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28 June 2019

Inquiry into the law of Contempt of Court

Dear Committee,

I provide this submission to the Commission's Inquiry into Contempt of Court. This submission may be published by the Commission.

I am a legal academic with expertise in media and journalism law, human rights and freedom of speech issues. I have ten years' experience as a practicing lawyer, including in matters relating to contempt of court. I have a Masters degree in Law, and I am currently completing postgraduate research in the area of racial vilification laws and free speech issues. I have had articles published in academic journals in the areas of human rights, international law, and equal opportunity law.

Scope of this submission

This submission relates only to contempt by **scandalising the court**; that is, questions 32-5 in the consultation paper.

Summary

This submission recommends the abolition of the form of contempt known as 'scandalising the court' ('scandalising contempt'). This offence is unnecessary, dangerous and oppressive in a modern democratic society. The reasons why abolition is necessary are outlined below.

1. The scope of scandalising contempt is extremely vague and uncertain

The offence of scandalising contempt, like other types of contempt, is currently defined entirely by common law. The tests developed by the courts for what types of conduct constitute this type of contempt are extremely vague and uncertain. Therefore, it is difficult for those subject to conviction and punishment to know in advance what conduct will be prosecuted and punished.

2. Courts exercise considerable power and must be accountable

Punishment for scandalising contempt is said to be justified on the basis that it maintains public confidence in the courts, and it maintains the court's authority.[1] However, public scrutiny and discussion of court's procedures and decisions is a vital part of a democratic society. Courts and judges exercise considerable public power. For example, judges have power to imprison people for breach of the criminal law. Judges also have power to determine the constitutional validity of legislation, and to interpret legislation. In this regard, judges have more power than elected members of parliament. As public servants, whose salary is paid from public revenue, judges must be accountable for their decisions and for the power they exercise, which often have a lasting impact on individual's rights.

3. The existence of defences to scandalising contempt is unclear, and no *mens rea* is required

Currently, the existence and scope of defences to scandalising the court are unclear. For example, it is unclear whether truth is a defence to this type of contempt.[2] Although scandalising contempt is a criminal offence, it is not necessary for the prosecutor to prove that the contemnor *intended* to interfere with the administration of justice.[3] Therefore, it is possible to be punished for accidental or unintentional scandalising contempt.

4. Penalties for contempt are unlimited

Conviction for contempt (including scandalising contempt) exposes the contemnor to potentially unlimited fines and imprisonment.[4] Given the uncertainty of the definition of the offence, including uncertainty regarding defences, this is a dangerous and oppressive state of affairs in a modern democracy such as Australia. The mere recording of a conviction for contempt, even without any further penalties being applied, can seriously affect a person's rights (for example, in relation to obtaining employment, and for obtaining a visa for international travel).

5. Few procedural safeguards apply, and courts have a conflict of interest

Allegations of contempt (including scandalising contempt) are currently heard and determined summarily, with few procedurals safeguards. The accused has no right to trial by jury. Guilt and sentence can be (and often are) determined by the judge (or a member of the court) alleged to have been scandalised. This is not inconsistent with the right to a fair hearing in s 24 of the *Charter of Human Rights and Responsibilities 2006* (Vic). Further, this is not consistent with the expectation that courts determine matters impartially. Rather, there is a clear conflict of interest when contempt charges are determined by the judge (or a member of the court) alleged to have been scandalised. This conflict of interest is likely to undermine public confidence in courts.

6. Any interference with a court proceeding is remote and speculative

Unlike *sub judice* contempt or disobedience contempt, scandalising contempt does not involve any interference with a current or pending proceeding, or disobedience with a particular court order. Rather, by its very nature, scandalising contempt involves harms that are much more remote and indeed highly speculative.[5] This submission supports the retention of court's power to punish for disobedience with a particular order, or for interference with a particular proceeding. However, punishing people for

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[1] *R v Dunbabin; Ex Parte Williams* (1935) 53 CLR 434.

[2] *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1.

[3] *Attorney-General (NSW) v Mundey* [1972] 2 NSWLR 882.

[4] *Gallagher v Durack* (1983) 152 CLR 238.

[5] *Bell v Stewart* (1920) 28 CLR 419, 429 (per Isaacs and Rich JJ).

statements that may lead others to think less of courts is undesirable and unnecessary in a modern democracy.

