jury. The request may not be made unless (a) it is made on or after the commencement of the inquest of within 24 days before that commencement, and (b) the person making the request had been given particulars of the commencement of the inquest at least 7 days before he or she made the request: *Coroners Act 1980* (NSW) s 18(2)(b), s 2A.

Influence on prospective parties to proceedings (civil and criminal)

7.44 Earlier in this Report, the Commission formulated recommendations dealing with publications imposing improper pressure on parties to legal proceedings.[44] The recommendation covered both criminal and civil proceedings. One significant feature of the recommendations is that they also seek to protect prospective parties (persons who are or appear to be in a position to prosecute or defend a claim) from publications that may influence them as to whether or not they should proceed. For this type of publication, the persons responsible for them should be liable for sub judice contempt even though the relevant proceedings have not yet commenced at the time of the publication and may indeed never commence.

7.45 This constitutes the exception, foreshadowed earlier, to the general rule that sub judice restrictions should not commence until proceedings are "pending".

RECOMMENDATION 16

Legislation should provide that, in its application to publications which create a substantial risk of influence on prospective parties to criminal or civil proceedings, the sub judice rule may apply even though no proceedings have commenced.

IDENTIFYING WHEN PROCEEDINGS ARE NO LONGER "PENDING": FIXING APPROPRIATE END POINTS FOR SUB JUDICE RESTRICTIONS

End point for publications relating to criminal proceedings

7.46 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.[45] 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

44. Recommendation 10. See ch 6.
45. *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.

or should be lodged, during appellate proceedings, and the time before and during any retrial which is ordered on appeal.

7.47 ***Basic end point.*** In DP 43, Proposals 14, 15 and 16, the Commission proposed that the end point of the sub judice period should be fixed 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, as a general rule, continue to apply beyond this point.

7.48 In DP 43, the Commission identified exceptions to the general rule. First, the sub judice rule may still apply in a limited way during the sentencing stage and until the sentence has become final. The Commission proposed that publications expressing opinions as to the sentence to be passed to a specific convicted offender should continue to be prohibited. As discussed below, this proposal has been revised in light of the submissions received from the public. The second exception is when a re-trial is ordered.

7.49 ***Before a notice of appeal is or should be lodged.*** It was proposed in Proposal 15 of DP 43 that 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 possibility of a re-trial is not, in the Commission's view, sufficient basis to extend the sub judice rule during the appeal proceedings. It appears that appellate courts do not order re-trials very frequently.[46] More importantly, comment made during the period before the notice of appeal is lodged 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.

7.50 The proposal focused on possible influence on jurors. It did not take into account publications that may create a risk of influence on parties and witnesses. The Commission's final recommendations below have been revised so that during the period before notice of appeal is or should be lodged any of these times, the sub judice restrictions should continue to apply out of concern to prevent influence on parties and witnesses. The reasons for the revisions are explained below.

7.51 ***During appeal proceedings.*** In DP 43, Proposal 15, the Commission proposed that the sub judice rule should not apply during any appellate proceedings. The reason for this was that these proceedings are determined by judges without a

46. See Australian Law Reform Commission, *Contempt* (Report 35, 1987) at para 309.

jury.
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. There are no grounds for 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.

7.52 The proposal focused on the absence of any substantial risk of influence on judges and jurors. It did not take into account publications that may create a risk of influence on parties and witnesses. The Commission's final recommendations below have been revised so that during appeal proceedings, publications that create a risk of influence on parties and/or witnesses to the proceedings should remain restricted. The reasons for the revisions are explained below.

7.53 ***Re-trial.*** If the appeal results in an order for re-trial, it was proposed in DP 43 Proposal 16 that the sub judice rule 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 should begin from the date when the order of the re-trial is made and should terminate when the case is finally disposed of, such as when the jury makes its verdict.

7.54 There are no changes in this Report to this particular proposal.

7.55 ***Sentencing.*** In DP 43, Proposal 14, the Commission proposed that the broad sub judice rule should no longer apply at the sentencing stage but 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.[47]

Feedback from the submissions and consultations
7.56 Only one aspect of the proposals relating to the end of the sub judice period received wide comment – Proposal 14 on publications relating to sentencing. This proposal was largely rejected both in the written submissions and during the consultation meetings.

7.57 Among those who lodged written submissions, the following disagreed with the proposal: the Australian Press Council, the New South Wales Bar Association, the New South Wales Director of Public Prosecutions, Mr David Norris, and the

47. In this the Commission is adopting the recommendation of the Australian Law Reform Commission in *Contempt* (Report 35, 1987) at para 309-310, Recommendation 52.

organisations who are parties to the Joint Broadcasters Submission, that is, the Federation of Australian Commercial Television Stations, the Federation of Australian Commercial Radio Broadcasters, the Special Broadcasting Services and the Australian Broadcasting Corporation.

7.58 The New South Wales Bar Association wrote that there is a general assumption in DP 43 that a judicial officer is not susceptible to influence by media publicity in the discharge of his or her judicial function and this assumption should apply equally where the judicial officer if exercising the discretion in determining a sentence.[48] The Australian Press Council made the same argument and added that the proposal would interfere with the media's ability to comment on, or argue for, a particular sentence.[49] The television and radio broadcasters group, in their joint submission, argued that the proposal is an unnecessary infringement on freedom of discussion; that it is inconsistent with the position that a judge is not susceptible to influence by the media; and that the common law is available "if a particular media organisation oversteps the mark with the nature of its comment."[50] Mr David Norris wrote that there is a strong and legitimate public interest in the discussion of sentences and suggested that the normal principles applicable to judge-only trials should apply.[51]

7.59 The New South Wales Director of Public Prosecutions ("DPP") objected to the proposal on very different grounds.
One was that it paid no attention to the separate issue of pressure on witnesses. The DPP argued that media publicity between conviction and sentence has the potential to impact upon the decision of witnesses whether or not to give evidence, and upon the type of evidence they are prepared to give.

7.60 Secondly, the DPP argued that it would be difficult to identify with certainty whether or not a particular publication offended the proposed prohibition. This, he said, may result in fruitless and expensive prosecutions. According to him, it would be possible for the media to report on various aspects of a conviction in such a manner as to amount to an expression of opinion about the sentence required, without actually directly expressing such an opinion. He cited this example: the media could publish the most graphic quotations from the records of interview of the prisoner, emotive quotations from the family of the victim as to their views about the offender and the victim, and photographs of the victim, and the convicted person's criminal history. The DPP contended that although the publication may not directly give an opinion on the sentence, its overall impact might convey the message that the

48. NSW Bar Association, *Submission* at para 9.
49. Australian Press Council, *Submission* at 6.
50. Australian Broadcasters, *Joint Submission* at 6.
51. D Norris, *Submission* at para 81.

convicted person deserves a heavy sentence. Another example he cited was where a politician makes a statement to the effect of "I think the DPP should appeal."

7.61 The DPP suggested that a partial solution might be to extend the prohibition to publications expressing *directly or indirectly* as to the sentence passed or to be passed on any specific convicted offender, or as to the sentence passed or to be passed in respect of a particular offender or as to the sentence passed or to be passed in respect of a particular offence. However, he cautioned that such a wording might not put an end to the problem. His preferred approach is to allow the sub judice period to continue until sentence is passed.

7.62 During the various consultation meetings, there was also widespread disagreement with the proposal. The main arguments presented in these meetings against the proposal were: First, if the Commission's position is that a judge is not susceptible to influence by media publicity in the discharge of his or her judicial function, this principle should apply equally at sentencing.[52] The Commission's concern for avoiding "embarrassment" to the sentencing judge, with the view to maintaining the public's perception of judicial impartiality, is not sufficient basis for prohibiting the publication of opinions on sentences.[53] Second, sentencing is a legitimate area of community concern and the public should be allowed to express their opinions on this as part of the process of community discussion.[54] There should not be an assumption that comment in the media about sentencing is a campaign to influence the judge.[55]

The Commission's final recommendations

7.63 ***A general rule on when sub judice principle should end, and exceptions to the rule.*** The Commission's proposals in DP 43 regarding the end point for the sub judice rule were anchored on considerations relating to risk of influence on juries. After the verdict is delivered, it may be argued that risk of prejudice to a criminal trial ceases because there is no longer a jury that could be influenced by media publications concerning the proceedings. However, the Commission did not take sufficient consideration of risks of influence on parties and, to a limited extent, witnesses to the proceedings. For example, after a guilty verdict is handed down, publications may create a substantial risk of influence on the accused regarding his or her decision whether or not to appeal. These types of publications may not be common in practice but the law must nevertheless be able to deal with them when they occur. Equally, witnesses may be called in sentencing proceedings, which often

52. Print Media Representatives, *Consultation 1*; Broadcast Media Representatives, *Consultation*; Barristers, *Consultation.*
53. Print Media Representatives, *Consultation 1.*
54. Print Media Representatives, *Consultation 1;* Broadcast Media Representatives, *Consultation*; Barristers, *Consultation.*
55. Print Media Representatives, *Consultation 1*.

take place a significant time after a verdict. They should not be subjected to undue pressure from publicity.

7.64 Consequently, the Commission has revised its position as follows:

- So far as influence on juries is concerned, the sub judice rule should cease to apply when a judgement is made at first instance or the proceedings are dismissed or discontinued. This is subject to an exception: if a re-trial before a jury is ordered, the sub judice rule should apply again from the time the order for re-trial is made.
- With respect to influence on parties and witnesses, the sub judice restrictions should continue to apply until the conclusion of appeal proceedings or the expiry of any period of appeal or further appeal.

7.65 ***A limited application of the sub judice principle at sentencing.*** The Commission has taken on account of the submissions opposing Proposal 14. The Commission's basis for Proposal 14 was the desire to maintain the public's perception of judicial impartiality. Public confidence in the administration of justice may be eroded if as a result of media publications, a judge might appear not to be free from extraneous influence in handing out a sentence. On reconsideration however, the Commission agrees that this is not a sufficient basis for prohibiting all media publications that comment on sentencing a person convicted of an offence. Sentencing is a legitimate area of community concern and the public should be allowed to express their opinions on this as part of the process of community debate. Allowing comment during the sentencing period would enhance accountability of the judicial process by opening it up to public scrutiny and debate.

7.66 However, the Commission remains concerned about publications that create a risk of influence on the parties or witnesses before sentencing occurs and during the period when an appeal against sentence takes place or may be instituted. The Crown law officers, such as the DPP, may be influenced by the media reactions to the sentence in their decision whether or not to appeal a sentence.
A convicted person might also be pressured not to lodge an appeal against the sentence. The New South Wales Supreme Court, in holding that a media publication regarding a sentence may constitute contempt, underlined the dangers of such publications:

> A convicted person who appeals against his sentence knows that he does so at the risk of having that sentence increased by the court of appeal. If he were aware that a campaign of vilification was in progress against himself and that newspapers were urging that his sentence was inadequate, this would be calculated to cause him to hesitate before instituting an appeal.

> He might reasonably fear that he would be sentenced by newspapers rather than by the court, however groundless such fears might be in reality. It is inescapable that an intending appellant might genuinely feel that he would be prejudiced in the matter of such an appeal …[56]

7.67 In addition, but perhaps to a lesser extent, media publicity between conviction and sentence has the potential to impact upon the decision of witnesses whether or not to give evidence at the sentencing proceedings, and upon the type of evidence they are prepared to give.

7.68 The Commission's revised position would not necessarily prevent the media from publishing the detailed accounts of crimes, offenders, victims, etc. that they regularly publish currently as soon as the jury delivers its verdict. Only very limited categories of publications are ever held to influence witnesses or impose improper pressure on parties. In practice, once a verdict is delivered, the only likely category, from a practical point of view, would be that of highly emotive publications which vilify a convicted offender unfairly and advocate a heavy sentence.

7.69 ***Summary of the Commission's recommendations on the end point of sub judice rule for criminal proceedings.*** So far as influence on juries is concerned, the sub judice restrictions should cease when the jury is discharged at the conclusion of the trial or hearing at first instance, or when the proceedings are terminated by other means.

7.70 However, if a conviction for a criminal offence is an outcome of the proceedings, then during

- the period between the verdict and the commencement of appeal proceedings or the expiry of the time allowed for appeal;
- the appellate proceedings; and
- the sentencing stage,

restrictions on publications on the ground of a risk of influence on parties and/or witnesses to the proceedings should remain in force.

7.71 In addition, where a re-trial is ordered following a successful appeal against conviction, the sub judice rule as it applies to all types of publications (including those that create risks of influence on a jury, witnesses and/or parties) begins to operate again from the time the order for a re-trial is made.

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56. See *Ex parte Attorney General; Re Truth & Sportsman Ltd* [1961] SR (NSW) 484 at 496 (Street CJ, Owen and Herron JJ).

RECOMMENDATION 17

Legislation should provide that for purposes of determining whether there has been contempt of court on the ground of influence on jurors or potential jurors, a criminal proceeding remains "pending" and sub judice restrictions remain operative until:

(a) the verdict of the jury in the proceedings is handed down, or

(b) the making of an order, or any other event, having the effect of the offence or offences charged will not be tried before a jury, or not at all.

For purposes of determining whether there has been contempt of court because of influence on parties, witnesses or potential witnesses, a criminal proceeding remains "pending" and sub judice restrictions remain operative until the conclusion of appeal proceedings or the expiry of any period of appeal or further appeal.

Where a re-trial before a jury is ordered following a successful appeal against a conviction, the sub judice rule as it applies to all types of publications (including those that create risks of influence on a jurors, potential jurors, witnesses, potential witnesses and/or parties) begins to operate again from the time the order for a re-trial is made.

End point for publications relating to civil proceedings

7.72 The Commission proposed in DP 43, Proposal 17 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.
Under the proposal, the sub judice rule would not apply 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 from that period and cease when the re-trial is concluded.

7.73 No objections to the proposal were made in the written submissions or during the consultation meetings. However, the Commission's final recommendation now expressly mentions coronial proceedings to clarify that the proposed end point for civil proceedings also applies to coronial inquests and inquiries.

RECOMMENDATION 18

Legislation should provide that publications relating to civil and coronial proceedings cease to be subject to the sub judice rule when the proceedings are disposed of by judgment at first instance, settled or discontinued. The rule should become operative again only when and from the time a re-trial, or another inquest or inquiry in the case of coronial proceedings, is ordered.

TIME LIMITS AND "INTENTIONAL" CONTEMPT

7.74 A distinction 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.[57]

7.75 In DP 43, the Commission suggested in Proposal 18 that the same time limits for sub judice contempt should apply whether or not there was an actual intention to interfere with the administration of justice. It considered that there are no sound policy grounds for applying different time frames for intentional contempts. If the intentional conduct clearly constitutes perverting the course of justice, it can be prosecuted as a criminal offence.
The Commission's reasons for its position not to advance the starting point of sub judice contempt to a stage when the proceedings are merely "imminent" are discussed in detail in an earlier part of this chapter[58] and in DP 43[59] and need not be repeated here.

57. See *Attorney General v News Group Newspapers Ltd* [1988] 2 All ER 906.
58. See para 7.5-7.11.
59. See NSWLRC DP 43 at para 7.26, 7.27, 7.36-7.38, 7.44, 7.48.

7.76 No objections were made to the proposal in the written submissions or in the consultation meetings. The Commission has no reason to change it.

RECOMMENDATION 19

Legislation should provide that the same time limits for the operation of sub judice restrictions 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
- An overview of the public interest principle
- Operation of the principle in other jurisdictions
- Recommendations of other law reform agencies
- The Commission's proposal in DP 43
- Consultation
- The Commission's response to the submissions and its final recommendation
- "Public safety" as a ground of exoneration
- The Commission's response to the submissions and its final recommendation

THE GROUNDS OF EXONERATION FROM LIABILITY FOR SUB JUDICE CONTEMPT

8.1 At common law, a publication may have a tendency to cause prejudice to proceedings, but may be found not to amount to 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 examines 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, it looks at 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.

8.3 In Chapter 9, the Commission analyses the second ground of exoneration, the fair and accurate reporting principle, and looks at outstanding issues that may require reform.

AN OVERVIEW OF THE PUBLIC INTEREST PRINCIPLE

8.4 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 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,

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).
2. See *Hinch v Attorney General (Vic)* at 57 (Deane J).

and the element of public interest outweighs the detriment it may cause to the criminal proceedings in question.[3]

8.5 This ground of exoneration is commonly referred to as the "public interest principle", or the *Bread Manufacturers* principle, referring to the first Australian case where it was authoritatively formulated. This principle recognises that there is sometimes a greater interest that justifies a publication despite the fact that that publication would otherwise attract sub judice liability on account of its tendency to prejudice proceedings.[4]

Narrow construction of the principle in earlier cases

8.6 The public interest principle as it operates in Australia has undergone some significant developments. As originally articulated by the Supreme Court of New South Wales in the *Bread Manufacturers* decision,[5] the public interest principle appeared to be quite narrow. 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 must have been prompted by the general public discussion, rather than by particular legal

3. This was the situation that arose in NSW 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. See *Ex parte Bread Manufacturers Ltd; Re Truth and Sportsman Ltd* (1937) 37 SR (NSW) 242; *Hinch v Attorney General (Vic)*. See also in G Borrie and N Lowe, *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 NSW" (1992) 9 *Australian Bar Review* 215 at 217.
5. 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, Court of Appeal v Willesee* (1985) 3 NSWLR 650; *Attorney General (NSW) v John Fairfax & Sons Ltd* (1985) 6 NSWLR 695.

proceedings, and must not have referred specifically to particular proceedings. The courts applied the public interest principle when any potential prejudice, which such a publication might cause to 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.

A broader approach to the principle in the Hinch case

8.7 The High Court has considered the public interest principle only once so far, in *Hinch v Attorney General (Vic)*.[6] This case is discussed in greater detail in Chapter 8 of DP 43.[7] It clarified that the public interest principle may apply, contrary to a view expressed by some judges,[8] to publications relating to criminal proceedings. However, the High Court in *Hinch* took a different approach to that taken in the *Bread Manufacturers* case and arguably expanded the scope of the principle.[9]

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6. *Hinch v Attorney General (Vic)* (1987) 164 CLR 15. For an analysis of this case, see S Walker, "Freedom of speech and contempt of court: the English and Australian approaches compared" (1991) 40 *International and Comparative Law Quarterly* 583.
7. See in particular NSW Law Reform Commission, *Contempt by Publication* (Discusion Paper 43, 2000) at para 8.8-8.18.
8. The *Bread Manufacturers* case was a civil case and there was a view that the principle that arose from that case did not apply to criminal cases: *Attorney General (NSW) v Willessee* [1980] 2 NSWLR 143 at 149, 151 (Moffitt P).
9. It is worth noting that the NSW 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, Court of Appeal v Willesee* (1985) 3 NSWLR 650 at 678-680, in which he referred to the balancing exercise required by 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).

8.8 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.
It recognised that, in theory at least, it could apply to publications that were prompted by, and 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. There were statements in the judgements that seemed to qualify the balancing approach to the public interest principle.

8.9 First, the Justices of the High Court made statements to the effect that where the contempt is intentional, the public interest principle cannot be used to avoid liability for contempt.[10] If that were so, no balancing exercise is required in this situation. However, the court did not base its decision on this proposition.[11]
It is, therefore, arguable that notwithstanding the strong dicta on this issue, it remains unsettled whether the public interest principle could be used to excuse contempt liability for material that is published with an intention to prejudice, or with the knowledge that it may prejudice, particular proceedings.

8.10 Second, where the material is directed at the guilt or innocence of an accused person, the High Court held that the public interest required to outweigh the public interest in a fair trial will have to be very substantial.[12] Justice Wilson wrote 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.[13] Justice Deane seemed to go further when he stated that where the publication implies or suggests the guilt of the accused, or canvasses matters directly related to the issue of guilt, the public interest defence would not be available.[14] He

10. 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.
11. See the discussion in NSWLRC DP 43 at para 8.18.
12. *Hinch v Attorney General (Vic)* at 26-27 (Mason CJ), at 37, 41-43 (Wilson J), at 52 (Deane J), at 67 (Toohey J), at 85-87, 88-89 (Gaudron J).
13. *Hinch v Attorney General (Vic)* at 41.
14. "It is difficult, if not impossible to envisage any situation in which countervailing public interest considerations could outweigh the detriment to the due administration of justice involved in public prejudgement by the mass media of the guilt of a person awaiting trial.": *Hinch v Attorney General (Vic)* at 58-59.

wrote that in the category of publication involving a public imputation of guilt of a criminal offence made against a person who is awaiting his or her trial of that very offence, there would be no countervailing public interest consideration that might effectively outweigh the detriment of a clear tendency to prejudice the due administration of justice.[15]

8.11 Another significance of the *Hinch* case is that it expanded the public interest principle by recognising that it may apply to publications relating to specific legal proceedings. It is, however, 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 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.

8.12 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 that 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 failure to investigate and suggesting that the accused was guilty both of the offences charged and of other offences.[17]

8.13 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

15. *Hinch v Attorney General (Vic)* at 52 (Deane J).
16. *Hinch v Attorney General (Vic)* 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.

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 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 that allowed a person facing current charges and with previous convictions to be in a position of care over children.[18]

Subsequent cases

8.14 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 in the fair administration of justice.[19] 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. 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.[20]

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18. This point was recognised by Toohey J in his judgment: *Hinch v Attorney General (Vic)* at 75-76.
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. 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 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.

8.15 It would therefore seem 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.

Recent development

8.16 Since the publication of DP 43, the New South Wales Court of Appeal considered the public interest principle in *Attorney General (NSW) v X*.[21] These are the facts of the case.

8.17 On 13 August 1993, Mr Duong Van Ia was arrested and charged with the supply of a prohibited drug, heroin. He was committed for trial on 29 April 1994. The trial was listed to commence in the District Court at Sydney on 23 March 1998. On 27 October 1997, the *Sydney Morning Herald* published material in relation to Mr Duong whose photograph appeared on the front page. The articles in the newspaper referred to Mr Duong as "the country's largest heroin distributor", "the drug dealer who bet more than $20m [in the casino], "[one of] our new drug bosses", and "your classic criminal". He and another man were said to "have carved out a giant portion of Australia's $3 billion heroin trade." There were other strong statements about Mr Duong's alleged criminal activities, like: "Duong is believed to buy his heroin in bulk (10 to 20 kilos) from importers for about $200,000 a kilo and then sell it to the upper-level street dealers, who distribute to runners." One of the articles referred to the existence of the pending criminal proceedings against Mr Duong. The Attorney General brought proceedings for contempt against the publisher John Fairfax Publications Pty Ltd.

8.18 At first instance, Justice Barr found that the articles had a tendency to interfere with the course of justice to Mr Duong's trial. However, his Honour held that the articles were part of a series of articles dealing with a subject matter of substantial broad public interest and that the trial was likely to raise narrower issues that were only incidental to those canvassed in the articles. His Honour characterised the newspaper articles as referring to the change in the persons controlling crime, particularly drug crime and that although there was discussion about Mr Duong's

21. *Attorney General (NSW) v X* [2000] NSWCA 199. See F Robinson, '"No, no! sentence first – verdict afterwards': freedom of the press and contempt by publication in Attorney General for the State of NSW v X" (2001) 23 *The Sydney Law Review* 261.

activities and personal life, there was no discussion of the facts and circumstances of the charges pending against him.[22] He dismissed the summons for contempt.

8.19 On appeal, all three judges of the Court of Appeal agreed that the newspaper articles gave rise to an implication of guilt of Mr Duong and canvassed matters directly related to such guilt, and therefore had a tendency to interfere with the administration of justice.[23] However, Chief Justice Spigelman and Justice Priestley decided that the *Bread Manufacturers* defence was available, while Justice Mason held otherwise.

8.20 The majority and minority judgments both confirmed that the *Bread Manufacturers* defence is concerned with the process of reconciling two conflicting public interests: the public interest in the administration of justice and the interest of the public in being informed about vital matters.[24] Both judgments proceeded on the basis the balancing approach adopted in *Hinch* is required in this process.

8.21 Chief Justice Spigelman (with whom Justice Priestley agreed) held that the authorities do not support the promulgation of a rule that wholly precludes the conduct of a balancing exercise where the offending publication implies guilt, or suggests guilt, or canvasses matters directly related to the issue of guilt. According to his Honour, there is no pre-determined balance in favour of the administration of justice for cases involving publications that fall under one or more of those categories.[25] He used the High Court formulation of an implied freedom of political communication[26] as another ground to reject a pre-determined balance rule.
Having concluded that a balancing test is to be exercised where the publication that deals with the guilt of the accused, the Chief Justice held that the finding of Justice Barr was reasonably open as a matter of law. He found that Justice Barr had before him a publication containing a clear and prominent implication of guilt of criminal conduct similar to the specific charges laid against an accused, but the latter's involvement in that conduct was pertinent to a wide ranging, serious in-depth journalistic investigation of a major social problem with significant public policy implications.[27]

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22. *Attorney General (NSW) v John Fairfax Publications Pty Ltd* [1999] NSWSC 318 at para 128 (Barr J).
23. *Attorney General (NSW) v X* [2000] NSWCA 199 at para 70 (Spigelman CJ), at para 155, 221 (Mason P).
24. *Attorney General (NSW) v X* at para 9 (Spigelman CJ), at para 175 (Mason P).
25. *Attorney General (NSW) v X* at para 111 (Spigelman CJ).
26. *Nationwide News Pty Ltd v Wills* (1992) 175 CLR 1; *Australian Capital Television Pty Ltd v Commonwealth (No 2)* (1992) 175 CLR 106; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.
27. *Attorney General (NSW) v X* [2000] NSWCA 199 at para 149 (Spigelman CJ).

8.22 Justice Mason's dissent emphasised the importance of the right to a fair trial.[28] He was of the view the protection of the right to a fair trial is the touchtone of the free and democratic society that the *Bread Manufacturers* defence is designed to advance. He examined passages from the different judgments in *Hinch* and was convinced that the Justices were vitally concerned to demonstrate the limits of the *Bread Manufacturers* defence.
He held that *Hinch* and subsequent cases that considered the public interest principle establish that the defence cannot be invoked to excuse a publication that has the tendency to interfere with the administration of justice, where the interference consists of implication or suggestion of guilt or the canvassing of matters directly related to the central issue of guilt.[29] To his Honour, the impugned publication was in a form and at a time that it directly trenched upon the question of Mr Duong's guilt; the canvassing of that issue in the graphic language of the articles did not and could not find justification by reference to a public interest in the general topic, important though it was.[30]

8.23 It is arguable that the majority judgment in *Attorney General (NSW) v X* represents a departure from some of the views expressed in *Hinch.* There were strong statements in *Hinch* that in the balancing of the conflicting interests, the courts should tilt the scales in favour of protecting the due administration of justice and where the material is directed at the guilt or innocence of an accused person, it would be difficult to outweigh the public interest in a fair trial. However, Chief Justice Spigelman in *Attorney General (NSW) v X* pointed out that since *Hinch* and subsequent cases that applied the *Bread Manufacturers* principle, the High Court has recognised an immunity in the Commonwealth Constitution with respect to the freedom of communication. Consequently, his Honour wrote that the law of contempt must adapt to this constitutional immunity.[31] It would appear that with respect to the public interest principle, his Honour considers that courts must now attribute greater weight to the freedom of public discussion when conducting a balancing test.

8.24 *Attorney General (NSW) v X* has not, however, provided guidance on how the *Bread Manufacturers* defence might apply to publications that deal specifically with the facts of a pending trial. This issue did not come up in this case because "there was no discussion of the facts and circumstances of the charges pending against [the accused]."[32]

28. *Attorney General (NSW) v X* at para 178-185 (Mason P).
29. *Attorney General (NSW) v X* at para 195 (Mason P).
30. *Attorney General (NSW) v X* at para 221 (Mason P).
31. *Attorney General (NSW) v X* at para 112 (Spigelman CJ).
32. *Attorney General (NSW) v John Fairfax Publications Pty Ltd* [1999] NSWSC 318 at para 128 (Barr J).

OPERATION OF THE PRINCIPLE IN OTHER JURISDICTIONS

8.25 The public interest principle forms part of the law of sub judice contempt in other jurisdictions. For example, in the United Kingdom, the 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 that are not linked to a wider theme.[33] 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.

8.26 The position in other jurisdictions is examined in paragraphs 8.22-8.37 of DP 43.

RECOMMENDATIONS OF OTHER LAW REFORM AGENCIES

8.27 The Commission, in Chapter 8 of DP 43, canvassed the recommendations of other law reform agencies. This survey need not repeated here. However, it is worth mentioning the recommendation of the Australian Law Reform Commission ("ALRC") because it was the basis of this Commission's proposal.

8.28 The ALRC recommended a narrower form of the public interest principle than exists at common law.[34] 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

33. See *Attorney General v English* [1983] 1 AC 116.
34. See Australian Law Reform Commission, *Contempt* (Report 35, 1987) ("ALRC Report 35") 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.

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 only that the discussion would be impaired, rather than significantly impaired.[35]

8.29 The approach of the ALRC would exclude from the scope of the defence the publication of material that 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.

8.30 The ALRC expressly rejected a form of the public interest principle that 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 that results from careless failure on the part of the media to make themselves aware of current trials.

THE COMMISSION'S PROPOSAL IN DP 43

8.31 The Commission took the view that there is a need to formulate a new public interest defence. It shared 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 indeed result from a failure on the part of the media to make themselves aware of current trials.[36]

8.32 As an alternative to the public interest principle found in common law, the Commission in Proposal 19 of DP 43 proposed a legislative provision in terms similar to those recommended by the ALRC.[37] It was to the effect that 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.

35. ALRC Report 35 at para 338, Appendix A (*Administration of Justice (Protection) Bill 1987* (Cth) cl 20(4)).
36. ALRC Report 35 at para 332.
37. ALRC Report 35 at para 303.

8.33 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.[38]

8.34 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,[39] this proposal would operate as a true defence. That means the burden of proof would be on the defendant to prove, on the balance of probabilities, all the elements of the defence.

CONSULTATION

Support for the proposal

8.35 There was support for the proposal in the consultations, for example, from the Law Society of New South Wales[40] and the New South Wales Director of Public Prosecutions.[41]

8.36 Mr David Norris, Senior Solicitor at the Crown Solicitor's Office, agreed in substance with the proposal but suggested that there should be exceptions to the defence, which should be in terms "other than the trial itself or the alleged criminal

38. ALRC Report 35 at para 332.
39. *Attorney General (NSW) v John Fairfax Publications Pty Ltd* [1999] NSWSC 318 at para 126.
40. Law Society of NSW, *Submission* at para 25.
41. N Cowdery QC, *Submission* at 3.

history of the accused."[42] In support of this suggestion, Mr Norris adopted the views expressed by Justice Mason in *Attorney General (NSW) v X*.[43]

8.37 In addition, or as an alternative, Mr Norris suggested that the balancing exercise be retained by adding a third element to the defence to the effect "any risk of prejudice to pending proceedings was outweighed by the public interest in continuance of the discussion".[44] He argues that public interest would otherwise appear to be an absolute defence, even where there may in fact be a very substantial risk of prejudice in the particular circumstances of the publication.

Opposition to the proposal

8.38 There was opposition, mainly from media groups,[45] but also from the New South Wales Bar Association[46] and the Victorian Bar Council.[47] Most of them expressed the view that there is no need to narrow down the public interest principle.[48] The Australian Press Council "believes that this proposal will unnecessarily lessen newspapers' abilities to report, and comment on, matters of public interest or matters on public record."[49] Another reason given by others who opposed an approach that limits the public interest defence was that courts have not so far applied it for the benefit of the media at the expense of fair criminal trials.[50]

8.39 There was particular concern about the second condition of the proposed defence – that the person accused of contempt must show that 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.[51] The Victorian Bar Council wrote that this requirement involves a judgment about the "value" of the publication considered. Consequently, the Council claimed this would leave a considerable margin for the courts to punish stories that they regard as

42. D Norris, *Submission* at para 82.
43. *Attorney General (NSW) v X* [2000] NSWCA 199.
44. D Norris, *Submission* at para 83.
45. ABC, *Submission* at 3; Australian Press Council, *Submission* at para 21; Australian Broadcasters, *Joint Submission* at 6-7.
46. NSW Bar Association, *Submission* at para 18-22.
47. Victorian Bar Council, *Submission* at para 20-23.
48. ABC, *Submission* at 3; Australian Press Council, *Submission* at para 21; NSW Bar Association, *Submission* at para 18-22.
49. Australian Press Council, *Submission* at para 21.
50. NSW Bar Association, *Submission* at para 18-22; Australian Broadcasters, *Joint Submission* at 6-7; NSW Bar Association Representatives, *Consultation.*
51. Broadcast Media Representatives, *Consultation.*

distasteful.[52] Furthermore, the Council wrote that "it is likely that in most cases, courts would, when focused specifically upon the content of a particular communication, consider that its absence would not have 'significantly impaired' the 'discussion'."[53] In the Council's view, the proposal "places considerable emphasis upon the value of the particular communication, and not enough emphasis upon the value of public discussion."[54]

8.40 The Joint Broadcasters' Submission also took exception to the second requirement of the proposal. It claimed that this condition is difficult to apply because it is not clear what degree or type of impairment would be required to be shown nor from whose perspective the impairment should be judged.[55] To demonstrate how the proposal would be difficult to apply, it gave this example: Newspaper A publishes an article that contains comments arguably in contempt of court but which clearly relate to a matter of public interest. Broadcast Station B publishes a summary of those comments. The submission claimed that it would be difficult for Station B to establish that the discussion of the matters of public interest would have been significantly impaired if the comments had not been published when that broadcast station is reporting the comments for a second time.[56]

8.41 Most of those who opposed the proposal advocated the retention of the public interest principle as it stands at common law. They considered the common law to be adequate in setting down the parameters of this aspect of contempt law.[57] It was submitted that the application of the principle depends on the attendant facts and the balancing test in the *Hinch* case is the best way to deal with situations where the principle might apply.[58]

8.42 However, if the Commission's proposal were to go ahead, two submissions suggested revisions. The Joint Broadcasters' Submission suggested that instead of requiring the publisher to prove that the public discussion would have been impaired if the material was not published, the publisher should instead be required to show that the statement creating the risk contributed to the public discussion.[59]

52. Victorian Bar Council, *Submission* at para 21.
53. Victorian Bar Council, *Submission* at para 22.
54. Victorian Bar Council, *Submission* at para 23.
55. Australian Broadcasters, *Joint Submission* at 6.
56. Australian Broadcasters, *Joint Submission* at 7.
57. ABC, *Submission* at 3; Australian Press Council, *Submission* at para 21; Australian Broadcasters, *Joint Submission* at 7.
58. NSW Bar Association Representatives, *Consultation.*
59. Australian Broadcasters, *Joint Submission* at 6.

8.43 The New South Wales Bar Association suggested[60] that if further attempts were made to draft legislation to give effect to Proposal 19, regard should be given to statutory provisions applicable to the publication of defamatory matter, such as s 377(8) Criminal Code (Qld), which reads:

> "It is a lawful excuse of a publication of defamatory matter –
>
> (8) If the publication is made in good faith in the course of, or for the purposes of, the discussion of some subject of public interest, the public discussion of which is for the public benefit, and if, so far as the defamatory matter consists of comment, the comment is fair. For purposes of this section, a publication is said to be made in good faith if the matter published is relevant to the matters the existence of which may excuse the publication in good faith of defamatory matter; if the manner and extent of the publication does not exceed what is reasonably sufficient for the occasion;"

THE COMMISSION'S RESPONSE TO THE SUBMISSIONS AND ITS FINAL RECOMMENDATION

8.44 After taking into account the submissions from our consultations, the Commission has come to the view that
Proposal 19 should not be pursued. It may not have taken sufficient account of the developments after the ALRC report, in particular the approach taken by the High Court in the *Hinch* case on the weighing of public interests involved. It agrees with comments made in the submissions about the difficulties that could arise from the proposal. Furthermore, it now considers that a balancing approach may be the best way to deal with situations that involve competing public interests.

8.45 However, the Commission does not wish to leave the development of the principle entirely to the common law. It makes a recommendation for legislation to clarify the principle, as follows:

RECOMMENDATION 20

Legislation should provide that a person charged with sub judice contempt on account of responsibility for the publication of material should not be found guilty if:

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60. NSW Bar Association, *Submission* at para 21.

(a) the material relates to a matter of public interest; and

(b) the public benefit from the publication of the material, in the circumstances in which it was published, and from the maintenance of freedom to publish such material, outweighs the harm caused to the administration of justice by virtue of the risk of influence on one or more jurors, potential jurors, witnesses, potential witnesses and/or litigants created by the publication.

8.46 This statutory recommendation contains the main elements of the principles developed by the High Court in *Hinch.* It adheres to the balancing approach in *Hinch*. However, it defines more precisely than does the case law what matters need to be "weighed" against each other. The case law refers to the protection of the public interest in the integrity of the criminal justice system or public interest in a fair trial as the main interest against which others must be weighed. The recommendation defines how this public interest might be harmed – the creation of a risk of influence on those involved in a pending legal proceeding.
It therefore links in with a prior recommendation in this Report on a statutory formulation of the criteria of liability for sub judice contempt.[61]

8.47 The recommendation requires, in the determination of whether the public benefit from the publication outweighs the harm, a consideration of the circumstances under which the material was published. One important factor to be considered is the timing of the publication. It must be asked, for instance, whether there was a significant time lapse between the publication and the trial, so that its prejudicial effect would have diminished by the time the trial commenced.

8.48 Furthermore, in cases where the media invoke the public interest in the free discussion of the subject matter of the published material, it should also be relevant for courts to consider whether such discussion would suffer significantly if the publication were delayed until after the trial, when the risk of prejudice has ceased. If the publication or broadcast of the material could have been postponed for a few days, for example, and if so delayed could still have made a contribution to the public discussion, it is arguable that the balance should be weighed in favour of the harm rather than the benefit.

8.49 There is a controversy at common law relating to published material that is directed at the guilt or innocence of an accused person, or canvasses matters directly related to the issue of guilt. On one view, there would be no countervailing public

61 Recommendation 2. See ch 4.

interest consideration that might effectively outweigh the detriment of a clear tendency to prejudice the due administration of justice, in cases involving such material.[62] In other words, the public interest principle cannot be invoked to excuse a publication that consists of some implication or suggestion of guilt or innocence of the accused.[63] On another view, such publications would still invite the application of the balancing process required by the public interest principle.[64] Our recommendation does not propose to make any changes to the current state of the common law on this issue. It is an issue that may be left for courts to develop.

8.50 Under this recommendation, the public interest principle could apply to a publication referring specifically to a particular pending criminal trial. It could be left to the courts to determine the circumstances in which the principle might prevail.

8.51 The recommendation clarifies that courts must not only look at the public benefit to the debate on the topic concerned but on the broader public interest of freedom of speech. Both in common law contempt decisions, such as *Hinch*, and in decisions on the implied constitutional freedom of political communication,[65] the courts have acknowledged that a self-governing community such as Australia derives benefit from the maintenance of a broad-ranging freedom to convey, and to receive, information and opinions about matters of public interest.

8.52 The recommendation follows the common law with respect to the burden of proof. It is for the prosecution to prove that the matter does not fall within the public interest principle, if this issue is raised by the defence.

"PUBLIC SAFETY" AS A GROUND OF EXONERATION

8.53 In DP 43, the Commission considered whether it is necessary or desirable to have a defence that 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 publish a photograph of the alleged offender. Publications of these kinds might give rise to liability for sub judice contempt if no ground of exoneration existed.

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62. *Hinch v Attorney General (Vic)* (1987) 164 CLR 15 at 52 (Deane J).
63. *Attorney General (NSW) v X* [2000] NSWCA 199 at para 195 (Mason P).
64 *Attorney General (NSW) v X* at para 64-117 (Spigelman CJ).
65. For a discussion of these cases, see NSWLRC DP 43 at para 2.7-2.15.

8.54 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, 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. However, relying on prosecutorial discretion is not conducive to clarity or certainty; publishers should be able to know in advance whether they might be prosecuted. Furthermore, the more reliance placed on the exercise of prosecutorial discretion, the greater the likelihood of complaints of selective prosecution.

8.55 In *Attorney General (NSW) v Macquarie Publications Pty Ltd*,[66] an accused was charged with sexual offences against a young person, apparently his daughter. When released on bail, he assaulted a woman and was re-arrested but escaped from custody. He also had several previous convictions. The local newspaper published a photograph of the accused and an article about him, which mentioned his criminal history. In his affidavit to the court, the editor, who read an early draft of the article, sought to justify the publication by stating that he wanted to inform the citizens of the town that the accused is dangerous and that he had hoped that someone would turn him in. However, the person who settled the article after the editor had left for the day received information from the police, shortly before the paper was finalised for printing, that the accused had been apprehended. The court did not have to deal with the editor's "defence" because the perceived danger to the public safety had clearly passed by the time the article was published. The case, however, is a good illustration of a situation where the media and possibly even the police could be liable for contempt, if the proposed defence were not clearly available.

The Commission's proposal in DP 43

8.56 In DP 43, the Commission proposed that 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

8.57 The Commission argued that, rather than relying on prosecutorial discretion or waiting for courts to broaden the application of the public interest defence, it was preferable for publications of this kind to have their own separate protection in legislation. One concern about such a defence relates to the meaning of "public

66. *Attorney General (NSW) v Macquarie Publications Pty Ltd* (1988) 40 A Crim R 405.

safety", a term which could be interpreted in many different ways. However, the formulation of the proposed 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.

Consultation

8.58 There was support for the proposal both from the media[67] and others.[68] However, some media groups suggested that the onus of proof should not be on the defendant.[69]

8.59 The Joint Broadcasters' Submission suggested that if any information was provided for publication by the police or similar agencies, there should be a presumption that publication was reasonably necessary or desirable for purposes of the defence.[70]

8.60 The Law Society of New South Wales, in its written submission, opposed the proposal because it considered the potential for abuse to be too great. However, it also expressed support for the need to protect the safety of the general public and stated that if the proposal goes ahead, those drafting the legislation should exercise great care in balancing the right to a fair trial and the imperative of public safety.[71] In a subsequent consultation with the Law Society's representative, Mr Trevor Nyman, it was clarified that the proposal would be acceptable to the Law Society if it were tightened up. For example, while the publication could be allowed to state that the person is dangerous, it need not mention his or her criminal history.[72]

8.61 The Victorian Bar Council expressed the view that while there might be occasions when the proposed defence could be used, it is likely that they will be rare. Moreover, it warned that there is a danger that the defence could be used to conduct trial by media of a person being pursued by the authorities.[73] In any case, the Council wrote that it is desirable to limit the ambit of the proposed defence in its terms. For

67. Australian Press Council, *Submission* at para 22; Australian Broadcasters, *Joint Submission* at 7; ABC, *Submission* at 3.
68. D Norris, *Submission* at para 85.
69. Australian Broadcasters, *Joint Submission* at 7; ABC, *Submission* at 3.
70. Australian Broadcasters, *Joint Submission* at 7.
71. Law Society of NSW, *Submission* at para 28.
72. Mr Trevor Nyman (Law Society of NSW), *Consultation.*
73. Victorian Bar Council, *Submission* at para 24.

example, it could be restricted to situations where there is an "immediate" and "serious" danger to the general public.[74]

THE COMMISSION'S RESPONSE TO THE SUBMISSIONS AND ITS FINAL RECOMMENDATION

8.62 The Commission disagrees with the suggestion in the Joint Broadcasters' Submission that if any information was provided for publication by the police, there should be a presumption that the publication was reasonably necessary or desirable for purposes of the defence. The persons or organisations that make the decision to publish should not be able to evade their responsibility to ensure that their publications do not create a risk of prejudice to the administration of justice. If there was an overriding interest to publish material that may have this risk, such as the protection of the public safety, the decision to publish should be reached only after a careful and independent examination of the relevant circumstances and not based on reliance on who gave the information nor on the representations made by the latter.

8.63 This view finds support in the New South Wales Court of Appeal case of *Attorney General (NSW) v Mayas*[75] where the court appeared to reject an editor's excuse that because the journalist's source was a ranking police officer, he failed to recognise the warning signs that the article could be contemptuous. The court placed the responsibility to become aware of and to appreciate the content of the matter published squarely on the editor and publisher.

8.64 The Commission does not agree with the comments made by the Victorian Bar Council and the New South Wales Law Society on the need to tighten up further the proposal. The proposal already specifies that circumstances under which the defence would apply and requires that the publication should have been "reasonably necessary or desirable" to achieve specific results.
As formulated, the proposed defence contains sufficient safeguards against possible abuse.

8.65 The Commission accepts the suggestion that the burden of proving the elements of the proposed defence should not be on the defendant. The recommendation is now framed as a matter to be negatived by the prosecution.

RECOMMENDATION 21

74. Victorian Bar Council, *Submission* at para 25.
75. *Attorney General (NSW) v Mayas* (NSWCA, No 174/83, 28 March 1984, unreported).

Legislation should provide that a person charged with sub judice contempt on account of responsibility for the publication of material should not be found guilty if 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.

9. The fair and accurate reporting principle

- An overview of the fair and accurate principle
- Some possible uncertainties in the law
- Recommendations of other law reform bodies
- The Commission's provisional view in DP 43
- Suggestions for reform from a submission from the public
- The Commission's final position

AN OVERVIEW OF THE FAIR AND ACCURATE PRINCIPLE

9.1 Generally speaking, a publication will not constitute 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, even one which refers to the previous convictions of the accused, may not breach the sub judice rule 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 be satisfied:

(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.

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 ch 10.

(3) The report must not relate to matters that are said in the absence of the jury (albeit in open court). Consequently, it has been held that a newspaper that reported allegations of a confession by the accused, which were the subject of 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, it seems, be presented as a report.
The immunity will probably not apply unless the fact that the relevant prejudicial statements were made during court proceedings is stated or is at least implicit.[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, 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 contempt.[13] It is not

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 278-279 (Jordan CJ).
8. *R v Scott and Downland 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.
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.

sufficient that the reporter honestly and reasonably believed the report to be accurate.[14]

(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.[15] A report may be held not to be published in good faith even though there is no intention to prejudice a trial.[16] An unfair report[17] or a delay in reporting the proceedings[18] may be evidence of the absence of good faith.

SOME POSSIBLE UNCERTAINTIES IN THE LAW

9.4 In DP 43, the Commission acknowledged that it might not always be clear when a publication will constitute a fair and accurate report of proceedings. Certainly, a publication need not be a verbatim account of the proceedings. A summary of a part of the proceedings may instead be sufficient.[19] There are, however, no clear guidelines on what it is permissible to include in and exclude from a summary of proceedings. In one case, the court identified the mode of presentation of the report, the comments or opinions expressed by the reporter about the proceedings, and the emphasis given to particular aspects of the proceedings, as factors that may affect the fairness of the report.[20] Following this reasoning, a report which recounts only, for example, the morning's portion of proceedings, and omits the afternoon's portion, may be held not to be a fair and accurate.[21] Similarly, it is arguable that a report which focused solely or primarily on the previous convictions of an accused person, as revealed in bail proceedings, would be unfair.

9.5 In addition to being fair and accurate, the publication must also be shown to be in good faith. 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

14. *R v Pearce* (1992) 7 WAR 395.
15. *R v Scott* [1972] VR 663 at 675 (Menhennitt J).
16. *R v David Syme & Co Ltd* [1982] VR 173.
17. *Ex parte Terrill; Re Consolidated Press Ltd* (1937) 37 SR (NSW) 255 at 259 (Jordan CJ).
18. *R v Scott and Downland Publications Ltd* [1972] VR 663 at 675 (Menhennitt J).
19. See *Ex parte Terrill; Re Consolidated Press Ltd*.
20. *Minister for Justice v Western Australian Newspapers Ltd*.
21. 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.

to which it relates.[22] For example, a report of committal proceedings, which was published one year after the proceedings and shortly before the commencement of the relevant trial, was found to be in bad faith and to amount to contempt.[23] 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 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.
This issue is canvassed in Chapter 11. The recommendations made in that chapter will affect the scope of the fair and accurate reporting principle.

RECOMMENDATIONS OF OTHER LAW REFORM BODIES

9.7 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.[24] 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.

9.8 The recommendation of the Phillimore Committee was substantially adopted into legislation by s 4 of the *Contempt of Court Act 1981* (UK), which states, "A person is not guilty of contempt of court under the strict liability rule in respect of a fair and accurate report of legal proceedings held in public, published contemporaneously and in good faith."

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22. See *Minister for Justice v Western Australian Newspapers Ltd*; *R v Scott* [1972] VR 663; *R v Sun Newspapers Pty Ltd* (1992) 58 A Crim R 281.
23. See *R v Scott*.
24. United Kingdom, Committee on Contempt of Court, *Report of the Committee on Contempt of Court* (Cmnd 5794, HMSO, London, 1974) at para 141; Australian Law Reform Commission, *Contempt* (Report 35, 1987) ("ALRC Report 35") at para 321-323, Appendix A (*Administration of Justice (Protection) Bill 1987* (Cth) cl 28).

9.9 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 this was unnecessary in light of its proposed requirement that the publication should have been published contemporaneously with, or within a reasonable time after, the relevant proceeding. Moreover, it stated 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.[25]
It considered that the right of the media to perform their function of reporting the operations of the courts should be absolute, and not subject to inquiries as to their motivation in reporting.[26]

9.10 The ALRC proposed an exception to the defence: that it should not apply to a publication of a report of part of the trial that took place before the jury was empanelled or in the absence of the jury.[27] It intended this exception to cover arguments on legal matters, including particularly the admissibility of evidence, which are put to the court on a *voir dire*, and also pleas of guilty to one or more other offences at the beginning of a trial where the accused had pleaded not guilty to one or more other offences.[28]

THE COMMISSION'S PROVISIONAL VIEW IN DP 43

9.11 In DP 43, the Commission did not propose any changes to the common law on the fair and accurate reporting principle.
It considered that it might be sufficient for the courts to clarify the possible uncertainties on this principle. However, the Commission welcomed submissions on any possible reform issues.

SUGGESTIONS FOR REFORM FROM A SUBMISSION FROM THE PUBLIC

9.12 The Commission received one submission that dealt specifically with this matter. Mr Craig Burgess, lecturer in Journalism at the University of Southern Queensland, noted the difficulties the media have had in using the fair and accurate

25. ALRC Report 35 at para 322.
26. ALRC Report 35 at para 322.
27. ALRC Report 35 at para 323, Appendix A (*Administration of Justice (Protection) Bill 1987* (Cth) cl 28(2)).
28. ALRC Report 35 at para 323.

principle as a basis for informing the public about legal proceedings.[29] He warned that if the standards of fairness and accuracy are set too high, there is a danger that media organisations, especially regional ones with less resources, may become reluctant to cover complicated and long-running trials for fear of legal action.[30]

9.13 Mr Burgess wrote that in view of the importance of freedom of communication, it is not satisfactory to leave it to courts to clarify what a fair and accurate report is.[31] He expressed the view that in the interests of certainty and consistency in the law, legislation should be introduced similar to that recommended by the Phillimore Committee and the ALRC.[32] He disagreed, however, with the recommendation of the ALRC to the extent that it excluded a good faith requirement.[33] Moreover, he expressed preference for the fair and accurate principle to be a component of liability rather than to be treated as a defence, where media defendants would have the burden of proving the existence of the elements of the principle.[34]

THE COMMISSION'S FINAL POSITION

9.14 In light of the submission, the Commission re-examined the desirability of legislative reforms similar to those recommended by the ALRC and by the Phillimore Committee.

9.15 The main idea common to the recommendations of both the ALRC and the Phillimore Committee is the requirement that the publication should have been published contemporaneously with the relevant proceeding. This requirement would apply, for example, in situations involving publication of reports of committal proceedings many months after they had taken place but close to or during the trial of the accused.

9.16 The Commission does not contest the purpose of such a requirement. The timing of reports of legal proceedings should be considered relevant in the determination of whether or not they come within the fair and accurate principle. Reports on legal proceedings must, ideally, be made immediately or within a reasonable time after conclusion of proceedings, when all the evidence has been

29. Mr Burgess cited the High Court decision of *Chakvararti v Advertiser Newspapers Limited* (1998) 193 CLR 519, a defamation case, as creating further uncertainty on the law on the fair and accurate principle.
30. C Burgess, *Submission* at 3.
31. C Burgess, *Submission* at 6.
32. C Burgess, *Submission* at 3.
33. C Burgess, *Submission* at 7.
34. C Burgess, *Submission* at 6.

given and properly assessed by the court.
Media reporters would by then be in a better position to report details of the proceedings accurately. Alternatively, the reporting may be done while the proceedings are ongoing, provided it is fair account of what has so far happened. On the other hand, a substantial delay in the publication of a report may be indicative of some improper purpose rather than a genuine desire to inform the public about details of the proceeding.

9.17 The common law has dealt with such a situation through its requirement that a fair and accurate report must also be made in good faith. It was held by the Supreme Court of Victoria in *R v Scott*[35] that to publish an article about a committal proceeding a year after it finished was an indication of an absence of good faith. The court in that case, however, looked at other factors as basis for its conclusion of a lack of good faith: the publication was made when the trial was imminent and, it was published in a form to disguise the staleness of the event (the committal proceeding) it was based on.

9.18 In light of the good faith rule developed by the common law on the fair and accurate principle, a legislative requirement that the publication should have been published contemporaneously with the relevant proceeding may be unnecessary. The common law rule seems adequate to deal with situations which the proposed legislative reform was intended to remedy. The common law rule is also more flexible than a statutory contemporaneous requirement. At common law, delay in publication is not conclusive evidence of lack of good faith: delay might be justified under certain circumstances. Rather, delay is only one factor courts will consider in deciding whether or not the protection afforded by the fair and accurate principle applies. A lack of good faith could be gathered from the unfairness of the published report, if it is partial, if it misrepresents the proceedings, by withholding material facts, which would put a different complexion upon facts truly reported.[36] The common law examines a delay in reporting of a legal proceeding in the context of the attendant circumstances. This, to the Commission, is an effective approach in the determination of whether media reports of legal proceedings come within the fair and accurate reporting principle, even though there was a substantial delay in the publication of the report.

9.19 Another feature of the ALRC recommendation is the proposed exception to a fair and accurate reporting defence: that it should not apply to a publication of a report of part of the trial that took place before the jury was empanelled or in the absence of

35. *R v Scott* [1972] VR 663.
36. *Ex parte Terrill; Re Consolidated Press Ltd* (1937) 37 SR (NSW) 255.

the jury.[37] The exception would cover arguments on legal matters, including the admissibility of evidence, which are put to the court on a *voir dire.*

9.20 This qualification to the fair and accurate reporting principle already exists at common law. It has been held that a newspaper that reported allegations of a confession by the accused, which were the subject of arguments as to admissibility during a voir dire, could not rely on the immunity.[38] "The due administration of justice requires that the jury should be unaware of what was the evidence adduced at the 'trial within a trial' until after they have reached their verdict …"[39] The proposed statutory exception would not add anything new to the existing law on the matter.

9.21 Finally, the ALRC's recommendation would require the media defendant in contempt proceedings to carry the burden of proving that all the elements of its proposed fair and accurate reporting defence are present.[40] At the moment, it appears that the principle operates at common law as a component of liability: it is for the prosecution in contempt proceedings to prove, beyond a reasonable doubt, that the publication was not a fair and accurate report, if the defendant raises this issue. The lone submission on the matter opposed the ALRC's recommendation.[41] The Commission does not see a need to change the status quo.

9.22 In sum, the Commission has not changed the position it took in DP 43 that the common law principle on fair and accurate reporting does not need legislative reform. However, any legislation enacted pursuant to this Report should make it clear that the common law principle is to be retained alongside the principles laid down in the legislation.

9.23 It should be noted the Commission in Chapter 11 of this Report recommends a right of access to certain types of documents involved in court proceedings and a right to publish the contents of these documents. To the extent that the media's right to report legal proceedings should also include a right to report on the contents of documents involved in them, the Commission's recommendations in Chapter 11 would effectively widen the scope of the fair and accurate reporting principle.

37. ALRC Report 35 at para 323, Appendix A (*Administration of Justice (Protection) Bill 1987* (Cth) cl 28(2)).
38. *R v Day* [1985] VR 261.
39. *Attorney General v Leveler Magazine Ltd* [1979] AC 440 at 450 (Diplock LJ).
40. See ALRC Report 35, Appendix A (*Administration of Justice (Protection) Bill 1987* (Cth) cl 28).
41. C Burgess, *Submission* at 6.

10. Suppression orders

- Introduction
- Statutory suppression orders
- Recommendations

INTRODUCTION

10.1 In its Discussion Paper 43 ("DP 43") the Commission proposed[1] a new legislative provision to replace s 119 of the *Criminal Procedure Act 1986* (NSW).[2] The proposed provision would empower any court to prohibit publication of reports of proceedings where publication would create a substantial risk of prejudice to the administration of justice. It was not envisaged that this would replace the common law. It was also stated in Proposal 21 that the new provision should not replace existing statutory powers to restrict publication.

10.2 The majority of submissions received either generally supported Proposal 21, or expressed approval of the direction taken by DP 43, without singling out this Proposal for specific comment. Criticism was expressed, however, in the submissions received from the Australian Press Council ("APC") and collectively from Australian broadcasters.[3] These expressed the fear that the proposal would result in an increase in the number of suppression orders being made and be likely to compromise the open justice principle.[4] The Proposal was characterised by the APC as "a major incursion into current free speech rights".[5] The Australian Broadcasting Corporation and the New South Wales Bar Association also queried linking the power to make suppression orders to the administration of justice generally, instead of limiting it to concerns arising out of the specific proceedings.[6] Concern was also expressed in both written submissions[7] and in the course of consultations[8] that the test for making suppression orders contained in Proposal 21 is too broad. We address this concern below.

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1. NSW Law Reform Commission, *Contempt by Publication* (Discussion Paper 43, 2000) ("NSWLRC DP 43"), Proposal 21.
2. This section replaced s 578 of the *Crimes Act 1900* (NSW). Section 578 was repealed by the *Crimes Legislation Amendment (Sentencing) Act 1999* (NSW).
3. Collective submission from the Federation of Australian Commercial Television Stations, Federation of Australian Commercial Radio Broadcasters, Australian Broadcasting Corporation (Legal Services Department) and the Special Broadcasting Service.
4. Australian Broadcasters, *Joint Submission* at 7.
5. Australian Press Council, *Submission* at 7.
6. ABC, *Submission* at 3; NSW Bar Association, *Submission* at 12.
7. NSW Bar Association, *Submission* at 12.
8. Broadcast Media Representatives, *Consultation*; Government Lawyers, *Consultation*; NSW Bar Association Representatives, *Consultation*; Print Media Representatives, *Consultation 2*.

STATUTORY SUPPRESSION ORDERS

Why they are needed

10.3 The uncertainty regarding various aspects of the court's power to issue non-publication orders led the Commission to the view that legislative intervention was required to provide a clear and comprehensive regime.[9] These include the questions of:

- who is subject to a suppression order;
- whether a person's ignorance of the existence of a suppression order is relevant; and
- whether existing provisions allowing courts to restrict publication are satisfactory.

These are discussed below.

Who is subject to a suppression order?

10.4 An order made in court is binding on those present in the court, and is made pursuant to judicial authority. However, for a suppression order to bind all members of the public, even those not present at proceedings, legislative sanction is required.[10] As Justice McHugh stated in *Attorney General (NSW) v Mayas*:

> Courts have general authority to make orders binding on the parties, witnesses and other persons present in the court room. But they have no general authority to make orders binding on persons unconnected with the proceedings before them. For a court order to operate as a common rule and to bind people generally, it needs the express or implicit sanction of the legislature. If, pursuant to statutory authority, a court makes an order binding on persons outside the court room, breach of it *will*

9. NSWLRC DP 43 at para 10.20 and following.
10. *Attorney General (NSW) v Mayas* (1988) 14 NSWLR 342 at 355 (McHugh JA, Hope JA concurring); *John Fairfax & Sons Ltd v Police Tribunal of NSW* (1986) 5 NSWLR 465 at 477 (McHugh JA, Glass JA concurring); D Butler and S Rodrick, *Australian Media Law* (LBC Information Services, Sydney, 1999) at136.

> *prima facie constitute a contempt whether or not the person is aware of the order*.[11] (emphasis added)

Knowledge of the existence of a suppression order

10.5 The words highlighted in the previous quotation raise the issue of requisite knowledge. In DP 43 we discussed this in relation to liability for breach of suppression orders made under common law powers.[12] There is little direct authority on the question of whether mens rea, that is, knowledge of the wrongfulness of an act, is an essential element of an offence against a statutory provision conferring power to make a suppression order.

10.6 *Nationwide News Pty Ltd v Bitter*,[13] a South Australian case, was an appeal by a company against its conviction pursuant to s 69(1)(e) and s 71(2) of the *Evidence Act 1929* (SA). The former provision empowered the court to make a non-publication order. The latter was in the following terms:

> 71(2) A person who disobeys an order under section 69(1)(d) or (e) shall be guilty of an offence and liable to a penalty of not more than two thousand dollars, or imprisonment for a period not exceeding six months.

Counsel for the defendant had argued at trial that there was a presumption that any statute creating an offence required the prosecution to prove mens rea. He submitted that as no evidence had been adduced of the defendant's knowledge of the order or its intention to breach it, there was no case to answer. The defendant was convicted, the magistrate holding in effect that the legislation created an absolute offence.[14] On appeal, Justice Olsson of the Supreme Court of South Australia stated:

> (W)hat must firmly be borne in mind in the case at bar is that I am here concerned with a statutory offence and not a charge of contempt. It follows that limited assistance is to be gleaned from authorities bearing upon the latter topic. In the final analysis the question of whether or not mens rea is an essential element of a

11. *Attorney General (NSW) v Mayas* (1988) 14 NSWLR 342 at 355.
12. NSWLRC DP 43 at para 10.27.
13. *Nationwide News Pty Ltd v Bitter* (1985) 38 SASR 390.
14. *Nationwide News Pty Ltd v Bitter* at 391.

> statutory offence is nothing more nor less than a question of statutory interpretation.[15]

His Honour said that if s 71(2) were not read as creating an absolute offence then "its whole purpose may well be aborted".
He went on:

> If, as in the case at bar, it was open to a member of the media to say that, because it did not take the trouble to check whether any prohibition existed, it should be exculpated then it is difficult to see how the statutory provision could possibly be effective. …[N]ot only will putting the defendant under strict liability assist in the enforcement of the scheme of the legislation, the fact is that such scheme is likely to be rendered substantially unworkable if that is not done.[16]

10.7 A judgment of the High Court, delivered almost contemporaneously with the previous case, examined in some detail the issue of mens rea in statutory offences and put forward a very different view. In *He Kaw Teh v The Queen*[17] the Court applied the general principle, previously stated in a case called *Sherras v De Rutzen* as follows:

> There is a presumption that mens rea, an evil intention, or a knowledge of the wrongfulness of the act, is an essential ingredient in every offence; but that presumption is liable to be displaced either by the words of the statute creating the offence or by the subject-matter with which it deals, and both must be considered.[18]

The High Court took this further, stating that there are three matters to be considered in deciding whether the presumption has been displaced and Parliament intended the offence created by legislation to have no mental ingredient. These are:

1. the words of the statute creating the offence;[19]

2. the subject matter of the statute;[20] and

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15. *Nationwide News Pty Ltd v Bitter* at 393.
16. *Nationwide News Pty Ltd v Bitter* at 397.
17. *He Kaw Teh v The Queen* (1985) 157 CLR 523.
18. *Sherras v De Rutzen* [1895] 1 QB 918 at 921.
19. *He Kaw Teh v The Queen* (1985) 157 CLR 523 at 529.

3. whether imposing absolute liability will assist in enforcing the statute.[21]

10.8 Statutory offences are in fact divided into three categories for the purposes of determining whether mens rea is required to establish liability. These were usefully set out in the judgment of Chief Justice Street in *R v Wampfler*:

> (1) Those in which there is an original obligation on the prosecution to prove mens rea.
>
> (2) Those in which mens rea will be presumed to be present unless and until material is advanced by the defence of the existence of honest and reasonable belief that the conduct in question is not criminal in which case the prosecution must undertake the burden of negativing such belief beyond reasonable doubt.
>
> (3) Those in which mens rea plays no part and guilt is established by proof of the objective ingredients of the offence.[22]

Those belonging to the second category are called offences of strict liability, while those falling into the third group are offences of absolute liability. The phrase "belief that the conduct in question is not criminal", which appears in the second category is "not [intended] to refer to ignorance or mistake of law".[23]

10.9 The consequence of not knowing that a suppression order has been made depends on which of the above three liability categories applies to the proposed statutory provision. This question of knowledge brings us back to the third consideration articulated by the High Court in *He Kaw Teh*, namely, the effect on enforcement of the statute. If the provision is within the first category, so that the prosecution must prove mens rea on the part of the defendant, then a person wishing to avoid the operation of the provision might need only to leave the courtroom before an order is made. This is similar to the point made by Justice Olsson at paragraph 10.6 above. In *Nationwide News Pty Ltd v Bitter* Justice Olsson upheld the conviction for breach of legislation that the magistrate had "in effect" held created an absolute offence.[24] Recently, however, the trend has been

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20. *He Kaw Teh v The Queen* at 529.
21. *He Kaw Teh v The Queen* at 530.
22. *R v Wampfler* (1987) 11 NSWLR 541 at 546.
23. *Strathfield Municipal Council v Elvy* (1992) 25 NSWLR 745 at 749.
24. *Nationwide News Pty Ltd v Bitter* (1985) 38 SASR 390 at 391. In the quotation at para 10.6 above His Honour, nonetheless, refers to the desirability of putting the defendant under *strict* liability.

against construing statutes as creating absolute liability.[25] This is due to the potential harshness[26] and lack of benefit[27] that can result. The Commission's recommendation with regard to this issue is discussed at paragraph 10.28 below.

Existing statutory regulation of publication

10.10 In DP 43[28] we discussed existing statutory provisions that impose or authorise restrictions on publication. We distinguished two major categories:

(a) Restrictions that apply unless lifted by court order (ie where there is a presumption of non-publication); and

(b) Restrictions that are imposed by a court order ie a suppression or non-publication order.

10.11 In its submission, the New South Wales Bar Association highlighted "the present unsatisfactory state of affairs in New South Wales" resulting from:

> the number of statutory provisions which operate to empower a variety of courts, commissions, and disciplinary tribunals to make suppression orders. Importantly, as analysis of these provisions shows, the extent of the power given to a particular court or other body to make such an order varies considerably, likewise the nature and measure of any sanction for breach.[29]

10.12 Indeed, an examination of numerous such provisions indicates that legislation confers often quite broad powers to issue suppression orders and in a range of circumstances. For instance, several statutes permit certain courts, tribunals, commissions or authorities to restrict publication in cases where this is "necessary or

25. *R v Wampfler* at 547.
26. For example, "This would lead to an absurdly Draconian result if it meant that a person who unwittingly brought into Australia narcotics which had been planted in his baggage might be liable to life imprisonment notwithstanding that he was completely innocent of any connexion with the narcotics and that he was unaware that he was carrying anything illicit": *He Kaw Teh v The Queen* at 529.
27. For example "[N]o good purpose would be served by punishing a person who had taken reasonable care and yet had unknowingly been an innocent agent to import narcotics.": *He Kaw Teh v The Queen* at 530.
28. See para 10.28 to 10.42.
29. NSW Bar Association, *Submission* at 10.

desirable in the public interest"[30] or where "necessary in the public interest or … there are other exceptional circumstances".[31] In some cases the "confidential nature" of evidence or other material is sufficient grounds for the issuing of a suppression order.[32] Such orders can also be made in some cases where publication may lead to certain persons being identified.[33] Infrequently, legislation will allow suppression orders to be made without specifying the grounds on which this can be done.[34] These cases are examples of legislative provisions falling within the second category referred to above, namely those with a broad discretion to impose suppression orders.

10.13 Statutory provisions embodying a presumption against publication tend to have a strong public policy reason for so doing. Section 578A of the *Crimes Act 1900* (NSW), for example, prohibits publication of matter which identifies victims in prescribed sexual offences. An objective common to several pieces of legislation is the desire to protect the identities of children involved in proceedings.[35] Other circumstances in which the presumption against publication may arise include a finding by the Coroner of self-inflicted death,[36] proceedings before the Guardianship Tribunal,[37] proceedings involving a participant in a so-called "authorised operation",[38] inquiries under the *Mental Health Act 1990* (NSW),[39] and hearings in connection with applications for statutory compensation before the Victims Compensation Tribunal.[40]

30. For example, *Independent Commission Against Corruption Act 1988* (NSW) s 112; *Police Integrity Commission Act 1996* (NSW) s 52; *Royal Commission (Police Service) Act 1994* (NSW) s 27.
31. For example, *Casino Control Act 1992* (NSW) s 143B.
32. For example, *Administrative Decisions Tribunal Act 1997* (NSW) s 75; *Fair Trading Tribunal Act 1998* (NSW) s 30; *Residential Tribunal Act 1998* (NSW) s 30.
33. For example, *Community Protection Act 1994* (NSW) s 18; *Crimes Act 1900* (NSW) s 562NC (proceedings relating to apprehended domestic violence orders); *Law Enforcement (Controlled Operations) Act 1997* (NSW) s 28(2)(b); *Law Enforcement and National Security (Assumed Identities) Act 1998* (NSW) s 14(2); *Public Health Act 1991* (NSW) s 35(1), s 35 (2), s 35(5).
34. For example, *Evidence (Audio and Audio Visual Links) Act 1998* (NSW) s 15; *Special Commissions of Inquiry Act 1983* (NSW) s 8.
35. For example, *Adoption of Children Act 1965* (NSW) s 53; *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 105; *Children (Criminal Proceedings) Act 1987* (NSW) s 11; *Crimes Act 1900* (NSW) s 562NB(1).
36. *Coroners Act 1980* (NSW) s 44(3).
37. *Guardianship Act 1987* (NSW) s 57.
38. *Law Enforcement (Controlled Operations) Act 1997* (NSW) s 3, s 28.
39. Section 44.
40. *Victims Support and Rehabilitation Act 1996* (NSW) Sch 2 cl 14.

10.14 The Commission makes no recommendation regarding legislation of the type referred to in the previous paragraph.
So long as the underlying policies are manifest and clearly justifiable and the scope of any such law is narrow and well defined, Parliament should retain the power to enact in the future laws containing such a presumption. However, with respect to statutory provisions of the type illustrated in paragraph 10.12, conferring a broad discretion to impose suppression orders, the Commission believes these should be repealed, and in their place a provision based on Recommendation 22, below, apply.

RECOMMENDATIONS

The test for making suppression orders

10.15 In formulating its proposal with regard to restricting publication of proceedings, the Commission was mindful of concerns of the type alluded to above in paragraph 10.2, and attempted to address these in DP 43.[41] There, for example, the Commission stated:

> [T]he 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.[42]

Such derogations "should be based upon securing the needs of justice rather than the needs of particular individuals."[43]

10.16 Furthermore, the Commission stated that while "the needs of witnesses and the accused must be accommodated to a certain extent" this should go no further than that which is "necessary for the administration of justice as a whole".[44] To secure this end, the Commission proposed that a suppression order would be justified only where publication "would create a *substantial risk* of prejudice to the administration of justice".[45] This proposal was modelled on s 4(2) of the *Contempt of Court Act 1981* (UK) which empowers a court to issue a so-called "postponement order".[46]

41. See in particular NSWLRC DP 43 at para 10.81-10.93.
42. NSWLRC DP 43 at para 10.91.
43. NSWLRC DP 43 at para 10.92.
44. NSWLRC DP 43 at para 10.92.
45. Proposal 21.
46. Section 4(2) states: "In any proceedings the court may, where it appears to be necessary for avoiding a substantial risk of prejudice to the administration of

10.17 However, in light of the concern expressed in the Discussion Paper to minimise departures from the open justice principle, the Commission has reconsidered the "substantial risk" test appearing in Proposal 21, and now regards it as being too broad to meet adequately the concerns expressed above. For a court to order the suppression of material produced in an open court, more should be required than to indicate a *risk* of prejudice to the administration of justice. As stated at paragraph 10.92 of the Discussion Paper, it should be "*necessary* for the administration of justice as a whole" (emphasis added).

10.18 One of the difficulties with the "substantial risk of prejudice" formulation is that while the risk must be great, the prejudice need not be.[47] Eady and Smith express the opinion that it seems strange that a court could impose an order restraining publication where the prejudice in contemplation is less than severe.[48] Even the meaning of "substantial risk" is more elusive than might at first appear. In one English case, for example, the Master of the Rolls accepted counsel's interpretation of "substantial" as not meaning "'weighty', but rather … 'not insubstantial' or 'not minimal'."[49] Lord Diplock had earlier expressed the view that "substantial risk" was "intended to exclude a risk that is only remote".[50] Another problem encountered in England, where the formula "substantial risk of serious prejudice" is employed to determine liability under the sub judice principle, is that determining the degree of risk may require a judge to assess the susceptibility of a particular jury to influence from a publication,[51] as opposed to making an objective assessment of the prejudice to justice likely to result from the publication.

10.19 Even where it may be considered that a substantial risk of prejudice to the administration of justice *does* exist, it does not necessarily follow that the appropriate course is to impose restrictions on the publication of proceedings. In *Re Central Independent Television Plc*[52] the Court considered an appeal brought by television

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justice in those proceedings, or in any other proceedings pending or imminent, order that the publication of any report of the proceedings, or any part of the proceedings, be postponed for such period as the court thinks necessary for that purpose."

47. N Lowe and B Sufrin, *The Law of Contempt* (3rd ed, Butterworths, London, 1996) at 286.
48. A Arlidge and T Smith, *Arlidge, Eady and Smith on Contempt* (2nd edition, Sweet & Maxwell, London, 1999) at para 7-133.
49. *Attorney General v News Group Newspapers Ltd* [1987] QB 1 at 15 (CA).
50. *Attorney General v English* [1983] 1 AC 116 at 142 (HL).
51. C Walker, I Cram and D Brogarth, "The reporting of Crown Court proceedings and the Contempt of Court Act 1981" (1992) 55 *Modern Law Review* 647 at 648.
52. *Re Central Independent Television Plc* [1991] 1 WLR 4 (CA).

and radio broadcasters against the granting of a so-called postponement order under s 4(2) of the *Contempt of Court Act 1981* (UK). The trial judge had made the order in circumstances where the members of a jury in a trial that had lasted three weeks retired to consider their verdicts and were spending the night at an hotel. The judge had expressed concern that the jury members should be allowed to relax and watch television, and so made an order that no report of the case be broadcast by either television or radio. In allowing the appeal,
Lord Lane CJ stated[53] that in the circumstance where the members of the jury were confined to the hotel it was possible to deprive them of television and radio, making it unnecessary to issue a postponement order. Where restrictions are necessary, alternatives to restricting publication should be used where reasonably available.

10.20 The Commission recommends that a new provision be enacted in substantially the same terms as contained in Proposal 21, but with the difference that the court be empowered to suppress publication where this is necessary for the administration of justice. Using the word "necessary" without a qualification such as "reasonably" is not intended to mean that suppression is *absolutely* necessary for the administration of justice. Rather, it is the Commission's view that suppression may be ordered where required as a *practical* necessity to serve the ends of justice.[54]

Standing

10.21 In DP 43 we proposed[55] that the media and others with a special interest be accorded standing to be heard by the court before the making of a suppression order, or to apply subsequently for the variation or revocation of such an order. Furthermore, we proposed[56] that any person or organisation heard by the court with regard to a suppression order should have a right of appeal against the court's decision, while those that did not appear should only be able to appeal by leave of the appellate court. Submissions and consultations generally endorsed the proposal, although the

53. *Re Central Independent Television Plc* at 8-9.
54. By way of analogy, the High Court has held that a party applying for preliminary discovery under Pt 3 r 1(1) of the *Supreme Court Rules 1970* (NSW) must show that "the order sought is necessary in the interests of justice; in other words, the making of the order is necessary *to provide him with an effective remedy* in respect of the actionable wrong of which he complains" (emphasis added): *John Fairfax & Sons Pty Ltd v Cojuangco* (1988) 165 CLR 346 at 357.
55. NSWLRC DP 43 at para 10.104.
56. NSWLRC DP 43 at para 10.105.

Joint Broadcasters' Submission stated that the media should have a right of appeal without restriction.[57]

10.22 The Commission has given more detailed consideration to the question of standing, and makes the following recommendations. A court should be empowered, on its own motion, to order that no report of a proceeding be published. Additionally, a person who can satisfy the court that he or she has a sufficient interest in the matter should be able to apply to the court for a suppression order. The categories of persons eligible to be heard on an application for the making, variation or revocation of a suppression order should comprise:

- the person applying for the suppression order;
- the media; and
- anyone else the court regards as having a sufficient interest.

10.23 The Commission has changed from "special" to "sufficient" the level of interest a person is required to demonstrate in order to be heard. This is because the concept of "sufficient interest" is well established in the rules of administrative law that govern the issue of standing to sue.

10.24 The same categories of persons as are mentioned in the previous paragraph should be able to appeal against a decision relating to a suppression order. The initial applicant for the suppression order, together with anyone previously heard on a matter relating to that suppression order, should be entitled to be heard on the appeal. So long as leave is granted, it should also be permissible for any other person with **a** sufficient interest to be heard.

Interim suppression orders

10.25 Additionally, courts should have the power to make interim suppression orders of no more than seven days' duration prior to a final determination of the matter, either on the court's own motion or on application from a person with a sufficient interest in the matter. The court, in exercising this power, must find it to be necessary for the due administration of justice that (a) an interim suppression order should be made and (b) that it should be made without delay. This means, in essence, that the case for immediately suppressing reporting of the relevant material must be clear, but the hearing of an application for a "regular" suppression order would unduly delay the trial being conducted.

57. Australian Broadcasters, *Submission* at 8.

10.26 If possible, the issue of whether a "regular" suppression order is justified should be determined within the period of operation of the interim order. It should therefore be provided that, during the currency of an interim suppression order, a second or subsequent interim suppression order, or a "regular" suppression order, may be applied for and granted, with the court empowered to stipulate that it should take effect upon the expiry of the current interim order.

10.27 Persons wishing to be heard on an application for an interim order should be required to seek the court's leave, with those categories mentioned in paragraph 10.22 above being eligible. Appeals relating to interim suppression orders should be open to those already heard on the matter or by others with a sufficient interest, providing they have obtained the appellate court's leave.

A strict liability offence

10.28 At paragraph 10.5 and following we discussed the mental element necessary for establishing liability for the breach of a suppression order, and noted that in recent times the move has been away from the designation of statutory offences as creating an absolute liability. The Commission likewise believes it inappropriate to designate breach of a statutory prohibition against publication as an offence of absolute liability. On the other hand the onus should not fall on the prosecution to prove as part of its case that the defendant was aware of the prohibition.

10.29 In the Commission's view the recommended legislative provision should be one of strict liability. A person publishing material the subject of a suppression order will prima facie be guilty of an offence. If, however, he or she can adduce evidence showing the existence of an honest and reasonable belief that the activity was not criminal, then the burden will fall on the prosecution to negate this. An example of such material might be incorrect advice from the court in response to an inquiry by the defendant as to whether a suppression order had been issued.[58]
In two cases the Commission is aware of, statutory provisions dealing with restrictions on publication state specifically that the offence created by the section is one of strict liability.[59] To avoid any uncertainty, the Commission recommends the same course be adopted in this case.

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58. An issue raised in consultations was the lack of a central register through which the media might ascertain whether a suppression order has been made. See ch 15 regarding the practical implications of measures designed to improve such communication.
59. *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 105(5) (s 105(1) creates a presumption against publication); *Crimes Act 1900* (NSW)

Material to which suppression orders apply

10.30 In making a suppression order, a court should be able to restrict the reporting of all or any part of proceedings. This has traditionally included such elements as evidence tendered during proceedings, and material that would lead to the identification of a party or witness. However, the Commission recommends that restrictions as to publication should be able to extend to all parts of proceedings, including oral submissions by counsel and evidence tendered but not admitted. This power should also apply to cases where proceedings are held in private (*in camera*), as it is unclear at common law whether in these circumstances a restriction on publication would automatically apply.[60]

s 562NC(5) (s 562NC(1) gives the court discretion to issue a suppression order).

60. *Attorney General (NSW) v Mayas* (1988) 14 NSWLR 342 at 346.

RECOMMENDATION 22

A new provision should be introduced into 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 this is necessary for the administration of justice, either generally, or in relation to specific proceedings (including 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 and oral submissions, as well as material that would lead to the identification of parties and witnesses involved in proceedings before the court. The new section should not replace the common law, and should operate alongside existing statutory provisions that restrict publication unless a successful application has been made rendering such a provision inapplicable in the circumstances. However, section 119 of the *Criminal Procedure Act 1986* (NSW), together with any other provisions contained in other statutes which give courts discretion if grounds are affirmatively made out to impose suppression orders, should be repealed.

A section should be introduced into the *Crimes Act 1900* (NSW) making breach of an order a criminal offence. The offence created by this section should be one of strict liability.

The *Evidence Act 1995* (NSW) should also expressly provide that a person with a sufficient interest in the matter should be eligible to apply to the court for the making, variation or revocation of a suppression order. The applicant for a suppression order, together with the media and anyone else regarded by the court as having a sufficient interest may be heard on the application. The same categories of persons should also be able to appeal in relation to a suppression order. Such a person, if heard previously on the original application, should be entitled to be heard on the appeal. Any other person with a sufficient interest may seek leave to be heard.
An appeal against a decision should be heard by a single judge of the Supreme Court, except where a suppression order was made in the Supreme Court, in which case an appeal should be heard by the Court of Appeal.

The court should also be empowered to make an interim suppression order, having a maximum duration of seven days, before proceeding to a final determination. The court should have the power to grant subsequent interim suppression orders.

11. Access to and reporting on court documents

- Introduction
- Current law
- Discussion Paper 43
- Submissions to DP 43
- The issues
- The Commission's view
- Conclusion

INTRODUCTION

11.1 The belief that courts and court proceedings should be open and accountable is known as the principle of open justice and is both an adjunct of free speech and an accepted doctrine within the Australian justice system.[1] In John Fairfax & Sons Limited v Police Tribunal, Justice McHugh said:

> The fundamental rule of the common law is that the administration of justice must take place in open court. A court can only depart from this rule when its observance would frustrate the administration of justice or some other public interest for whose protection Parliament has modified the open justice rule. The principle of open justice also requires that nothing should be done to discourage the making of fair and accurate reports of what occurs in the courtroom.[2]

11.2 To enable the public to exercise their right to scrutinise and criticise courts and court proceedings, and to make fair and accurate reports of what occurs in the courtroom, it is arguably a logical extension to allow public access to, and reporting on, court documents. This chapter examines whether there should be a public right of access to court documents and, if so, to what documents such a right should apply, what should be the parameters of the right and whether the right should extend to publishing the contents of such documents.[3]

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1. See, for example, *Russell v Russell* (1976) 134 CLR 495 at 520, and the cases cited therein.
2. John Fairfax & Sons Limited v Police Tribunal (1986) 5 NSWLR 465 at 476-477, cited with approval in Australian Securities and Investment Commission v Rich (2001) 51 NSWLR 643 at para 21. See also Attorney General v Leveller Magazine [1979] AC 440
at 450: "The application of this principle of open justice has two aspects: as respects proceedings in the court itself it requires that they should be held in open court to which the press and public are admitted and that, in criminal cases at any rate, all evidence communicated to the court is communicated publicly. As respects the publication to a wider public of fair and accurate reports of proceedings that have taken place in court this principle requires that nothing should be done to discourage this."
3. See also ch 9, which deals with the defence to a charge of contempt that a publication is a fair and accurate report of proceedings that take place in open court; and ch 10 which deals with suppression orders.

CURRENT LAW

11.3 At common law, a court file is not a public register and there is no public right to inspect court files.[4] Access by non-parties to documents on file in a court registry is regulated by statute or rules of court. The approach taken to regulating access to documents varies among Australian courts. In some jurisdictions, access is given as of right to the entire file,[5] while other court rules restrict access to specific documents[6] or grant access to a file only by leave of the court.[7]

New South Wales

11.4 In New South Wales, access to court documents in the Supreme, District and Local Courts is governed, respectively, by the *Supreme Court Rules 1970* (NSW) Part 65 rule 7, the *District Court Rules 1973* (NSW) Part 52 rule 3(2) and the *Local Courts (Civil Claims) Rules 1988* (NSW) Part 39 rule 4.

11.5 The *Criminal Procedure Amendment (Justices and Local Courts) Act 2001* (NSW), which has been assented to but has not yet commenced,[8] amends the *Criminal Procedure Act 1986* (NSW) with respect to committal proceedings before magistrates and proceedings for summary and indictable offences. The amending Act inserts s 314 which provides for media access to court documents. Once that Act commences, the media will be entitled to inspect: the indictment; the court attendance notice or other document commencing the proceedings; witnesses' statements tendered as evidence; the brief of evidence; the police fact sheet (in the case of a guilty plea); transcripts of evidence; and any record of a conviction or an order.[9] However, inspection of these documents can only take place after an

4. *Smith v Harris* [1996] 2 VR 335.
5. See, for example, *Rules of the Supreme Court 1996* (Vic) r 28.05 which provides: "When the office of the court is open, any person may, on payment of the proper fee, inspect and obtain a copy of any 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, r 20.
6. See, for example, *High Court Rules 1952* (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.
7. See, for example, *Family Law Rules 1984* (Cth) O 5 r 6.
8. Only Schedule 1[17] of the Act, which concerns the description of offences, has commenced.
9. *Criminal Procedure Amendment (Justices and Local Courts) Act 2001* (NSW) s 314(2).

application is made to the registrar within two days after the proceedings are finally disposed of and where the purpose of inspection is to make a fair report of the proceedings for publication.[10] As well, the granting of access will be subject to any court order or overriding law and the registrar need not grant access to documents not in his or her possession or control.[11]

11.6 *Supreme Court Rules 1970* (NSW) Part 65 rule 7(1) provides that "a person may not search in a registry for or inspect any document or thing in any proceedings except with the leave of the court". The discretionary basis on which that leave is granted or withheld is set out in *Supreme Court Practice Note 97* (1998) ("Practice Note 97").[12] Access will normally be granted to non-parties to:

- pleadings and judgments in proceedings that have been concluded, except in so far as a confidentiality order has been made;
- documents that record what was said or done in open court;
- material that was admitted into evidence; and
- information that would have been heard or seen by a person present in open court.[13]

Even if documents or information fall within these categories, the judge or registrar still has a discretion to refuse access.