7. Scandalising contempt infringes freedom of expression, and is not justified

The criminal offence of scandalising the court constitutes an 'oppressive limitation on free speech'.[6] Freedom of expression is protected under s 15 of the *Charter of Human Rights and Responsibilities 2006* (Vic). Although freedom of expression is subject to other interests listed under s 15(3), the interests said to be protected by scandalising contempt (discussed below) are not included in this list.

8. Scandalising contempt is censorship

Scandalising contempt is censorship in that it allows the state to punish those who criticise or disagree with the decisions or processes of a court or a judge. As former High Court judge Lionel Murphy stated, 'At stake is not merely the freedom of one person; it is the freedom of everyone to comment rightly or wrongly on the decisions of courts.'[7]

9. More effective ways for courts to respond to criticism

There are other, more effective, ways in which courts can respond to criticism and ensure public confidence in and respect for their decisions and authority. For example, judges regularly publicly explain court processes and legal principles. Judges also respond publicly to criticisms, for example by explaining court processes. Public commentary such as this is more effective that proceedings for contempt in promoting respect for the authority of courts. Making public statement is also less restrictive of individual rights that punishing individuals for contempt.

10. Selective use of the offence undermines public confidence in courts

It is common for unsuccessful litigants and victims of crime (and their families) to make public statements criticizing courts and the legal system, following a decision. Although these statements are often broadcast or published by media organisation, they are rarely prosecuted for scandalising contempt.[8] Indeed, scandalising contempt is rarely prosecuted in any circumstances. However, far from lessening the risk of prosecution, the rarity of prosecutions in fact increases the potentially 'chilling' effect of scandalising contempt on public discussion of courts, court decisions and legal processes. Because prosecutions are unpredictable, any given prosecution for this offence is open to accusations of being selective, arbitrary and even politically motivated.[9] As stated by Justice Murphy, 'the authority and standing of [courts] can only be lowered [where courts are] the vehicle for...selective prosecutions'.[10]

11. Political communication should not be restricted

Courts are also regularly criticised by politicians and, to a lesser extent, by legal academics. Given the uncertainty of the offence of scandalising the court, it is difficult to know what conduct courts will regard as scandalising, and what is legitimate criticism of courts and the legal system. According to the High

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[6] *Gallagher v Durack* (1983) 152 CLR 238, 248 (per Murphy J).

[7] Ibid.

[8] Latiba Oyiela 'Does the Offence of Contempt by Scandalising Have a Valid Place in the Law of Modern Day Australia?' (2003) 8 *Deakin Law Review* 113.

[9] *Gallagher v Durack* (1983) 152 CLR 238, 253 (per Murphy J).

[10] Ibid.

Court's decision in *Lange v Australian Broadcasting Corporation*,[11] discussion of politics and government enjoys constitutional protection in Australia. Therefore, it is likely that the implied right to political communication would provide a defence to statements of this kind in any case.

12. Codification is not adequate or desirable

Codifying the offence of scandalising contempt, by replacing it with statutory provisions, is not a complete solution to the issues outlined above. Although codification would make the offence less ambiguous and easier to understand, it would also make prosecution less flexible and most likely considerably slower. The offence of scandalising contempt is archaic, oppressive and unnecessary in contemporary democratic society.

13. Laws should foster discussion of court decisions, and prevent misuse of judicial power

Laws should foster and encourage discussion of courts and court decisions, rather than punish and discourage this.[12] It is not unknown for Victorian judicial officers to abuse their powers in relation to punishing for contempt of court, and to act in an oppressive manner. In *The Magistrates' Court of Victoria at Heidelberg v Robinson*,[13] a magistrate threatened to punish a legal representative for contempt simply because the magistrate disagreed with the representative's submissions.

In the interests of accountability, judicial misconduct such as this should be disclosed, and rectified, at the earliest opportunity. Conduct such as this, particularly if it is allowed to go unchecked, brings courts and the legal system into disrepute. Laws should encourage the disclosure of such conduct, rather than potentially punishing those who disclose judicial wrongdoing. In a democratic society, individuals should not be placed in the invidious position of having to defend a charge of scandalising contempt by having to prove the truth of a disclosure they have made of judicial wrongdoing (if indeed truth is a defence to scandalising contempt).

I thank you for this opportunity to provide a submission on these important topics. I am available to elaborate further on these issues, if this is needed.

Yours sincerely,

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[11] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.
[12] Oyiela (n 8).
[13] [2000] VSCA 198.