11.7 Access to other material is granted only if the judge or registrar is satisfied that exceptional circumstances exist.[14] Practice Note 97 gives the following rationale for this. In relation to affidavits and witness statements filed in proceedings, these are often never read in open court either because they contain matter that is objected to and rejected or because the matter has settled before coming on for hearing. These documents, as well as exhibits and pleadings, may contain matter that is "scandalous,

10. *Criminal Procedure Amendment (Justices and Local Courts) Act 2001* (NSW) s 314(1).
11. *Criminal Procedure Amendment (Justices and Local Courts) Act 2001* (NSW) s 314(3)-s 314(4).
12. "That Practice Note in turn reflects the underlying principles and the distinctions made in the case law which has developed over the last ten to twelve years both in Australia and the United Kingdom": *eisa Ltd v Brady* [2000] NSWSC 929 at para 15.
13. *Supreme Court Practice Note 97* (1998) para 2.
14. *Supreme Court Practice Note 97* (1998) para 2. This includes 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, for example, hand-up briefs.

frivolous, vexatious, irrelevant or otherwise oppressive" and which may, at the hearing, be ruled inadmissible.[15] Practice Note 97 also explains that access is not normally allowed to pleadings and judgments prior to the conclusion of the hearing because material that is ultimately not read in open court or admitted into evidence would be seen.[16]

11.8 Practice Note 97 further points out that even where material has been read in open court or is included in pleadings, there may be good reason for refusing access:

> Material that has been rejected or not used or struck out as being scandalous, frivolous, vexatious, irrelevant or otherwise oppressive, may still be legible. Where access to material would otherwise be unobjectionable, it may concern matters that are required to be kept confidential by statute … or by public interest immunity considerations …[17]

11.9 Leave of the court is also required for access to documents relating to proceedings in the District Court[18] and the Local Courts.[19] In summary, the public does not have any general right of access to documents kept on the court file of proceedings. Nor does it appear to have any right of access to documents produced by one party to another on discovery or subpoena, without the documents actually being placed on the court file and leave being granted to search the file.[20] For a party or their legal advisor to disclose documents produced on discovery or subpoena to the media without the court's permission constitutes a breach of the implied undertaking not to use such documents for a "collateral purpose."[21]

Case law

11.10 In *Hammond v Scheinberg*,[22] Justice Hamilton dealt with an application by two of the plaintiffs that the Court give notice to the parties before allowing further media access to the affidavits. The plaintiffs objected to the Court having already given media access to affidavits without giving the parties notice of the application for access in accordance with *Supreme Court Rules 1970* (NSW) Part 65 rule 7 and

15. *Supreme Court Practice Note 97* (1998) para 3.
16. *Supreme Court Practice Note 97* (1998) para 4.
17. *Supreme Court Practice Note 97* (1998) para 5.
18. *District Court Rules 1973* (NSW) Pt 52 r 3(2).
19. *Local Courts (Civil Claims) Rules* 1988 (NSW) Pt 39 r 4(2).
20. See *Supreme Court Rules 1970* (NSW) Pt 65 r 7; *District Court Rules 1973* (NSW) Pt 52 r 3(2); *Local Court (Civil Claims) Rules 1988* (NSW) Pt 39 r 4(2).
21. *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.
22. *Hammond v Scheinberg* [2001] NSWSC 568.

Practice Note 97. His Honour held that a Supreme Court trial judge has power pursuant to the inherent jurisdiction of the Court, or under s 23 of the *Supreme Court Act 1970* (NSW), to determine all matters relating to granting access to any person to any material in evidence in the trial, including transcript of evidence, affidavits and exhibits.[23] Accordingly, he held that it was within these general powers, independently of Part 65 rule 7 and Practice Note 97, to allow media access to affidavits formally "read" (though not read aloud) in court in the proceedings without giving to the parties notice of the application for access.

11.11 There have been a number of cases where the courts have considered whether there were exceptional circumstances which warranted granting access to documents, to which access would otherwise have been refused.

11.12 In *Australian Securities and Investments Commission v Adler*,[24] Justice Santow granted media access to the Statement of Claim on the basis that the interests of justice would not be prejudiced, as the subject matter of the pleading was already in the public domain. In a subsequent application for media access to the defences filed,[25] Justice Santow allowed the application "in the interests of open justice" noting that "no countervailing prejudice to a fair trial"[26] had been identified and it was likely that the defence would be read in open court. His Honour was persuaded by the fact that there was considerable public interest in the proceedings. His Honour observed that "the Court must be the custodian of a responsibility to ensure that its processes are transparent and that justice occurs in a public way".[27] His Honour further observed that:

> If reporting is to be informed the media do, generally speaking, need access to the underlying documents before the court. That consideration though of great importance must not prejudice a fair trial.[28]

11.13 In *Idoport Pty Ltd v National Australia Bank Ltd*,[29] Justice Einstein granted public access to the pleadings because of the "crucial significance of the

23. *Hammond v Scheinberg* at 52.
24. *Australian Securities and Investments Commission v Adler* [2001] NSWSC 644.
25. *Australian Securities and Investments Commission v Adler* (2001) 39 ACSR 216.
26. *Australian Securities and Investments Commission v Adler* at para 7.
27. *Australian Securities and Investments Commission v Adler* at para 9.
28. *Australian Securities and Investments Commission v Adler* at para 10.
29. *Idoport Pty Ltd v National Australia Bank Ltd* [2000] NSWSC 769.

administration of justice taking place in open court",[30] because the pleadings would be referred to during the hearing, at which the public could be present and because the pleadings, in the circumstances of the case, ought to be regarded as already in the public domain.

11.14 In *Australian Securities and Investment Commission v Rich*,[31] Justice Austin dealt with what were advanced by counsel opposing access to affidavits as qualifying principles to the doctrine of open justice. Although His Honour ultimately decided, on the facts of that case, that media access to the affidavits *should* be granted, His Honour took account of these qualifying principles.
It is useful to set them out here as relevant considerations in resolving how a right of access to court documents should be framed. The arguments were as follows:

1. It would be unfair to release the evidence of one party, presented, for example, at an ex parte hearing, before the other party had had a chance to reply. However, His Honour was of the view that the principle of open justice entails that "when the Court makes quite significant orders on an ex parte application, the basis for the making of those orders must be available so that the court is accountable for what it has done".[32]

2. "Trial by media" may result from allowing public access to the court file prior to the hearing, a proposition which His Honour accepted carried weight.[33]

3. Public access to affidavits may lead to abuse of the "absolute privilege" protecting a party from liability for defamation.[34] In other words, the media, if granted access to affidavits, may be free to publish defamatory material contained in the affidavits, relying on the defence of publication of a "fair protected report". His Honour was of the view that this is a relevant consideration in an application for access, but that it must be weighed against other factors.[35]

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30. *Idoport Pty Ltd v National Australia Bank Ltd* at para 24.
31. *Australian Securities and Investment Commission v Rich* (2001) 51 NSWLR 643.
32. *Australian Securities and Investment Commission v Rich* at para 26.
33. *Australian Securities and Investment Commission v Rich* at para 27-28. See *Stonham v Speaker of the Legislative Assembly of New South Wales (No 1)* (1990) 90 IR 325 at 333.
34. See *Defamation Act 1974* (NSW) s 24.
35. *Australian Securities and Investment Commission v Rich* (2001) 51 NSWLR 643 at para 29-33.

4. Access should be denied if release of information will only satisfy "prurience" and serve no public interest. His Honour accepted that considerations of privacy were relevant but needed to be weighed against the principle of open justice.[36]

5. Access should be denied if release of information might jeopardize a negotiated arrangement between the parties.[37]

6. Allowing media access to affidavits runs the risk of misleading reporting, as the media may not distinguish between admissible and non-admissible evidence.[38]

7. Access should be denied if commercial confidentiality attaches to the documents.[39]

11.15 On the other hand, in *eisa Ltd v Brady*,[40] the Court did not consider that there were exceptional circumstances warranting a grant of access. In that case, Justice Santow denied the media access to the Statement of Claim and Defence. His Honour was concerned that these particular pleadings contained serious accusations that "may not reflect what is ultimately pressed in the actual court proceedings when they occur or where the pleadings change in light of the pre-trial stages including new evidence".[41] His Honour was generally concerned that "if it became the norm for courts to release to the press pleadings not yet heard and tested in open court, serious and damaging allegations could be put in pleadings for the purpose of their Press exposure relatively free of defamation risk".[42]

DISCUSSION PAPER 43

11.16 In Discussion Paper 43 ("DP 43"),[43] the Commission was of the view that the law surrounding media reporting on court documents needed clarification. In order to give full rein to the principle of open justice, the Commission proposed (Proposal 22) that there should be a general public right of access to those court documents:

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36. *Australian Securities and Investment Commission v Rich* at para 34-36.
37. *Australian Securities and Investment Commission v Rich* at para 37-38.
38. *Australian Securities and Investment Commission v Rich* at para 39-40.
39. *Australian Securities and Investment Commission v Rich* at para 43.
40. *eisa Ltd v Brady* [2000] NSWSC 929.
41. *eisa Ltd v Brady* at para 18.
42. *eisa Ltd v Brady* at para 20.
43. NSW Law Reform Commission, *Contempt by Publication* (Discussion Paper 43, 2000) ("NSWLRC DP 43").

- admitted into evidence in proceedings in open court;
- read out, or read out as to the relevant part, in open court; or
- comprising part of the pleadings, information, indictment or summons on which the proceedings were based.

11.17 It was proposed that "documents" would include electronic material and sound or visual recordings. It was also proposed that a right of access should be subject to any order made by the court restricting access to such documents.[44]

11.18 In Proposal 23, the Commission proposed that legislation should confer a public right to publish the contents of, or a fair and accurate summary of the contents of, such documents (subject to any restriction on publication ordered by the court). In addition, the Commission proposed that courts establish a system to facilitate ready access by non-parties to the relevant court documents.[45]

SUBMISSIONS TO DP 43

11.19 The Australian Broadcasting Corporation[46] and a collective of Australian broadcasters[47] agreed with both Proposals 22 and 23 but submitted that the situation in relation to facts sheets and hand-up briefs, not marked as an exhibit or read out in open court, required clarification. ATN Channel 7 was similarly concerned that facts sheets may not come within the definition of "documents" and that the media was uncertain whether or not they were reportable, yet these were the more readily available documents on which the media relied.[48] In addition, the Joint Broadcasters' Submission suggested that the media should have access to "any document relied on in open court."[49]

11.20 The Australian Press Council was also in agreement with both Proposals 22 and 23, subject to the limitation of circumstances in which lawful orders for restricted access are possible.[50] The Council did not elaborate on what it thought those limitations should be.

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44. NSWLRC DP 43, Proposal 22.
45. See ch 15 of this Report, "The Media and the Courts".
46. ABC, *Submission 2* at 3.
47. Australian Broadcasters, *Joint Submission* at 10.
48. ATN Channel 7, *Consultation*.
49. Australian Broadcasters, *Joint Submission* at 10.
50. Australian Press Council, *Submission* at 7.

11.21 Mr Norris, Senior Solicitor, Crown Solicitor's Office supported the proposals, with the qualification that a statement of facts should be a document "admitted into evidence" and for which, therefore, there should be a general right of access.[51]

11.22 News Limited[52] and TCN Channel 9[53] both supported Proposal 22. TCN Channel 9 submitted that "the ability to report accurately relies on access to documents". Neither commented on Proposal 23.

11.23 The New South Wales Industrial Relations Commission, in support of dot point one of Proposal 22, and, by implication, of dot point two, submitted that the argument can be made that if journalists are allowed to take down notes during the trial, then they ought to have access to documents that are admitted in evidence in open court. This, it was argued, would aid them in reporting court proceedings more accurately. Giving access imposes a burden on judges but not giving access imposes burdens on the media.[54]

11.24 The New South Wales Industrial Relations Commission was, however, concerned that giving access to documents to the media would require giving access to the public, which could, in certain situations, compromise the administration of justice.
The example given was the situation where a person against whom an apprehended violence order is sought gains access to court documents in order to track down the people who gave evidence against him or her.[55]

11.25 The New South Wales Bar Council was in support of a general right of access to documents admitted into evidence in proceedings in open court, or read out in open court, but was of the opinion that giving access to pleadings merely relied on in a proceeding in open court may result in injustice.[56] It submitted that in many pleadings, scurrilous allegations are made and, if published, may cause damage to the parties.

11.26 The Law Society of New South Wales disagreed with Proposals 22 and 23 submitting that:

> there are good reasons that general access to such material [as that specified in Proposal 22] ought to be restricted to

51. D Norris, *Submission 3* at para 101.
52. News Limited, *Consultation*.
53. TCN Channel 9, *Consultation*.
54. NSW Industrial Relations Commission, *Consultation*.
55. NSW Industrial Relations Commission, *Consultation*.
56. NSW Bar Council, *Consultation*.

> circumstances where a person has a legitimate forensic reason to have access.[57]

11.27 In support of this view, the Law Society pointed to problems that have arisen out of television replay of the videotaped records of interview of suspects ("the ERISP") or of videotapes of occasions where police have returned a suspect to a crime scene and carried out what is known as a "walk through". The Law Society argued that this material was particularly likely to stay in the minds of jurors and had the potential to be prejudicial. This takes on greater significance in light of the fact that the time lapse between the committal hearing and trial is getting shorter. The Law Society pointed out that:

> material produced to courts dealing with bail applications has sometimes been prematurely displayed in print or electronic media and that material tendered at committal has been prematurely reprinted or displayed on television (in circumstances where the material may never be exhibited at trial because of its prejudicial nature).[58]

11.28 The Law Society also questioned whether access should be given to the first set of facts presented by the police at preliminary proceedings, which routinely include admissions made by the accused, material that may be ruled inadmissible at the trial.[59]

11.29 The Law Society did not favour giving the magistrate in the bail application the power to block access to material.[60] The Law Society's rationale for this was that it is unreasonable to make defence lawyers, who may not themselves have access to all the material (such as an ERISP) at the time of the bail application, responsible to alert the court to inadmissible material; nor should responsibility fall on the magistrate, who may not even be aware of the existence of certain material, to issue a suppression order.

It also pointed out that magistrates would be hard pressed to find the time to hear access applications, in addition to their normal workload. It preferred that applications for access to material presented at preliminary proceedings be made to the Attorney General. It also submitted that, because it would be difficult to know in advance what evidence may be inadmissible in the trial, media reporting on material not yet

57. Law Society of NSW, *Submission* at para 46.
58. Law Society of NSW, *Submission* at para 46.
59. Law Society of NSW, *Consultation*.
60. Law Society of NSW, *Consultation*.

presented (or not presented
at all) at the trial should be delayed until the trial is concluded.[61]

11.30 The Police Media Unit also expressed concern regarding access to ERISPs. In addition, it submitted that the publication of material obtained through covert surveillance, especially when the surveillance was ongoing, may jeopardise the particular, or similar, surveillance operations and even put those involved at risk.[62]

11.31 The Director of Public Prosecutions ("DPP") did not agree with Proposals 22 and 23 insofar as they related to criminal proceedings. He submitted that:

> access should be denied to the media until the conclusion of the proceedings or until the Court makes a specific order authorising access in the proceedings. In the absence of a Court order, the denial of access should apply until the conclusion of the sentencing proceedings, and until the conclusion of summary proceedings, where relevant.[63]

11.32 The DPP submitted that a general right of access during a trial or a committal hearing was "fraught with danger". Even under the current system, where access to the Court file is only possible by leave of the Court, he stated that there were many instances where the media has inadvertently gained access to, and published, evidence obtained on a *voir dire* (that is, in the absence of the jury) and subsequently rejected by the court, or material which was the subject of a suppression order, or material which was ruled, in part, inadmissible, or was nor relied on. The DPP submitted that the publication of such material had the potential to prejudice the outcome of the proceedings.

11.33 The DPP also submitted that media reporting, particularly reporting verbatim, of witnesses' statements could deter those witnesses from giving evidence in subsequent trial proceedings. Further, media reporting of the contents of police briefs of evidence tendered at a committal hearing (which may contain much prejudicial material subsequently excluded by the trial judge on a discretionary basis) had the potential to prejudice a fair trial.
The DPP also drew attention to instances where the media have obtained, and improperly published, ERISPs. Finally, the DPP submitted that if a broad right of access *were* to be given, it should not apply to video or audiotapes, nor to

61. Law Society of NSW, *Consultation*.
62. Police Media Unit, *Consultation*.
63. N Cowdery QC, *Submission* at 3.

photographs, being material which has a "greater impact and potential to influence than other documentary material".[64]

11.34 The New South Wales Legal Aid Commission was concerned that the media may re-use material, originally obtained for reporting purposes, for subsequent purposes for which it was never intended. The example it gave was where a television program designed merely to entertain rather than inform incorporates material from court proceedings.[65]

11.35 During consultations with several government lawyers, it was suggested that there should be a provision in the legislation to prevent certain material submitted in committal proceedings, for example, names of complainants in sensitive cases, being published. Some participants expressed the view that there should be no right of access to court files. It was also submitted that the term "right" of access should not be used.[66]

THE ISSUES

Informed reporting

11.36 One of the key issues that must be considered is whether better access to court documents would lead to better reporting by the media, and, if so, what weight should be given to this. It is an issue going to the operation of open justice. It is not always practicable, or even possible, for a media organisation to have a representative in attendance for the duration of every court proceedings. Hence, the media will not always know everything that has transpired in a trial or hearing.[67] Furthermore, there is an increasing trend towards giving evidence in documentary form and a practice of affidavits not being read aloud in open court, but formally designated as "read" by counsel to the court.[68] As well, in a civil matter, one party, but

64. N Cowdery QC, *Submission* at 4.
65. NSW Legal Aid Commission, *Consultation*.
66. Government Lawyers, *Consultation*.
67. Mr Burgess, Lecturer in Journalism at the University of Southern Queensland, has noted the difficulties involved in preparing a fair and accurate report: "Trials can last for weeks or months, and often all the evidence given on a particular day will be in support of one side only. Additionally, the space available for court reports is limited": C Burgess, *Submission 2*.
68. In *Hammond v Scheinberg*, Justice Hamilton observed that this practice was adopted to save court time and costs and "not for the purpose of removing from public hearing and scrutiny the affidavit material which would formerly

not the other, may make documents available to the media, giving a one-sided view of proceedings.

11.37 Clearly, if the media does not have all the information regarding a case, the reporting to the public is less reliable. If, on the other hand, there is a general right of access to the documents described in Proposal 22, it can be argued that the media will obtain a better understanding of the facts and issues involved in a case, and "fair and accurate" reporting of court proceedings would result.[69] This was succinctly put by Justice Santow in *Australian Securities and Investments Commission v Adler*, as quoted in paragraph 11.12 above: "If reporting is to be informed the media do, generally speaking, need access to the underlying documents before the Court."[70] However, Justice Santow went on to say:
"That consideration, though of great importance, must not prejudice a fair trial."[71]

Balancing competing principles

11.38 As Justice Santow rightly observed, the concern to facilitate fair and accurate reporting of court proceedings must be balanced against the need to protect the parties to a hearing, in particular the accused in a criminal trial, from prejudice to the proceedings.

11.39 Justice Austin, in *Australian Securities and Investment Commission v Rich*, after conveying the fundamental importance of the principle of open justice, emphasized that:

> free access by the media to the contents of a court file is not, in absolute terms, a proposition flowing from the principle of open justice. There must be some limits to the extent to which any non-party is entitled to have access to material, especially where the material has not been the subject of evidence in open court.[72]

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have been read aloud in court and available to that scrutiny": (2001) 52 NSWLR 49 at 54.

69. See ch 9, "The Fair and Accurate Reporting Principle".
70. *Australian Securities and Investments Commission v Adler* (2001) 39 ACSR 216 at para 10.
71. *Australian Securities and Investments Commission v Adler* at para 10.
72. *Australian Securities and Investment Commission v Rich* (2001) 51 NSWLR 643 at para 23.

11.40 Justice Santow in *eisa Ltd v Brady* pointed to the balancing exercise between open justice and a fair trial:

> Thus adopting a single bright line rule that access should *always* be allowed – or indeed *never* – in either case ignores that there are genuinely competing principles to be weighed. There is open justice, its processes made as accessible as possible through a properly informed Press reporting to the wider community and which seek to be contemporaneous. There is the need to avoid injustice and unfair prejudice in the trial from disclosure of serious and as yet untested or incompletely tested allegations, where prematurity of disclosure is at issue and where there is likely to be no redress in defamation, no matter how malicious the pleaded allegation. Neither principle has a priori ascendancy.
> Both are subordinated to the interests of justice in which the community is vitally concerned as well as the parties.
> These questions must therefore be tested, case by case, against that overriding purpose of the interests of justice.[73]

11.41 Likewise, the Hon J J Spigelman, Chief Justice of New South Wales, in his keynote address to the 31st Australian Legal Convention, said that the principle of open justice "operates subject only to the overriding obligation of a court to deliver justice according to law".[74]

11.42 Paradoxically, enlarging the media's access to court documents imposes a substantial burden on the media to ensure that what is published is, in fact, a fair and accurate report of the court's proceedings, or in any other respect free of prohibitions or restrictions on reporting, and thereby protected from a charge of contempt.[75] This signals the need for journalists to ensure that they well understand what material can be published, including understanding what evidence is inadmissible, such as evidence given on a *voir dire*, and should therefore not be reported.
In Chapter 15, "The Media and the Courts", the Commission discusses ways to assist the media in their ability to report without prejudicing court proceedings.

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73. *eisa Ltd v Brady* [2000] NSWSC 929 at para 36, quoted with approval by Justice Santow in *Australian Securities and Investment Commission v Rich* (2001) 51 NSWLR 643 at para 23.
74. J J Spigelman "Seen to be done: the principle of open justice – part 1" (2000) 74 *ALJ* 290 at 292.
75. R McColl "President's report" (2001) 21 *Australian Bar Review* 125 at 128.

11.43 The DPP illustrated the dangers of allowing a general right of access in criminal trials by drawing attention to the instances where the media have obtained leave to access the court file and then inadvertently published material obtained on a *voir dire* and later rejected by the court, or the subject of a suppression order or inadmissible material or material not relied on. While these are legitimate concerns, it has to be questioned whether the incidence of improper reporting justifies complete restriction. As suggested by Justice Santow, adopting a single rule that access should never be allowed ignores the competing principle of open justice.
Even with restrictions on accessing documents, there is still the danger that the media will inadvertently report prejudicial or inadmissible material it has heard in open court. Furthermore, the Commission recommends the safeguard that any right of access be subject to orders of the court.

Access to particular categories of documents

11.44 A number of submissions expressed particular concern in relation to giving access to pleadings and the court file generally, video and audio recordings (including ERISPs), witnesses' statements, photographs, police surveillance material and documents relating to bail applications and committal hearings. The issue that arises is whether, if a general right of access is given to court documents, specific categories of documents, or even documents relating to specific proceedings, should be excepted.

Pleadings

11.45 The Commission notes the concern that pleadings often contain scurrilous allegations that, if published, may cause damage to the parties and result in injustice. As set out in paragraph 11.7 above, Practice Note 97 similarly explains that access is not normally allowed to pleadings and judgments prior to the conclusion of the hearing because material that is ultimately not read in open court or admitted into evidence, possibly because it is rejected or struck out as being scandalous, frivolous, vexatious, irrelevant or otherwise oppressive, would be seen. The issue therefore arises whether these documents should be excepted from a general right of access to court documents.

The court file

11.46 Documents which are kept on the court file include the originating process, transcripts of evidence, witness statements, affidavits, the associate's records of proceedings, orders of the court, notices of motion and documents marked for identification, if these are not with exhibits. Exhibits are normally too bulky to be kept on the court file.

11.47 ***Affidavits and witnesses' statements*.** Practice Note 97 explains that affidavits and witnesses' statements are rarely read in open court (even in the purely formal sense), either because they contain matter that is objected to and rejected or because the matter has settled before coming on for hearing. As with pleadings, these documents may contain matter that is "scandalous, frivolous, vexatious, irrelevant or otherwise oppressive" and which may, at the hearing, be ruled inadmissible. In fact, affidavits may have an even greater potential to cause injustice than pleadings. There is also the possibility that media reporting, particularly reporting verbatim, of witnesses' statements could deter those witnesses from giving evidence in subsequent trial proceedings.[76] Should these documents, therefore, be excepted from a general right of access to court documents?

Committal hearings

11.48 In *David Syme & Co Ltd v Hill*, the Court observed that:

> [A committal] is an administrative step, albeit an important one, in the criminal process. The need for the public to know what is happening at a committal is of less significance than its need to know what is happening at a trial. Indeed, I consider it is strongly arguable that the less publicity attaching to a committal the better. I say that for the reason that often at a committal only one side of the case is fully presented to the magistrate, namely the case for the Crown.[77]

11.49 Similarly, in *Hinch v Attorney General (Vic)*, Chief Justice Mason noted that a report of committal proceedings has a "special capacity to influence the minds of potential jurors"[78] because the evidence led at the committal is directed to the very issues that will arise at trial but may include evidence inadmissible at that trial. Nevertheless, His Honour continued:

> [t]he reporting of committal proceedings is an example of the reporting of public affairs, notwithstanding that the publication of the report may cause prejudice to the accused at his trial by prejudicing the mind of potential jurors in relation to the issues to be determined at the trial. … [I]t is a case where on balance the

76. N Cowdery QC, *Submission* at 2.
77. *David Syme & Co Ltd v Hill* (VSC, Beach J, 10 March 1995, unreported) at 6 cited with approval in *Herald & Weekly Times Ltd v Magistrates' Court of Victoria* [2000] 2 VR 346 at para 6.
78. *Hinch v Attorney General (Vic)* (1987) 164 CLR 15 at para 21.

> wider interests of the administration of justice are thought, as the law currently stands, to be better served by allowing publicity.[79]

11.50 In their empirical research of jury trials, *Managing Prejudicial Publicity*,[80] the authors reported that there was a comparatively low incidence of jurors recalling reports of preliminary hearings, including committal hearings.[81] Predictably, the incidence of recall was higher when the period between committal and trial was relatively short.[82]

11.51 It should be noted that the Law Society has observed that the time between a committal hearing and the trial is getting shorter, which presumably increases the potential for juror recall of prejudicial publicity surrounding the committal.[83] As well, as it is the practice to conduct committal proceedings by way of documentary evidence, if access were freely given to committal documents, media coverage of these hearings would in all likelihood increase.

11.52 In *Herald & Weekly Times Ltd v Magistrates' Court of Victoria*,[84] the Court did not accept that the magistrate in a committal hearing did not have power to permit the public and reporters to see parts of the hand-up brief, or witness statements, otherwise:

> reporting of committal proceedings would in many cases be in practical terms impossible. This would be a serious invasion of the principle of open justice.[85]

11.53 However, a distinction needs to be made between rejecting the proposition that a magistrate can *never* allow access to the documents in committal hearings and holding that the public should, as of right, have access to all such documents.

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79. *Hinch v Attorney General (Vic)* at para 22.
80. M Chesterman, J Chan and S Hampton, *Managing Prejudicial Publicity* (Justice Research Centre, Law and Justice Foundation of NSW, 2001).
81. Of 29 trials that received specific pre-trial publicity, reports of preliminary hearings of 11 trials, or 38%, were recalled by at least one juror: Chesterman, Chan and Hampton, Table 3.1 at 70 and para 173.
82. In relation to a very small number of trials where this period was less than six months, the incidence of recall was 54%: Chesterman, Chan and Hampton at para 195.
83. Law Society of NSW, *Consultation*.
84. *Herald & Weekly Times Ltd v Magistrates' Court of Victoria* [2000] 2 VR 346.
85. *Herald & Weekly Times Ltd v Magistrates' Court of Victoria* at para 39.

11.54 The Court agreed with the judge at first instance that "a proceeding is properly conducted in open court if the public has the right of admission to that court which is reasonably and conveniently exercisable"[86] and does not "become 'closed' if a request by a member of the public or the press for such access were refused in the committal proceeding".[87] The Court held that the requirement to hold proceedings in the Magistrate's Court in open court[88] gave no *right* to access to the charge sheet and witness statements in a committal.[89] However, the Court commented that:

> if the press is entitled to report upon committal proceedings, it would seem desirable that reasonable access be afforded to enable a fair and accurate report to be made, unless considerations contemplated by s 126 of the [Magistrates'] Act or referred to by Beach, J in *David Syme & Co Ltd v Hill*, dictate otherwise.[90]

11.55 ***Statement of facts.*** The Commission notes the argument that a statement of facts should be a document "admitted into evidence" and for which, therefore, there should be a general right of access.[91] However, the Law Society questioned whether access should be given to the first set of facts presented by the police at preliminary proceedings, which routinely include admissions made by the accused, material that may be ruled inadmissible at the trial. Similarly, the DPP pointed out that police briefs of evidence tendered at a committal hearing may contain much prejudicial material subsequently excluded by the trial judge on a discretionary basis and therefore had the potential to prejudice a fair trial, if reported.

11.56 ***Hand-up brief.*** What is known colloquially as a "hand-up brief" is a brief of evidence handed up at a committal hearing. Section 48AA of the *Justices Act 1902* (NSW) provides for mandatory use of written statements in committal proceedings.[92] The documents in a hand-up brief can include transcripts, surveillance material,

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86. *Herald & Weekly Times Ltd v Magistrates' Court of Victoria* at para 40.
87. *Herald & Weekly Times Ltd v Magistrates' Court of Victoria* at para 40.
88. *Magistrate's Court Act 1989* (Vic) s 125(1).
89. *Herald & Weekly Times Ltd v Magistrates' Court of Victoria* at para 40.
90. *Herald & Weekly Times Ltd v Magistrates' Court of Victoria* at para 42.
91. D Norris, *Submission 3* at para 102.
92. *Justices Act 1902* (NSW) s 48AA: "Evidence for the prosecution in any committal proceedings must (subject to this section) be given by means of written statements which are admissible as evidence under section 48A." The *Justices Act 1902* (NSW) is to be repealed by the *Justices Legislation Repeal and Amendment Act 2001* (NSW), which was assented to on 19 December, 2001 but has not yet commenced.

ERISP transcript (and sometimes the ERISP audiotape itself), analyst's certificates in drug cases and photos.

11.57 One argument in favour of allowing access as of right to the hand-up brief is that ordinarily there will be no opening address and, unless the media is allowed access to the hand-up brief, it will be almost impossible to understand what is going on and produce a fair and accurate report. In particular, it can be difficult to understand cross-examination of witnesses without having access to the witnesses' statements. An inability to access the hand-up brief acts as a strong deterrent to reporting on committal hearings, which is not in the interests of open justice.

11.58 However, hand-up briefs can contain material that has the potential to be highly prejudicial if published, such as details of prior convictions and admissions or confessions, and which may be ruled inadmissible at the subsequent trial. The Commission notes that s 314(1) of the *Criminal Procedure Amendment (Justices and Local Courts) Act 2001* (NSW) will, when it commences, allow media access to the hand-up brief (but not access by the general public) only after application to the Registrar and only after the "criminal proceedings" (as distinct from the committal proceedings) are "finally disposed of".

THE COMMISSION'S VIEW

11.59 The Commission agrees with Justice Austin, in *Australian Securities and Investment Commission v Rich*, that:

> free access by the media to the contents of a court file is not, in absolute terms, a proposition flowing from the principle of open justice. There must be some limits to the extent to which any non-party is entitled to have access to material, especially where the material has not been the subject of evidence in open court.[93]

11.60 Equally, the Commission agrees with Justice Santow, in *eisa Ltd v Brady*, that "adopting a single bright line rule that access should *always* be allowed – or indeed *never* – in either case ignores that here there are genuinely competing principles to be weighed".[94] In particular:

93. *Australian Securities and Investment Commission v Rich* (2001) 51 NSWLR 643 at para 23.
94. *eisa Ltd v Brady* [2000] NSWSC 929 at para 36.

> there is the need to avoid injustice and unfair prejudice in the trial from disclosure of serious and as yet untested or incompletely tested allegations, where prematurity of disclosure is at issue and where there is likely to be no redress in defamation, no matter how malicious the pleaded allegation.[95]

11.61 It also needs to be emphasised that Justice McHugh, in *John Fairfax & Sons Limited v Police Tribunal*, stated that "nothing should be done to discourage the making of fair and accurate reports *of what occurs in the courtroom*" (italics added),[96] which is not necessarily the same thing as making fair and accurate reports of all that is pleaded or sought to be tendered as evidence. Likewise, the Court in *Attorney General v Leveller Magazine* said that nothing should be done to discourage the publication to a wider public of fair and accurate reports of proceedings *that have taken place in court*.[97]

11.62 The Commission notes that the majority of submissions were in favour of allowing the public access to any document, or part of a document, admitted into evidence in a criminal trial or civil proceedings held in open court, or read out in open court, subject to any suppression order.

11.63 The Commission does not agree that access to the documents included in Proposals 22 and 23 should only be given where there is "a legitimate forensic reason to have access".[98]
This negates the valid role of journalism in keeping the public informed about court hearings and exposing the judicial system to scrutiny. Although the Commission has reconsidered, in the light of submissions, exactly what court documents should be available to the public, it does not accept that the media should be denied access to all court documents because it does not have a "forensic reason" for accessing those documents.

11.64 The Commission notes the view that the media should not have access to court documents relating to criminal trials until the conclusion of proceedings or unless the court specifically authorizes access. Except for specific categories of documents and certain preliminary hearings, which the Commission considers below,

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95. *eisa Ltd v Brady* at para 36.
96. *John Fairfax & Sons Limited v Police Tribunal* (1986) 5 NSWLR 465 at 476-477, cited with approval in *Australian Securities and Investment Commission v Rich* (2001) 51 NSWLR 643 at para 21.
97. *Attorney General v Leveller Magazine* [1979] AC 440 at 450.
98. See Law Society of NSW, *Submission* at para 46. The Commission is assuming that in using the term "forensic reason", the Law Society means a reason directly related to the conduct of the trial or hearing.

it is difficult to see why the media should not be able to view documents that record what was said or done in open court or that were admitted into evidence in open court. In the Commission's view, a blanket restriction on media access to such documents until the conclusion of proceedings, at which time the proceedings may well have lost their "newsworthiness", is too great an interference with open justice.

11.65 Concerns that giving access to pleadings may lead to injustice are legitimate. Justice Santow in *eisa Ltd v Brady* expressed such a concern:

> if it became the norm for courts to release to the press pleadings not yet heard and tested in open court, serious and damaging allegations could be put in pleadings for the purpose of their Press exposure relatively free of defamation risk.[99]

11.66 His Honour noted that the particular pleadings to which access was being sought in that case contained serious accusations that "may not reflect what is ultimately pressed in the actual court proceedings when they occur or where the pleadings change in light of the pre-trial stages including new evidence".[100]

11.67 The Commission appreciates the potential for pleadings to contain scurrilous allegations, which may not be pressed at the hearing itself. Although it also needs to be borne in mind that pleadings must only contain a statement in summary form of the material facts on which the party pleading relies for their claim or defence, but not the evidence by which they are to be proved.[101] There is, therefore, less scope to make damaging allegations in pleadings than there is, for example, in affidavits.

11.68 Weighed against the concern that pleadings will contain damaging allegations is the reality that it may be difficult for the media to understand proceedings, and therefore report them accurately, without having access to pleadings, especially in light of the fact that pleadings are not usually read out in court.

11.69 The Commission is of the view that the concerns noted above would be addressed, and the media's need to have access to pleadings accommodated, by excluding access to pleadings merely placed on the court file, and pleadings filed in the early stages of proceedings and later amended. This would be achieved by allowing access to pleadings only to the extent their content is relied on in open proceedings and referred to as forming the basis of the case argued by the party. In other words, pleadings would need to have been "deployed" in the proceedings. This

99. *eisa Ltd v Brady* [2000] NSWSC 929 at para 20.
100. *eisa Ltd v Brady* at para 18.
101. *Supreme Court Rules 1970* (NSW) Pt 15 r 7(1).

approach accords with the observations of Justice Byrne in *Smith v Harris*[102] that "a document prepared for, filed and even served is not in that sense [that is, in the context of open justice] part of the court's proceedings, at least until it is deployed as part of the judicial process".[103] His Honour further observed that there is a significant distinction between a document filed in the registry and the hearing in open court and that this distinction touches the policy underlying the immunity against any legal action where what is published is a fair and accurate report of court proceedings.[104] Ultimately, His Honour held that no common law privilege based on the public interest in court proceedings is available to the publisher of the content of a document that has been filed in court but not used in the judicial process.

CONCLUSION

11.70 Overall, the Commission has concluded that the interests of open justice and due process of the law can best be served if access is made available, without application, to a reasonably broad range of court documents and access to other specific documents is made possible after successful application to the court.

11.71 The Commission recommends that public access to the following categories of documents be given:

- pleadings to the extent their content is relied on in open proceedings and referred to as forming the basis of the case argued by a party;
- judgments and orders;
- documents that record what was said or done in open court;
- documents that were admitted into evidence in proceedings other than bail and committal proceedings and coronial inquiries;
- written submissions, to the extent their content is relied on in open proceedings and referred to as forming the basis of the case argued by a party; and
- documents recording the offences with which a person has been charged in open court.

102. *Smith v Harris* [1996] 2 VR 335.
103. *Smith v Harris* at 341.
104. *Smith v Harris* at 341. Furthermore, "this distinction may be applicable, too, to affidavits which are filed in court and which may never be read or tendered" at 341.

11.72 In relation to the above categories of documents, there is a presumption of open access. This means that the onus will lie on those objecting to access to persuade the court that access should be prohibited or restricted. In all other cases, application for access to documents would need to be made to the court.

11.73 Specifically, access to documents in bail and committal hearings and coronial inquiries would only be granted upon application. This does not mean that access to such documents would never be possible. It merely represents a reversal of the presumption of open access otherwise applicable to the categories of documents set out in paragraph 11.71 above, and a shifting of the onus to persons seeking access. The court would not have the task of considering whether access should be denied. Instead, the person wanting access would have the burden of showing the court why access should be given.

11.74 The reasons for distinguishing criminal preliminary hearings and coronial inquiries are largely practical ones.
As referred to above, the empirical research in *Managing Prejudicial Publicity* suggests that there is no need to be overly concerned that a jury will recall media publicity of preliminary hearings. Nonetheless, a safeguard must be in place of preventing access to documents in certain circumstances. In the day-to-day running of these hearings, there are very real practical difficulties in making the magistrate or defence responsible for vetting all documents for their fitness for release to the public. In committals, the burden on the magistrate to go through all the documents contained in the hand-up brief to determine whether any material should be suppressed is too great, especially if there is no-one in court to alert the magistrate to problem material. The time is simply not available, with most preliminary hearings, and coronial inquiries as well, being concluded very quickly. Furthermore, the material that is handed up, in both preliminary hearings and coronial inquiries, is not actually ruled on as being admissible or not admissible and may be ruled inadmissible at a subsequent trial. On the other hand, application can be made to the magistrate, who has wide powers to make suppression orders, to suppress potentially prejudicial material. Such applications are frequently made and granted.

11.75 Another reason for distinguishing these particular hearings is that they are, as pointed out by Justice Beach in *David Syme & Co v Hill*[105] and referred to in paragraph 11.48 above, administrative proceedings and therefore not, strictly speaking, subject to the open justice principle.

105. *David Syme & Co Ltd v Hill* (VSC, Beach J, 10 March 1995, unreported) at 6 cited with approval in *Herald & Weekly Times Ltd v Magistrates' Court of Victoria* [2000] 2 VR 346 at para 6.

11.76 The Commission has included one type of preliminary hearing document, namely the charge-sheet, in the above list of documents to which there should be open access, because this document is the criminal equivalent of civil pleadings that are relied upon. A charge-sheet is a simple statement of fact setting out the particulars of the offences charged. Usually, it is read out in open court, enabling the media to have access to the information. However, the defendant can waive his or her right to have the charges read out, which prevents media reporting of them.

11.77 This is what occurred in the case of *R v Clerk of Petty Sessions; Ex parte Davies Brothers Limited* and led to protests from the media.[106] In that case, Justice Slicer held that the public is entitled to know the nature of charges brought against a defendant put in open court and that access to the charge-sheet pleaded to should be allowed, despite the fact that the defendant had waived his right to have the charges read out. However, his Honour said that "publication of the contents of a complaint before its presentation in open court ought not to be permitted as of right.[107] The Commission has described the charge-sheet in its Recommendation 23 as being a document that sets out the offences with which a person has been charged in open court (whether or not it has actually been read out). This ensures that the document must have already been used in the criminal proceedings before it can be accessed and is the equivalent of the requirement that civil pleadings have been "deployed" in the civil proceedings.

11.78 In relation to access to material admitted into evidence, there is a potential risk that inadmissible material will then be seen. Often, objections are made in court to parts of evidence contained in a document, which parts may then be struck out, leaving the remaining contents of the document to be admitted into evidence. Access is made available to something that is, physically, one document, but which has sections of it that have not been admitted into evidence. It would not be practical for the court to make a fresh copy of the document, omitting the parts that have been struck-out, for the purposes of access. The Commission considered whether material admitted into evidence should be removed from the above list because of this risk. However, in the interests of open justice, it is preferable to err on the side of allowing wide-ranging access and rely on the court to make orders denying access in particular circumstances.

11.79 Under the Commission's recommendation, a party or their legal representative would need to make known that they object to access being granted, or that they wish to reserve their position in regard to access, at the time material is

106. *R v Clerk of Petty Sessions; Ex parte Davies Brothers Limited* (1998) 8 Tas R 283.
107. *R v Clerk of Petty Sessions; Ex parte Davies Brothers Limited* at 297.

being submitted for admission into evidence, in the same way that objections on the grounds of admissibility are made at this time. Otherwise, once material is admitted into evidence, open access would apply to that material. In the case of pleadings, once their content is relied on in open proceedings and referred to as forming the basis of the case argued by a party, open access would apply to such content. If an objection to access has been made and the objecting party has not given a release, media representatives, or anyone else not involved as a party, would need to apply to the court for access to the material.

11.80 Application would have to be made to obtain access to material on the court file not presented at the trial or hearing, with a presumption against the granting of access. Likewise, if the media wanted access to court documents before a trial or hearing, an application for access would have to be made.

11.81 The Commission believes that ERISP material and videotapes of “walk-throughs” should be excluded from the open access category because this material can be too graphic and can too easily contain inadmissible evidence, including inadmissible confessions of guilt. The propensity to prejudice a fair trial is too great. As well, the potential for broadcasts of this material to distress victims and family is a relevant consideration.

11.82 It should be borne in mind that, under the Commission’s recommendations, there would be an overriding safeguard whereby the court would retain the power to prohibit or postpone access to a document if it is potentially prejudicial. In addition, if a suppression order is not placed on particular documents, publication may still constitute contempt unless a defence of fair and accurate reporting is proved.

11.83 The Commission notes the concern that the media might archive certain footage from videos and records of interview and reproduce it at a later date, for a purpose unrelated to keeping the public informed of court proceedings. Likewise, a member of the public may be allowed access to a document for inappropriate personal reasons. There may also be cases where access is granted to photographs but publication of them in the course of making a fair and accurate report will cause great distress to the victim and/or family, or publication of them without explanatory text may distort their effect. The Commission is of the view that legislation should make provision for a power to impose conditions on access to, and reporting on a document, such as that the material is to be used for a specified purpose and not otherwise.

11.84 No distinction should be made between the media and the general public in regard to rights of access to documents.
Pursuant to the principle of open justice, once it is thought appropriate to give access to certain documents, the general public has as much right as the media to access

those documents.
The operation of the principle of open justice is not confined to allowing the general public to walk through the door of the court to be present at a hearing or trial. It carries with it the implication that the public is entitled, just as much as the media, to avail themselves, as appropriate, of documentary material in order to be properly informed as to those proceedings.

11.85 Neither should a distinction be made between a right to obtain access to documents and a right to publish them. If access to documents is generally allowed, or granted after application, this carries with it, subject to any orders of the court or overriding law, a right to publish or summarise those documents, not merely to make reports of them from memory. Also, a right of access to documents should carry with it the right to copy those documents, subject to the payment of a reasonable amount by way of fee if copying is done by the court's registry.

11.86 The Commission is of the view that application for access to documents should be made to the court involved in the proceedings, rather than to the Attorney General. The court itself is in the best position to make decisions as to whether access should be granted to specific documents and then to make documents available, knowing what orders have been made. As Justice Charles said in *Herald & Weekly Times Ltd v Magistrates' Court of Victoria*:

> [T]he presiding magistrate and counsel in any committal will obviously read the hand-up brief and all other statements or documents used during the committal. They should therefore be well-placed to deal with a request for access to any such document and the relevant considerations bearing upon the question whether access should be denied or limited, or publication of any material prohibited.[108]

11.87 The Commission acknowledges that its recommendations are likely to have a financial and administrative impact and that it will be necessary to have an administrative mechanism in place before the legislative changes, giving access to court documents, can be effected. It is possible that practical difficulties will emerge in the course of implementation of the changes that will require adjustments to the new regime to be made. The Commission accepts that the courts will be in the best position to monitor and evaluate how the regime works in practice and what modifications may be needed.

108. *Herald & Weekly Times Ltd v Magistrates' Court of Victoria* [2000] 2 VR 346 at para 42.

RECOMMENDATION 23

Legislation should provide that, subject to (a) any statute, (b) any order of the court prohibiting or restricting access to the relevant document or prohibiting or postponing reporting of the proceedings, or of the relevant part of the proceedings, and (c) any objection by a party or a person having a sufficient interest, the public should have a right of access to any document in one or more of the following categories:

(1) pleadings to the extent their content is relied on in open proceedings and referred to as forming the basis of the case argued by a party;

(2) judgments and orders;

(3) documents that record what was said or done in open court;

(4) documents that were admitted into evidence in proceedings other than bail and committal proceedings and coronial inquiries;

(5) written submissions, to the extent their content is relied on in open proceedings and referred to as forming the basis of the case argued by a party; and

(6) documents recording the offences with which a person has been charged in open court.

Where an objection is made, the court must prohibit or limit access only if the person objecting establishes that a grant of access would be contrary to the due administration of justice.

In relation to all other categories of document, applications for access to a document must be made to the court in which the proceedings are taking place. The applicant must establish grounds for a grant of access.

The word "document" should be defined to mean any record of information including:

(a) anything on which there is writing;

(b) anything on which there are marks, figures, symbols or perforations having a meaning for persons qualified to interpret them;

(c) anything from which sounds, images or writings can be reproduced with or without the aid of anything else; or

(d) a map, plan, drawing or photograph.

RECOMMENDATION 24

The court in which the proceedings are taking place should have the power to prohibit or impose conditions on access to, or reporting of, a document referred to in Recommendation 23, including a condition restricting the purpose for which the document is to be used.

RECOMMENDATION 25

Legislation should provide that, subject to any rule of common law or statute or any order of the court prohibiting or postponing reporting of the proceedings, or of the relevant part of the proceedings, the public should have the right to publish the contents of, or a fair and accurate summary of the contents of, a document referred to in Recommendation 23.

12. Procedure and jurisdiction in sub judice contempt proceedings

- Overview
- Do the recommendations in this and the next chapter apply to other forms of contempt?
- Who should be allowed to instigate sub judice contempt proceedings?
- Jurisdiction: who should hear sub judice cases
- Mode of trial: should the summary procedure for sub judice contempt proceedings be retained?
- Should appeal proceedings for contempt be heard by the Court of Appeal or by the Court of Criminal Appeal?

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]

12.2 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 ("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 proceeding.[3] In New South Wales, appeals from convictions for contempt are heard by the Court of Appeal, not the Court of Criminal Appeal.[4]

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.

1. *Registrar, Court of Appeal v Maniam (No 2)* (1992) 26 NSWLR 309 at 314 (Kirby J); *Young v Registrar, 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) 42 NSWLR 22 at 27 (Mason J).
3. 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.
4. *Supreme Court Act 1970* (NSW) s 101(5), s 101(6).

DO THE RECOMMENDATIONS IN THIS AND THE NEXT CHAPTER APPLY TO OTHER FORMS OF CONTEMPT?

12.4 This Report is primarily concerned with sub judice contempt. This is mainly because the inquiry originated from the controversy arising from the *Costs in Criminal Cases Amendment Bill 1997* (NSW), which deals with matters relating to the operation of the sub judice rule. 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 that have a direct impact on sub judice contempt. Matters concerning civil contempt or those peculiar to other forms of criminal contempt will not be dealt with in these chapters.

12.5 Nevertheless, most of the proposals in these two 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, Recommendation 27 on the transfer of appeal 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 goes, as at present, to the Court of Appeal. Recommendation 28 and 29 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 undesirable results. 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 terms of reference.

WHO SHOULD BE ALLOWED TO INSTIGATE SUB JUDICE CONTEMPT PROCEEDINGS?

12.6 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.[5] In *Attorney General v Times Newspapers Ltd*,[6] 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 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.[7]

12.7 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,[8] it has been stated that it can apply equally to the right of the Attorney General to initiate such proceedings.[9] Legislation enacted in 1998 expressly recognises the Attorney General's power to institute contempt proceedings.[10]

12.8 The following sections of this chapter consider the roles of persons other than the Attorney General in the instigation of sub judice contempt proceedings. In particular, the Commission looks at whether the (1) Director of Public Prosecutions, (2) private individuals, and (3) courts (on their on motion) should be able to initiate these proceedings.

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5. *Re Whitlam; Ex parte Garland* (1976) 8 ACTR 17 at 23 (Connor J); *United Telecasters Sydney Ltd v Hardy* (1991) 23 NSWLR 323 at 330 (Samuels J).
6. *Attorney General v Times Newspapers Ltd* [1974] AC 273 at 311.
7. Quoted by Justice Samuels in *United Telecasters Sydney Ltd v Hardy* at 330.
8. *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); *Capaan v Joss* (NSWCA, No 40255/94 and 402257/94, 6 June 1994, unreported).
9. *Killen v Lane* [1983] 1 NSWLR 171 at 177-178 (Moffitt J).
10. *Courts Legislation Amendment Act 1998* (NSW) Sch 7. The Act commenced on 8 August 1998. For a more detailed discussion of the relevant provisions of this law, see NSW Law Reform Commission, *Contempt by Publication* (Discussion Paper 43, 2000) ("NSWLRC DP 43") at para 12.7-12.8.

The Director of Public Prosecutions

Does the DPP have the power to prosecute for contempt at common law?

12.9 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,[11] 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.[12]

12.10 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 have examined the issue of whether the DPP can prosecute criminal contempts. In *Director of Public Prosecutions v Australian Broadcasting Corporation ("ABC")*,[13] the New South Wales Court of Appeal held that the Commonwealth DPP has standing to institute contempt proceedings in relation to a case being tried by a State court involving a federal offence. In reaching this decision, the court said:

> 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.[14]

12.11 The second case upholding the power of the DPP to institute contempt proceedings is *R v Pearce*,[15] 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). This provision empowers the DPP "to exercise any power, authority or discretion relating to the investigation and prosecution of offences that is vested in the Attorney

11. *Director of Public Prosecutions Act 1986* (NSW) s 7(1)(a).
12. *Director of Public Prosecutions Act 1986* (NSW) s 8(1).
13. *Director of Public Prosecutions v Australian Broadcasting Corporation* (1987) 7 NSWLR 588. This has been followed in *United Telecasters Sydney Ltd v Hardy* (1991) 23 NSWLR 323.
14. *Director of Public Prosecutions v Australian Broadcasting Corporation* at 596.
15. *R v Pearce* (1992) 7 WAR 395.

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.[16] Since *R v Pearce*, the DPP of Western Australia has instituted and successfully prosecuted other sub judice contempt cases.[17]

12.12 An analysis of the cases of *Director of Public Prosecutions v ABC* and *R v Pearce*[18] produces this result at common law: While the Attorney General is the law officer primarily charged with the prosecution of contempt cases, the DPP has this power only with respect to contempt relating to cases in which the DPP is a party.[19]

12.13 Notwithstanding the recognition at common law of the DPP's power to prosecute certain contempt cases, the DPP in New South Wales has yet to exercise this power. In this state, the Attorney General[20] remains the main prosecution officer for contempt cases.

A reform option considered: should legislation be adopted making the DPP the prosecution officer for contempt cases?

12.14 One reform option that the Commission considered in its Discussion Paper 43 ("DP 43")[21] is for legislation to be passed giving the DPP the day-to-day responsibility for the prosecution of criminal contempts, with the Attorney General retaining residual powers. This would resemble the arrangement under the DPP Act

16. *R v Pearce* at 409-410 (Malcolm J).
17. See, for example, *R v Australian Broadcasting Corporation; Ex Parte the Director of Public Prosecutions (WA)* (WA, Supreme Court, No 1256/94, 26 July 1994, unreported); *R v 6IX Southern Cross Radio Pty Ltd; Ex parte Director of Public Prosecutions (WA)* (1999) WASCA 254.
18. For a detailed discussion of these cases see NSWLRC DP 43 at para 12.11-12.15.
19. The courts have not had the opportunity to decide whether or not the DPP also has this power in relation to criminal cases where he or she is not a party, for example, criminal cases prosecuted by police. It might be argued that although the DPP is not a party to these cases, he or she has an interest as the main prosecution officer of the state, so that if there was a contempt committed in relation to them, the DPP should be allowed to prosecute the contempt.
20. Or the Solicitor General or Crown Advocate under delegation from the Attorney General: *Criminal Procedure Act 1986* (NSW) s 16B.
21. NSWLRC DP 43.

for indictable offences.[22] This was essentially the recommendation of the Australian Law Reform Commission ("ALRC") in its report on contempt.[23]

12.15 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 the way in which it is prosecuted.
This would be consistent with the purpose underlying the establishment of the office of the DPP in 1986, that is, 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.[24] 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, giving the DPP the responsibility over sub judice cases would ensure the adoption of a consistent prosecution policy for such cases, which would be uniform, or at least be congruent with, the policy for all other offences.

12.16 Another reason for empowering the DPP to prosecute sub judice contempt is to ensure 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 a prosecution might alienate a powerful media organisation or commentator. The Attorney General is an elected Member of Parliament and is also a member of Cabinet (in New South Wales). 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 insulating prosecutions from the political process and ensuring independence with respect to decisions concerning prosecutions.[25]

12.17 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

22. *Director of Public Prosecutions Act 1986* (NSW) s 27, s 28.
23. Australian Law Reform Commission, *Contempt* (Report 35, 1987) at para 470. This recommendation was made in the context of the ALRC's general approach of making the procedures for criminal contempts in line with those of all other offences.
24. NSW, *Parliamentary Debates (Hansard)* Legislative Assembly, 1 December 1986 at 7339.
25. See *Price v Ferris* (1994) 34 NSWLR 704 at 707-708 (Kirby J).

to be partisan when it comes to determining whether contempt proceedings should also be commenced. In a case involving statements by a police officer or one involving material published by a media organisation that 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 view in DP 43

12.18 In DP 43, the Commission expressed the opinion 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.

12.19 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. This will 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.

Feedback from the consultations and written submissions

12.20 There were no objections made during the consultation meetings and in the written submissions to the Commission's position on the matter. The Law Society of New South Wales and the Bar Council of Victoria, and Mr David Norris of the Crown Solicitor's Office support the Commission's position.[26] The DPP (NSW) informed the Commission that the current arrangements on the prosecution of contempt proceedings are working well.

He expressed the view that the current law and convention, whereby the Attorney General is the main law officer charged with the prosecution of sub judice contempt cases, do not need to be changed.[27]

The Commission's final view

12.21 There are no reasons to change the view adopted by the Commission in DP 43.

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26. Law Society of NSW, *Submission* at para 48; Victorian Bar Council, *Submission* at para 31; D Norris *Submission* at para 104.
27. N Cowdery QC, *Submission* at 4.

Should private individuals have the right to prosecute for contempt?

The current law

12.22 At common law, 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.[28] In particular, any party to litigation, including a corporation, may take proceedings for contempt to protect that litigation.[29] It seems that a litigant may apply in person to the court.[30]

12.23 Part 55 rule 11(4) of the *Supreme Court Rules 1970* (NSW) preserves this right.[31] It provides 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."

Possible reform options

12.24 The issue that arises is whether this rule should be retained. In DP 43, at paragraphs 12.23-12.31, the Commission canvassed these possible alternatives:

(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). It has been argued that confining the power to institute contempt to the Attorney General is a powerful guarantee for the due administration of justice because this ensures that when a newspaper errs and the error is brought to the attention of the Attorney General,

28. *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 Corporation* (1987) 7 NSLWR 588 at 595; *NSW 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).
29. *Director of Public Prosecutions (Cth) v Australian Broadcasting Corporation* 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* at 328 (Samuels J).
30. *Bevan v Hasting Jones* [1978] 1 All ER 794.
31. See *Ex parte Tubman; Re Lucas* (1970) 72 SR (NSW) 555; *European Asian Bank AG v Wentworth* at 458-460 (Kirby J); *Capaan v Joss* (NSWCA, No 40255/94 and 402257/94, 6 June 1994, unreported).

proceedings can be instituted irrespective of the parties to the litigation in question.[32] This is now the position in Victoria.[33]

(2) Abolish this right as it relates to contempts allegedly affecting criminal proceedings, but retain it with respect to contempts allegedly affecting civil proceedings. There is a view that civil actions should be treated differently because 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 takes proceedings for contempt, it is argued that this could be construed to mean that he is putting the authority of the Crown behind the complaint.[34]

(3) Require the consent of the public law officer charged with the prosecution of sub judice contempt cases before an individual may institute proceedings. This is the position in the UK with respect to publications that breach the strict liability rule under the *Contempt of Court Act 1981* (UK).[35] The ostensible reason for this requirement is to prevent frivolous and vexatious contempt prosecutions or those that are an abuse of the process.

(4) Retain this right but require the individual to notify the relevant public law officer before the sub judice contempt proceedings are commenced.

The Commission's position in DP 43

12.25 The Commission took the 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. Parties to criminal or civil proceedings to which the allegedly contemptuous act relates have a compelling stake in ensuring the fairness of the trial since the outcome of these proceedings will have a direct impact on them. In particular, the Commission cannot dismiss 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 may suffer in terms of delay and costs. If the official prosecution authorities do not set contempt proceedings in motion, the private parties should have the right to do so.

32. *Re Hargreaves; Ex parte Drill* [1954] Crim L R 54. See also NSWLRC DP 43 at para 12.23.
33. *Public Prosecutions Act 1994* (Vic) s 46(1).
34. *Attorney General v Times Newspaper Ltd* (1973) QB 710 at 737-738 (Lord Denning MR). See also NSWLRC DP 43 at para 12.31.
35. See *Contempt of Court Act 1981* (UK) s 6(c).

12.26 As to the possibility of frivolous and vexatious contempt prosecutions, the Commission is not aware that there is currently a problem of private parties using contempt proceedings for harassment or for vexatious or for 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[36] or for collateral abuse of legal process.[37]

12.27 Even if frivolous contempt prosecutions did occur, 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.[38] These powers were canvassed in paragraph 12.35 of DP 43 and need not be repeated here.

12.28 The Commission, in DP 43, rejected a prior consent requirement. It preferred leaving the assessment of the merits of a prosecution or the motives behind its institution to the courts rather than requiring law officers, such as the Attorney General or the DPP to screen private prosecutions. This would be unduly restrictive of the right of private individuals to prosecute for sub judice contempt.

12.29 The Commission proposed in DP 43, however, 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).[39]

12.30 The notice 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

36. 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.
37. 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.
38. *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.
39. The contempt may not relate to particular proceedings, for example, in the case of scandalising the court.

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 considered it appropriate to do so.

12.31 The Commission also 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.[40] 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.

Submissions

12.32 ***Support for the proposal.*** The New South Wales Director of Public Prosecutions, the Australian Press Council and Mr David Norris support the proposal.[41]

12.33 However, Mr Norris suggested possible additional provisions.[42] He proposed, as one option, that the Attorney General should have power (exercisable by the Solicitor General or Crown Advocate under s 53 of the *Criminal Procedure Act 1986* (NSW)) to take over a criminal contempt prosecution in the same way that the DPP may take over a criminal offence prosecution pursuant to s 9 of the DPP Act. This, he believed, would provide an additional option to intervention or appearance as *amicus curiae*.[43] Alternatively, he suggested that the Attorney General could have a statutory right to intervene in contempt proceedings.

12.34 ***Opposition to the proposal.*** The Federation of Australian Commercial Television Stations, the Federation of Australian Commercial Radio Broadcasters, the Australian Broadcasting Corporation and the Special Broadcasting Service, in their joint submission, argued that a private individual should not have the right to commence proceedings for criminal contempt because "criminal proceedings should always be a matter for the State."[44]

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40. *Supreme Court Rules 1970* (NSW) Pt 55 r 11(6).
41. N Cowdery QC, *Submission* at 4; Australian Press Council, *Submission* at para 26; D Norris, *Submission* at para 105.
42. D Norris, *Submission* at para 106.
43. For an example of a contempt case prosecuted by a private individual but where the Attorney General appeared as *amicus curiae*, see *Long v Specifier Publications Pty Ltd* (1998) 44 NSWLR 545.
44. Australian Broadcasters, *Joint Submission* at 8. The Australian Broadcasting Corporation, in its separate submission (at 3) made the same submission. Both submissions claimed that the Commission did not give reasons for its position

12.35 The New South Wales Law Society, in its written submission, expressed the same view. Its reason was that "there is too high a risk of the prosecution being initiated otherwise than in good faith."[45] During a consultation meeting, Mr Trevor Nyman, the Law Society's representative, suggested that there is a danger, in the future, of private groups being formed for the purpose of prosecuting the media for any legal liability, in the same manner that the victims' groups and similar interest associations have been formed and become vocal in recent years.[46] It was, however, suggested to him that such contempt prosecutions are expensive and private individuals or organisations have not instituted them in the past. In the end, Mr Nyman agreed that the Law Society should not be too concerned about the Commission's proposal.

12.36 The Victorian Bar Council referred to s 46 of the *Director of Public Prosecutions Act 1994* (Vic), which vests the initiation of contempt prosecutions in the Attorney General.[47] The Council claimed that this section has played a valuable role in ensuring that an experienced prosecutorial officer initiates and conducts contempt proceedings. It also removes, according to the Council, an opportunity by litigants to file abusive or vexatious contempt prosecutions.[48]

The Commission's response to the submissions and its final recommendation

12.37 The submissions opposing the proposal did not persuade the Commission that private individuals should not be allowed to initiate contempt proceedings. In relation to the comment in the joint submission from the broadcasters, the Commission notes that private prosecution is available in criminal offences generally, even for offences more serious than contempt.

12.38 As regards the comment of the Victorian Bar Council, the Commission has noted in DP 43, at paragraph 12.28 that s 46 of the *Public Prosecutions Act 1994* (Vic) has proved difficult and complex to interpret and apply. As to the Council's concern for vexatious or abusive prosecutions for contempt, the Commission considers that the possibility of abuse is not a sufficient reason for abolishing the right of private individuals to prosecute criminal contempt. Courts have powers to deal with

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that private individuals should be allowed to initiate sub judice contempt proceedings. This is incorrect; the Commission's reasons are found in NSWLRC DP 43 at para 12.33-12.36.

45. Law Society of NSW, *Submission* at para 48.
46. Mr Trevor Nyman (Law Society of NSW), *Consultation.*
47. For a discussion of the law in Victoria, see NSWLRC DP 43 at para 12.27-12.30.
48. Victorian Bar Council, *Submission* at 6-7.

frivolous or abusive prosecutions.[49] The proposal is however being revised, as indicated below, partly to deal with this issue.

12.39 ***Taking over a private prosecution.*** The Commission accepts Mr Norris' suggestion that the Attorney General be given the power to take over a private prosecution for contempt. However, the proposed right should also be given to the DPP, who has also has the power at common law to prosecute certain criminal contempts.

12.40 The objects of such a power would be to ensure integrity, neutrality and consistency in the making of prosecutorial decisions and the conduct of prosecutions. The right of private prosecution is open to abuse and to the intrusion of improper motives. Further, there may be considerations of public policy why a private prosecution, although instituted in good faith, should not proceed, or at the least should not be allowed to remain in private hands. The proposed power would constitute an important safeguard against abuse of the right.

12.41 The proposed power, if implemented, should be exercised very carefully and only in limited categories of appropriate cases. It is not a general veto power over the right of private prosecutions, which must be recognised and upheld unless there are compelling reasons for curtailing it. Examples of cases where the proposed power might be exercised are where a prosecution appears to be frivolous or vexatious, or there appears to be a conflict of interest, or if the private prosecutor requests the public authorities to take over.

RECOMMENDATION 26

Legislation should provide that a private person may commence proceedings for the punishment of contempt.

This is subject to two provisos.

First, the person must, prior to the commencement of such action, notify the Attorney General and the parties to the proceeding (if any) allegedly involved.

Second, the Attorney General (or the Solicitor General or Crown Advocate acting under a delegation from the Attorney General) and the Director of Public Prosecutions shall have the discretion to take over the matter and:

49. These powers were canvassed in NSWLRC DP 43 at para 12.35.

(a) carry on the proceeding,

(b) cause the termination of the proceeding,

(c) carry on, on behalf of the prosecution or as respondent, an appeal in any court in respect of the contempt,

(d) cause the termination of an appeal in any court in respect of a contempt,

(e) institute and conduct, on behalf of the prosecution, an appeal in any court in respect of the contempt, and

(f) conduct, as respondent, an appeal in any court in respect of the contempt.

Should the Supreme Court continue to have the power to commence proceedings for punishment of sub judice contempt?

Courts have an inherent power at common law to initiate contempt proceedings

12.42 The courts may act on their own motion to deal with cases on contempt,[50] including contempt by publication.[51] This has been described as an exceptional power, to be invoked sparingly and only in clear cases.[52] 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.[53]

50. *European Asian Bank AG v Wentworth* (1986) 5 NSWLR 445 at 458-460 (Kirby J); *NSW 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).
51. *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, Court of Appeal v Willessee* [1984] 2 NSWLR 378.
52. *Broken Hill Pty Co Ltd v Dagi* [1996] 2 VR 117 at 178 (Phillips J).
53. *Killen v Lane* [1983] 1 NSWLR 171 at 178 (Moffitt J).

The Supreme Court has the power under its Rules to commence contempt proceedings

12.43 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 that predates the *Supreme Court Act 1970* (NSW).[54] Although the proceedings remain technically the proceedings of the court and the court's officer is responsible only 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.[55]

12.44 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 proceedings is entirely a matter for the court's decision taken of its own motion.[56] 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.[57]

12.45 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 1970* (NSW) to direct the Registrar to commence proceedings for contempt of court.[58]

Courts in other Australian and overseas jurisdictions have the power to initiate contempt proceedings

12.46 The Rules of Court of the other Australian jurisdictions also contain provisions empowering their respective Supreme Courts to initiate contempt

54. *Killen v Lane* at 173 (Moffitt J).
55. *Killen v Lane* at 173 (Moffitt J).
56. *Killen v Lane*.
57. *Killen v Lane* at 177-178 (Moffitt J).
58. See *Re An Allegation of Contempt of Court Made by Her Honour Judge Mathews* (NSWCA, BC 8400372, 7 March 1984, unreported); *Re An Allegation of Contempt of Court Made by the Honourable Mr Justice Maxwell* (NSWCA, BC 8500884, 10 April 1985, unreported); *Varley v Attorney General (NSW)* (1987) 8 NSWLR 30.

proceedings.[59] In the United Kingdom and Victoria, where legislation locates the authority to initiate most forms of contempt proceedings in the Attorney, the relevant laws have expressly preserved the power of the courts to initiate such proceedings on their own motion.[60]

The Commission's position in DP 43

12.47 In DP 43, the Commission took the view that no change is required to the present law, which gives the power of the Supreme Court to direct the registrar to commence proceedings for the punishment of criminal contempt, including sub judice contempt. This power is useful because it supplements the authority of the traditional prosecution officers, ie the Attorney General in contempt cases and the DPP in most other offences. Where these officials do not act on a publication that the court considers to be prejudicial to pending proceedings, the court should be in a position to commence prosecution on its own motion.

12.48 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 be able to approach the Supreme Court and may request it to prosecute.

Feedback from the consultations and written submissions

12.49 There were no objections made during the consultation meetings and in the written submissions to the Commission's position on the matter.

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59. See *Supreme Court Rules* (NT) r 75.07(1); *Rules of the Supreme Court* (Qld) O 84 r 1; *Uniform Civil Procedures Rules 1999 (Qld)* Ch 20 Pt 7 r 928; *Supreme Court Rules* (SA) r 93.03, r 93.04; *Supreme Court Rules 2000* (Tas) O 941; *Rules of the Supreme Court* (Vic) r 75.07; *Rules of the Supreme Court 1971* (WA) O 55 r 3. There is no equivalent provision in the Australian Capital Territory.

60. In the United Kingdom, the *Contempt of Court Act 1981* (UK) s 7 provides: "Proceedings 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 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."

The Commission's final view

12.50 There are no reasons to change the view adopted by the Commission in DP 43.

The prosecution of contempt relating to a Commonwealth offence which is being tried in a State court

12.51 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.[61] 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.[62]

12.52 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.[63] 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).[64]

12.53 The Commission is not aware of any reform issues on this matter and therefore makes no recommendation.

JURISDICTION: WHO SHOULD HEAR SUB JUDICE CASES

The current law

12.54 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) to hear

61. *Director of Public Prosecutions (Cth) v Australian Broadcasting Corporation* (1987) 7 NSWLR 588.
62. See Australian Law Reform Commission, *Contempt* (Report 35, 1987) at para 464.
63. *R v B* [1972] WAR 129.
64. 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.

sub judice contempt cases.[65] Prior to the establishment of the Court of Appeal, the Supreme Court, which meant all the judges sitting together, or three or more judges sitting in banc, heard sub judice contempt proceedings.[66] However, from 1997, this power has been transferred to the Common Law Division of the Supreme Court.[67] 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.

Background to the current law

12.55 The law appears to have been changed as a result of a call for reform by Justice Kirby in *Young v Registrar, Court of Appeal.*[68] In that case, his Honour held that the arrangement whereby the Court of Appeal heard sub judice cases did not give the person convicted of contempt a right to appeal. This, according to him, contravened Article 14.5 of the *International Covenant on Civil and Political Rights* ("ICCPR"), which Australia has ratified, and which provides: "Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law." Justice Kirby did not regard the procedure for review by special leave application to the High Court, which may be taken after a conviction by

65. *Supreme Court and Circuit Courts (Amendment) Act 1965* (NSW) s 2.
66. See *Waterhouse v Australian Broadcasting Corporation* (1986) 6 NSWLR 716 at 719-720 (Young J).
67. 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 NSW, *Government Gazette 47* (2 May 1997) at 2427. The *Courts Legislation Amendment Act 1996* (NSW) was repealed on 3 December 1999.
    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.
68. *Young v Registrar, Court of Appeal* (1993) 32 NSWLR 262.

the Court of Appeal, as a sufficient compliance with article 14.5. This case is discussed in greater detail in paragraphs 12.48-12.50 of DP 43.

12.56 On the other hand, under the present arrangement, a person convicted of contempt by a single Supreme Court judge has the right to appeal the conviction and sentence to the Court of Appeal.

The Commission's view in DP 43

12.57 The Commission took the position in DP 43 that there is no need to revert to the former arrangement. It was aware of no practical difficulties arising from the assignment to the Common Law Division of the Supreme Court of proceedings for sub judice contempt. Moreover, it found persuasive the concerns raised by Justice Kirby in *Young v Registrar, Court of Appeal* about the absence of an effective right of appeal under the former arrangement and its possible inconsistency with Article 14.5 of the ICCPR.[69] It considered 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.

12.58 Nevertheless, the Commission, in DP 43, welcomed submissions on the matter, including any evidence about the practical workings of the new process.

Feedback from the consultations and written submissions

12.59 During the consultation meetings and in the written submissions, there was no mention of any practical or policy difficulties with the present arrangement.

The Commission's final view

12.60 There are no reasons to change the current position. Sub judice contempt proceedings should continue to be heard by a Supreme Court judge of the Common Law Division of the Supreme Court.

69. 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: SHOULD THE SUMMARY PROCEDURE FOR SUB JUDICE CONTEMPT PROCEEDINGS BE RETAINED?

12.61 One of the most distinctive characteristics of the law of criminal contempt is that the offence is dealt with summarily without the assistance of a jury.[70] In the case of contempt *in facie curiae* or in the face of the court itself, there is no formalised procedure. 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.[71] Evidence in support of the charge for contempt is given by affidavit, unless the court permits it to be given in some other form.[72] Even so, such proceedings are still summary in the sense that the defendant does not have the right to a jury trial.

Arguments for a criminal mode of trial for sub judice contempt

12.62 An alternative to the present form of summary procedure in *sub judice* contempt cases is to treat them as normal criminal trials and to prosecute the accused by way of indictment.

The accused may then 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

12.63 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.[73] Its practical justification lies in the fact that in general, "the undoubted

70. 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* (1765) *Wilmot's Notes* 243; 97 ER 94. The historical background of the summary procedure for contempt is discussed lengthily in NSWLRC DP 43 at para 12.55-12.58.
71. *Supreme Court Rules 1970* (NSW) Pt 55 r 6(2).
72. *Supreme Court Rules 1970* (NSW) Pt 55 r 8.
73. *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);

possible recourse to indictment and criminal information is too dilatory and too inconvenient to afford any satisfactory remedy."[74] This is true especially in cases of contempt committed in the face of the court, where contemnors have to be dealt with swiftly to prevent them from further disturbing the court proceedings.

12.64 The situation with a publication that may be in breach of the sub judice rule is, however, different. 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.[75]
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.[76] If the publication has in fact caused some harm to pending proceedings by creating prejudice in the minds of the jurors, the hearing of the contempt case could add to such harm. The publicity that will ensue from the hearing of the contempt case will only draw more attention to the original publication that had the risk or tendency to create the prejudice.[77]

12.65 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.[78]

Attorney General (NSW) v Mundey [1972] 2 NSWLR 887 at 912; *Balogh v St Albans Crown Court* [1975] 1 QB 73 at 91.

74. *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).
75. *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).
76. *Attorney General v John Fairfax & Sons Ltd* at 406 (Hope J).
77. 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.
78. Australian Law Reform Commission, *Contempt* (Report 35, 1987) at para 473.

Certain issues better dealt with by jury

12.66 Juries are used to assess and determine the facts in certain proceedings, especially criminal trials, because they are seen as better equipped to do this than a judge. The twelve 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 that 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.[79] It has been claimed that juries are effective fact-finders for these reasons:[80]

(a) A jury brings to bear on its decision a diversity of experiences;

(b) It deliberates as a group and therefore has the advantage of collective recall; and

(c) The jury's deliberative process contributes to better fact-finding because each detail is explored and subjected to conscious scrutiny by the group.

12.67 In sub judice contempt cases, there may be issues that may be best settled by a jury. One – 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.[81] The alternative to this so-called tendency test is the substantial risk test, which is preferred by the Commission.[82] According to this test, a publication would amount to contempt if it were shown to have a substantial risk of causing serious prejudice to particular legal proceedings.[83] The test for determining the meaning of the words alleged to constitute contempt is the effect upon an ordinary reasonable member of the community.[84] Because jurors are examples 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.

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79. Criminal Law and Penal Methods Reform Committee of South Australia, *Court Procedure and Evidence* (Report 3, 1975) at 84.
80. Canada, Law Reform Commission, *The Jury in Criminal Trials* (Working Paper 27, 1980) at 6.
81. See NSWLRC DP 43 at para 4.3 and accompanying notes.
82. See NSWLRC DP 43 at para 4.29-4.32, Proposal 3.
83. See para 4.10 and accompanying notes.
84. *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).

12.68 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.[85] It may be argued that there is a greater need to require a jury to apply a similar test to a similar issue in a sub judice contempt case because of the criminal sanction it attracts.

12.69 Another issue where jury input may be desirable concerns the element of fault. If the Commission's Recommendation 5 were adopted, it would create a defence that the person 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. It may be argued that it would be appropriate for a jury to assess the type of evidence that would be raised and tested in relation to the proposed defence.

Arguments for retaining summary procedure for sub judice contempt

12.70 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.[86] 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.

12.71 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 allegedly prejudiced – are either undisputed or are matters which the judge can very easily determine by himself or herself. Moreover, it is

85. *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).
86. See *Registrar, Court of Appeal v Willesee* [1984] 2 NSWLR 378 at 382 (Samuels J).

arguable that what constitutes prejudicial publication – publication that 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.

12.72 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 or is not contemptuous 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.

12.73 Finally, there is the argument of long-standing practice. There is no recorded case last century in New South Wales of a contempt case being tried otherwise than by summary procedure.[87] 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.

The Commission's view in DP 43

12.74 In DP 43, the Commission took the view that the summary procedure for sub judice contempt cases should be retained.
Its reasons are: 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.

87. *Registrar, Court of Appeal v Willessee* at 380 (Glass J), at 381 (Samuels). See also NSWLRC DP 43 at para 12.59-12.63.

12.75 Secondly, the special features 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.

12.76 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.

12.77 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.

Feedback from the consultations and written submissions

12.78 During the consultation meetings and in the written submissions, there was no mention of any practical or policy difficulties with the present arrangement.

The Commission's final view

12.79 There are no reasons to change the current position.

SHOULD APPEAL PROCEEDINGS FOR CONTEMPT BE HEARD BY THE COURT OF APPEAL OR BY THE COURT OF CRIMINAL APPEAL?

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.[88] 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. Now, a person convicted of contempt by a single judge of the Common Law Division of the Supreme Court may appeal to the Court of Appeal.

12.81 Legislation also 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 contempt is acquitted.[89] The determinations of the Court of

88. The *Courts Legislation Amendment Act 1996* (NSW) inserted s 101(4) to the *Supreme Court Act 1970* (NSW).
89. *Supreme Court Act 1970* (NSW) s 101A(1). 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

Appeal of the question of law submitted do not in any way affect any finding or decision in the contempt proceedings.[90]

12.82 In DP 43, the Commission raised the issue whether the jurisdiction to hear appeals should lie with the Court of Appeal or the Court of Criminal Appeal.

12.83 In DP 43, the Commission took the position that it should be with the Court of Criminal Appeal. It would seem that because the courts have consistently recognised that a conviction for contempt is a conviction for a criminal offence,[91] it must follow that appeals from such convictions should be assigned to the Court of Criminal Appeal. It can be argued 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,[92] the power to release the appellant on bail pending the appeal,[93] 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".[94] 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 There were no contrary views expressed in the submissions and during the consultations meetings.

Criminal Appeal Act 1912 (NSW). In *John Fairfax Publications Pty Ltd v Attorney General (NSW)* [2000] NSWCA 198, the NSW Supreme Court declared invalid the provisions of s 101A that requires proceedings under it to be held in camera and that which prohibits the publication of any report of any submission made in those proceedings.

90. *Supreme Court Act 1970* (NSW) s 101A(4).
91. See *Registrar, 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).
92. *Criminal Appeal Act 1912* (NSW) s 8.
93. *Criminal Appeal Act 1912* (NSW) s 18.
94. *Criminal Appeal Act 1912* (NSW) s 6(1).

RECOMMENDATION 27

The hearing and decision of an appeal against a conviction and/or sentence for criminal contempt, and of a review of a question of law submitted by the Attorney General, should be assigned to the Court of Criminal Appeal.

13. Penalties and remedies

- Overview
- Fines
- Imprisonment
- Other sentencing options
- Corporate offenders
- Creation and maintenance of official records of contempt convictions
- Injunctions in contempt proceedings
- Civil action for damages

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. There are currently no upper limits for these penalties. This Report considers whether or not there should be. The chapter also discusses the remedies of injunction and damages as they relate to contempt.

13.2 As with the previous chapter, the recommendations in this chapter are written in a manner that would cover not only sub judice contempt but criminal contempts more generally.
Where a recommendation on procedure and sanctions may apply to other forms of criminal contempt, the Commission has decided to extend them to criminal contempts generally. This will avert the undesirable outcome of having special rules for sub judice contempt, where such special treatment is not warranted and may lead to confusion.

FINES

13.3 A fine is the usual penalty that 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] The penalty of imprisonment is, however, rarely used in sub judice contempt. It has been observed that a fine is the appropriate penalty for a body corporate that has been found guilty of contempt, such as a media proprietor.[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]

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".
2. *Registrar, Court of Appeal v John Fairfax Group Pty Ltd* (NSWCA, 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).

13.4 Fines have been imposed on newspaper publishers[4] and editors[5], radio[6] and television licensees,[7] speakers at public meetings,[8] journalists[9], radio announcers[10] and media interviewees.[11]

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; *Attorney General (NSW) v Mayas Pty Ltd* (NSWCA, No 174/83, 28 March 1984, unreported); *Attorney General (NSW) v Macquarie Publications Pty Ltd* (1988) 40 A Crim R 405; *Attorney General (NSW) v Nationwide News Pty Ltd* (NSWCA, No 40141/90, 11 October 1990, unreported); *Registrar, Court of Appeal v John Fairfax Group Pty Ltd* (NSWCA, No 40478/92, 21 April 1993, unreported); *Attorney General (NSW) v Northern Star Ltd* (NSWCA, No 40259/94, 14 October 1994, unreported); *Attorney General (NSW) v Time Inc Magazine Co Pty Ltd* (NSWCA, No 40331/94, 15 September 1994, unreported); *R v Day & Thomson* [1985] VR 261; *R v Herald & Weekly Times Ltd* (VSC, No 6570/95, 15 April 1996, unreported); *R v Nationwide News Pty Ltd; Ex parte DPP for WA* (WA, Supreme Court, No 1763/95, 10 July 1996, unreported); *R v Saxon* [1984] WAR 283; *R v Thompson* [1989] WAR 219; *Registrar, Supreme Court of SA v The Advertiser Ltd* (SA, Supreme Court, No 2418/95, 17 May 1996, unreported).
5. *Director of Public Prosecutions (Cth) v Australian Broadcasting Corporation* (1986) 7 NSWLR 588; *Attorney General (NSW) v Time Inc Magazine Co Pty Ltd* (NSWCA, No 40331/94, 15 September 1994, unreported); *R v David Syme and Co Ltd* [1982] VR 173; *R v Day* [1985] VR 261; *R v Truth Newspaper* (VSC, No 4571/93, 16 December 1993, unreported); *R v Herald & Weekly Times Ltd* (VSC, No 6570/95, 15 April 1996, unreported); *R (On Application of AG for State of Vic) v Spectator Staff Pty Ltd* [1999] VSC 107; *R (On Application of the AG for the State of Vic) v Herald & Weekly Times Ltd* [1999] VSC 432 (liability); *R v Herald & Weekly Times (No 2)* [2000] VSC 35 (penalty); *R v Barber* (WA, Supreme Court, No 2330/90, 22 October 1990, unreported); *R v West Australian Newspapers Ltd; Ex parte DPP for WA* (1958) 60 WALR 108; *R v Saxon* [1984] WAR 283; *R v Thompson* [1989] WAR 219.
6. *R v Pacini* [1956] VLR 544; *Hinch v Attorney General (Vic)* [1987] VR 721; *Attorney General (NSW) v Radio 2UE Sydney Pty Ltd* (NSWCA, No 40236/96, 11 March 1998, unreported); *Attorney General v Radio 2UE Sydney Pty Ltd* (NSWCA, No 40225/91 and 40226/91, 28 August 1992, unreported); *R v 61X*

13.5 The Supreme Court may make an order for the imposition of a fine on terms, including a suspension of such fine.[12]

13.6 The matters which courts may take into account in determining the appropriate fine to be imposed upon a person or organisation found guilty of sub judice contempt include:

- the presence or absence of an intention to interfere with the administration of justice,
- the effects of the prejudicial publication,
- the existence of a system to prevent prejudicial publications,

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Southern Cross Radio Pty Ltd; Ex Parte Director of Public Prosecutions (WA) [1999] WASCA 254.

7. *Attorney General (NSW) v Willesse* [1980] 2 NSWLR 143; *Director of Public Prosecution (Cth) v United Telecasters Sydney Ltd* (1992) 7 BR 364; *R v Australian Broadcasting Corporation* [1983] Tas R 161; *Director of Public Prosecutions (Cth) v Australian Broadcasting Corporation* (1987) 7 NSWLR 588; *R v Australian Broadcasting Corporation; Ex Parte Director of Public Prosecutions (WA)* (WA, Supreme Court, No 1256/94, 26 July 1994, unreported); *Attorney General (NSW) v TCN Channel Nine Pty Ltd* (1990) 20 NSWLR 368 (liability), (1990) 5 BR 419 (penalty); *Attorney General (NSW) v Amalgamated Television Services Pty Ltd* (1990) 5 BR 396; *Attorney General (NSW) v Australian Broadcasting Corporation* (NSWCA, 40136/90, 11 October 1990, unreported); *Attorney General (NSW) v United Telecasters Sydney Ltd* (NSWCA, No 40139/90, 11 October 1990, unreported).
8. *Re Brookfield* (1918) 18 SR (NSW) 479.
9. *Registrar, Court of Appeal v John Fairfax Group Pty Ltd* (NSWCA, No 40478/92, 21 April 1993, unreported); *R v Truth Newspaper* (VSC, No 4571/93, 16 December 1993, unreported); *R v Nationwide News Pty Ltd* (VSC, No 6129/97, 22 December 1997, unreported) (liability), (VSC, No 6129/97, 18 February 1998, unreported) (penalty); *R v Barber* (WA, Supreme Court, No 2330/90, 22 October 1990, unreported); *R v Saxon* [1984] WAR 283; *R v Thompson* [1989] WAR 219.
10. *Attorney General v Radio 2UE Sydney Pty Ltd* (NSWCA, No 40225/91 and 40226/91, 28 August 1992, unreported); *Attorney General (NSW) v Radio 2UE Sydney Pty Ltd* (NSWCA, No 40236/96, 11 March 1998, unreported); *Hinch v Attorney General (Vic)*[1987] VR 721.
11. *Director of Public Prosecutions (Cth) v Wran* (1986) 7 NSWLR 616.
12. *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.

- the extent of control exercised over the contemptuous material,
- training, experience and academic history of individuals,
- reliance or failure to rely on legal advice on whether or not to publish the offending material,
- and an undertaking not to repeat the offence, and
- prior the size of the business and financial circumstances of the defendant,
- extent of circulation of material, including audience size and location,
- a plea of guilty,
- an apology record of charges and convictions for contempt.

These are canvassed in greater detail in Discussion Paper 43 ("DP 43").[13]

Establishing limits for fines

The present law: no limit as to the amount of fine that may be imposed

13.7 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) 1 Will and Mar, Sess 2, c 2* (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.[14]

Reform issue

13.8 The main issue with respect to fines as a form of penalty in contempt cases is whether or not there is a need to provide a statutory maximum penalty.

13. NSW Law Reform Commission, *Contempt by Publication,* (Discussion Paper 43, 2000) ("NSWLRC DP 43") at para 13.6.
14. *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* [1973] VR 682 where the Supreme Court of Victoria held that *The Bill of Rights (1688) 1 Will and Mar, Sess 2, c 2* (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.

The Commission's proposal in DP 43

13.9 The Commission took the position in Proposal 27 of DP 43 that there should be a limit on fines that can be imposed.[15] Contempt (sub judice contempt, in particular, where substantial fines are imposed) should be in line with most other offences for which penalties have ceilings. Establishing a maximum amount for the fine that 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.

Feedback from the submissions

13.10 All the submissions that dealt with this issue agree that there should be a limit on the fine that may be imposed on a person convicted of contempt.[16]

What should be the maximum amount of fines?

13.11 In DP 43, the Commission did not form a position as to a specific maximum fine but welcomed submissions on this matter. One submission stated that a maximum fine, particularly for a corporation, would need to be substantial having regard to the fact that a fine of $200,000 has been imposed a number of times in New South Wales.[17]

13.12 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 everyone, corporate media entities in particular, from flouting the sub judice rule.

13.13 ***Trends and examples of fines.*** It is also useful to look at the fines imposed so far by the courts. In sub judice contempt convictions in New South Wales, the highest fine that a court has imposed so far on a corporate offender has been $200,000.[18]

15. NSWLRC DP 43, Proposal 27.
16. ABC, *Submission* at 3; Australian Press Council, *Submission* at para 26; N Cowdery QC, *Submission* at 4; Law Society of NSW, *Submission* at para 52; D Norris, *Submission* at para 112.
17. D Norris, *Submission* at para 112.
18. For a comparison of penalties imposed in the different Australian states for sub judice contempt, see Appendix E. See also R Williams, "Contempt of court: prejudicing the administration of justice" [1995] *Gazette of Law and Journalism* (No 30) 2.

This amount has been imposed in four cases in the last twenty years.[19] The second and third highest fines imposed have been $120,000[20] and $100,000,[21] respectively. Appendix E of this Report sets out the penalties imposed in sub judice cases in New South Wales, as well as other Australian jurisdictions.

13.14 For individual offenders, the highest fine imposed by a New South Wales court has been $50,000.[22] The fine of $10,000 has been imposed on a magazine editor.[23] The fine of $2,000 has been imposed in a number of cases on an editor of a TV programme,[24] a radio talk back host,[25] the author of a newspaper article[26] and on a compere of a TV program.[27] Journalists have been fined $1,000[28] and $2,000.[29] A

19. *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* (NSWCA, No 40141/90, 11 October 1990, unreported); *Attorney General (NSW) v Radio 2UE Sydney Pty Ltd* (NSWCA, 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.
20. *Attorney General v Australian Broadcasting Corporation* (NSWCA, No 40136/90, 11 October 1990, unreported). This is one of the "Paul Mason cases".
21. *Director of Public Prosecutions (Cth) v Australian Broadcasting Corporation* (1987) 7 NSWLR 588; *Attorney General v Time Inc Magazine Co Pty Ltd* (NSWCA, No 40331/94, 15 September 1994, 21 October 1994, unreported).
22. *Attorney General (NSW) v Radio 2UE Sydney Pty Ltd* (NSWCA, No 40236/96, 11 March 1998, unreported).
23. *Attorney General (NSW) v Time Inc Magazine Co Pty Ltd*.
24. *Director of Public Prosecutions (Cth) v Australian Broadcasting Corporation* (1986) 7 NSWLR 588.
25. *Attorney General v Radio 2UE Sydney Pty Ltd* (NSWCA, No 40225/91 and 40226/91, 28 August 1992, unreported).
26. *Harkianakis v Skalkos* (1997) 42 NSWLR 22 (liability), (NSWCA, No 40514/96, 15 October 1997, unreported) (penalty).
27. This person was also managing director of the company producer and the person in control of the program: *Attorney General (NSW) v Willesee* [1980] 2 NSWLR 143.
28. *Registrar, Court of Appeal v John Fairfax Group Pty Ltd* (NSWCA, No 40478/92, 21 April 1993, unreported).
29. *Harkianakis v Skalkos* (1997) 42 NSWLR 22 (liability), (NSWCA, No 40514/96, 15 October 1997, unreported). The journalist in this case was also the managing director of the company that own the paper.

fine of $25,000 was imposed on a person who made a contemptuous statement to the media.[30]

13.15 In addition to actual fines imposed in cases, the Commission notes that the draft bill dealing with contempt of court prepared by the Federal Government in 1993[31] set the maximum amount of a fine at 60 penalty units for a natural person and 300 penalty units[32] for a body corporate.

13.16 Guidance may also be had from other legislation that imposes fines on bodies corporate. For example, the *Trade Practices Act 1974* (Cth) imposes a maximum fine of $200,000 on companies for breaches of most of the provisions of its Part 5 (Consumer Protection),[33] and $750,000 or $10,000,000 for breaches of provisions of Part 4 (Restrictive Trade Practices).

Should there be a distinction between fines for individuals and corporate offenders?

13.17 The trend in sub judice cases in Australia is for fines imposed on bodies corporate to be higher than those on individuals, such as journalists, radio announcers, editors or individuals interviewed by the media.[34] This may be because the former are in a superior financial position to the latter. An amount that is sufficient to deter 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.

13.18 On the other hand, 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 that is comparable to those imposed on bodies corporate.[35] In addition, the

30. *Director of Public Prosecutions (Cth) v Wran* (1986) 7 NSWLR 616.
31. This was entitled *Crimes (Protection of the Administration of Justice) Amendment Bill* (Cth). It was never introduced in Parliament.
32. A penalty unit means $110: *Crimes (Sentencing Procedure) Act 1999* (NSW) s 17; *Crimes Act 1914* (Cth).
33. *Trade Practices Act 1974* (Cth) s 79.
34. See Appendix E.
35. In *Attorney General (NSW) v Radio 2UE Sydney Pty Ltd* (NSWCA, No 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 he said Radio 2UE Pty Ltd should be 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

Commission 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.[36] It is arguable that such an arrangement undermines the desired deterrent effect on the individual offender. Imposing a large fine on the individual in such situation may arguably influence the employer organisation to ensure the maintenance of a system to prevent the commission of the offence by its employees.

The Commission's recommendation

13.19 The Commission, based on the support arising from its consultations, implements its recommendation that the law should specify a maximum fine for criminal contempts.

13.20 The maximum amount to be set in legislation should be substantially more than $200,000, the highest amount imposed so far in New South Wales in sub judice cases. This is to allow for courts to deal with more extreme cases than those that have occurred and come before the courts. It should also be taken into account that the recommendation would apply to other forms of criminal contempts, for which the amount of $200,000 could, in the worst cases, not be sufficient.

13.21 The legislation need not make a distinction between the maximum fine that can be imposed on bodies corporate as opposed to that which may be ordered against individual offenders, such as journalists, radio announcers, editors or individuals interviewed by the media. This would allow courts to deal with situations when the financial resources of an individual offender are so substantial that a fine comparable to those imposed on corporate offenders may be justifiable. Moreover, it would give the courts the discretion to set a large fine on individuals, in circumstances

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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 the radio station was $200,000 but only $50,000 for Mr Laws. The fine on Mr Laws has been the highest imposed on an individual in a sub judice case in NSW and is higher than the fines imposed on corporate offenders in a number of other cases: See Appendix E.

36. Although the threat of a recorded conviction may be a significant deterrent.

where it is the employer organisation who might in the end pay it, to force the latter to take measures to prevent the commission of the offence by its employees. On the other hand, the courts could still, when appropriate, take due account of the fact that individual offenders will normally have less financial resources than corporate offenders.

RECOMMENDATION 28

Legislation should provide an upper limit for fines that may be imposed on persons convicted of criminal contempt. The maximum amount to be set in legislation should be substantially more than $200,000, the highest amount imposed so far in New South Wales in sub judice cases, to enable courts to deal with the worst class of criminal contempt cases. The legislation need not distinguish between the maximum fines that may be imposed on corporate offenders on the one hand, and individuals on the other.

IMPRISONMENT

13.22 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.[37] However, it has been asserted 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.[38]

13.23 Although there is no limit on the length of the sentence that could be ordered at common law, the practice in criminal contempt cases is to fix the term of the imprisonment when it is imposed.[39]

37. *Registrar, Court of Appeal 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).
38. See *Registrar, Court of Appeal v Maniam (No 2)* at 314 (Kirby J) citing *Smith v The Queen* (1991) 25 NSWLR 1. See also *Gallagher v Durack* at 249 (Murphy J).
39. *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

13.24 Recent legislation in New South Wales – s 4 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) – provides for a maximum penalty of 5 years for *statutory offences* for which no penalty is provided by or under that Act or any other Act. Although a recent New South Wales Supreme Court decision held that the Act applies to criminal contempts,[40] the specific provision in the Act specifying this maximum seems drafted so as to apply only to statutory offences and may not, therefore, apply to common law offences such as contempt.

13.25 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 rule 13(3) allows the court to "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 and in such terms as the court may approve for good behaviour and performs the terms of the security."

13.26 The Supreme Court of New South Wales also has the power to discharge a contemnor before the expiry of the term of the imprisonment.[41] The power to discharge will normally be exercised only where there has been some change in the circumstances since the sentence was imposed.[42] For example, this power may be exercised in civil contempt cases where the contemnor has purged his or her contempt[43] or where no good purpose will be served by further detaining the contemnor.[44]

13.27 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

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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.

40. *Principal Registrar, Supreme Court of NSW v Jando* (2001) 53 NSWLR 527.
41. *Supreme Court Rules 1970* (NSW) Pt 55 r 14.
42. *Young v Registrar, Court of Appeal* (1993) 32 NSWLR 262.
43. *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.
44. *Re Barrel Enterprises* [1972] 3 All ER 631.

conduct.[45] Where persons other than the contemnor have published the contemptuous material but have not been prosecuted, this may be taken into account.[46]

13.28 While imprisonment is an available sentence in contempt by publication, it is not often invoked.[47] The Commission is aware of only two Australian cases where imprisonment has been imposed for publications infringing the sub judice rule. One involved a New South Wales case, *Registrar, Court of Appeals v Collins,*[48] where the respondent Collins was ordered imprisoned for 2 months.
The other is the *Hinch* case,[49] which is the only one in which a journalist (Collins was an activist) was imprisoned. In *Hinch,* 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. The original term of imprisonment was reduced by the Full Court of the Full Court of the Supreme Court of Victoria Supreme Court of Victoria on appeal from six weeks to 28 days.[50]

Retaining imprisonment as a penalty

13.29 The first issue with respect to the penalty of imprisonment is whether it should continue to be a sentencing option at all in sub judice contempt cases.

13.30 In DP 43, the Commission took the position it should be retained.[51] While it is a harsh penalty when a prejudicial publication is the result of inadvertence or carelessness, imprisonment may be appropriate when the breach of the sub judice principle is deliberate or the result of recklessness on the part of an individual as to

45. *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).
46. *Gallagher v Durack* (1983) 152 CLR 238; *Attorney General (NSW) v Mundey* [1972] 2 NSWLR 887.
47. A similar prudence in the use of this penalty is shown in other jurisdictions: See G Borrie and N Lowe, *The Law of Contempt* (3rd edition, Butterworths, London, 1996) at 527-528.
48. *Registrar, Court of Appeal v Collins* [1982] 1 NSWLR 682 at 710. This case was on the borderline between sub judice contempt and contempt by way of direct interference with proceedings.
49. *Hinch v Attorney General (Vic)* [1987] VR 721.
50. See *Hinch v Attorney General (Vic)* at 733 (Young CJ).
51. NSWLRC DP 43 at para 13.34.

the consequences of the publication.[52] The fact that a fine is often paid by an employer corporation undermines the effectiveness of this form of penalty.

13.31 The submissions support the Commission's position on this matter.[53]

Setting an upper limit for the term of imprisonment

13.32 The second issue with imprisonment is whether or not there should be an upper limit on the term that may be imposed.

13.33 In DP 43, the Commission considered that an upper limit must be established.[54] The penalty for sub judice contempt should be in line with other criminal offences, for which the courts' power of sentencing has been in almost every sphere limited to a maximum by legislation.[55]

13.34 The submissions support the Commission's position on this matter.[56]

13.35 In DP 43, the Commission did not make a proposal as to the specific maximum period but sought submissions on this.

13.36 ***Submissions.*** Mr David Norris argued that section 4 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) applies to criminal contempt and the maximum of 5 years set by that section is appropriate for criminal contempt.[57]

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52. In *Attorney General (NSW) v Radio 2UE Sydney Pty Ltd* (NSWCA, 40236/96, 11 March 1998, unreported), Justices Meagher and Powell expressed the view 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.
53. ABC, *Submission* at 3; Australian Press Council, *Submission* at para 26; N Cowdery QC, *Submission* at 4; Law Society of NSW, *Submission* at para 53; D Norris, *Submission* at para 113-114.
54. NSWLRC DP 43 at para 13.35.
55. 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.
56. ABC, *Submission* at 3; Australian Press Council, *Submission* at para 26; N Cowdery QC, *Submission* at 4; Law Society of NSW, *Submission* at para 53; D Norris, *Submission* at para 113-114.
57. D Norris, *Submission* at para 113.

13.37 The Law Society of New South Wales, in its written submission, asserted that "in the range of offences in Part 7 of the *Crimes Act 1900* (NSW) (which deals with offences against public justice) sub judice contempt would rate a maximum of 7 years."[58] The Law Society was perhaps referring to the offence of influencing witnesses or jurors.[59]

13.38 ***Examples and other possible models.*** The statutory offence of perverting the course of justice,[60] which theoretically could apply to a breach of the sub judice principle if there is an intent to pervert the course of justice, carries the penalty of penal servitude for fourteen years.

13.39 This seems excessive to the Commission, especially in contempt cases where the summary procedure is utilised.

13.40 The draft bill prepared by the Federal government in 1993 that was intended to implement the ALRC Contempt Report specified a period of one year as maximum.

13.41 In England, the law sets two years as the maximum custodial period for contempt of court committed in superior courts.[61] Two years was also the recommendation of the Law Reform Commission of Canada.[62]

13.42 In Canada, England and the United States, the cases indicate that the maximum custodial period for criminal contempts does not normally exceed two years.[63] However, in Australia courts in have imposed periods exceeding 2 years,[64] and even 6 years in one case.[65] Appendix F of this Report surveys the length of custodial sentences imposed in selected non-sub judice contempt cases in Australia.

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58. Law Society of NSW, *Submission* at para 53.
59. *Crimes Act 1900* (NSW) s 323.
60. *Crimes Act 1900* (NSW) s 319.
61. *Contempt of Court Act 1981* (UK) s 14(1).
62. Canada, Law Reform Commission, *Contempt of Court* (Report 17, 1982) at 36.
63. 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.
64. *Attorney General (NSW) v Whiley* (1993) 31 NSWLR 314; *Wood v Galea* (1997) 92 A Crim R 287.
65. *Registrar, Criminal Division, Supreme Court of NSW v Glasby* [1999] NSWSC 846 (Adams J).

The Commission's recommendation

13.43 The Commission recommends 5 years as the maximum period for criminal contempt. It should be emphasised that this recommendation is not confined to sub judice cases but would apply to criminal contempts generally. There have been criminal contempts decided in Australia where two years, the maximum imposed in other jurisdictions, would not have been sufficient.
The recommended 5 years would enable courts to deal with the worst class of criminal contempt cases. Moreover, it is consistent with the 5 years set by Parliament in s 4 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) for statutory offences for which there is currently no maximum imposed by any other law.

RECOMMENDATION 29

Legislation should provide that the upper limit for a custodial sentence that may be imposed on a person convicted of criminal contempt should be 5 years.

OTHER SENTENCING OPTIONS

13.44 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,[66] accepted an apology made to the court,[67] recorded the conviction[68] and/or required the offender to pay an amount by way of costs.[69] In some of these cases,

66. *R v West Australian Newspapers Ltd; Ex parte the Minister for Justice* (1958) 60 WALR 108 (the editor of the newspaper was censured but the corporate proprietor of the newspaper was fined for the breach of the sub judice principle).
67. See, for example, *R v Gray* [1900] 2 QB 36.
68. It was held in *R (On Application of AG for State of Vic) v Spectator Staff Pty Ltd* [1999] VSC 107 that a conviction would be sufficient, without the imposition of a penalty, as a significant deterrent.
69. *Attorney General (NSW) v Mundey* [1972] 2 NSWLR 887; *Attorney General (NSW) v Dean* (1990) 20 NSWLR 650; *R v Pearce* [1992] 7 WAR 395; *Registrar, Court of Appeal v John Fairfax Group Pty Ltd* (NSWCA, No 40250/94, 23 February 1995, unreported).

these alternative forms of punishment were deemed sufficient to justify the non-imposition of the formal penalties of fine and/or imprisonment.[70]

13.45 For offences generally, the law provides alternatives to the penalty of imprisonment such as community service orders,[71] good behaviour bonds,[72] dismissal of charges and conditional discharge of the offender,[73] deferral of sentencing for rehabilitation,[74] and suspended sentences.[75] The law also provides alternatives to traditional full-time detention in prisons through schemes such as periodic detention[76] and home detention.[77] In addition, parole is available to offenders sentenced to prison which allows them to be 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.[78]

13.46 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.

13.47 The Commission, in paragraphs 13.39-13.45 of DP 43, analysed the case law and the relevant legislation on the matter and reached the conclusion that there is

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70. See, for example, *Attorney General (NSW) v Mundey*; *Attorney General (NSW) v Dean*.
71. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 8; formerly governed by the *Community Service Orders Act 1979* (NSW).
72. *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.
73. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 10 and Pt 8; formerly governed by the *Crimes Act 1900* (NSW) s 556A.
74. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 11; formerly governed by the *Crimes Act 1900* (NSW) s 558.
75. *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 NSW since 1974.
76. *Crimes (Sentencing Procedure) Act 1999* (NSW) Pt 5; formerly governed by the *Periodic Detention of Prisoners Act 1981* (NSW).
77. *Crimes (Sentencing Procedure) Act 1999* (NSW) Pt 6; formerly governed by the *Home Detention Act 1996* (NSW).
78. See NSW Law Reform Commission, *Sentencing* (Report 79, 1996) at para 11.1.

uncertainty as to whether or not courts have the power to use alternative sentencing options for persons found guilty of criminal contempt.

13.48 The cases mentioned in DP 43 dealt with different legislation on sentencing because at the time, the various sentencing options were found in a number of statutes. The courts' decisions varied on the issue of whether or not these sentencing options apply to contempt. For example, the *Sentencing Act 1989* (NSW) was construed as having application to contempt,[79] and consequently parole would be available to a contemnor sentenced to suffer the penalty of imprisonment. On the other hand, it was held the provisions for community service orders in the *Community Service Order Act 1979* (NSW) did not apply to contempt.[80] The various statutes on sentencing have since been consolidated in the *Crimes (Sentencing Procedure) Act 1999* (NSW). In a recent decision by the New South Wales Supreme Court, it was held that "where a contemnor is now to be imprisoned for contempt, the *Crimes (Sentencing Procedure) Act* applies."[81] The court in that case ordered, among other things, that each sentence of imprisonment it imposed on the contemnor be served by way of periodic detention.[82]

Proposal 28 of DP 43

13.49 The Commission proposed that 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.

79. *Attorney General v Whiley* (1993) 31 NSWLR 314. But see contrary view in *Young v Registrar, Court of Appeal* (1993) 32 NSWLR 262 at 288 (Handley J).
80. *Registrar, Court of Appeal v Maniam (No 2)* (1992) 26 NSWLR 309.
81. *Principal Registrar, Supreme Court of NSW v Jando* (2001) 53 NSWLR 527 at para 45.
82. In an earlier case, *ICAC v Cornwall* (NSWSC, No 11043/93, Abadee J, 8 September 1993, unreported), there was a view that periodic detention, then governed by the *Periodic Detention of Prisoners Act 1981* (NSW), should be available in contempt cases. That view was *obiter* because the Act could not be applied to that case due to a provision preventing a sentence of less than 3 months being served by way of periodic detention.

Reasons for the proposal

13.50 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.

13.51 The same policy considerations underlying the "alternatives" to imprisonment apply equally to criminal contempt cases. For example, community service may be more appropriate under certain circumstances because it still registers disapproval of the offender's behaviour without the negative effects of full-time imprisonment. It also allows offenders to compensate the damage that their behaviour might have inflicted on the community without having to give up employment or have their domestic relations severely disrupted.

The submissions support the Commission's proposal

13.52 Most of those who commented on this issue in the written submissions agree with the proposal.[83] Only one submission said that imprisonment and other sentencing options, like community service, should not be imposed in contempt cases.[84]

The Commission's recommendation

13.53 Courts have demonstrated flexibility in sentencing persons found guilty of contempt of court.[85] However, the Commission is of the view that sentencing of criminal contempt should not be left to the common law where the nature and direction of its development is uncertain.

13.54 The Commission notes the recent decision by the New South Wales Supreme Court holding that where a contemnor is to be imprisoned for contempt, the

83. ABC, *Submission* at 3; Australian Press Council, *Submission* at para 26; N Cowdery QC, *Submission* at 4; D Norris, *Submission* at para 115.
84. Victorian Bar Council, *Submission* at para 37.
85. See for example the cases cited in NSWLRC DP 43 at para 13.36.

Crimes (Sentencing Procedure) Act 1999 (NSW) applies.[86] Although the main sentencing option applied in that case was periodic detention, the decision ought to be read liberally so that all the various sentencing options in the Act could apply to criminal contempt cases. Yet, for as long as this Act does not contain express provision making it applicable to criminal contempt cases, there remains the possibility that another court or judge could construe it differently and less liberally. Its predecessor, the *Sentencing Act 1989* (NSW), received different interpretations as to its application to contempt cases.[87]

13.55 The Commission considers that legislation is required to expressly empower courts with more options when sentencing persons convicted of criminal contempt. This would remove any uncertainty on the issue. Legislation applying 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 that might be more appropriate than the traditional ones, such as imprisonment. It would 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.

86. *Principal Registrar, Supreme Court of NSW v Jando* (2001) 53 NSWLR 527 at para 45.
87. Compare *Attorney General v Whiley* (1993) 31 NSWLR 314 and *Young v Registrar, Court of Appeal* (1993) 32 NSWLR 262 at 288 (Handley J).

RECOMMENDATION 30

Legislation should expressly provide that the various methods of and alternatives to serving custodial sentence, such as 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 for the sentencing courts to use in criminal contempt proceedings.

CORPORATE OFFENDERS

13.56 A large number of persons convicted of sub judice contempt are corporations rather than individuals. This means that a fine is the principal penalty available and other sanctions, such as imprisonment and its alternatives, are not available. The desirability of sentencing options for corporate offenders that are alternative to or in addition to the penalty of fine remains an issue. The Commission is currently examining the law on sentencing of corporate offenders. It has published an Issues Paper[88] for public consultation purposes. In that project, it is looking at the most effective sentencing strategy for corporate offenders, including when, if ever, is it desirable to impose criminal sanctions on corporations, as opposed to civil and/or administrative penalties. More to the point, it is canvassing equity fines, publicity orders, corporate probation, community service orders, disqualification and dissolution, as possible sentencing options.[89] The Commission will not make any recommendation on this matter in this Report but considers that any proposed law reform on this matter should apply not just to criminal offences generally but also to criminal contempt cases.

CREATION AND MAINTENANCE OF OFFICIAL RECORDS OF CONTEMPT CONVICTIONS

13.57 Information about an offender's record of criminal conviction is regularly used by courts in sentencing. A good record, such as no prior convictions, will invariably be taken into account in the contemnor's favour,[90] while a bad record may show that the

88. NSW Law Reform Commission, *Sentencing: Corporate Offenders* (Issues Paper 20, 2001) ("NSWLRC IP 20").
89. NSWLRC IP 20, ch 3.
90. *Director of Public Prosecutions (Cth) v Australian Broadcasting Corporation* (1987) 7 NSWLR 588 at 615; *Hinch v Attorney General (Vic)* [1987] VR 721 at

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.[91] When the same media organisation was convicted a second time, the court noted the number of years that had elapsed since it was first licensed and the thousands of hours of broadcasts it must have made during that time. It considered that two convictions for sub judice contempt during this period constituted a good record, and accordingly took this factor into account as a mitigating circumstance.[92]

Records of court outcomes for offences

13.58 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.[93]

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 the Department of Corrective Services maintains records in its Juvenile Index System of court outcomes concerning youth offenders.[94]

13.59 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),[95] proposed that legislation be introduced to

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* (NSWCA, No 40331/94, 21 October 1994, unreported).

91. *Director of Public Prosecutions (Cth) v United Telecasters Sydney Ltd* (NSWCA, No 40139/90, 11 October 1990, unreported).
92. *Director of Public Prosecutions (Cth) v United Telecasters Sydney Ltd* (1992) 7 BR 364 at 376 (Kirby J).
93. NSW, Attorney General's Department, *Criminal Records Act 1991* (Discussion Paper, 1998) at 6. See also Royal Commission into the NSW Police Service, *Final Report* (1997) vol 2 at para 7.182-7.184.
94. NSW, Attorney General's Department, *Criminal Records Act 1991* (Discussion Paper, 1998) at 6.
95. 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

recognise the right of these agencies to create and maintain criminal histories.[96] It was further recommended that the proposed legislation should cover the use of and access to criminal history information.[97]
The Government has not yet implemented the proposals.

No records for outcomes of contempt cases

13.60 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.[98]

The Commission's proposal

13.61 In Proposal 26 of DP 43, the Commission proposed that the Attorney General should create and maintain a registry of court outcomes of criminal contempt proceedings, and that the information in the proposed registry should be used only for sentencing purposes.

13.62 It is desirable to establish a formal system that would allow prosecutors and courts to determine accurately an accused's record of 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. However, it is important that the use of such information be limited to sentencing proceedings.

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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.

96. NSW, Attorney General's Department, *Criminal Records Act 1991* (Discussion Paper, 1998) at 7.
97. NSW, Attorney General's Department, *Criminal Records Act 1991* (Discussion Paper, 1998) at 7.
98. D Norris (Senior Solicitor, Crown Solicitor's Office), *Letter to the Executive Director of the NSW Law Reform Commission* (29 October 1999) at 2.

Feedback from the submissions and consultations

13.63 The Australian Broadcasting Corporation,[99] the Australian Press Council[100] and Mr David Norris of the New South Wales Crown Solicitor's Office[101] support the Commission's proposal. There was no opposition made in the written submissions or during the consultation meetings.

13.64 The New South Wales Director of Public Prosecutions ("DPP") supports the proposal but suggests that the information in the proposed registry should not only be used for sentencing purposes but "should be able to be adduced on the issue of whether or not a criminal contempt has been committed where relevant to an issue in the proceedings; for example, information about a prior breach should be admissible where the accused is relying on the assertion that he/she/it was ignorant of the law."[102]

13.65 The Commission does not accept the DPP's suggestion. Its adoption might suggest that ignorance of the law is a defence on liability for contempt.

The Commission's recommendation

13.66 The Commission has found no reason to change its proposal.

RECOMMENDATION 31

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.

99. ABC, *Submission* at 3.
100. Australian Press Council, *Submission* at para 26.
101. D Norris, *Submission* at para 111.
102. N Cowdery QC, *Submissions* at 4.

INJUNCTIONS IN CONTEMPT PROCEEDINGS

The legal background

13.67 An injunction to restrain an actual or threatened contempt of court may be granted by a superior court that has power both to punish and to issue injunctions.[103] An injunction is an order of the court, which in the context of sub judice contempt, would restrain the publication of allegedly prejudicial material. However, it may also require the publisher to retrieve copies of a publication in written form that has already been released.[104] 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.[105]

13.68 The jurisdiction of courts to issue injunctions in the context of contempt by publication is examined very sparingly.[106] One reason for this is that it is the settled practice of courts not to grant injunctions restraining the commission of a criminal act unless the penalties available are inadequate to deter the commission of an offence.[107] Other reasons are canvassed in DP 43 at paragraphs 13.58 and 13.59.

13.69 An application for an injunction may be made to the Supreme Court,[108] 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.[109]

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103. *Victoria v Australian Building Construction Employees' and Builders' Federation* (1982) 152 CLR 25 at 42 (Gibbs J).
104. *Attorney General (NSW) v Time Inc Magazine Co Pty Ltd* (NSWCA, No 40327/94, 7 June 1994, unreported).
105. See, for example, *Hardy v United Telecasters Ltd* (1989) 4 BR 347; *Doe v John Fairfax Publications Pty Ltd* (1995) 125 FLR 372.
106. *P v Liverpool Daily Post and Echo Newspaper Plc* [1991] AC 370 at 381-382 (Lord Donaldson MR).
107. *P v Liverpool Daily Post and Echo Newspaper Plc* at 381-382 (Lord Donaldson MR).
108. 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.
109. *Waterhouse v Australian Broadcasting Corporation* (1986) 6 NSWLR 716 at 718-721 (Young J).

13.70 In proceedings for an injunction to restrain an apprehended contempt, the instigating party must prove the relevant matters on the balance of probabilities.[110]

13.71 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.[111] 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".[112]

13.72 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.[113]

110. *Waterhouse v Australian Broadcasting Corporation* at 735 (Glass J); *Attorney General (NSW) v TCN Channel Nine Pty* (1990) 5 BR 10 at 19 (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).
111. *Hardy v United Telecasters Ltd* (1989) 4 BR 347; *John Fairfax Publications Pty Ltd v Doe* (1995) 37 NSWLR 81.
112. *Waterhouse v Australian Broadcasting Corporation* 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* (NSWCA, No 40229/96, 2 May 1996, unreported).
113. *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* (NSWCA, No 40229/96, 2 May 1996, unreported).

Who can apply for an injunction to stop the publication of prejudicial material

Private individuals

13.73 It is accepted that the Attorney General has standing to seek an application for an injunction to restrain the publication of prejudicial material.[114] Nevertheless, a private individual who is deemed to have a sufficiently proximate interest may also apply.[115] 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.[116] The most obvious example of a private citizen who has a special interest is somebody who is an accused.[117] 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.[118]

13.74 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.[119]

The Commission's proposal on the standing of private individual to apply for injunctions

13.75 In DP 43, the Commission supported 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

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114. *Attorney General (NSW) v TCN Channel Nine Pty Ltd* (1990) 5 BR 10 at 16 (Hunt J).
115. *Waterhouse v Australian Braodcasting Corporation* (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.
116. *Leary v BBC*.
117. See, for example, *Waterhouse v Australian Broadcasting Corporation* at 720; *Hardy v United Telecasters Ltd* (1989) 4 BR 347; *Doe v John Fairfax Publications Pty Ltd* at 384 (Spender J).
118. *Leary v BBC*.
119. *Attorney General (NSW) v TCN Channel Nine Pty Ltd* (1990) 5 BR 10 at 16 (Hunt J).

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 that could potentially cause the trial to be 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 that could jeopardise the proceedings to which he or she is a party.

13.76 However, the Commission, in its Proposal 29, proposed that 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. This is consistent with the Commission's Recommendation 26 in Chapter 12. The reasons for Recommendation 26 concerning the need for coordination of efforts in prosecuting contempts[120] apply equally to applications for injunctions. As with Recommendation 26, 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.

Feedback from the submissions

13.77 The Australian Press Council, Law Society of New South Wales, the New South Wales Director of Public Prosecutions, and Mr David Norris support the Commission's proposal.

13.78 The Australian Broadcasting Corporation does not agree with the proposal but gave no reasons for its position.

The Commission's recommendation

120. See para 12.30.

RECOMMENDATION 32

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.

Should the New South Wales Director of Public Prosecutions have the power to apply for injunctions?

13.79 In Proposal 30 of DP 43, the Commission proposed that legislation that would provide that the Director of Public Prosecutions ("DPP") 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.

13.80 The DPP 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. Since both the Attorney General and the DPP have power to institute and maintain sub judice contempt proceedings, 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.

13.81 In his written submission, the DPP noted the Commission's comment that both the DPP and the Attorney General have the power at common law to commence and maintain contempt proceedings. However, he asserted that in practice, it is the Attorney General who exercises this power in New South Wales. Consequently, with respect to the proposed grant of a statutory power to apply for injunction in relation to sub judice contempts, the DPP wrote that his office "does not need this power (as it would not use it)."[121]

The Commission's recommendation

13.82 Notwithstanding the DPP's submission, the Commission considers it useful to give to that office the proposed power.

There could in the future be a change in policy concerning the active use of the DPP's power (the existence of which no one disputes) to prosecute for criminal contempt. When that happens, it is important for the office to also have the ancillary power to

121. N Cowdery QC, *Submission* at 5.

deal with an apprehended commission of a criminal contempt, or an anticipated repetition of such offence, through injunctions.

RECOMMENDATION 33

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.

CIVIL ACTION FOR DAMAGES

13.83 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.[122] The leading authority on the unavailability of this remedy in contempt is the English case of *Chapman v Honig*.[123] 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.[124]

13.84 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 that 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

122. *Roberts v J F Stoen Lighting and Radio Ltd* (1945) 172 LT 240.
123. *Chapman v Honig* [1963] 2 QB 502. See discussion in *United Telecasters Sydney Ltd v Hardy* (1991) 23 NSWLR 323 and in A Arlidge and T Smith, *Arlidge, Eady and Smith on Contempt* (2nd edition, Sweet & Maxwell, London, 1999) at 883-884.
124. Arlidge and Smith at 880.

> 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 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.[125]

13.85 The Court of Appeal nevertheless dismissed the claims for reparation and damages in that particular case because they were instituted 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 that breached sub judice principle.

13.86 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 is examined in greater detail in the next chapter.

125. *United Telecasters Sydney Ltd v Hardy* at 346-347. Justices Clarke and Meagher agreed with Justice Samuels' judgment.

14. Payment for costs of aborted trials

- Should a power to order costs be enacted?
- DP 43
- Submissions to DP 43
- Conclusion
- Overview of the Costs in Criminal Cases Amendment Bill 1997
- Criticisms of the Bill
- DP 43
- Submissions to DP 43
- Conclusion

14.1 This chapter examines the issue of compensation for loss suffered as a result of a contemptuous publication. Specifically, this chapter considers whether the media, or any one else, should be made liable for the costs of a trial that 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.

SHOULD A POWER TO ORDER COSTS BE ENACTED?

Existing powers to order compensation

14.2 In Discussion Paper 43 ("DP 43"),[2] the Commission examined whether there were existing powers in New South Wales to order payment of compensation for the costs of legal proceedings that are discontinued because of a contemptuous publication.[3] The Commission concluded that that was doubtful. This conclusion was reached after considering three possible sources for such power:

1. A common law action for damages arising out of an aborted trial.[4] There does not appear to have been any recent attempt to bring an action in this situation[5] and whether such an action would be successful has not been resolved;

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1. This Bill lapsed on 3 February 1999 when the Legislative Council was prorogued.
2. NSW Law Reform Commission, *Contempt by Publication* (Discussion Paper 43, 2000) ("NSWLRC DP 43").
3. NSWLRC DP 43 at para 14.2-14.6.
4. 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 Lloyd's Reports 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 J). However, see the interpretation of Justice Mustill's comments by Justice Samuels in *United Telecasters Sydney Ltd v Hardy* 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

2. A power derived from s 21B of the *Crimes Act 1914* (Cth).[6] 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. However, this case decided 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.[7]

3. A power derived from s 77B of the *Victims Support and Rehabilitation Act 1996* (NSW).[8] As far as the Commission is aware, however, this legislative provision

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of the tort or breach of contract. In an earlier English case, *Weston v Central Criminal Courts Administrator*, Lord Stephenson had commented that a contempt is not punishable by payment of costs: [1976] 3 WLR 103 at 112. That case was not, however, concerned with contempt by publication.

5. In *United Telecasters Sydney Ltd v Hardy*, 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. However, the court 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.

6. 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."

7. See *United Telecasters Sydney Ltd v Hardy* (1991) 23 NSWLR 323 at 338-339 (Samuels J). It seems clear that a contempt prejudicing Federal proceedings being tried in a State court would not be an "offence against a law of the Commonwealth", as the relevant contempt principles are State laws: See *Re Colina; Ex parte Torney* (1999) 200 CLR 386.

8. Section 77B of the *Victims Support and Rehabilitation Act 1996* (NSW) 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 that is aborted because of a contemptuous publication. Although the statutory scheme for compensation established by the *Victims Support and Rehabilitation Act 1996* (NSW) is for victims of violence, the alternative scheme that the *Victims Support and*

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.

14.3 It would therefore seem that if it is deemed desirable for the courts to have the power to order a contemnor to pay the costs of an aborted trial, this power should be conferred by legislation specifically enacted for the purpose. The following paragraphs 14.4-14.29 consider the preliminary question of whether such a power is desirable or appropriate.

Is a power to order costs desirable?

14.4 In DP 43, the arguments in favour of a power to order compensation and the arguments against such a power were considered.[9] These are summarised below.

Arguments in favour of a power to order compensation

14.5 In brief, the arguments in favour of a power to order compensation are as follows:[10]

- The expense incurred by aborting a trial is usually substantial.[11] Neither the community nor the parties in a trial should have to bear losses occasioned by the unlawful conduct of the contemnor.

Rehabilitation Act 1996 (NSW) 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. See the objects of the *Victims Support and Rehabilitation Act 1996* (NSW) as articulated in s 3; see Pt 4 (Compensation Awarded by Court), especially Div 2 (Compensation for Loss).

9. NSWLRC DP 43 at para 14.13-14.55

10. These are set out in full in NSWLRC DP 43 at para 14.13-14.19.

11. The daily cost of running a case in court is high. Appendix B of NSWLRC DP 43 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 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. The average length of a criminal trial in the District Court (State-wide) in 1998

- A power to order costs may act as a deterrent to irresponsible media reporting.
- The law should implement all measures to deter conduct that may result in a trial being aborted. Aside from the significant wasted expenses and the costs of a new trial, 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. Overall, the public interest in the due administration of justice is frustrated.
- There is ample precedent for ordering offenders to make reparation to those who have suffered loss as a result of their criminal conduct and, in fact, a trend towards doing so.[12]
- Reparation is a legitimate element of sentencing.[13]
- 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.[14]

Arguments against a power to order compensation

14.6 The Commission received a number of submissions arguing against a power to order compensation.[15] In summary, the following arguments were presented in the submissions:

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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. The costs borne by an accused who is not legally funded could well be higher than these figures.

12. NSWLRC DP 43 at para 14.14. See the provisions in the *Victims Support and Rehabilitation Act 1996* (NSW) and the *Crimes Act 1914* (Cth) for the payment of compensation by an offender to his or her victim. 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.
13. 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; NSW 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.
14. See *United Telecasters Sydney Ltd v Hardy* (1991) 23 NSWLR 323 at 347 (Samuels J); NSW, *Parliamentary Debates (Hansard)* Legislative Assembly, 14 May 1997 at 8572. However, that suggestion has been strongly disputed by others, particularly by the media.
15. These are referred to in detail in NSWLRC DP 43 at para 14.21-14.55.

- Ordering media organisations to pay for the cost of an aborted trial, in addition to paying what could well be a large fine (the usual sentence imposed for contempt), would be to punish the offender twice for the same offence.[16] The financial burden placed on the organisation as a result could be enormous.
- 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, thereby profiting unfairly.[17] The money levied from a fine imposed for the contempt conviction should be able to be applied to compensate individuals who have been financially disadvantaged as a result of media publicity.
- The incidence of trials that 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.[18]
- The existing unlimited powers to punish for contempt by way of a fine and/or imprisonment are sufficient to deter the media from publishing material that might be contemptuous.[19]
- It is unfair to impose an order to pay compensation for an offence that requires no element of blameworthiness on the part of the offender.[20]
- A decision to abort a trial is a matter for the discretion of the individual trial judge, which may be exercised too readily, or give rise to inconsistencies

16. FACTS, *Submission 1* at para 3.2; John Fairfax Publications Pty Limited and News Limited, *Joint Submission to Attorney General* at para 1.2; SBS, *Submission* at 2. See also M Chesterman, "Costly Terminations" [1997] 45 *Gazette of Law and Journalism* 5 at 6.
17. FACTS, *Submission 1* at para 3.2; SBS, *Submission* at 2.
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.
18. ABC, *Submission to the Attorney General* (20 September 1997) at 1; FACTS, *Submission 1* at para 4.2; John Fairfax Publications Pty Limited and News Limited, *Joint Submission to Attorney General* at para 1; SBS, *Submission* at 1.
19. SBS, *Submission* at 2.
20. ABC, *Submission to the Attorney General* (20 September 1997*)* at 1; David Syme & Company Limited, *Submission* at para 9; FACTS, *Submission 1* at para 4.2; John Fairfax Publications Pty Limited and News Limited, *Joint Submission to Attorney General* at para 5; SBS, *Submission* at 2; S Walker, *Submission* at para 2.

between cases.[21] There is generally no avenue for questioning the appropriateness of the decision to abort (as opposed to the decision *not* to abort) a trial. Furthermore, 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.

- The fear of being ordered to pay substantial costs would discourage the media from reporting at all on criminal proceedings. In this way, a power to order compensation for the cost of an aborted trial would represent a significant restriction on freedom of discussion.[22]
- 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.
- 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.

DP 43

14.7 In DP 43, the Commission was inclined to support, in principle, enactment of a power to order costs where a trial is discontinued because of a contemptuous publication or broadcast.[23] However, the Commission acknowledged the arguments raised against such a power and invited further submissions on the issue.

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21. ABC, *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, *Submission* at 2.
22. ABC, *Submission to the Attorney General* (20 September 1997) at 1; David Syme & Company Limited, *Submission* at para 9; FACTS, *Submission 1* at para 4.2; John Fairfax Publications Pty Limited and News Limited, *Joint Submission to Attorney General* at para 5; SBS, *Submission* at 2; S Walker, *Submission* at para 2.
23. NSWLRC DP 43 Proposal 31.

SUBMISSIONS TO DP 43

14.8 The Australian Broadcasting Corporation opposed,[24] and a collective of Australian broadcasters[25] "strongly" opposed,[26] the introduction of a power to order costs. The Australian Broadcasters submitted that "there is no evidence to suggest an endemic problem requiring this excessive response." They expressed concern that liability to pay substantial costs may result from an incorrect decision to abort a trial. The Australian Broadcasters also argued that the imposition of a costs order without regard to the contemnor's capacity to pay would threaten the viability of smaller broadcasters and discourage their provision of reporting services. This would particularly affect people in rural areas who are more likely to access the broadcasts and publications of small, local, media organisations. Further, the Australian Broadcasters argued that to impose both a fine or other penalty in the contempt proceedings, and a costs order, amounted to excessive punishment and would discourage court reporting and adversely affect both freedom of speech and open justice.

14.9 The Australian Press Council submitted that if the proposed power:

> is enacted in conjunction with the other proposals in the DP, the consequences will be far too draconian and illiberal.
> The risk and threat of excessive costs as much as anything else will result in inappropriate media self-censorship. … the issue of a trial abortion, or a judge's decision to continue the trial, should properly be a matter for a judge to consider when assessing any penalty for a conviction on a contempt charge.[27]

14.10 The Australian Press Council also referred to the "chilling effect" on free speech of the Bill, particularly if it would result in an increased willingness to abort trials because a media outlet, not the State, would pay for the aborted trial. The Council argued that very few trials are aborted because of prejudicial publicity and hence the Bill:

> addresses a problem that does not merit such a draconian response and does so in a way that will, inevitably, have

24. ABC, *Submission* at 4.
25. Collective submission from the Federation of Australian Commercial Television Stations, Federation of Australian Commercial Radio Broadcasters, Australian Broadcasting Corporation (Legal Services Department) and the Special Broadcasting Service.
26. Australian Broadcasters, *Joint Submission* at 8-9.
27. Australian Press Council, *Submission* at para 28.

> negative consequences on the public's right to information that would enable it to participate in important community debates.[28]

14.11 Mr Cowdery, QC, Director of Public Prosecutions[29] and the Law Society of New South Wales[30] agreed with the Commission's Proposal 31, that legislation should give the Supreme Court power to order a contemnor to pay the costs of an aborted trial.
Mr Norris, Senior Solicitor, Crown Solicitor's Office agreed by inference, although this was not expressly stated.[31]

14.12 The Victorian Bar Council expressed reservations about a power to order costs. The Bar Council submitted that:

> [t]rials may be aborted for very serious contempts and also for much more minor and technical contempts. In either case, the fact of aborting a trial is a very significant additional punishment. The imposition of very considerable liability for costs is probably not desirable in most cases. The Bar Council has significant concerns that such a proposal could have a potential for abuse which, in turn, would have the potential to bring the law itself into disrepute. Finally, and possibly most importantly, in light of the freedom of speech considerations involved and the risk of unnecessary restrictions on speech, such a proposal should be examined and considered very carefully before it is introduced.[32]

14.13 News Limited opposed a power to order costs on the basis that a contemnor is already caught by the imposition of a penalty, in other words, there would a "double punishment" and that the additional threat of a costs order provided a disincentive to media reporting. In its view, reporting on court proceedings should be encouraged. It submitted that the fact that a jury has been discharged as a result of a prejudicial publication should not be linked with the contempt proceedings. It also submitted that an undesirable effect of imposing liability for the costs of a discontinued trial is that the contemnor would seek to adduce evidence in the cost proceedings, including cross-examination of the trial judge, to show that the contemptuous publication was not the sole or main cause of the discontinuance of the trial. News Limited also submitted that

28. Australian Press Council, *Submission* at para 28, quoting from a submission to members of the NSW Legislative Council in September 1997.
29. N Cowdery QC, *Submission*.
30. Law Society of NSW, *Submission* at para 57.
31. D Norris, *Submission*.
32. Victorian Bar Council, *Submission* at para 38-40.

there would be an increase in the number of trials aborted if it is known that the media will bear the costs.[33]

14.14 Similarly, Fairfax Limited opposed the power on the basis that the consequence would be to increase the number of applications by defence counsel to trial judges to abort trials.[34] Channel 10 submitted that the common law should be allowed to develop in response to losses occasioned as a result of an aborted trial, without legislative intervention.[35]

14.15 Prime TV drew attention to the fact that contempt convictions have often resulted from unintentional infringements.[36] Therefore, if the courts had the power to order the media to bear the costs of an aborted trial, local broadcasters and small newspapers would not run the risk of reporting on a trial.
It submitted that this would leave society worse off and would deleteriously affect open justice and the integrity of justice system. However, it would not oppose enactment of a power to order costs if a prerequisite was that the contempt had been intentional, provided that elements of "reasonableness" and "recklessness" were not introduced into the formulation.

14.16 TCN Channel 9 said that it would factor in the risk of a costs order when deciding whether to broadcast a report and, as a result, there would probably be more occasions when a report was not broadcast. It was argued that if this is the likely response of a large broadcasting organisation, then the smaller media groups, with less resources than TCN Channel 9, would be likely to withhold reports of trials even more often. This, it was submitted, raised concerns for freedom of speech.[37]

14.17 The New South Wales Legal Aid Commission submitted that the media, not the State or a self-funded accused, should bear the costs of a trial aborted because of a contemptuous publication.[38] It pointed out that about 80% of District Court trials, and an even higher percentage of Supreme Court murder trials are funded by Legal Aid. It submitted that the costs to Legal Aid of an aborted trial can be enormous and yet Legal Aid struggles to meet commitments within its budget. It further submitted that, by contrast, many media organizations are well resourced.

33. News Limited, *Consultation*.
34. Fairfax Limited, *Consultation*.
35. Channel 10, *Consultation*.
36. Prime TV, *Consultation*.
37. TCN Channel 9, *Consultation*.
38. NSW Legal Aid Commission, *Consultation*.

CONCLUSION

14.18 The Commission agrees that the incidence of aborted trials due to contemptuous media publications is not high.[39] However, the Commission cannot accept that the law should not respond to an identified problem within the legal system, by way of enacting legislation, merely on the basis that the legislative power may rarely need to be invoked. What is important is to ensure that the *framing* of the response is not "draconian" or excessive.

14.19 As noted above, an objection to a costs order has been made on the basis that it would mean punishing the contemnor twice, to some extent, this objection 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 that is ancillary to sentencing. The focus of sentencing is on the offender, with its aim being punishment, but including the objective of deterrence. 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. A power to order costs is also consistent with the general trend in criminal law to compensate victims of crime. 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.

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39. Professor Chesterman has examined the criminal cases in Australia between 1980 and 1997 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 that 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 Ltd* (NSWCA, No 371/87, 21 April 1988, unreported); *Director of Public Prosecutions (Cth) v United Telecasters Sydney* (1992) 7 BR 364; *Attorney General (NSW) v Northern Star Ltd* (NSWCA, No 40259/94, 14 October 1994, unreported); *Attorney General (NSW) v Radio 2UE Sydney Pty Ltd* (NSWCA, No 40236/96, 11 March 1998, unreported).

14.20 The objection does, however, highlight that a fine should not be increased solely on the ground that the publication caused a trial to be aborted.

14.21 The Commission is concerned that an order to pay compensation for an aborted trial could be made where there was no intention to commit a contempt or, in some circumstances, where a contempt could not reasonably have been avoided. This is because it is not necessary to prove any element of intent or fault in order to establish liability for contempt. Of particular concern is the situation where interviews or broadcasts are live, such as radio broadcasts.[40] In this regard, the Commission accepts Prime TV's assertion that contempt convictions have often resulted from unintentional infringements. The Commission considers that unfairness can arise from this absence of any requirement for fault and has therefore made recommendations to introduce an element of fault into liability for sub judice contempt.[41] If liability were formulated according to the Commission's recommendations, then the potential for unfairness in respect of a power to order compensation would be significantly diminished.

14.22 The Commission has considered the arguments against a power to order costs that focus on the exercise of a judicial discretion. Although there is good reason to approach the exercise of a discretion that may give rise to a liability for costs with caution, in this case, there are a number of factors that allay concerns. First, while it is true that it is ultimately a matter for the trial judge whether or not to abort a jury trial,[42] there are established principles that guide the exercise of that discretion. These include the principle that the trial judge should only discharge the jury if she or he considers it necessary to do so in the interests of ensuring a fair trial, and that a jury should not be discharged merely because some prejudicial material has been published, if appropriate directions can cure any possible prejudice.

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40. Radio news services are often syndicated throughout NSW 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. 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.
41. See Recommendation 5 and the discussion accompanying this recommendation in ch 5.
42. 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.

14.23 The possibility that the costs of an aborted trial will be recovered from a media organisation is not a factor that can properly be taken into account in the exercise of the discretion to discharge. At any rate, the trial judge would be conscious of the fact 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.

14.24 Secondly, the Commission is not aware of any evidence to support the perception that judges mistrust the capabilities of juries, nor of 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.

14.25 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 recommendation is accepted, there is a conviction for contempt.

14.26 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 a substantial cause of the trial being discontinued (if this is thought to be a better test).

14.27 The Commission has given careful consideration to the argument that a power to order costs will inhibit freedom of speech. In the Commission's view, the Bill, as currently formulated, does represent a potentially significant intrusion on freedom of discussion. However, it does not follow that *all* schemes for compensation will unacceptably inhibit freedom of speech.

A scheme of compensation formulated in different terms could successfully achieve its aim of reparation as well as striking a proper balance between due administration of justice and freedom of discussion. Amendments to the Bill that the Commission believes would achieve these aims are outlined in paragraphs 14.64-14.75 below. In particular, 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 imposed in the sentencing process, to introduce an element of fault into liability for

sub judice contempt[43] and to reformulate the test for liability from one of "tendency" to prejudice to one of "substantial risk" of prejudice.[44]

14.28 The Commission also notes that, although no other common law jurisdiction has, as yet, enacted a power to order compensation for sub judice contempt in the circumstances provided for in the Bill,[45] 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.[46]

14.29 On balance, the Commission remains of the view that, in principle, it is proper for a person or organization found guilty of sub judice contempt to bear the wasted costs of a trial that is discontinued because of the contemptuous publication. However, the Commission believes that the way in which a power to order costs is formulated in the Bill has the potential to give rise to injustice and inhibit freedom of speech to an unacceptable degree. Criticisms of the Bill are set out in paragraphs 14.35-14.39 below, following an outline of the key provisions of the Bill.

RECOMMENDATION 34

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.

43. See ch 5.
44. See ch 4.
45. Although, 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 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).
46. See NSWLRC DP 43 at para 14.52-4.54.

OVERVIEW OF THE COSTS IN CRIMINAL CASES AMENDMENT BILL 1997

14.30 Under the framework provided by the Bill, there are three conditions that 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.[47]

14.31 Publications that 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)[48] in charge of the business or other undertaking responsible for the printed publication or broadcast.

14.32 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[49] 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.[50] It is questionable whether the "legal costs" of the parties and the provision of "legal services" to the accused include disbursements, such as payment to expert witnesses and the cost of transcripts.[51]

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47. See *Costs in Criminal Cases Amendment Bill 1997* (NSW) cl 14(4).
48. Under s 21 of the *Interpretation Act 1987* (NSW), reference in an Act to a "person" includes reference to a corporation (unless otherwise stated).
49. *Costs in Criminal Cases Amendment Bill 1997* (NSW) cl 8.
50. No regulation was drafted, or at least no draft regulation was made publicly available for discussion, prior to the Bill lapsing.
51. One submission pointed out that it is unclear whether cl 8(c) would extend to the salaries and other expenses of police witnesses, and that, it being

14.33 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.

14.34 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.

CRITICISMS OF THE BILL

14.35 In DP 43, the Commission examined criticisms of the Bill that had been raised in submissions.[52] These are summarised in the following paragraphs 14.36-14.39.

14.36 Submissions criticised the Bill on the basis that the contemnor may become liable for certain losses that were not referable to the offence. As it is presently drafted, the Bill allows for the costs that can be ordered to include the cost of remuneration of judicial officers and other staff. It was argued that these costs 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.[53]

appropriate that these costs should be included, the legislation should be clear on their inclusion: D Norris, *Submission* at 5.

52. See NSWLRC DP 43 at para 14.59-14.69.

53. FACTS, *Submission 1* at para 3.1.

14.37 It was also argued that it was unfair to single out media organisations in the application of the Bill.[54] In some instances, persons other than media organisations are primarily responsible for a contempt, and the media unintentionally also attracts liability by publishing the contemptuous statements of those others.

14.38 The fact that the Bill allows the costs proceedings to take place separately from, and up to three years after, the contempt proceedings, was criticised on the basis that it may result in excessive penalisation of the contemnor.[55] Under this framework, the sentencing court may not be in a position to take into account a compensation order as a mitigating factor. On the contrary, the fact that the publication has caused a trial to be aborted may be considered by the sentencing court as an aggravating factor that increases the amount of the fine to be imposed.[56]

14.39 Other criticisms raised in submissions included: 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; and that the reference in s 7 to the discontinuance of criminal proceedings was insufficiently clear. It is arguable that "criminal proceedings" remain extant notwithstanding that a jury may be discharged. 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.[57] The Bill's

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54. ABC, *Submission to the Attorney General* (20 September 1997*)* at 1; David Syme & Company Limited, *Submission* at para 6; FACTS, *Submission 1* at para 4.1; John Fairfax Publications Pty Limited and News Limited, *Joint Submission to Attorney General* at para 1.3; SBS, *Submission* at 1; S Walker, *Submission* at para 1. 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: *Costs in Criminal Cases Amendment Bill 1997* (NSW) cl 7(2). The scheme therefore does not apply to individuals, including individual journalists or editors.
55. See *Costs in Criminal Cases Amendment Bill 1997* (NSW) cl 9(2). However, the Bill also envisages that the costs application can form part of the contempt proceedings: cl 14(2). It was 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: D Norris, *Submission* at 6.
56. See *Attorney General (NSW) v John Fairfax & Sons Ltd* (NSWCA, 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* (1992) 7 BR 364; *Attorney General (NSW) v Northern Star Ltd* (NSWCA, No 40259/94, 14 October 1994, unreported). Contrast *Hinch v Attorney General (Vic)* [1987] VR 721 at 731 (Young CJ), at 748 (Kaye J).
57. D Norris, *Submission* at 4.

provision that a certificate from the Attorney General would be conclusive evidence of the costs of the aborted trial was also criticised.[58]

DP 43

14.40 The Commission considered the argument that the Bill imposes on the contemnor liability for expenses not directly referable to the contempt, namely the salaries of court staff. Although there is a counter-argument that the judicial officer 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, that does not get away from the fact that it is an expense the State has to bear anyway. The Commission concluded that the legislation should restrict compensation to expenses directly referable to the trial in question.

14.41 The Commission agreed that it is unfair to make the media the sole target of an order to pay compensation and 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.

14.42 The Commission was of the view that the sentencing court should be able to take into account as relevant to determining an appropriate fine, the likelihood that an order for compensation would be made and, conversely, the Court in the costs proceedings should be able to take into account the amount of any fine imposed on the offender by the sentencing court. The Commission reached the tentative conclusion that it would therefore be desirable to retain cl 14(2) of the Bill, which envisages that the costs application can form part of the contempt proceedings. However, the Commission did not consider it essential that both should be heard together.

14.43 The Commission noted the concerns over the definition of "publication" and proposed 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".

14.44 The Commission agreed that deeming the Attorney General's certificate to be "conclusive" evidence of the costs of an aborted trial gives cause for concern. The

58. SBS, *Submission* at 2; See *Costs in Criminal Cases Amendment Bill 1997* (NSW) cl 10(3).

Commission believed 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.

14.45 As well as discussing the criticisms of the Bill raised in submissions, DP 43 also analysed certain features of the Bill to determine whether or not the power to order costs could be better formulated.

14.46 The Commission had misgivings that the Bill allows for an order for costs to be made in respect of a person against whom a charge of contempt is simply "found proven".[59] An order could therefore be made where there was no conviction for contempt, provided that the charge of contempt was proven. For example, the court could find that a charge of contempt against a person is proven, but, in its discretion, determines not to enter a conviction due to mitigating circumstances. Under the provisions of 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.
The Commission was of the view that the Bill's potential for unfairness would be diminished if the power to order compensation arose only when there had been a conviction for contempt.[60]

14.47 The Commission considered whether the power to order costs should arise where proceedings had been discontinued "solely or mainly" because of a contemptuous publication, as the Bill provides,[61] or, alternatively, where the contemptuous publication was the *sole* reason proceedings were discontinued. The Commission was inclined to adopt a "sole reason" test, provided the Court had a discretion to order an amount for compensation that was just and equitable.[62] The Commission noted that 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.[63]

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59. *Costs in Criminal Cases Amendment Bill 1997* (NSW) cl 7(2)(a).
60. The Australian Law Reform Commission 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 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: Australian Law Reform Commission, *Contempt* (Report 35, 1987) at para 485.
61. *Costs in Criminal Cases Amendment Bill 1997* (NSW) cl 7(1).
62. See para 14.71.
63. See NSWLRC DP 43 at para 14.76.

14.48 The Commission believed that it was desirable that the power to make a costs order should continue to be a discretionary one[64] but queried whether legislation should include guidelines as to the factors which ought to be taken into account in the exercise of that discretion.[65] The Commission noted that both the *Victims Support and Rehabilitation Act 1996* (NSW)[66] and the *Crimes Act 1914* (Cth)[67] include provisions setting out factors that the court must take into account in the exercise of its discretion.

14.49 Although 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, it does not give the Court any discretion to order an amount greater than the amount specified in the certificate tendered by the Attorney General nor what the Court might determine to be a reasonable amount.[68] The Commission proposed that the Court should have a discretion to order an amount that is "just and equitable in all the circumstances".[69]

14.50 The Bill contemplates a scheme for compensation as an adjunct to a criminal offence, rather than providing for a separate action in tort.[70] The Commission concluded that this was proper as there would be a number of disadvantages to allowing a civil action for compensation.[71]

14.51 The Commission queried whether the Bill should apply not only to "discontinuance" of proceedings but to wasted expenses arising out of delays in the commencement of a trial because of publicity, a change of venue, and an overturning of a conviction, and the ordering of a retrial, because of prejudicial reporting. The

64. *Costs in Criminal Cases Amendment Bill 1997* (NSW) cl 7(1): "The Supreme Court may make an order under this Part …"
65. See NSWLRC DP 43 at para 14.80.
66. *Victims Support and Rehabilitation Act 1996* (NSW) s 73.
67. *Crimes Act 1914* (Cth) s 16A.
68. *Costs in Criminal Cases Amendment Bill 1997* (NSW) cl 11(3).
69. The Australian Law Reform Commission 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: Australian Law Reform Commission, *Contempt* (Report 35, 1987) at para 485.
70. *Costs in Criminal Cases Amendment Bill 1997* (NSW) cl 14(2): "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".
71. See NSWLRC DP 43 at para 14.71-14.73.

Commission was of the tentative view that the legislation should not be widened in this way. In relation to retrials, in particular, the Commission was inclined to the view 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.

14.52 The Commission's tentative view was that the Bill was correct to limit its application to criminal jury trials and not to apply to civil proceedings.

14.53 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. The Commission was of the provisional view that, based on the precedent of the Victims Compensation Act, the accused should be able to apply for compensation for any emotional or physical injury directly arising from the discontinuance of proceedings. However, the Commission did not think it appropriate to allow witnesses to be able to claim compensation for any emotional distress caused by the discontinuance of a trial.

14.54 The Commission took the view that an individual, such as the accused in the substantive trial, should have standing to apply for compensation and that there was 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.[72]

SUBMISSIONS TO DP 43

14.55 The Australian Broadcasting Corporation ("ABC")[73] submitted that if there were to be enacted a power to order costs (which they opposed) it agreed with all the Commission's proposals for modifications to the Bill except the proposal that the accused should be able to apply for compensation for any emotional or physical injury directly arising from the discontinuance of proceedings. The ABC did not give reasons why it disagreed with this proposal.

14.56 The Australian Broadcasters submitted that if a costs order were to be enacted (which they also opposed), it should only follow on a conviction for contempt

72. One submission considered that, as contempt proceedings are brought in the name of the State of NSW, it may be appropriate for the State to be the moving party in an application for costs:
D Norris, *Submission* at 5.

73. ABC, *Submission* at 4.

and a finding that the contempt was intentional. They also submitted that regard should be had to the contemnor's ability to pay.[74]

14.57 The Australian Press Council was of the view that the proposed Bill, even as modified, was not appropriate.[75]

14.58 Mr Cowdery, QC, Director of Public Prosecutions ("DPP")[76] agreed with Proposal 32, except Proposal 32(4) that an order for compensation be made only where a trial is discontinued "solely" because it has been affected by a contemptuous publication or broadcast. The DPP preferred the wording of the current Bill, which provides that the Court may make an order in respect of proceedings that are discontinued solely or mainly because they have been affected by a contemptuous publication. The DPP questioned:

> why should an organisation escape liability where some other minor factor contributed to a discharge in circumstances where the main reason for the discharge was its own conduct? The legislation is designed partly as a deterrent and partly as a punishment. Its effectiveness in both respects would be enhanced by the more robust trigger proposed in the initial Bill.

14.59 Also in relation to Proposal 32(4), Mr Norris, Senior Solicitor, Crown Solicitor's Office suggested a formulation requiring publicity to be the principal or substantial reason for discontinuance to take account of relatively minor additional grounds.[77] Mr Norris did not agree with the Commission's Proposal 32(6) that 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. He submitted that State costs are real costs and should be compensable in the same way that the State can recover legal costs in proceedings. In support of this, Mr Norris cited *Commonwealth Bank v Hattersley*.[78] Mr Norris further argued that if the costs of salaried government personnel cannot be claimed, this would have the result that the cost of representation assigned to private solicitors by the Legal Aid Commission could be recovered whereas the cost of an in-house solicitor could not, even though the result to the Legal Aid Commission's budget may be the same.[79]

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74. Australian Broadcasters, *Joint Submission* at 9.
75. Australian Press Council, *Submission* at para 28.
76. N Cowdery QC, *Submission*.
77. D Norris, *Submission* at para 118.
78. *Commonwealth Bank of Australia v Hattersley* (2001) 51 NSWLR 333.
79. D Norris, *Submission* at para 119.

14.60 Mr Norris also submitted that no legislative definition of "publication" is required, although he did point out that an issue may arise as to whether a statement made by an interviewee to a journalist is a "publication", if contribution to costs were to be sought in that situation.[80] In relation to the Commission's proposal that the party against whom a costs order is to be made should be able to challenge the accuracy of the contents of the Attorney General's certificate as to costs, Mr Norris submitted that the certificate should at least amount to prima facie evidence, in the absence of contrary evidence produced by the contemnor.[81]

14.61 The Law Society of New South Wales ("Law Society") submitted that the definition of "discontinued" contained in the Bill should remain as presently drafted.[82] It also submitted that the application of the legislation should be widened to apply to circumstances where the commencement of a trial is delayed because of publicity, a change of venue is granted, or a conviction is subsequently overturned, and a retrial ordered, because of prejudicial reporting.[83]

14.62 The Commission raised two questions for discussion, namely, whether legislation should contain guidelines for the exercise of the Court's discretion to make an order for costs and, if so, whether guidelines should 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.
The Commission also asked what other guidelines should be included.

14.63 The Law Society submitted that the legislation should contain guidelines for the exercise of the court's discretion and offered examples of relevant factors to be taken into account:

- the real loss occasioned
- to what extent it was occasioned to the public purse, a public company, to a private individual etc
- the capacity of the contemnor to pay (but only in appropriate circumstances)
- the capacity of the party who has been put to expense, being able to bear that expense

80. D Norris, *Submission* at para 120. See *Director of Public Prosecutions (Cth) v Wran* (1986) 7 NSWLR 616.
81. D Norris, *Submission* at para 121.
82. Law Society of NSW, *Submission* at para 58(a).
83. Law Society of NSW, *Submission* at para 58(b).

- the culpability of the contemnor (eg, a deliberate and calculated intention to cause the trial to abort, contract ignorance of the law or ignorance of the fact that there was a trial going on)

- whether there were any other factors leading to the decision to discharge the jury.[84]

CONCLUSION

14.64 The Commission notes that, except for the Australian Press Council who oppose any scheme for compensation, submissions either expressly supported, or offered no opposition to, the Commission's proposals that the following modifications be made to the Bill:

- The application of the legislation should not be restricted to media organisations.
- An order for compensation should only be made where there has been a conviction for contempt.
- The Court should have a discretion to order an amount which is "just and equitable in all the circumstances".
- The "legal costs" of the parties and the provision of "legal services" to the accused should include disbursements directly related to the aborted trial.
- 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.

Accordingly, the Commission recommends that these modifications be made.

14.65 The Commission notes that there was support for its proposal that the party against whom a costs order is to be made should be able to challenge the accuracy of the contents of the Attorney General's certificate setting out the costs that relate to the discontinued proceedings. The Commission agrees, however, that the certificate should amount to prima facie evidence of the costs, in the absence of contrary evidence produced by the contemnor.

14.66 Although these matters were not raised for discussion in DP 43, the Commission now makes two recommendations in relation to the accused's costs. First, the Attorney General's certificate should include the accused's claim for costs.

84. Law Society of NSW, *Submission* at para 58(c).

Secondly, where the Court makes an order awarding an amount that is less than the total amount claimed in the certificate, the accused should receive the full amount of his or her claim, with the balance going to the State.

14.67 In Proposal 32(3), the Commission proposed that reference in the Bill to "printed publication" and "radio, television or other electronic broadcast" be omitted and "publication", for the purposes of the legislation, be defined to mean a "publication in respect of which a conviction for contempt has been entered". The Commission notes the view that that no legislative definition of "publication" is required but is inclined to interpret this submission as supporting the Commission's proposal. The reason for this is that the Bill attempts to restrict "publication" to printed matter or electronic broadcasts whereas the Commission is proposing that there be no such restrictions. If a defendant is found guilty of publishing a contempt, the court in the contempt proceedings has been satisfied that there has been the requisite publication and this, therefore, would be enough to trigger the costs power.

14.68 The Commission has considered the view that legislation retain the more "robust trigger" of the Bill that an order for compensation should be made where a trial is discontinued "solely or mainly" because it has been affected by a contemptuous publication or broadcast. The Commission has also considered the suggestion that the language of cl 7 of the Bill be reformulated, requiring contemptuous publicity to be the "principal or substantial reason" for discontinuance, to take account of relatively minor additional grounds. The Commission sees the merit in this suggestion and believes that the right balance between freedom of speech and due administration of justice is struck if the power to order compensation is triggered where a contemptuous publication has been a substantial cause of the trial being aborted. It need not have been the sole or main cause. However, in determining what is a "just and equitable" amount the contemnor be ordered to pay, the fact that the publication was, or was not, the sole cause of the trial being discontinued would become relevant. The Commission has recommended that the trial judge's reasons for aborting a trial be admissible in the contempt proceedings.[85] It will therefore be possible for the court to establish whether the contemptuous publication has, or has not, been the sole reason for the trial having been aborted.

14.69 The Commission has considered the objection to the Commission's Proposal 32(6) that 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. The Commission notes that in no other circumstances where an order for costs can be made, are ongoing State expenses, such as judicial salaries, ordered to be paid. The Commission is of the view that including such expenses in a costs order is too harsh.

85. See para 4.46-4.54 and Recommendation 3**.**

Accordingly, the Commission is not persuaded by the reasons on which the objection was based and concludes that cl 8 of the Bill should be amended to exclude losses not directly referable to the aborted trial in question.

14.70 The Commission has reconsidered its proposal that the accused should be able to apply for compensation for any emotional or physical injury directly arising from the discontinuance of proceedings. The sole purpose of the Bill is to recover costs thrown away when a trial is aborted. It is not a victims' compensation mechanism. It is therefore proper that the monies that a contemnor can be ordered to pay are confined to the wasted expenses borne by the State and the accused. However, the Commission suggests that an amendment to the Victims' Compensation Act be considered to provide for compensation for the physical and emotional harm that an accused suffers when the finalisation of his or her trial is delayed because of a contemptuous publication.

14.71 The Commission recommends that the legislation contain guidelines for the exercise of the discretion to order an amount that is "just and equitable in all the circumstances". 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 that 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. Legislation could also direct the Court to consider, in determining what is just and equitable, the financial hardship that would arise from the imposition of an order for a certain amount.

14.72 The Commission considered whether the category of cases where a costs order could be made should be limited to cases where there is *significant* fault or culpability. This would mean, for example, that a publisher must have had actual knowledge of proceedings and must have acted negligently or recklessly in publishing contemptuous material without due concern for its likely effect on the trial. It would need to be shown by the prosecution that the contemnor should have known that the likely consequence of publishing the contemptuous material was that the trial would be aborted. The Australian Broadcasters and the Law Society went a step further and submitted that, in order to establish liability for costs, it should be proved that the contempt was intentional. However, the Commission is of the view that this is too high a threshold as intention to commit a contempt would be too hard to prove.

14.73 The Commission has concluded that there should not be a specific requirement that there be a finding of fault before an order for costs can be made. Rather, in the exercise of its "just and equitable" discretion, the Court would take into account the culpability of the contemnor's conduct on the issue of quantum.

14.74 The Commission notes that there were no submissions on whether there should be a statutory cap on the total amount of money that may be ordered by way of compensation. The Commission has concluded that a statutory cap is unnecessary in light of its recommendation that the court have a "just and equitable" discretion. However, the Court should not have the power to make an order for an amount that is higher than the actual wasted costs.

14.75 As noted in paragraph 14.42 above, in DP 43, the Commission was of the view that, for a number of reasons, it would be advantageous, but not essential, that the costs application and the contempt proceedings be heard at the same time. The Commission considers now that it is sufficient to provide that the Court, in determining the amount of any fine to be paid and the amount of any costs order, must have regard to the total sum that the contemnor will have to pay. While the application for a costs order will not be made until the Court has determined the issue of contempt liability adversely to the person charged, it will generally be appropriate for the Court to adopt the approach of fixing the penalty and reaching its decision regarding the costs order at the same time. All parties to the trial that was aborted would need to be given notice of the initiation of contempt proceedings and the opportunity to file an application for a costs order.

14.76 The Commission notes that it will be necessary for the *Supreme Court Rules 1970* (NSW) to be amended to take into account the provisions of the Bill.

RECOMMENDATION 35

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:

The application of the legislation should not be restricted to media organisations.

An order for compensation should only be made where there has been a conviction for contempt.

An order for compensation should only be made where the contemptuous publication was either the sole or a substantial cause of the trial being discontinued.

Reference in the *Costs in Criminal Cases Amendment Bill 1997* to "printed publication" and "radio, television or other electronic broadcast" should 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".

The legislation should provide that the Court, in determining the amount of any fine to be imposed and the amount of a costs order, should take account of the total sum to be paid by the contemnor.

The Court should have a discretion to order an amount which is "just and equitable in all the circumstances", providing that the amount ordered does not exceed the actual wasted costs. The legislation should provide that the matters to which the court should have regard in the exercise of this discretion should include:

(a) the financial resources of the contemnor; and

(b) the degree of culpability of the contemnor.

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.

The "legal costs" of the parties and the provision of "legal services" to the accused should include disbursements directly related to the aborted trial.

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. However, the certificate should amount to prima facie evidence of the costs, in the absence of contrary evidence produced by the contemnor.

The Attorney General's certificate of costs should include the costs claimed by the accused affected by the discontinued trial.

An order for costs which is less than the amount claimed in the Attorney General's certificate should, nonetheless, include the full amount of the accused's costs.

15. The media and the courts

- Introduction
- Media/liaison positions in New South Wales
- The Victorian model
- The Commission's recommendations

INTRODUCTION

15.1 In Discussion Paper 43 ("DP 43"), the Commission acknowledged the importance of a good relationship between the media and the courts as a way of minimising the risk of prejudice to court proceedings. A co-operative relationship, based on open communication, represents a significant first step in preventing breaches of the sub judice rule and fulfilling the fundamental aim to which that rule is directed, namely, to ensure that the fairness of the judicial system is not compromised by media publicity. Representatives of the media have suggested that there are ways in which communication between the media and the courts in New South Wales could be improved.[1] In DP 43, we referred briefly to initiatives that have been taken in this state to improve the relationship between the media and the courts, and further reforms that could be considered.[2] We also discussed initiatives taken in Victoria to ensure a good relationship between the media and the courts.

15.2 Since the release of DP 43, we have consulted further with the media and those involved in court/media liaison.[3] Representatives of the media have cited several practical matters that, they suggest, have a significant impact on their ability to report on the courts and avoid liability for sub judice contempt. These include having a means of confirming whether a matter is pending or currently being heard in a court and verifying the details of that matter, timely access to comprehensive information about suppression orders, and access to transcripts. Another issue, access to court documents, was also referred to. On the part of those working in the courts, emphasis has been placed on the importance of proper training of journalists involved in court reporting, and ensuring that they have a sufficient level of experience and/or supervision to report accurately and in a way that does not compromise court proceedings. The Commission discusses access to, and reporting on, court documents in Chapter 11 of this Report.

15.3 Victoria has been held up by representatives of the media as a model for New South Wales to follow for court/media liaison.
In fact, there is already a strong foundation in New South Wales on which to build a good relationship between the courts and the media. Several media liaison positions exist in key areas of the justice system in this state that potentially go a long way in facilitating communication between the media and the courts.

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1. See Media Liaison Officers, *Consultation*; TV and Radio Representatives, *Consultation*.
2. See NSW Law Reform Commission, *Contempt by Publication* (Discussion Paper 43, 2000) at para 1.47-1.63.
3. See Media Liaison Officers, *Consultation*; K Ashbee, *Telephone consultation*.

15.4 A strategy that has worked well in Victoria that could assist in ensuring a co-operative relationship between the media and the courts in New South Wales is the creation of a courts/media committee, consisting of representatives from both the media and the courts. It would provide a central forum for discussion of practical problems and areas of concern for the media and the courts, and provide a channel of open communication to try to resolve these concerns. It would also, to some extent, take the burden away from single individuals to liaise between the media and the courts, and would hopefully raise awareness of, and commitment to, the importance of a co-operative relationship between the two.

15.5 Below is a summary of the key positions that already exist in New South Wales to assist in court/media liaison, as well as issues relating to those positions that were raised in consultation. We also discuss the initiatives that have been taken in Victoria and recommend that some of these initiatives be adopted in New South Wales.

MEDIA/LIAISON POSITIONS IN NEW SOUTH WALES

15.6 At present in New South Wales, there are several positions in key government departments that provide a source of information to the media about court proceedings.

15.7 ***Public Information Officer to the Chief Justice of New South Wales.*** The Public Information Officer provides the media with information about proceedings in the New South Wales Supreme and District Courts and some Local Court matters. For example, the Public Information Officer will answer media queries about particular cases, help them to understand court orders and judgments and provide one-on-one or small group information sessions for new journalists on court reporting.
She also handles enquiries from the media about access to court files and filming within the Supreme Court.

15.8 On a day-to-day basis, the Public Information Officer notifies the major media outlets when a suppression order has been made, as well as the terms of the order. As in Victoria, the Public Information Officer relies on the individual judicial officer, his or her associate, or counsel, to inform him or her when such an order has been made, so that he or she can then notify the media.

15.9 While it is impossible to know whether she is routinely kept up to date on the existence of suppression orders, the present Public Information Officer considers that the current system of keeping the media informed is relatively effective, but that the system relies on the co-operation of others. No major problems have arisen in terms of the media being unaware of the existence of an order. She did note that this system of notification is probably more effective in relation to suppression orders

made in the Supreme Court than in the District Court, although the computer court files of the District Court often note suppression orders.
As for the Local Court, journalists often seek information first from the Clerk of the Local Court. While judicial officers are expected to be made aware of the role of the Public Information Officer by their head of jurisdiction, in general she considers that judicial officers are sufficiently aware of her position to know that they can and should inform her of matters of significant media interest, including suppression orders. She noted also that Associates should be proactive in letting her know when a judicial officer has made a suppression order. In December 2001, materials were circulated to Associates of Supreme and District Court judges about handling media enquiries received in Chambers.

15.10 One matter relating to suppression orders that perhaps could be improved is the timeliness in which the Public Information Officer is informed of an order. The present Public Information Officer has found that sometimes she is not informed of the making of an order until after 4 pm. From the media's point of view, notification of an order that late in the afternoon may create significant problems if the deadline for preparing a report has already passed, particularly in the case of reports broadcast on the radio. As well, the terms of the order are sometimes not detailed enough to allow the Public Information Officer, and consequently the media, to know exactly what information is to be suppressed. The Public Information Officer has also suggested that it would be helpful to note the existence of a suppression order on the electronic file relating to a matter. This would provide a quick point of reference for her, and for the Registry, to answer media queries about such orders.

15.11 The Public Information Officer has also suggested that the procedure for putting judgments on the Internet needs reviewing. At present, it is up to the individual judicial officer to decide whether or not to arrange for his or her judgment to be publicised on the Internet, and sometimes this may not occur until a week after the decision has actually been handed down. This can be frustrating for media who are attempting to gain timely access to judgments. Judgments of the District Court are quite often typed by Chambers and hard copies given to parties, but not made available to the media. They are instead referred to the Registry, which often does not have the Court file back from Chambers.
This is very frustrating for the media. Waiting for Court Reporting Services Branch to produce District Court judgments delivered
ex-tempore is often not possible and the media will and do run stories without having read the judgment.

15.12 ***Media Relations Officer, New South Wales Office of the Director of Public Prosecutions.*** The Office of the Director of Public Prosecutions ("DPP") employs a Media Relations Officer as a consultant on contract to liaise with the media solely on its behalf. The Media Relations Officer provides an initial contact for the

media and can assist them in obtaining information about prosecutions conducted by the DPP, such as the details of certain charges. He can also arrange media interviews with the DPP.
The DPP considers that the engagement of a consultant as Media Relations Officer has resulted in a more co-operative relationship between his Office and the media, and has lifted the burden of initial media contact from a number of his officers.[4] There was some suggestion in consultation with media representatives that the DPP's engagement of a Media Relations Officer is not universally known among the media, and that officers at the Office of the DPP do not always refer the media on to the Media Relations Officer as a point of contact when the media call the Office for information.[5]

15.13 ***Police Media Unit.*** The Police Media Unit is established as the point of contact between all major media outlets in New South Wales and the police. It handles enquiries from the media, co-ordinates media conferences and issues news releases. Journalists are invited to register their contact information on the New South Wales Police Service website to receive, via email, media releases and updates issued by the Police Media Unit.
Police officers are advised to notify the Police Media Unit and provide them with a full briefing of any matter representing significant media interest.[6]

15.14 When giving information to the media about a person who has been arrested and/or charged, or likely to be charged, it seems that it is current police policy not to give information to the media that would identify the person.[7] This may make it difficult for the media to follow up on a case, such as inquiring about details of a subsequent prosecution conducted by the DPP.[8]

THE VICTORIAN MODEL

15.15 Representatives of the media have referred to Victoria as the most congenial state in which to work, because of the
co-operative relationship that exists there between the media and the courts. The position of Courts Media Information Officer ("CMI Officer") has existed in Victoria

4. See N Cowdery QC, *Submission* at 1.
5. See Media Liaison Officers, *Consultation*.
6. See NSW Police Service, *NSW Police Service Handbook* (1999) at M-2.
7. See NSW Police Service, *NSW Police Service Handbook* (1999) at M-4 to M-5; Media Liaison Officers, *Consultation*.
8. It appears that if the media wish to inquire about a prosecution conducted by the DPP, they are required to provide the DPP with a name of the person charged: see Media Liaison Officers, *Consultation*.

since 1993. The role of the CMI Officer is to liaise with the media on behalf of all Victorian courts, and act as a central point of contact and assistance for the media.

15.16 An important part of the CMI Officer's day-to-day work consists of notifying the media of suppression orders or other orders affecting publication. Copies of the orders are sent by facsimile to approximately 25 media organisations and their lawyers. The CMI Officer 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. She sends out alerts to the media about suppression orders that have been made in the past that remain current, and other problems the media should know about. The CMI Officer is notified about suppression orders by judges' associates and court clerks. Sometimes she may hear about an order and make further inquiries. As well, she sometimes makes requests to the media on behalf of a judicial officer to restrict reporting on a particular case. The media usually follow such requests.

15.17 The CMI Officer also offers practical assistance to members of the media in understanding the legal requirements of court reporting, by 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. A document called *Covering the Courts – A Basic Guide for Journalists* has been developed to assist journalists reporting on court proceedings. It contains a series of guidelines that have been developed by the Courts Information Officer to educate members of the media on the legal requirements of court reporting. The Guide is available on the Internet as well as in hard copy.

15.18 Some of the CMI Officer's work involves pointing the media in the right direction for assistance if she cannot help them herself. In this way, the CMI Officer has become a point of contact for the media in relation to court matters. The guide, *Covering the Courts*, includes contact names and telephone numbers for those handling media inquiries in various government departments and courts, such as the Victorian and Federal DPP, and the Federal and Family Courts in Victoria.

15.19 The CMI Officer is available to provide assistance to the media in rural, as well as metropolitan, Victoria. However, although she receives requests for assistance from country reporters from time to time, in general, County Court registries are good in giving information to the media, especially on suppression orders.

15.20 The CMI Officer does not have a role in assisting the media at the stage where a person has been arrested or charged. If she receives inquiries from the media at that stage, she may either suggest that the media go directly to the police.

15.21 In addition to the CMI Officer, there is a Media Committee in Victoria, established by the then Chief Justice in 1993.
Justice Bernie Teague is the current chair of the Committee.
Its other members include a representative of the County Court and the Magistrates Court, the state DPP, solicitors working in the area of media law, and two journalists. The federal DPP and the Media Liaison Officer of the Federal Court also attend meetings of the Committee when necessary or appropriate. 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, there are protocols for reporters to obtain trial transcripts, or to film and take photographs in court.

15.22 There have also been recent initiatives in Victoria regarding the use of tape recorders in court.[9] While this may be a further initiative worth considering in New South Wales to facilitate accurate court reporting, it really goes beyond the scope of our current reference to make any recommendation to this end. Similarly, the issue of the media's access to transcripts, which appears to be easier in Victoria than in New South Wales,[10] is an initiative worth considering but lies beyond the scope of our reference.

THE COMMISSION'S RECOMMENDATIONS

RECOMMENDATION 36

A media information officer should be appointed in New South Wales with the specific function of liaising between the media and the Supreme Court (including the Court of Appeal), the Court of Criminal Appeal, the Land and Environment Court, the Children's Court, the District and Local Courts, the Coroner's Court, the Industrial Relation Commission, and the Dust Diseases Tribunal.

RECOMMENDATION 37

9. For example, the Magistrates Court has agreed on new guidelines that allow reporters to use their own tape recorders in court for the purpose of gaining a fair and accurate report, on the provision that they first sign an undertaking.
10. It may be, however, that this is more a matter of resources than of any differences in protocol between the two States.

A Courts Media Committee should be established in New South Wales, comprising representatives of both the media and the courts, based on the courts media committee in Victoria.

RECOMMENDATION 38

There should be a protocol to the effect that, when a court makes a suppression order, the terms of that order are to be posted on the court's web page within a specified period of time.

RECOMMENDATION 39

The registry of the court in which a suppression order is made should make available to the public the terms of the order.

15.23 These recommendations are aimed at improving communication between the media and the courts in New South Wales. A good foundation is already laid in this State for a co-operative relationship between the media and the courts. Greater awareness of the media liaison positions that already exist, and commitment by both the media and the courts to improving their relationship, will improve communication.

15.24 While the Public Information Officer of the Supreme Court already does much to facilitate communication between the media and the courts, her current functions go beyond media liaison, and extend to other facets of public relations, such as educating members of the public on the functions of the Court. Recommendation 15(a) proposes that a position be established specifically for liaising between the media and the courts, as has been done in Victoria, which would allow the media information officer to focus solely on the demands involved in facilitating communication between the media and the courts.

15.25 Recommendation 15(b) is similarly based on the Victorian model. It aims to ensure a co-operative relationship between the media and the courts by allowing their representatives to discuss and address together issues of concern.

15.26 Finally, recommendations 15(c) and 15(d) deal specifically with the issue of suppression orders. Recommendation 15(c) aims to ensure that the media is consistently made aware of the terms of such orders by establishing a protocol within

the courts for posting the orders on their websites. We consider that it is more efficient and effective to use the court websites for such communications rather than requiring the media information officer to fax notices of the orders to individual media organisations. Recommendation 15(d) requires the registry of the relevant court to make available to the public the terms of current suppression orders, to ensure that the media have every opportunity to make themselves aware of, and comply with, such orders.

Appendices

- **Appendix A**
  Draft Contempt of Court by Publication Bill 2003
- **Appendix B**
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Appendix A: Draft Contempt of Court by Publication Bill 2003

Draft

New South Wales

Contempt of Court by Publication Bill 2003

Overview of Bill

The object of this Bill is to make provision regarding the type of criminal contempt of court by publication that is sometimes known as the "sub judice rule"(that is, the imposition of restrictions on publications that have a tendency to prejudice the fairness of legal proceedings) and other contempts of court. The Bill:

(a) declares that the common law offence of criminal contempt of court by publication of matter (whether within or outside the State) that has a tendency to prejudice the fairness of a proceeding in a court of the State (sub judice contempt) is committed by the publication of certain matters in relation to pending criminal or civil proceedings, and

(b) sets out certain defences to proceedings for criminal sub judice contempt of court, and

(c) allows any person to ask the Supreme Court for an order (such as an injunction) to restrain an actual or threatened criminal sub judice contempt of court, and

(d) grants to the Supreme Court the power to make an order as to the costs of criminal proceedings before a jury that are discontinued solely or substantially on account of a publication in respect of which criminal contempt has been established, and

(e) allows any person to commence proceedings for criminal contempt of court, and

(f) allows any person to commence proceedings for criminal contempt of court, and

(g) abolishes the prejudgment principle at common law, and

(h) sets out the time frames within which the publication of prejudicial material would constitute sub judice contempt by defining when court proceedings are active for certain requirements of the Act, and

(i) makes it clear that when a court convicts a person of civil or criminal contempt the court has the whole range of sentencing options set out in the Crimes (Sentencing Procedure) Act 1999, and

(j) provides that the hearing and decision of an appeal against a judgment or order relating to criminal contempt, and of a review of a question of law submitted by the Attorney General, should be assigned to the Court of Criminal Appeal.

Draft

New South Wales

Contempt of Court by Publication Bill 2003

Contents

New South Wales

Contempt of Court by Publication Bill 2003

No , 2003

A Bill for

An Act to make provision regarding the type of criminal contempt of court by publication that is sometimes known as the sub judice rule, and other contempts of court.

The Legislature of New South Wales enacts:

Part 1 Preliminary

1 Name of Act

This Act is the Contempt of Court by Publication Act 2003.

2 Commencement

This Act commences on a day or days to be appointed by proclamation.

3 Definitions

(1) In this Act:

civil proceeding means a proceeding in a court other than a criminal proceeding and includes:

(a) a proceeding by way of an appeal in relation to a civil proceeding, and

(b) an inquest or inquiry held under the Coroners Act 1980.

court:

(a) means:

(i) the Supreme Court (including the Court of Appeal), the Court of Criminal Appeal, the Land and Environment Court, the Dust Diseases Tribunal, the Industrial Relations Commission, the Children's Court, the District Court or a Local Court, or

(ii) any other court that, or person who, exercises criminal or civil jurisdiction, and

(b) in relation to an inquest or inquiry held under the Coroners Act 1980--means the coroner, and

(c) in relation to a committal proceeding--means the Justice or Justices conducting the proceeding.

criminal proceeding means a proceeding in a court relating to the trial or sentencing of a person for an offence and includes:

(a) a proceeding for the committal of a person for trial, and

(b) a proceeding for the sentencing of a person following conviction, and

(c) a proceeding relating to bail (including a proceeding during the trial or sentencing of a person), and

(d) a proceeding relating to an order under Part 15A (Apprehended violence) of the Crimes Act 1900, and

(e) a proceeding preliminary or ancillary to:

(i) a prosecution for an offence, or

(ii) a proceeding for the committal of a person for trial, or

(iii) a proceeding relating to bail, or

(iv) a proceeding relating to an order under Part 15A (Apprehended violence) of the Crimes Act 1900, and

(f) a proceeding by way of an appeal with respect to the trial or sentencing of a person.

sub judice contempt proceedings--see section 4 (1).

(2) Notes included in this Act do not form part of this Act.

4 Application of Act

(1) This Act (other than this Part, Part 8 and Schedule 3) applies only to and in respect of proceedings against a person at common law for contempt of court by publication of matter (whether within or outside the State) that has a tendency to prejudice the fairness of proceedings in a court of the State. In this Act such proceedings are referred to as sub judice contempt proceedings.

(2) This Part, Part 8 and Schedule 3 apply to and in respect of any proceedings for contempt (whether or not they are sub judice contempt proceedings).

(3) Except as provided by this section, nothing in this Act limits the jurisdiction that a court has in proceedings against a person for contempt of court apart from this Act or affects the operation of a principle or rule of the common law or equity in relation to such proceedings.

(4) Without limiting subsection (3), nothing in this Act affects any defence to a charge of criminal contempt available at common law for fair and accurate reporting of judicial proceedings or parliamentary proceedings.

5 Act to bind Crown

This Act binds the Crown in right of New South Wales and, in so far as the legislative power of the Parliament of New South Wales permits, the Crown in all its other capacities.

Part 2 Publication of certain matter relating to proceedings to constitute sub judice contempt

6 Effect of Part

This Part sets out the only circumstances in which a court may find a person guilty of contempt in sub judice contempt proceedings.

Note. Section 4 (1) describes sub judice contempt proceedings.

7 Contempt because of risk of influence on jurors and potential jurors

(1) A person is guilty in a sub judice contempt proceeding against the person if:

(a) the person publishes matter or causes matter to be published, and

(b) a criminal or civil proceeding is active at the time of the publication of the matter, and

(c) the proceeding is one that will be, may be or is being tried before a jury, and

(d) the publication of that matter creates a substantial risk, according to the circumstances at the time of publication, that a juror in the proceeding or a person who could become a juror in the proceeding (a potential juror) will become aware of the matter, and

(e) there is a substantial risk, according to the circumstances at the time of publication, that the juror or potential juror will recall the matter at the time of acting as a juror in the proceeding, and

(f) because of the risk that the juror or potential juror will recall the matter at that time, there is a substantial risk, according to the circumstances at the time of publication, that the fairness of the proceeding will be prejudiced through influence being exerted on jurors or potential jurors by the published matter.

(2) A person can be found guilty as referred to in subsection (1) whether or not the person intended to prejudice the fairness of the proceeding.

(3) Part 1 of Schedule 1 applies for determining the times at which a proceeding is active for the purposes of this section.

(4) This section extends to the publication of matter outside New South Wales.

8 Contempt because of risk of influence on witnesses and potential witnesses

(1) A person is guilty in a sub judice contempt proceeding against the person if:

(a) the person publishes matter or causes matter to be published, and

(b) a criminal or civil proceeding is active at the time of the publication of the matter, and

(c) the publication of that matter creates a substantial risk, according to the circumstances at the time of publication, that a witness in the proceeding or a person who could become a witness in the proceeding (a potential witness) will become aware of the matter, and

(d) there is a substantial risk, according to the circumstances at the time of publication, that a witness will recall the contents of the matter at any stage of the proceeding or of any official investigation in relation to the proceeding, and

(e) because of the risk that the witness will recall the matter at that time, there is a substantial risk, according to the circumstances at the time of publication, that the fairness of the proceeding will be prejudiced through influence being exerted on witnesses or potential witnesses by the published matter.

(2) A person can be found guilty as referred to in subsection (1) whether or not the person intended to prejudice the fairness of the proceeding.

(3) Part 2 of Schedule 1 applies for determining the times at which a proceeding is to be treated as active within the meaning of this section.

(4) This section extends to the publication of matter outside New South Wales.

9 Contempt because of pressure on parties or prospective parties to civil proceedings

(1) A person is guilty in a sub judice contempt proceeding against the person if:

(a) the person publishes matter or causes matter to be published, and

(b) the matter contains unfair comment or material misrepresentation of fact that incites hatred towards, serious contempt for, or severe ridicule of a person in his, her or its character as a party or prospective party to a civil proceeding, and

(c) because of the publication of that matter, there is a substantial risk, according to the circumstances at the time of publication, that a person of reasonable fortitude in the position of a party or prospective party to the proceeding would make a different decision in relation to instituting, maintaining, defending, continuing to defend or seeking to settle the proceeding than he, she or it would otherwise make.

(2) A person can be found guilty as referred to in subsection (1) whether or not the person intended to give rise to a risk such as is described in subsection (1) (c).

(3) This section does not apply to or in respect of publication of matter concerning a party or prospective party to a civil proceeding after the conclusion of any appeal in the civil proceeding and the expiry of any period permitted for appeal or further appeal (whichever is the later).

(4) This section extends to the publication of matter outside New South Wales.

(5) In this section, prospective party, in relation to a proceeding, means:

(a) any person who there are reasonable grounds for believing could be or become a party in the proceeding, and

(b) any person who is or may be in a position to institute the proceeding, whether or not actually minded to do so.

10 Contempt because of pressure on parties or prospective parties to criminal proceeding

(1) A person is guilty in a sub judice contempt proceeding against the person if:

(a) the person publishes matter or causes matter to be published, and

(b) the matter contains unfair comment or material misrepresentation of fact that incites hatred towards, serious contempt for, or severe ridicule of a person in his, her or its character as a party or prospective party to a criminal proceeding, and

(c) because of the publication of that matter, there is a substantial risk, according to the circumstances at the time of publication, that a person of reasonable fortitude in the position of a party or prospective party to the proceeding will make a different decision in relation to instituting, maintaining, defending, pleading guilty in or accepting a plea of guilty in the proceeding than he, she or it would otherwise make.

(2) A person can be found guilty as referred to in subsection (1) whether or not the person intended to give rise to a risk of the kind described in subsection (1) (c).

(3) This section does not apply to or in respect of publication of matter concerning a party or prospective party to a criminal proceeding after the conclusion of any appeal proceeding instituted in the criminal proceeding and the expiry of any period permitted for appeal or further appeal (whichever is the later).

(4) This section extends to the publication of matter outside New South Wales.

(5) In this section:

party means a defendant or a prosecutor.

prospective defendant, in relation to a criminal proceeding, means:

(a) a person questioned by a police officer or other investigating official in connection with the investigation of the commission or possible commission of an offence to which the proceeding relates, or

(b) any other person who there are reasonable grounds for believing could be a defendant in the proceeding.

prospective party means a prospective defendant or a prospective prosecutor.

prospective prosecutor, in relation to a proceeding, means any person who has or may have the authority to prosecute the proceeding.

Part 3 Factors in making a finding of criminal sub judice contempt

11 Pre-existing publicity does not prevent finding of contempt

For the purpose of determining whether the fairness of a proceeding may be prejudiced by the publication of matter, a court hearing a sub judice contempt proceeding referred to in section 7 or 8 is not to consider that the risk of prejudice is reduced solely on the ground that another publication, containing like matter, has been made at or before the time of the relevant publication.

12 Evidence relating to discharge of jury following publication is admissible in contempt proceedings

(1) The following evidence is admissible in a sub judice contempt proceeding referred to in section 7 where it is alleged that, by virtue of the publication of matter, there was a substantial risk that the fairness of a criminal proceeding might be prejudiced through influence being exerted on jurors or potential jurors:

(a) evidence of the fact that a trial judge has decided to dismiss, or has decided not to dismiss, the jury in the criminal proceeding, and

(b) the reasons given by the judge for deciding to discharge or not to discharge the jury.

(2) Such evidence must not be excluded under section 135 (General discretion to exclude evidence) of the Evidence Act 1995 on the ground only that the relevant judge cannot be examined on such evidence.

(3) This section applies despite section 129 (Exclusion of evidence of reasons for judicial etc decisions) of the Evidence Act 1995.

Part 4 Defences in sub judice contempt proceedings

13 Defence if conduct is innocent or if no relevant knowledge or control

In a sub judice contempt proceeding arising from the publication of matter, it is a defence for the person accused to prove, on the balance of probabilities:

(a) that the person did not know a fact that, but for this section, would otherwise cause the publication of the matter to be criminal contempt, and

(b) that before the matter was published, the person either:

(i) took reasonable steps to ascertain any fact that, but for this section, would otherwise cause the publication to be a criminal contempt and to prevent the publication if any such fact was ascertained, or

(ii) relied reasonably on one or more other persons to take such steps and to prevent the publication if any such fact was ascertained.

14 Defence if no editorial control over content of publication

(1) In a sub judice contempt proceeding arising from the publication of matter, it is a defence for the accused person to prove, on the balance of probabilities:

(a) that the matter was published pursuant to an agreement or arrangement whereby the content of matter to be published by the person accused was to be determined by a person or persons other than the person accused or any employee or agent of the person accused, and

(b) that either:

(i) at the time of publication, having made those inquiries that were reasonable in the circumstances, neither the person accused nor any employee or agent of the person accused knew or had any reason to suspect that the proposed publication would comprise or include the matter, or

(ii) before publication, having become aware, or having reason to suspect, that the proposed publication would or might comprise or include the matter or any like matter, the person, or an employee or agent of the person, took reasonable steps to prevent the publication from being made.

(2) A person accused who, in a sub judice contempt proceeding, intends to raise a defence under this section must notify the prosecutor within 14 days after the day on which:

(a) the person accused is served with a summons, or

(b) the sub judice contempt proceeding is otherwise commenced,

whichever is the earlier.

(3) If a person accused does not notify the prosecutor within that period, the court concerned may order the person to pay the costs of the prosecutor in prosecuting the action.

(4) If a person accused does not notify the prosecutor within that period, the defence remains available (if applicable) to that person.

Part 5 Exclusion of liability in sub judice contempt proceedings

15 Exclusion of liability when publication relates to a matter of public interest

(1) A person cannot be found guilty in a sub judice contempt proceeding on account of the publication of matter unless the prosecution establishes that:

(a) the matter published does not relate to a matter of public interest, or

(b) that the public benefit from:

(i) the publication of the matter, in the circumstances in which it was published, and

(ii) the maintenance of freedom to publish such matter,

does not outweigh the harm caused by publication to the administration of justice by virtue of the risk of influence on one or more jurors, potential jurors, witnesses, potential witnesses or parties or potential parties to proceedings, as the case may be.

(2) In this section:

potential juror has the same meaning as it has in section 7.

potential witness has the same meaning as it has in section 8.

prospective party has the same meaning as it has in section 9.

16 Exclusion of liability when publication necessary to protect public safety

A person cannot be found guilty in a sub judice contempt proceeding on account of the publication of matter unless the prosecution establishes that the publication was not reasonably necessary or desirable:

(a) to facilitate the arrest of a person, or

(b) to protect the safety of a person or of the public, or

(c) to facilitate investigations into an alleged criminal offence.

Part 6 Restraint of actual or threatened criminal contempt

17 Restraint of actual or threatened contempt of court

(1) Any person having a sufficient interest may bring a proceeding in the Supreme Court for an order to restrain a contempt of court by publication of matter (whether within or outside the State) that has a tendency to prejudice the fairness of another proceeding in a court of the State.

(2) An application must not be made under this section unless the Attorney General and the parties to the other proceeding (if any) have been notified of the application.

(3) The Director of Public Prosecutions does not have to comply with subsection (2).

(4) A proceeding under this section may be brought by a person on his or her own behalf or on behalf of himself or herself and on behalf of other persons (with their consent), or a body corporate or unincorporated (with the consent of its committee or other controlling or governing body), having like or common interests in that proceeding.

Part 7 Costs of trial discontinued because of contemptuous publication

18 Supreme Court may order person guilty of criminal contempt of court to pay costs

(1) The Supreme Court may make an order under this Part as to the costs of a criminal proceeding before a jury that was discontinued solely or substantially because of the publication of matter in respect of which a person has been found guilty in a sub judice contempt proceeding referred to in section 7.

(2) The order may only be made if the Supreme Court considers it is just and equitable in all the circumstances.

(3) The order may only be made against a person found guilty in the sub judice contempt proceeding referred to in section 7 because of the publication.

(4) The order may only be made on application by the Attorney General.

(5) The order may be made whether or not a new trial has been ordered in place of the discontinued proceedings.

19 Application

The Attorney General may apply under this Part for an order against a person for the benefit of any of the following who has, in the opinion of the Attorney General, suffered monetary loss as a result of the discontinuation of a criminal proceeding referred to in section 18 (1):

(a) the accused,

(b) the State,

(c) any other person, or person within a class, prescribed by the regulations.

20 Calculation of costs

(1) In determining the amount of a fine to be imposed on a person referred to in section 18 (3) and the amount of a costs order, the Supreme Court must take into account the total amount that would be payable by the person concerned if the fine is imposed and order made.

(2) The Court may order an amount of costs that is just and equitable in all the circumstances, provided that the amount ordered does not exceed the actual costs attributed to the discontinued trial (being costs referred to in section 22 (1)).

(3) Without limiting the matters to which the Court must have regard in deciding whether to make an order and for what amount, the court must have regard to:

(a) the financial resources of the person alleged to have committed the contempt, and

(b) the degree of culpability of the person, and

(c) the extent, if any, to which any matters other than the publication constituting the contempt caused the trial to be discontinued.

21 Nature of costs

(1) The costs in respect of which an order under this Part may be made are:

(a) the legal costs of parties to the discontinued proceeding (including any disbursements), and

(b) the cost to the State of the provision of legal services to the accused, and

(c) the cost to the State in the provision of fees and services related to the conduct of the proceeding (including the fees paid to legal practitioners and members of the jury and the expenses paid to witnesses and members of the jury), and

(d) any costs claimed by the accused in the discontinued trial, and

(e) costs, related to the discontinued proceeding, of any other class prescribed by the regulations.

(2) The costs in respect of which an order under this Part may be made may not include:

(a) the cost to the State in the provision of salaries related to the conduct of the proceeding (including the remuneration of judicial and other officers and other staff), or

(b) any other ongoing State expenses not directly referable to the discontinued proceeding.

22 Certificate of costs

(1) The Attorney General may attach to an application under this Part, or separately tender, a certificate setting out the costs that relate to the discontinued proceeding and apply to each person specified in the application.

(2) To the extent that the regulations so require, the costs set out in the certificate must be stated and calculated in accordance with the regulations.

(3) The certificate is admissible in evidence in a proceeding under this Part. The certificate is rebuttable evidence of the costs certified by it except to the extent that it is shown that the costs have not been stated or calculated in accordance with the regulations or that it is otherwise inaccurate.

23 Nature of order

(1) An order for costs under this Part is to be made in favour of the Attorney General for the benefit of all or any of the persons specified in the relevant application.

(2) The order is to specify in respect of each person for the benefit of whom it is made the amount of costs to which the person is entitled.

(3) The amount specified:

(a) in respect of the person or persons accused in the discontinued trial--must not be less than the amount specified in the certificate of the Attorney General, and

(b) in respect of each other person--may be less than or equal to the amount specified in the certificate of the Attorney General.

24 Enforcement of order

(1) An order under this Part is enforceable by the Attorney General, the costs to which it relates being a civil debt due to the Crown for the benefit of the person specified in the order and recoverable as such in any court of competent jurisdiction from the person against whom the order is made.

(2) A failure to comply with the order does not constitute contempt of court.

(3) The Attorney General must distribute the costs recovered under the order among the persons for the benefit of whom they have been recovered according to the distribution specified in the order of the Supreme Court.

25 Recovery of any payment under the Suitors' Fund Act 1951

(1) If the accused has already received payment from the Suitors' Fund under the Suitors' Fund Act 1951 and the Supreme Court makes an order for costs under this Part for the benefit of the accused, the Supreme Court is to order that:

(a) those costs be paid directly to the Suitors' Fund to the extent that their amount does not exceed the payment from the Fund, and

(b) any amount by which those costs exceed that payment be paid to the accused.

(2) If the accused has received the payment from the Suitors' Fund and some or all of his or her costs ordered under this Part, the Attorney General may recover from the accused the amount of the payment from that Fund (except to the extent that it exceeds the costs received by the accused) and pay it back into that Fund.

(3) Payment by the accused of the amount that the Attorney General may recover under subsection (2) is enforceable as a civil debt in any court of competent jurisdiction.

26 Procedure

(1) An application for an order for costs under this Part is to be heard and determined by the Supreme Court after a charge in a sub judice contempt proceeding referred to in section 7 has been found proven against one or more persons, even if the finding was made in the Supreme Court as differently constituted.

(2) A proceeding for the hearing and determination of the application is in the nature of a civil proceeding.

(3) Any evidence heard in a proceeding at which a person is tried in a sub judice contempt proceeding may be taken into account by the Supreme Court at the proceeding for the hearing and determination of the application.

(4) The application against one person may be heard and determined whether or not other persons responsible for the publication to which the contempt relates have been tried in the sub judice contempt proceeding and whether or not, if they have been tried, the charge of contempt has been found proven against them.

(5) In a case where there is more than one person who has been found guilty in a sub judice contempt proceeding referred to in section 7, the Supreme Court may treat the persons as jointly and severally liable for the costs, or may apportion the amounts of costs, for which it makes an order under this Part.

(6) The only parties to the hearing and determination of the application are the Attorney General and the person or persons found guilty in the sub judice contempt proceeding.

Part 8 Provisions applying to criminal contempt generally

27 Any person may commence proceeding for criminal contempt

(1) Any person may commence a proceeding for criminal contempt (whether or not a sub judice contempt proceeding).

(2) A person cannot commence a proceeding unless the person has notified the Attorney General in writing and any parties to the other proceeding.

(3) The Solicitor General or the Crown Advocate, acting under a delegation from the Attorney General, may take over a proceeding for criminal contempt.

(4) This section does not affect the operation of section 53 (Institution of contempt proceedings)of the Criminal Procedure Act 1986.

Note. Section 9 of the Director of Public Prosecutions Act 1986 provides for the Director of Public Prosecutions to take over certain prosecutions whether or not the person otherwise responsible for the prosecution consents.

28 Prejudging issues in proceedings is not enough to constitute contempt

A person does not commit criminal contempt of court by publishing matter, or by causing matter to be published, that merely prejudges or purports to prejudge one or more of the issues to be determined by a court in a proceeding.

Part 9 Miscellaneous

29 Regulations

The Governor may make regulations, not inconsistent with this Act, for or with respect to any matter that by this Act is required or permitted to be prescribed or that is necessary or convenient to be prescribed for carrying out or giving effect to this Act.

30 Savings and transitional provisions

Schedule 2 has effect.

31 Amendment of other Acts

Each Act specified in Schedule 3 is amended as set out in that Schedule.

Schedule 1 When are proceedings active?

(Sections 7 and 8)

Part 1 When are proceedings active for the purposes of determining whether there has been contempt of court because of risk of influence on jurors and potential jurors?

1 When is a criminal proceeding active?

(1) A criminal proceeding is active for the purposes of section 7:

(a) from the earliest of the following:

(i) the arrest of a person in New South Wales or in another State or Territory,

(ii) the laying of a charge,

(iii) the issue of a court attendance notice and its filing in the registry of the relevant court,

(iv) the filing of an ex officio indictment,

(v) the making of an order in a country other than Australia that a person be extradited to New South Wales for the trial of an offence,

(b) until:

(i) the verdict of a jury in the proceedings, or

(ii) the making of any order, or any other event, having the effect that the offence or offences charged will not be tried before a jury, or at all.

(2) If a re-trial before a jury is ordered, a criminal proceeding is active from the time the order for a re-trial is made.

2 When is a civil proceeding active?

(1) A civil proceeding is active for the purposes of section 7 from the time it is known that a jury will be used until:

(a) a judgment is made at first instance, or

(b) the proceedings are settled or discontinued.

(2) If a re-trial before a jury is ordered, a civil proceeding is active from the time the order for a re-trial is made.

3 Re-activating a coronial proceeding

A coronial proceeding that was before a court is taken to be active again for the purposes of section 7 if another inquest or inquiry into the same matter is undertaken.

Part 2 When are proceedings active for the purposes of determining whether there has been contempt of court because of risk of influence on witnesses and potential witnesses?

4 When is a criminal proceeding active?

(1) A criminal proceeding is active for the purposes of section 8:

(a) from the earliest of the following:

(i) the arrest of a person in New South Wales or in another State or Territory,

(ii) the laying of a charge,

(iii) the issue of a court attendance notice and its filing in the registry of the relevant court,

(iv) the filing of an ex officio indictment,

(v) the making of an order in a country other than Australia that a person be extradited to New South Wales for the trial of an offence,

(b) until the later of the following:

(i) the conclusion of any appeal proceedings,

(ii) the expiry of any period permitted for appeal or further appeal.

(2) If a re-trial is ordered in a criminal proceeding, the criminal proceeding is active again from the time the order for a re-trial is made, until

(a) the conclusion of any appeal proceedings, or

(b) the expiry of any period permitted for appeal or further appeal,

whichever is the later.

5 When is a civil proceeding active?

A civil proceeding is active for the purposes of section 8:

(a) from the earlier of the following:

(i) when a statement of claim is filed,

(ii) when any other originating process is filed or served,

(b) until the later of the following:

(i) the conclusion of any appeal proceedings,

(ii) the expiry of any period permitted for appeal or further appeal.

6 Re-activating a coronial proceeding

A coronial proceeding that was before a court is taken to be active again for the purposes of section 8 if another inquest or inquiry into the same matter is undertaken.

Schedule 2 Savings and transitional provisions

(Section 30)

1 Savings and transitional regulations

(1) The regulations may contain provisions of a savings or transitional nature consequent on the enactment of the following Acts:

this Act

(2) Any such provision may, if the regulations so provide, take effect from the date of assent to the Act concerned or a later date.

(3) To the extent to which any such provision takes effect from a date that is earlier than the date of its publication in the Gazette, the provision does not operate so as:

(a) to affect, in a manner prejudicial to any person (other than the State or an authority of the State), the rights of that person existing before the date of its publication, or

(b) to impose liabilities on any person (other than the State or an authority of the State) in respect of anything done or omitted to be done before the date of its publication.

2 Application of Part 5

Part 5 applies to proceedings commenced before, on after the commencement of the Part.

3 Application of Part 7

Part 7 applies where proceedings, whether commenced before or after the commencement of that Part, are discontinued solely because of the publication of matter on or after the commencement of that Part.

Schedule 3 Amendments

(Section 31)

3.1 Crimes (Sentencing Procedure) Act 1999 No 92

Section 3 Interpretation

Insert after section 3 (2) (d):

(e) a reference to an offender includes a reference to a person found guilty in proceedings relating to contempt (whether civil or criminal).

3.2 Suitors' Fund Act 1951 No 3

Section 6E

Insert after section 6D:

6E Reduction where order for costs under Contempt of Court by Publication Act 2003

If an amount is to be paid to an accused from the Fund under this Act in respect of costs incurred in criminal proceedings that have been discontinued, the amount is to be reduced by the total amount (if any) recovered by the Attorney General for the benefit of the accused under an order under Part 7 of the Contempt of Court by Publication Act 2003 in respect of the discontinuation of those proceedings.

3.3 Supreme Court Act 1970 No 52

[1] Section 101 Appeal in proceedings before the Court

Omit "contempt (whether civil or criminal)" from section 101 (5).

Insert instead "civil contempt".

[2] Section 101 (5A)

Insert after section 101 (5):

(5A) An Appeal lies to the Court of Criminal Appeal from any judgment or order of the Court in any proceedings that relate to criminal contempt of the Court or any other court.

[3] Section 101 (6)

Omit "subsection (5)".

Insert instead "subsection (5A)".

[4] Section 101A Question of law concerning criminal contempt may be submitted to Court of Criminal Appeal

Omit "Court of Appeal" wherever occurring from section 101A (1), (2), (3), (4) and (5).

Insert instead "Court of Criminal Appeal".

Appendix B: Draft Legal Proceedings (Access to Documents and Reporting) Bill 2003

Draft

New South Wales

Legal Proceedings (Access to Documents and Reporting) Bill 2003

Overview of Bill

The object of this Bill is to make provision about access to documents involved in legal proceedings and the reporting of legal proceedings. The Bill:

(a) creates a general public right of access to documents that form part of the court record in relation to a proceeding held in open court, and

(b) provides for a court to grant access to certain other documents in court records, and

(c) provides for a court to impose conditions on access to documents in proceedings or to prevent access to such documents, and

(d) creates a general statutory right to publish a fair and accurate summary of the contents of certain documents in court records, and

(e) provides for a court to make a suppression order (that is, an order that no report be published of the whole or any part of any proceeding, of any document, evidence, submission or material relating to the proceeding or of any finding made by the court in the proceeding) or an interim suppression order, and

(f) provides for appeals against suppression orders or interim suppression orders and sets out the persons who may be heard regarding the making, variation or revocation of suppression orders.

Draft

New South Wales

Legal Proceedings (Access to Documents and Reporting) Bill 2003

Contents

New South Wales

Legal Proceedings (Access to Documents and Reporting) Bill 2003

No , 2003

A Bill for

An Act about access to documents involved in legal proceedings and the reporting of legal proceedings.

The Legislature of New South Wales enacts:

Part 1 Preliminary

1 Name of Act

This Act is the Legal Proceedings (Access to Documents and Reporting) Act 2003.

2 Commencement

This Act commences on a day or days to be appointed by proclamation.

3 Definitions

(1) In this Act:

civil proceeding means a proceeding other than a criminal proceeding and includes:

(a) a proceeding by way of an appeal in relation to a civil proceeding, and

(b) an inquest or inquiry held under the *Coroners Act 1980*.

court:

(a) means:

(i) the Supreme Court (including the Court of Appeal), the Court of Criminal Appeal, the Land and Environment Court, the Dust Diseases Tribunal, the Industrial Relations Commission, the Children's Court, the District Court or a Local Court, or

(ii) any other court that, or person who, exercises criminal or civil jurisdiction, and

(b) in relation to an inquest or inquiry held under the Coroners Act 1980--means the coroner, and

(c) in relation to a committal proceeding--means the Justice or Justices hearing the proceeding.

criminal proceeding means a proceeding relating to the trial or sentencing of a person for an offence and includes the following:

(a) a proceeding for the committal of a person for trial,

(b) a proceeding for the sentencing of a person following conviction,

(c) a proceeding relating to bail (including a proceeding during the trial or sentencing of a person),

(d) a proceeding relating to an order under Part 15A (Apprehended violence) of the Crimes Act 1900,

(e) a proceeding that is preliminary or ancillary to a prosecution for an offence, a proceeding for the committal of a person, a proceeding relating to bail or a proceeding relating to an apprehended violence order,

(f) a proceeding by way of an appeal with respect to the trial or sentencing of a person.

document means any record of information, and includes:

(a) anything on which there is writing, or

(b) anything on which there are marks, figures, symbols or perforations having a meaning for persons qualified to interpret them, or

(c) anything from which sounds, images or writing can be reproduced with or without the aid of anything else, or

(d) a map, plan, drawing or photograph.

interim suppression order means an order made under section 22.

proceeding means a civil proceeding or a criminal proceeding.

suppression order means an order made under section 15.

(2) A reference in this Act to a document includes a reference to:

(a) any part of the document, or

(b) any copy, reproduction or duplicate of the document or of any part of the document, or

(c) any part of such a copy, reproduction or duplicate.

4 Notes

Notes included in this Act do not form part of this Act.

5 Act to bind Crown

This Act binds the Crown in right of New South Wales and, in so far as the legislative power of the Parliament of New South Wales permits, the Crown in all its other capacities.

6 Act applies to all criminal and civil proceedings

This Act applies to all criminal proceedings and civil proceedings.

Part 2 Access to documents in court records and right to publish documents

Division 1 Right to inspect documents in court records

7 General public right of access to documents in court records

(1) Any person has the right to inspect any of the documents specified in subsection (2) that form part of the court record in relation to a proceeding held in open court unless an objection to the exercise of the right is made in accordance with section 8.

(2) The documents are as follows:

(a) pleadings, to the extent that their content is relied on in the proceeding and referred to as forming the basis of the case argued by a party,

(b) judgments and orders made in the proceeding,

(c) a transcript of the evidence in the proceeding or any other document that records what was said or done in the court,

(d) documents comprising evidence in the proceeding (but not where the proceeding is a bail or committal proceeding or coronial inquiry),

(e) written submissions, to the extent that their content is relied on in the proceeding and referred to as forming the basis of the case argued by a party,

(f) documents recording the offences with which a person has been charged in the proceeding.

(3) A person has the right to inspect any document under this section during or after the hearing of the relevant proceeding.

(4) A person may make, or be furnished by the court registry with, a copy of any document that the person has the right to inspect under this section. A reasonable fee may be charged for the making of copies by the court registry.

(5) If a person has a right to inspect a document under this section and the document is not in written form, the court may make any orders that are reasonable and practicable to facilitate the right to inspect given by this section.

(6) The right to inspect a document under this section is subject to:

(a) compliance with any conditions relating to inspection of the document imposed under section 10 (Court may impose conditions on access to documents), and

(b) any order under section 11 preventing inspection of the document (Court may prevent access to documents), and

(c) any suppression order prohibiting publication of a report that is contained in the document, and

(d) any interim suppression order prohibiting publication of a report that is contained in the document, and

(e) any Act, or any instrument made under an Act, that prohibits the publication of the document.

8 Parties and others may object to right of access to documents in court records

(1) An objection may be made to the exercise by a person other than a party to a proceeding in a court or an officer of the court who is engaged as such in the proceeding of a right under section 7 to inspect a document that forms part of the court record in relation to the proceeding.

(2) An objection must be made to the court concerned before or at the time when a right to inspect the document would, but for the objection, arise under section 7.

(3) An objection may be made by or on behalf of:

(a) a party to the proceeding, or

(b) any other person who satisfies the court that the person has a sufficient interest in the proceedings or in the question whether the right to inspect should be exercised.

(4) For the purposes of this section, a party to the proceeding includes the defendant in a criminal proceeding or the person against whom an apprehended violence order is sought.

Division 2 Proceedings regarding access to documents

9 Applications may be made for access to certain documents in court records

(1) Any person may make an application to a court before which a proceeding has been heard or is being heard seeking leave:

(a) to inspect any document relating to the proceeding that the person would have a right to inspect under section 7 were it not for an objection made under section 8, or

(b) to inspect any other document relating to the proceeding that the person does not have a right to inspect under section 7.

(2) An application must contain a description of the document that enables the document to be identified.

(3) If an application is made under this section in relation to any document relating to a proceeding, the parties to the proceeding may make submissions to the court concerning the application.

(4) In proceedings on an application under subsection (1) (a) for leave to inspect a document, the onus is on the person who objected under section 8 to the exercise of a right to inspect the document (the objector) to establish that the application should not be granted. An application must be granted unless the objector shows that it would be contrary to the due administration of justice to grant it.

(5) In proceedings on an application under subsection (1) (b) for leave to inspect a document, the onus is on the applicant to show why leave to inspect the document should be granted.

(6) The court may:

(a) grant an application (with or without conditions), or

(b) refuse an application.

(7) An application is to be dealt with by the court as soon as practicable (and, in any case, within 21 days) after it is received.

(8) A person may make, or be furnished by the court registry with, a copy of any document that the person is granted leave to inspect under this section. A reasonable fee may be charged for the making of copies by the court registry.

(9) If a person is granted leave to inspect a document under this section and the document is not in written form, the court may make any orders that are reasonable and practicable to facilitate the person's inspection of the document.

Division 3 Restrictions on right of access to documents

10 Court may impose conditions on access to documents

(1) A court before which a proceeding is proposed to take place, is taking place or has taken place may, on application or on its own initiative, make an order imposing any condition in relation to the inspection of:

(a) a document in the proceeding that any person has a right to inspect under section 7 (General public right of access to documents in court records), or

(b) a document in the proceeding in relation to which leave to inspect has been granted to any person under section 9 (Applications may be made for access to certain documents in court records).

(2) Conditions that may be imposed under subsection (1) include conditions restricting the purpose for which the document is to be used.

(3) Any person may make an application to a court for an order under this section.

(4) In proceedings on an application under this section to impose conditions in relation to the inspection of a document, the onus is on the applicant to show why conditions should be imposed. The application should not be granted unless the applicant shows that it would be contrary to the due administration of justice for inspection to take place unless it takes place subject to those conditions.

11 Court may prevent access to documents

(1) On the application of any person, a court before which a proceeding is proposed to take place, is taking place or has taken place may make an order:

(a) that a particular document or class of documents in that proceeding is not to be inspected, or

(b) that a particular person or class of persons is not to inspect a particular document or class of documents in that proceeding.

(2) In proceedings on an application under this section for an order preventing inspection of a document, the onus is on the applicant to show why the document should not be inspected. The application should not be granted unless the applicant shows that inspection of the document would be contrary to the due administration of justice.

(3) Such an order has effect despite section 7 (General public right of access to documents in court records).

12 Appeals regarding orders relating to access to other documents in court records

(1) A person who has made an application under section 9, 10 or 11 may appeal against:

(a) a refusal of the application, or

(b) the imposition of conditions on the grant of the application, or

(c) in the case of an application under section 10--the imposition of conditions that differ from those applied for.

(2) A party to a proceeding may appeal against:

(a) the granting of an application under section 9 for leave to inspect a document relating to the proceeding, or

(b) the imposition of conditions in relation to inspection of the document, or

(c) the granting of an application for an order under section 10 imposing conditions in relation to inspection of a document relating to the proceeding, or

(d) the granting of an application under section 11.

(3) A person who satisfies the court that the person has a sufficient interest in the proceeding or in the question whether inspection of the document concerned should be allowed may seek leave to appeal against:

(a) the grant of an application under section 9, 10 or 11 by any person, or

(b) the refusal of such an application, or

(c) the imposition of conditions on the grant of such an application.

(4) An appeal under this section is to be heard:

(a) if the decision the subject of the appeal was made by a court other than the Supreme Court--by a single judge of the Supreme Court, or

(b) if the decision the subject of the appeal was made by the Supreme Court--by the Court of Appeal.

(5) The appellate court may, on any ground that the court sees fit, confirm or vary the decision, or revoke the decision, whether or not it substitutes another decision.

Division 4 General

13 General right to publish documents

(1) Any person may publish the contents of, or a fair and accurate summary of the contents of, any document or part of a document:

(a) that any person may inspect under section 7 (General public right of access to documents in court records), or

(b) in relation to which an application for leave to inspect has been granted to any person under section 9 (Applications may be made for access to certain documents in court records).

(2) This section is subject to:

(a) compliance with any conditions relating to inspection of the document imposed under section 10 (Court may impose conditions on access to documents), and

(b) any order under section 11 preventing inspection of the document (Court may prevent access to documents), and

(c) a suppression order prohibiting publication of the document, and

(d) an interim suppression order prohibiting publication of the document, and

(e) any other prohibition or restriction imposed on the publication of the document:

(i) by any other Act, or

(ii) by an instrument made under an Act or any other instrument, or

(iii) by any order made under an Act or instrument.

14 Access to documents is subject to any law restricting access

Any restriction on inspection of documents under this Part applies in addition to any other applicable prohibition or restriction relating to inspection of documents imposed:

(a) by any other Act, or

(b) by any instrument made under an Act or any other instrument, or

(c) by any order made under an Act or instrument.

Part 3 Suppression orders and interim suppression orders

Division 1 Suppression orders

15 Suppression orders

(1) A court may, on application or on its own motion, order that no report be published of:

(a) the whole or any part of any proceeding of the court, or

(b) any document relating to the proceeding, or

(c) any evidence admitted in the proceeding, or

(d) any evidence tendered but not admitted in the proceeding, or

(e) any oral submissions made by counsel in the proceeding, or

(f) any material that would lead to the identification of a party or witness involved in the proceeding, or

(g) any finding made by the court in the proceeding.

(2) A court may only make such an order if the court considers it necessary for the due administration of justice, either generally or in relation to a specific proceeding, including the proceeding in which the order is made.

(3) A suppression order may be made subject to conditions.

16 Enforcement of suppression orders

(1) A person must not breach a suppression order.

Maximum penalty:

(a) in the case of an individual--50 penalty units or 12 months imprisonment or both, and

(b) in the case of a corporation--2,000 penalty units.

(2) The offence created by this section is an offence of strict liability.

17 Applications for suppression orders

(1) An application for a suppression order may be made by a person who satisfies the court that the person has a sufficient interest in the question as to whether the suppression order should be made.

(2) A person may make an application without being joined as a party to the relevant proceeding.

(3) A person who has made an application may call or give evidence in support of the application.

(4) The court may delay a proceeding to allow the application for a suppression order to be made or evidence to be called or given.

18 Variation and revocation of suppression orders

(1) A suppression order may be varied or revoked by the court that made it, however constituted and on any ground that to the court appears sufficient.

(2) The power to vary or revoke a suppression order may only be exercised on application.

(3) An application for the variation or revocation of a suppression order may be made by any person who satisfies the court that the person has a sufficient interest in the question whether the suppression order should be varied or revoked.

19 Persons who may be heard regarding making, variation or revocation of suppression orders

(1) Any of the following may object to or support the making of a suppression order:

(a) the applicant for the suppression order,

(b) a representative of a newspaper, of a radio or television station or of a news website,

(c) any other person who has, in the opinion of the court, a sufficient interest in the question whether the suppression order should be made.

(2) A person who may apply for a suppression order, or for the variation or revocation of a suppression order, may be heard by the court on the question whether a suppression order should be varied or revoked.

(3) A person referred to in subsection (1) or (2) may object to or support the making, variation or revocation of a suppression order without being joined as a party to the relevant proceeding.

(4) Such a person may call or give evidence for or against the making, variation or revocation of a suppression order.

(5) The court may adjourn the main proceeding to allow the objection to or statement in support of the making, variation or revocation of a suppression order to be made or evidence to be called or given in relation to the suppression order.

(6) This section applies whether the court makes a suppression order on an application or of its own motion.

20 Appeals relating to suppression orders

(1) Any person referred to in section 19 (1) or (2) may appeal against the decision of a court:

(a) to make a suppression order, or

(b) not to make a suppression order, or

(c) to vary or revoke a suppression order, or

(d) not to vary or revoke a suppression order.

(2) Any person:

(a) who made an application under section 17, or

(b) who was heard by a court under section 19,

in relation to a suppression order or a proposed suppression order is entitled to be heard by the appellate court.

(3) Any person who satisfies the court that the person has a sufficient interest in the making of the suppression order may seek leave to be heard by the appellate court.

(4) An appeal against a decision made under this Division is to be heard:

(a) if the suppression order was made by a court other than the Supreme Court--by a single judge of the Supreme Court, or

(b) if the suppression order was made by the Supreme Court--by the Court of Appeal.

(5) The appellate court may, on any ground that the court sees fit, make a suppression order, confirm or vary the decision or revoke the decision or the order made as a result of the decision, whether or not it substitutes another decision.

21 Duration of suppression orders

A suppression order remains in force until it is revoked or lapses according to its terms.

Division 2 Interim suppression orders

22 Interim suppression orders

(1) A court may make an order (an interim suppression order), on application or on its own motion, that no report be published of:

(a) the whole or any part of any proceeding of the court, or

(b) any document relating to the proceeding, or

(c) any evidence admitted in the proceeding, or

(d) any evidence tendered but not admitted in the proceeding, or

(e) any oral submissions made by counsel in the proceeding, or

(f) any material that would lead to the identification of a party or witness involved in the proceeding, or

(g) any finding made by the court in the proceeding.

(2) A court may only make an interim suppression order if the court considers that it is necessary for the due administration of justice either generally or in relation to a specific proceeding, including the proceeding in which the order is made:

(a) that the order be made, and

(b) that the order be made without delay.

23 Enforcement of interim suppression orders

(1) A person must not breach an interim suppression order.

Maximum penalty:

(a) in the case of an individual--50 penalty units or 12 months imprisonment or both, and

(b) in the case of a corporation--2,000 penalty units.

(2) The offence created by this section is an offence of strict liability.

24 Applications for interim suppression orders

(1) An application for an interim suppression order may be made by a person who satisfies the court that the person has a sufficient interest in the question whether the interim suppression order should be made.

(2) A person may make an application without being joined as a party to the relevant proceeding.

(3) A person who has made an application may call or give evidence in support of the application.

(4) The court may delay a proceeding to allow the application for an interim suppression order to be made or evidence to be called or given.

(5) The court, in hearing an application under this section, may:

(a) inform itself of such material as it considers relevant to and sufficient for its determination of the application, and

(b) make orders or give directions regarding the determination of the application, including on the matters of notice and parties to the application.

25 Persons may seek leave to be heard concerning interim suppression orders

Any of the following may seek leave to be heard on the question of whether an interim suppression order should be made:

(a) the applicant for the interim suppression order,

(b) a representative of a newspaper, of a radio or television station or of a news website,

(c) any other person who has, in the opinion of the court, a sufficient interest in the question whether the interim suppression order should be made.

26 Variation and revocation of interim suppression orders

(1) An interim suppression order may be varied or revoked by the court that made it, however constituted and on any ground that to the court appears sufficient.

(2) The power to vary or revoke an interim suppression order may only be exercised on application.

(3) An application for the variation or revocation of an interim suppression order may be made by any person who satisfies the court that the person has a sufficient interest in the question whether the interim suppression order should be varied or revoked.

(4) The court, in hearing an application under this section, may:

(a) inform itself of such material as it considers relevant to and sufficient for its determination of the application, and

(b) make orders or give directions regarding the determination of the application, including on the matters of notice and parties to the application.

27 Appeals relating to interim suppression orders

(1) Any person who was heard by a court in an application under section 24 or 26 may, with the leave of the appellate court, make an appeal against the decision of the court:

(a) to make an interim suppression order, or

(b) not to make an interim suppression order, or

(c) to vary, revoke or continue an interim suppression order, or

(d) not to vary or revoke an interim suppression order.

(2) Any other person who satisfies the court that the person has a sufficient interest in the question whether the interim suppression order should be made, varied , revoked or continued may appeal against such a decision but only with the leave of the appellate court.

(3) Any person heard by a court in an application under section 24 or 26 is entitled to be heard by the appellate court.

(4) An appeal against a decision made under this Division is to be heard:

(a) if the interim suppression order was made by a court other than the Supreme Court--by a single judge of the Supreme Court, or

(b) if the interim suppression order was made in the Supreme Court--by the Court of Appeal.

(5) The appellate court may, on any ground that the court sees fit, confirm or vary the decision, or revoke the decision, whether or not it substitutes another decision.

28 Duration of interim suppression order

(1) An interim suppression order has effect until:

(a) a suppression order prohibiting the reporting of the same or like material is made under section 15, or

(b) the interim suppression order is revoked, or

(c) the interim suppression order lapses according to its own terms, or

(d) 7 days have passed since the interim suppression order was made,

whichever occurs first.

(2) The fact that an interim suppression order has ceased to operate by virtue of subsection (1) (b)-(d) does not prevent the court from making another interim suppression order, or a suppression order under section 15, prohibiting the publishing of a report of the same or like material.

(3) During the time when an interim suppression order has effect a second or subsequent interim suppression order, or a suppression order under section 15, prohibiting the reporting of the same or like material may be applied for and may be granted. The court, in granting such an order, may stipulate that it should come into effect on the expiry of the current interim suppression order.

Division 3 General

29 Other provisions may suppress publication

The prohibition on publishing of reports under this Part applies in addition to any other prohibition or restriction imposed by any other Act or law on the publication of such reports.

Part 4 Miscellaneous

30 Costs

A court hearing an application made under this Act may:

(a) make an order for costs against the applicant, a party to the relevant proceeding or any other interested person involved in the proceedings, and

(b) make orders dealing with any other incidental or ancillary matter.

31 Nature of proceedings for offences

(1) Proceedings for an offence under this Act or the regulations may be dealt with:

(a) summarily before a Local Court constituted by a Magistrate sitting alone, or

(b) summarily before the Supreme Court in its summary jurisdiction.

(2) If proceedings are brought in a Local Court, the maximum monetary penalty that the Local Court may impose for the offence is 100 penalty units, despite any higher maximum monetary penalty provided for in respect of the offence.

32 Regulations

The Governor may make regulations, not inconsistent with this Act, for or with respect to any matter that by this Act is required or permitted to be prescribed or that is necessary or convenient to be prescribed for carrying out or giving effect to this Act.

33 Rules

(1) The power to make rules under an Act regulating the practice and procedure of a court extends to making any rules prescribing all matters necessary or convenient to be prescribed for carrying out or giving effect to this Act.

(2) Rules so made must not be inconsistent with this Act or any regulation made under section 32.

(3) This section does not affect any power to make rules under any other law.

34 Savings and transitional provisions

Schedule 1 has effect.

35 Amendment of other Acts

Each Act specified in Schedule 2 is amended as set out in that Schedule.

Schedule 1 Savings and transitional provisions

(Section 34)

1 Savings and transitional regulations

(1) The regulations may contain provisions of a savings or transitional nature consequent on the enactment of the following Acts:

this Act

(2) Any such provision may, if the regulations so provide, take effect from the date of assent to the Act concerned or a later date.

(3) To the extent to which any such provision takes effect from a date that is earlier than the date of its publication in the Gazette, the provision does not operate so as:

(a) to affect, in a manner prejudicial to any person (other than the State or an authority of the State), the rights of that person existing before the date of its publication, or

(b) to impose liabilities on any person (other than the State or an authority of the State) in respect of anything done or omitted to be done before the date of its publication.

2 Parties may object to general right of access to documents already on court file

A party to a proceeding or any other person referred to in section 8 may object to the inspection of a document tendered for admission into evidence before the commencement of section 8.

3 Saving of certain suppression orders and directions

(1) An order or direction that, immediately before the commencement of section 35, was an order made or direction given by a court under any of the following provisions is taken to be a suppression order made under this Act, subject to any condition imposed when it was made:

(a) section 18 of the *Community Protection Act 1994*, or

(b) section 562NC of the *Crimes Act 1900*, or

(c) section 119 of the *Criminal Procedure Act 1986*, or

(d) section 14 of the *Law Enforcement and National Security (Assumed Identities) Act 1998*, or

(e) section 28 of the *Law Enforcement (Controlled Operations) Act 1997*, or

(f) section 35 of the *Public Health Act 1991*.

(2) Such an order or direction continues in force as if the provision under which the order was made were still in force and a breach of such an order or direction is to be dealt with as if that provision were still in force.

Schedule 2 Amendment of other Acts

(Section 35)

2.1 Community Protection Act 1994 No 77

Section 18 Orders prohibiting publication of material that may identify persons

Omit the section.

2.2 Crimes Act 1900 No 40

Section 562NC Publication of names and identifying information about persons involved in ADVO proceedings

Omit the section.

2.3 Criminal Procedure Act 1986 No 209

[1] Section 119 Publication of evidence may be forbidden in certain cases

Omit the section.

[2] Schedule 2 Savings, transitional and other provisions

Omit clause 12.

2.4 Law Enforcement and National Security (Assumed Identities) Act 1998 No 154

[1] Section 14 Identity of certain officers not to be disclosed in legal proceedings

Omit "a court," from section 14 (1).

[2] Section 14

Omit " the court," wherever occurring. Insert instead "the".

2.5 Law Enforcement (Controlled Operations) Act 1997 No 136

[1] Section 28 Identity of certain participants not to be disclosed in legal proceedings

Omit "a court," from section 28 (1).

[2] Section 28

Omit " the court," wherever occurring. Insert instead "the".

2.6 Public Health Act 1991 No 10

Section 35 Restrictions on publication

Omit the section.

APPENDIX C: LIST OF WRITTEN SUBMISSIONS

Australian Broadcasting Corporation, Legal Services Department ("ABC")

Submission 1 (8 September 1998)
Submission 2 (27 November 2000)

Australian Broadcasters (Federation of Australian Commercial Television Stations, Federation of Australian Commercial Radio Broadcasters, Australian Broadcasting Corporation (Legal Services Department) and the Special Broadcasting Service)

Joint Submission (1 June 2001)

Australian Capital Territory Bar Association (20 March 2001)

Australian Press Council (3 May 2001)

Berman SC, Peter, Deputy Crown Prosecutor (16 November 2001)

Burgess, Craig, Lecturer in Journalism, Department of Mass Communication, Faculty of Arts, The University of Southern Queensland

Submission 1 (3 November 1998)
Submission 2 (30 March 2001)

Cowdery QC, N R, New South Wales Director of Public Prosecutions (8 November 2000)

David Syme & Company Limited (30 January 1998)

Federation of Australian Commercial Television Stations ("FACTS")

Submission 1 (20 October 1998)
Submission 2 (2 November 1998)

Law Society of New South Wales (24 November 2000)

New South Wales Bar Association (25 May 2001)

Norris, David, Senior Solicitor, Crown Solicitor's Office

Submission 1 (15 September 1998)
Submission 2 (29 October 1999)
Submission 3 (30 March 2001)
Submission 4 (15 February 2002)

School of Communication, Charles Sturt University
(22 September 1998)

Sexton SC, Michael, Solicitor General of New South Wales
(13 February 2001)

Special Broadcasting Service Corporation ("SBS")
(22 October 1997)

Victorian Bar Council (30 March 2001)

Walker SC, Bret (2 October 1998)

Walker, Sally, Hearn Professor of Law,
Law School, The University of Melbourne (16 September 1998)

APPENDIX D:
CONSULTATIONS ON CONTEMPT BY PUBLICATION

4 April 2001

Print Media Representatives (Consultation 1)

Professor Ken McKinnon (Australian Press Council, chairman), Mr Jack Herman (Australian Press Council, executive secretary), Ms Gail Hambly (Fairfax, company secretary), Mr Sandy Dawson (Freehills, solicitor for Fairfax), Mr Richard Coleman (Fairfax, general legal counsel), Mr Robert Todd (Blake Dawson Waldron, senior partner, solicitor for News Limited), Ms Sophie Dawson (Blake Dawson Waldron, senior associate), Mr Brian Gallagher (News Limited, legal counsel).

11 April 2001

Radio and Television Representatives

Mr Kevin Lynch (Federation of Australian Radio Broadcasters Limited, Legal Counsel); Mr Daniel Grynberg (Macquarie Radio Network, Business Affairs Manager); Ms Sandy Aloisi (Radio 2UE); Ms Bridget Goodwin (ATN Channel 7, Manager, Regulatory and Business Affairs); Mr Michael Lloyd-Jones (ATN Channel 7, General Counsel); Ms Sophie Dawson (Blake Dawson Waldron, Senior Associate, solicitor for Channel Ten); Mr Paul Walsh (Channel Ten, Network Manager for Broadcast Policy); Ms Creina Chapman (TCN Channel 9, Manager of Regulatory and Corporate Affairs); Mr Andrew Stewart (TCN Channel 9, Corporate Counsel); Ms Shirley Brown (Prime TV, Manager of Corporate Affairs; also representing other regional TV stations); Mr Bruce Burke (Bush Burke and Co. Solicitors, Partner, for Prime TV); Mr Simon Cordina (Federation of Australian Commercial Television Stations, Director, Legal and Broadcasting Policy); Mr Michael Martin (Australian Broadcasting Corporation, Acting Head, Legal Services); Ms Sally McCausland (Special Broadcasting Service Corporation, lawyer).

27 April 2001

Legal Aid Commission

Mr Doug Humphreys (Legal Aid, Director, Criminal Law); Ms Bernadette Grant (from about 11am, Legal Aid, Grants Director).

2 May 2001

Print Media Representatives (Consultation 2)

Prof Ken McKinnon (Australian Press Council, chair), Mr Jack Herman (Australian Press Council, executive secretary), Ms Gail Hambly (Fairfax, company secretary), Mr Richard Coleman (Fairfax, general legal counsel), Mr Sandy Dawson (Freehills, solicitor for Fairfax), Mr Robert Todd (Blake Dawson, senior partner, for News Limited), Mr Brian Gallagher (News Limited, legal counsel).

9 May 2001

Media Liaison Officers

Ms Prue Innes (Media Information Officer for the Victorian courts), Ms Tracey Arthur (Manager, Police Media Unit), Mr Michael Holmes (General Manager, Court and Legal Service of the Police Service), Mr Robert Vellar (legal officer, Court and Legal Service of the Police Service), Mr Peter Symonds (media liaison officer, contracted by the DPP), Mr Michael Lloyd-Jones (Channel 7 legal counsel), Ms Anne Lampe (business writer, Sydney Morning Herald).

23 May 2001

Government Lawyers

Mr Michael Sexton SC (Solicitor General), Mr Nick Cowdery QC (Director of Pubic Prosecutions), Mr Peter Berman SC (Senior Crown Prosecutor), Mr David Norris (Senior Solicitor, Crown Solicitor's Office), Mr Andrew Haesler (Public Defender's Offfice).

30 May 2001

NSW Bar Association

Mr Henric Nicholas QC, Mr Robert Stitt QC, Mr Stephen Rares SC, Mr Robert Campbell.

14 June 2001

NSW Law Society

Mr Trevor Nyman (NSW Law Society).

22 August 2001

NSW Industrial Relations Commission judges and registrars

Wright J (IRC President), Walton J (IRC Vice-President), Hungerford J, Peterson J, Marks J, Schmidt J, Kavanagh J, SaMs DP, Boland J, Haylen J, Mr T McGrath (Industrial Registrar), Mr A Musgrave (Deputy Industrial Registrar).

APPENDIX E:
SUB JUDICE CONTEMPT CASES IN AUSTRALIA

This table looks at two matters in relation to a selection of sub judice contempt cases decided in Australia between 1980 to the present. First, the table examines whether each case falls under any of the categories in Proposal 4 of DP 43, and if so, which category. Proposal 4 states:

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:

1. 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;

2. A statement that suggests, or from which it could reasonably be inferred, that the accused has confessed to committing the crime in question;

3. 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;

4. 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;

5. 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.

The table also looks at the penalty imposed in case of conviction, as well as whether the respondents have been ordered to pay the costs of the contempt proceedings.

NEW SOUTH WALES

(1) Successful prosecutions

CASE	PREJUDICIAL MATERIAL	FALLS UNDER PROPOSAL 4? IF SO WHICH CATEGORY?	PENALTIES AND COSTS
Attorney General (NSW) v John Fairfax & Sons Ltd [1980] 1 NSWLR 362	Newspaper article in *The Sun* alleging the accused, charged with the murder of his mongoloid son, had made admissions to the police. The article was published before reference had been made in Court to the alleged statements.	2	$10,000 plus costs (Publisher)
Attorney General (NSW) v Mirror Newspapers Ltd [1980] 1 NSWLR 374	Newspaper article in *The Daily Telegraph* containing statements of a ride attendant from Luna Park whom the police intended to use as a witness in the Coroners Court in relation to a fire. The article was published before the attendant was called to give evidence.	Does not belong to any of the categories. The publication was contemptuous due to the possible effect it could have on witnesses. Firstly, the person who made the statement may feel constrained to keep to their published account. Secondly, other witnesses encountering the publication might be influenced by it and give different evidence to that they would otherwise have given. Moreover, because the published statement contradicted the testimony of a previous witness, it may imply that the latter gave a wrong account and may even discourage other potential witnesses from testifying for fear of being belittled in the press.	$10,000 plus costs (Publisher)

CASE	PREJUDICIAL MATERIAL	FALLS UNDER PROPOSAL 4? IF SO WHICH CATEGORY?	PENALTIES AND COSTS
Attorney General (NSW) v Willesee [1980] 2 NSWLR 143	Television broadcast concerning the death of a prison warden which referred to the prior convictions of the prisoner charged with the murder while the trial was pending.	1	$2,000 plus costs (Managing director of the company, producer, compere and person in control of the program) $2,000 plus costs (Broadcaster or licensee of the TV channel) $1,000 plus costs (Production company)
Registrar, Court of Appeal v Collins [1982] 1 NSWLR 682	The contemnor distributed pamphlets on the footpath outside the entrance to buildings in which criminal sittings of the Supreme and District Courts in Darlinghurst were then being held, to members of the public who included jurors and persons summoned for jury service in those sittings. The pamphlet warned potential jurors against accepting police evidence and invited them to disregard directions of trial judges.	Does not belong to any of the categories. The conduct was contemptuous as a form of "contempt in the face of the Court" which was held to extend to conduct occurring outside the actual courtroom.	Imprisonment for 2 months plus costs (Contemnor)
Attorney General (NSW) v Mayas Pty Ltd (NSWCA, No 174/83, 28 March 1984 unreported)	Article in a country newspaper, the *Moree Champion,* referring to past criminal conduct of two persons charged with armed robbery and assault.	1	$5,000 plus one-half the costs (Publisher)

CASE	PREJUDICIAL MATERIAL	FALLS UNDER PROPOSAL 4? IF SO WHICH CATEGORY?	PENALTIES AND COSTS
Director of Public Prosecutions (Cth) v Wran (1986) 7 NSWLR 616	Newspaper 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.	3, 4	$200,000 plus costs (Publisher) $25,000 plus costs (Wran)
Director of Public Prosecutions (Cth) v Australian Broadcasting Corporation (1987) 7 NSWLR 588	Television broadcast in ABC's *The National* program screened on the eve of committal proceedings against Justice Lionel Murphy referring to the "Age tapes". The broadcast stated that "Justice Murphy had made improper overtures on behalf of a Sydney solicitor, Mr Morgan Ryan." Murphy J was facing charges of perverting the course of justice by attempting to influence the outcome of the criminal proceedings against Mr Ryan.	3	$100,000 plus costs (Broadcaster) $2,000 plus costs (Editor)
Director of Public Prosecutions (Cth) v John Fairfax & Sons Ltd (1987) 8 NSWLR 732	Newspaper article in the *Sun Herald* containing the alleged criminal record of an accused, a file photograph of him 'leaving court' in 1977, and remarks attributed to a judge which were adverse to the accused ("the worst criminal of his type").	1, 4, 5	$5,000 plus costs (Publisher) No penalty for editors and journalist but they were ordered to pay costs
Attorney General (NSW) v John Fairfax & Sons Ltd (NSWCA, No 371/87, 21 April 1988, unreported)	Newspaper articles in *The Sun* which referred to the accused as a "prison escapee" before his arrest, during committal proceedings and during the trial for the murder of Anita Cobby.	1	$20,000 plus costs (Publisher)

CASE	PREJUDICIAL MATERIAL	FALLS UNDER PROPOSAL 4? IF SO WHICH CATEGORY?	PENALTIES AND COSTS
Attorney General (NSW) v Macquarie Publications Pty Ltd (1988) 40 A Crim R 405	Article in the *Daily Liberal*, a newspaper in the Dubbo District, containing the name, previous criminal record and photograph of an accused after committal but before trial. The article referred to the accused as a "dangerous criminal".	1, 4, 5	$10,000 plus costs (Publisher)
Attorney General (NSW) v Dean (1990) 20 NSWLR 650 (Paul Mason case)	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.	2, 3	No penalty but the police officer was ordered to pay costs
Attorney General (NSW) v TCN Channel Nine Pty Ltd (1990) 20 NSWLR 368 (liability); (1990) 5 BR 419 (penalty) (Paul Mason case)	Television broadcast on *TCN9 Evening News* in relation to three murder charges showing film footage of the accused with the police at the murder scenes. The broadcast included an interview with a police officer to the effect that the accused had confessed. The accused committed suicide before committal proceedings commenced.	2, 3, 5	$75,000 plus costs (Broadcaster)
Attorney General (NSW) v Amalgamated Television Services Pty Ltd (1990) 5 BR 396 (Paul Mason case)	Television broadcast on *Channel 7 Evening News* in relation to three murder charges showing film footage of the accused with the police at the murder scenes. The broadcast included an interview with a police officer to the effect that the accused had confessed. It also included an interview with the accused asking whether he had any messages for the family of two of the victims.	2, 3, 5	$200,000 plus costs (Broadcaster)

CASE	PREJUDICIAL MATERIAL	FALLS UNDER PROPOSAL 4? IF SO WHICH CATEGORY?	PENALTIES AND COSTS
Attorney General (NSW) v Australian Broadcasting Corporation (NSWCA, No 40136/90, 11 October 1990, unreported) (Paul Mason case)	Television broadcast on *ABC News* in relation to three murder charges showing film footage of the accused with the police at the murder scenes and reporting that a confession had been made.	2, 3, 5	$120,000 plus costs (Broadcaster)
Attorney General (NSW) v United Telecasters Sydney Ltd (NSWCA, No 40139/90, 11 October 1990, unreported) (Paul Mason case)	Television broadcast on *Ten Evening News* in relation to three murder charges showing film footage of an accused with the police at the murder scenes. The broadcast included an interview with a police officer to the effect that the accused had confessed.	2, 3, 5	$75,000 plus costs (Broadcaster)
Attorney General (NSW) v Nationwide News Pty Ltd (NSWCA, No 40141/90, 11 October 1990, unreported) (Paul Mason case)	Newspaper article published in the *Daily Mirror* and two articles in the *Daily Telegraph* from two different editions. The articles contained photographs of the accused, photographs of accused handcuffed by the police, the confession by the accused and other incriminating statements made to police.	2, 3, 5	$200,000 plus costs (Publisher)
Director of Public Prosecutions (Cth) v United Telecasters Sydney Ltd (1992) 7 BR 364	Television broadcast on arranged marriages containing prejudicial information about the accused during his trial for offences under the *Migration Act 1958* (Cth). The accused was not identified in the TV program but it could be inferred that he was one of its subjects.	3	$20,000 plus costs (Broadcaster)

CASE	PREJUDICIAL MATERIAL	FALLS UNDER PROPOSAL 4? IF SO WHICH CATEGORY?	PENALTIES AND COSTS
Attorney General (NSW) v Radio 2UE Pty Ltd (NSWCA, No 40225/91 and 40226/91, 28 August 1992, unreported)	Two broadcasts on Radio 2UE containing statements about the arrest of a Mr Dias by police officers. The statements were to the effect that Mr Dias had wrongly accused the police officers of planting drugs on him as a result of which charges were laid against the police, that Mr Dias had committed perjury, and that the charges against some of the police officers were dismissed. There was a pending case against one of the police officers where Mr Dias was the main witness.	3	$75,000 plus costs (Broadcaster) $2,000 plus costs (Announcer)
Registrar, Court of Appeal v John Fairfax Group Pty Ltd (NSWCA, No 40478/92, 21 April 1993, unreported)	Newspaper article in the *Sun Herald* which attacked the credibility of a defence witness during a criminal trial for attempting to pervert the course of justice.	3, 4	$75,000 plus costs (Publisher) $1,000 plus costs (Journalist)
Attorney General (NSW) v Northern Star Ltd (NSWCA, No 40259/94, 14 October 1994, unreported)	Newspaper article in *The Northern Star* published during a trial for armed robbery and kidnapping which referred to the accused's prior conviction, the fact that he had previously escaped from custody in another case, and that there were extraordinary security measures at the trial.	1	$20,000 plus costs (Publisher)
Attorney General (NSW) v Time Inc Magazine Co Pty Ltd (NSWCA, No 40331/94, 15 September 1994, 21 October 1994, unreported)	Article in a magazine, *Who Weekly,* which contained photographs of Ivan Milat, accused of the "backpacker murders".	5	Interlocutory injunction granted against Time Inc $100,000 plus costs (Publisher) $10,000 (Editor)

CASE	PREJUDICIAL MATERIAL	FALLS UNDER PROPOSAL 4? IF SO WHICH CATEGORY?	PENALTIES AND COSTS
Registrar, Court of Appeal v John Fairfax Group Pty Ltd (NSWCA, No 40250/94, 23 February 1995, unreported)	Newspaper article in the *Sun Herald* disclosing that a person accused of conspiracy to rob an Armaguard van was recently convicted of armed robbery.	1	No penalty Publisher ordered to pay costs
Harkianakis v Skalkos (1997) 42 NSWLR 22 (liability); (NSWCA, No 40514/96, 15 October 1997, unreported) (penalty)	Newspaper article in the *Greek Herald* 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.	Does not belong to any of the categories. The court held that the article had a tendency to deter the claimant in his prosecution of the defamation proceedings and to deter others in similar situations – improper pressure on parties.	$2,000 (Journalist and managing director of the proprietor) $1,000 (Proprietor) No order as to costs
Attorney General (NSW) v Radio 2UE Sydney Pty Ltd (NSWCA, No 40236/96, 11 March 1998, unreported)	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 the murder with which he was charged.	3, 4	$200,000 (Broadcaster) $50,000 (Announcer) The broadcaster and announcer were ordered to pay costs assessed at $60,000

(2) Unsuccessful prosecutions

CASE	PREJUDICIAL MATERIAL	FALLS UNDER PROPOSAL 4? IF SO WHICH CATEGORY?
The Prothonotary v Collins (1985) 2 NSWLR 549	The defendant distributed pamphlets in the Darlinghurst court complex which warned potential jurors about "police verbals" or evidence from police about oral confessions by persons accused of crimes. (Note: This case involved the same defendant and more or less the same pamphlets as in Registrar v Collins (1982) 1 NSWLR 682. While he was convicted in the 1982 case, he was acquitted in this case, in part because when the pamphlets were distributed this time around, none of the cases being tried at the court complex involved police evidence re confessions.)	Does not belong to any of the categories.
Registrar, Court of Appeal v Willessee (1985) 3 NSWLR 650	TV program on *Channel 9* which contained material about an accused who was being tried for larceny, including statements the he was a "minder" who sorted out trouble with his fists and sometimes with a gun, that he has killed a man, and that he has no credibility. Aired the night before the jury were to consider their verdict.	1, 4
Attorney General (NSW) v John Fairfax & Sons Ltd (1985) 6 NSWLR 695	Newspaper article in *National Times* that summons were issued against a Police Detective, Rogerson, for attempted bribery of another detective Michael Drury; that in June 1984 Drury was shot and made a dying deposition in which he claimed that Rogerson attempted to bribe him; that Darlinghurst police station where Rogerson was stationed was notorious for regular pay-offs by prostitutes, rapes and bashings in the station, and a relationship between a drug trafficker and some detectives. The article gave details of the shooting by Rogerson of heroin dealer Warren Lafranchi in 1981, including evidence excluded from the inquest into Lafranchi's death. It also mentioned a complaint filed with the Ombudsman by an ex-prisoner, Pouch, that Rogerson had attempted to murder him.	1, 4

CASE	PREJUDICIAL MATERIAL	FALLS UNDER PROPOSAL 4? IF SO WHICH CATEGORY?
The Council of the Shire of Warringah v The Manly Daily Pty; The Council of the Shire of Warringah v Sutton (NSWCA, No 163/85, 27 August 1985, unreported)	Councillor Sutton opposed organisational restructuring of Warringah Shire Council and instituted proceedings in the Supreme Court challenging the validity of the resolutions effecting the restructure. An article was published in *The Manly Daily* in which Mrs Sutton accused the Council of diversionary tactics to prevent the quick resolution of the Supreme Court case.	None of the categories apply. It was claimed (unsuccessfully) that the publications held the Council up to public obloquy and derision, thereby tending to inhibit it from pursuing its defence to the proceedings. In other words, it was alleged that the publication had a tendency to impose improper pressure on a party to proceedings.
Civil Aviation Authority v Australian Broadcasting Authority (1995) 39 NSWLR 540	Radio broadcast on ABC's *Radio National* discussing the events surrounding a plane crash and including interviews with potential witnesses to the coronial inquest. In the program's conclusion, the report stated that "there is no doubt that [the coroner] will lay most of the blame on a company that operated outside the law and on an air safety regulator which knew about the breaches and didn't stop them."	None of the categories apply. The statements were claimed to have asserted the guilt of the parties involved prior to the commencement of the coronial proceedings. In other words they went to the findings which the coroner might ultimately make – prejudging the issues before the coroner.
Attorney General (NSW) v Radio 2UE Pty Ltd and Jones (NSWCA, No 40762/91, 28 August 1992, unreported)	Radio broadcast where the presenter said that a key witness in a murder trial admitted the he was an accomplished liar, had been a professional poker machine thief for 10 years, a heroin smuggler.	1, 4
Attorney General (NSW) v John Fairfax Publications Pty Limited [1999] NSWSC 318	The Sydney Morning Herald published an article and photograph about a man facing charges concerning the supply of heroin. He was described as a drug boss and a top heroin distributor, a "Mr Big", was called a drug csar, headed a list of criminals the Police Commissioner wanted banned from the casino, etc.	1, 3, 4, 5

VICTORIA

(1) Successful prosecutions

CASE	PREJUDICIAL MATERIAL	FALLS UNDER PROPOSAL 4? IF SO, WHICH CATEGORY	PENALTY AND COSTS
R v David Syme and Co Ltd [1982] VR 173	Newspaper article in *The Age* that referred to two accuseds on trial for drug offences, without naming them, but with a description detailed enough to be recognisable to jury. The article inferred that the accuseds had ordered the murder of a key witness and suggested they were guilty of the drug offences.	1, 3	$75 000 plus costs (Publisher) $5 000 plus costs (Editor) No penalty was ordered against the journalist but he was ordered to pay costs.
Hinch v Attorney General (Vic) [1987] VR 721	Radio broadcasts revealed an accused's previous convictions and acquittals and suggested he had committed other crimes for which he had never been charged. A notice of motion was issued after two such broadcasts and a second notice of motion was issued when a further offending broadcast was made.	1	$15 000 for the first motion, $25,000 for the second motion (Broadcaster) $15,000 and 28 days imprisonment (Announcer)
R v Day & Thomson [1985] VR 261	Newspaper article in *The Truth* stating that information excluded on a voir dire about a rape trial had been "tossed out" as the suspect had been held too long.	3 – Inference that the suppressed material implicated the accused.	$7000 plus costs (Publisher) $3000 plus costs (Editor)

CASE	PREJUDICIAL MATERIAL	FALLS UNDER PROPOSAL 4? IF SO, WHICH CATEGORY	PENALTY AND COSTS
Attorney General (Vic) v Gordon, Robert Edward Cronin & The Herald & Weekly Times Ltd (VSC, No CC89/85, 12 July 1985, unreported)	Newspaper article in *The Sun* stating an accused on trial for theft had previously been acquitted of murder and linked him to "underworld" figures.	1	$8000 plus costs (Proprietor) No penalty ordered against the editors.
AG (Vic) v Austarama Television Pty Ltd (VSC, No 93/86, 23 December 1986, unreported) (Nicholson J) NB Case involved two publications. Contempt found in respect of first publication; no contempt found in respect of second (See below).	First publication: "News telecast" on Channel 10 that referred to the accused as an "underworld hitman", who was facing charges for murder and conspiracy to murder.	3	
R v Truth Newspaper (VSC, No 4571/93, 16 December 1993, unreported)	Newspaper article in *The Truth* about the effect of a trial on a policeman on trial for corruption. The trial lasted over three years and cost over $33 million.	4 – Article engendered sympathy for the policeman by talking about the huge cost of the trial, as well as the effect of the trial on his marriage, health and parents' health.	$15,000 plus costs (Proprietor) $5,000 each plus costs (Editors-2) $3,000 plus costs (Journalist) No penalty against the Printer but ordered to pay costs.

CASE	PREJUDICIAL MATERIAL	FALLS UNDER PROPOSAL 4? IF SO, WHICH CATEGORY	PENALTY AND COSTS
R v Herald & Weekly Times Ltd (VSC, No 6570/95, 15 April 1996, unreported)	Two newspaper articles in the *Herald Sun* stating an accused on trial for murder was "a notorious Pentridge prisoner … infamous within criminal circles …" who had held a hostage during a prison siege, made bomb threats and was on trial for two separate murders (the latter fact prohibited from publication by court order).	1	$15000 plus costs (Publisher) $1000 plus costs (Editor)
R v Nationwide News Pty Ltd (VSC, No 6129/97, 22 December 1997, unreported) (liability); (VSC, No 6129/97, 18 February 1998, unreported) (penalty)	Newspaper article in *The Australian* stating an accused on trial for conspiracy to defraud Coles was scapegoating by blaming his predecessor for initiating the fraud. It also stated that others had described the accused's predecessor as scrupulously honest and hardworking.	4 – Suggestion that the accused was a liar and a coward; therefore presented an unfavourable view of him.	$75,000 plus costs (Proprietor) $10,000 plus costs (Journalist) Costs only (Printer and Publisher)
R (On Application of AG for State of Vic) v Spectator Staff Pty Ltd [1999] VSC 107	Newspaper article in the *Hamilton Spectator* that published submissions made on a voir dire for an application to permanently stay the trial because of delay. The submissions referred to information not before the jury. Three charges of indecent assault were stayed however a rape charge continued.	1 Charges that had been stayed suggest prior criminal activity 3 "Judicial imprimatur" to the rape charge due to three charges being stayed, one continued. 4 Possibility the credit of the complainant could be questioned (complainant's inability to make a positive ID was published).	$2000 each plus costs (Proprietors – 5) $1000 plus costs (Managing Director) $1000 plus costs (Editor) Conviction on the journalist but no fine or costs order.

CASE	PREJUDICIAL MATERIAL	FALLS UNDER PROPOSAL 4? IF SO, WHICH CATEGORY	PENALTY AND COSTS
R (On Application of the AG for the State of Vic) v Herald & Weekly Times Ltd (VSC, No 4398-9/99 12 November 1999, unreported) (liability) R v Herald & Weekly Times (No 2) [2000] VSC 35 (penalty)	Two newspaper articles published in the *Herald Sun* relating to a review of a custodial supervision order over the accused who had pleaded insanity to a murder. The decision would be based on issues of safety and the contemptuous articles included: "Don't let him out"; interview with the victim's father; suggestion that there had been other victims; and one detective's view that D was still a danger to society. NB potential influence was on a judge sitting alone.	4	$10,000 plus costs (Proprietor in each case) $2000 plus costs (Editor in each case)

(2) Unsuccessful prosecutions

CASE	PREJUDICIAL MATERIAL	FALLS UNDER PROPOSAL 4? IF SO WHICH CATEGORY?
AG (Vic) v Austarama Television Pty Ltd (VSC, No 93/86, 23 December 1986, unreported) NB Case involved two publications. Contempt found in respect of first publication (see above); no contempt found in respect of second.	Second publication (the "interview telecast"): Live telecast of an interview on *Good Morning Australia* with a clergyman about bikie groups (a topic unrelated to the accused's trial). The interviewee suggested the accused would kill on request; a suggestion that the accused was guilty of the offence for which he was charged. No contempt found because the interviewee's assertion was non-responsive and a "bolt from the blue", and the broadcaster had no opportunity to delete the contemptuous statement as it was a live interview.	3
R v Tennison & The Herald & Weekly Times Ltd v DPP (Vic) (VSC, No 1956/87, Nathan J, 12 November 1987, unreported)	Newspaper article in the *Herald Sun* disclosed the accused's previous convictions. No contempt found because person referred to in the contemptuous article was only obliquely identifiable as the accused.	1

WESTERN AUSTRALIA

CASE	PREJUDICIAL MATERIAL	FALLS UNDER PROPOSAL 4? IF SO WHICH CATEGORY?	COSTS
R v Barber (WA, Supreme Court, No 2330/90, 22 October 1990, unreported)	Newspaper article in the *Albany Advertiser* disclosing evidence of a confession heard on a voir dire that was ruled admissible and needed to be reheard in front of the jury at a later date.	2	$250 (Journalist) $500 (Editor) $1000 (Proprietor and publisher)
R v Pearce [1992] 7 WAR 395	Television interview with the employer of the accused who said that he did not believe she had done anything wrong.	3	No penalty but costs ordered against the respondants
R & ABC v Ex Parte DPP for WA (WA, Supreme Court, No 1256/94, 26 July 1994, unreported)	The accused was described in *The 7.30 Report* as the leader of organised crime (Mafia) and it was said that he was behind bars and had financed the drug activities in relation to which he was charged at the time of the publication.	1, 3	$5000 (Broadcaster)
R v Nationwide News Pty Ltd & Anor; Ex parte DPP for WA (WA, Supreme Court, No 1763/95, 10 July 1996, unreported)	Newspaper article in *The Australian* referring to the recent gaoling of the accused (who was on trial for fraud) and insinuating that he was of bad character in his dealings in relation to horseracing.	1, 4	$10 000 (Proprietor)
R v West Australian Newspapers Ltd & Others; Ex parte DPP for WA (WA, Supreme Court, No 1758/95, 10 July 1996, unreported)	Newspaper article in *The West Australian* referring to the accused as a “bad boy” and publishing his previous convictions and a photograph of him.	1, 4, 5	$25 000 plus costs (Proprietor) $5 000 plus costs (Editor) No penalty against the journalist but ordered to pay costs

CASE	PREJUDICIAL MATERIAL	FALLS UNDER PROPOSAL 4? IF SO WHICH CATEGORY?	COSTS
R v Nationwide News Pty Ltd; DPP (Cth) CLS 1997 WASC 380	Newspaper article in *The Australian* impugned the accused's honesty (the accused was Alan Bond, facing charges involving dishonesty). The article suggested that Bond was involved in the dishonest concealment of millions of dollars worth of art works.	3, 4	$10,000 plus costs (Publisher)
R v Saxon [1984] WAR 283	Newspaper article in *The Western Mail* stating that the accused, on trial for perjury, owed money to various creditors and that she had previously been acquitted on one charge of false pretences. A photograph was also published.	1, 4, 5	$2000 plus costs (Publisher) $250 plus costs (Journalist) $250 plus costs (Editor)
R v Thompson [1989] WAR 219	TV broadcast on *Channel 7* disclosed that the accused, on trial for murder, had previous convictions for rape.	1	$7500 (Publisher) $3000 (Editor) $1000 (Journalist)
DPP for WA v Rural Press Regional Media (WA) Pty Ltd CLS 1988 WASC 573	Newspaper article in the *Bunbury Mail* disclosing that the accused, charged with sexual offences, had previously been convicted of sexual offences.	1	$1 000 plus costs (Proprietor)
R v 61X Southern Cross Radio Pty Ltd; Ex parte DPP (WA) [1999] WASCA 254	Radio broadcast on *6IX* that referred to details of a video recorded interview with the accused that had been ruled inadmissible on voir dire. The accused was charged with attempting to murder her father; the video contained confessional material regarding the offence.	2	$2500 plus costs (Radio Station)
Resolute Ltd v Warnes [2000] WASC 35	Defamatory material contained on a website	Does not belong to any category. Contempt involved improper pressure on a party.	Costs

SOUTH AUSTRALIA

CASE	PREJUDICIAL MATERIAL	FALLS UNDER PROPOSAL 4? IF SO WHICH CATEGORY?	PENALTIES AND COSTS
Registrar of the Supreme Court of SA v The Advertiser Ltd (SA, Supreme Court, No 2418/95, 17 May 1996, unreported)	Newspaper article in *The Advertiser* reporting the trial of the accused, on trial for murder, generally inciting sympathy for victim and antipathy for accused; commenting on credibility of a witness.	4	$10 000 plus costs (Publisher)
Registrar of the Supreme Court v Channel 9 South Australia P/L [2001] SASC 3	*Channel 9* News broadcast showing incriminating photos allegedly taken by the accused (on trial for sex offences) and suggesting he was guilty of other, more serious, offending behaviour than that charged with. Footage of the accused outside court aimed at inciting antipathy for accused.	1, 3, 4, 5	Channel 9 (with a guilty plea) – $20 000 If plea had been not guilty penalty would have been $25 000

QUEENSLAND

CASE	PREJUDICIAL MATERIAL	FALLS UNDER PROPOSAL 4? IF SO WHICH CATEGORY?
R v Sun Newspapers Pty Ltd (1992) 58 A Crim R 281	Newspaper article in the *Sunday Sun* dealing with the completed trial of Lewis, a former Police Commissioner convicted on charges of corruption. The article revealed information ruled inadmissible in another, factually-linked trial (details of Lewis's diary which pointed to Lewis doing deals with the accused in the second trial).	1, 3

APPENDIX F: SELECTED CRIMINAL (NON SUB JUDICE) CONTEMPT CASES WHERE A CUSTODIAL SENTENCE WAS IMPOSED

CASE	CONTEMPTUOUS CONDUCT	CUSTODIAL SENTENCE
Principal Registrar, Supreme Court of NSW v Jando [2001] NSWSC 969	Continually refusing to answer questions	12 months periodic detention
ASIC v Matthews [2001] NSWSC 735	Continually failing to comply with court orders	12 months imprisonment if the defendant failed to pay a $5,000 security for a 2 year good behaviour bond. Costs
Wilson v The Prothonotary [2000] NSWCA 23	Throwing paint at a judge following an adverse ruling	3 months, 20 days (the time he had already served) for each offence, served concurrently (down from 2 years on appeal)
R v Georgiou [2000] NSWSC 287 (Dowd J)	Refusal to answer questions in a murder trial	12 months (served concurrently with other offences)
R v Duncan [2000] NSWSC 440	Refusing to answer questions as a witness in her de facto husband's murder trial	2 month fixed term
Environment Protection Authority v Keogh [2000] NSWLEC 237	Failure to comply with cleanup orders of the Land and Environment Court	2 month fixed term
Rich v Attorney General (Vic) (1999) VSCA 14	(a) addressing the trial judge in a threatening, abusive and offensive manner with an intention to interfere with the administration of justice (b) threatening the prosecutor with an intention to intimidate the prosecutor and undermine the court	(a) 6 months (b) 12 months Commencing at the expiration of the defendant's current term of imprisonment. At trial the sentences were to be served cumulative, on appeal they were reduced to be served concurrently
Arkway Pty Ltd v Hirning (Qld, Supreme Court, No 1524/99, 19 July 1999, unreported) (Derrington J)	Breach of an undertaking given to the court	Fine of $5,000 or 3 months' imprisonment in default of payment

CASE	CONTEMPTUOUS CONDUCT	CUSTODIAL SENTENCE
Registrar, Criminal Division, Supreme Court of NSW v Glasby [1999] NSWSC 846 (Adams J)	Refusing to answer questions as a witness in her husband's murder trial	6 years imprisonment comprising a minimum term of two years and an additional term of four years
Pelechowski v Registrar, Court of Appeal [1999] HCA 19	Failure to comply with court orders against selling or encumbering property	6 months fixed term (overturned on appeal to the High Court by a 3-2 majority)
NSW Crime Commission v Johns (NSWSC, No 10129/97, 3 April 1998, unreported)	Refusal to answer questions	12 months fixed term cumulative on present sentence
Wood v Galea (1997) 92 A Crim R 287	Refusal to give evidence before a Royal Commission	2 years and 3 months fixed term
Langer v Australian Electoral Commission (1996) 59 FCR 463	Defying court orders prohibiting distribution of election material	10 weeks (released on appeal after serving 3 weeks)
Wood v Moller (NSWSC, No 030118/96, 15 November 1996, unreported) (Dunford J)	Failure to comply with a summons to give evidence at a Royal Commission	8 month fixed term
C v Registrar, Court of Appeal (NSWCA, No 40130/94, 10 May 1996, unreported)	Failing to answer questions in a trial	6 month fixed term and $10,000 fine
Registrar, Court of Appeal v Craven (No 1) (1995) 120 FLR 427 (liability); Registrar, Court of Appeal v Craven (No 2) (1995) 120 FLR 464 (penalty)	Refusal to answer questions	6 month fixed term and $10,000 fine
Wood v Staunton (No 5) (1995) 86 A Crim R 183	Continually refusing to answer questions of a Royal Commission inquiry	11 month fixed term for first contempt, 8 month fixed term for second contempt served concurrently
R v Quirke (Toowoomba, District Court, 9 March 1994, unreported) (Howell DCJ)	Failure to answer questions after giving undertakings to do so	12 months
R v Speedy (Brisbane, District Court, 15 April 1994, unreported) (Hoath DCJ)	Failure to give evidence at a retrial	6 months (would have been 12 months had the accused not given evidence at the first trial)

CASE	CONTEMPTUOUS CONDUCT	CUSTODIAL SENTENCE
Young v Jackman (NSWSC, Court of Appeal, No 40308/93, 5 June 1993, unreported)	Disobedience of Family Court order	6 month fixed term
Attorney General (NSW) v Whiley (1993) 31 NSWLR 314	(a) Attempting to improperly influence a Magistrate by threatening violence pending the outcome of a Family Court order (b) Placing improper pressure on the Director General of DOC's by threatening violence	(a) 2 years minimum with an additional term of 18 months (b) 12 months minimum with an additional term of 6 months, served concurrently with the first sentence
ICAC v Cornwall (1993) 38 NSWLRC 207 (liability); ICAC v Cornwall (No 2) (NSWCA, No 11043/93, 8 September 1993, unreported) (Abadee J) (penalty)	Refusal to answer questions and produce documents	2 month fixed term for each offence served concurrently, suspended on the condition that 90 hours of community service is performed
Registrar, Court of Appeal v Raad (NSWCA, No 40585/91, 9 June 1992, unreported)	Refusal to answer questions	12 month fixed term cumulative on present sentence
Registrar, Court of Appeal v Gilby (NSWCA, No 40172/91 20 August 1991, unreported)	Refusing to take the oath and give evidence	6 month fixed term for each of the six offences, served concurrently
R v Herring (NSWSC, No 70140/90, 3 October 1991, unreported)	Physically attempting to attack a judge	2 year fixed term
Registrar, Court of Appeal v Collins [1982] 1 NSWLR 682	Distributing pamphlets outside a court	2 months fixed term
Dow v Attorney General [1980] Qd R 58	An outburst of rudeness	3 months (subsequently set aside on appeal after 7 weeks served)
Ex Parte Tuckerman; Re Nash [1970] 3 NSWR 23	Six men on trial for trespass entered the court to answer the charges and each raised an arm in a clenched fist salute	14 days each

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TABLE OF CASES

See also cases listed in Appendix E and Appendix F.

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