

Acting Commissioner  
Victorian Law Reform Commission  
Level 3  
333 Queen Street  
Melbourne VIC 3000

Dear Acting Commissioner

1. Thank you for the opportunity to make a submission in relation to the Law Reform Commission of Victoria's review of the law of contempt of court.
2. Although I live and practise as a solicitor in NSW, I am making a submission because, as the Commission notes, the Supreme Court of Victoria's power "may be exercised whenever and wherever an alleged contempt may occur".<sup>1</sup> I also understand the potential of the Commission's report to actuate and influence reforms to the law in NSW.
3. I was formerly Associate to the NSW Attorney General and a tipstaff to a judge of the Supreme Court of NSW, and during that time, became interested in the common law offence of scandalising the court (**scandalising contempt**), which applies across Australia to the extent it has not been modified by state and territory legislatures. As the Commission knows, the offence was recently raised in contempt proceedings initiated by the Supreme Court of Victoria against three Commonwealth ministers for their comments about the court.<sup>2</sup>
4. Without intending to comment on those proceedings, I argue in this submission that:
  - the offence of scandalising contempt is so lacking in definition as to fail the benchmark of certainty usually required of the law, especially criminal law; and
  - there is insufficient principled or empirical justification to retain an offence that aberrantly abridges the usual position of freedom of speech in our society.
5. I therefore ask the Commission to recommend abolition of the offence.

#### **The certainty of the offence**

6. I agree with the Commission that "[t]here is a number of uncertainties in the operation and application of the offence".<sup>3</sup>
7. In *Shaw v Director of Public Prosecutions*, it was said by Lord Reid that:<sup>4</sup>

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<sup>1</sup> *Consultation Paper* at [2.23], citing *R v Metal Trades Employers' Association; Ex parte Amalgamated Engineering Union (Australian Section)* (1951) 82 CLR 208, 241 (Latham CJ), 254 (Dixon J); *R v Taylor; Ex parte Roach* (1951) 82 CLR 587, 598 (Dixon, Webb, Fullagar and Kitto JJ).

<sup>2</sup> *Consultation Paper* at [3.82].

<sup>3</sup> *Consultation Paper* at [8.6].

<sup>4</sup> *Shaw v Director of Public Prosecutions* [1961] UKHL 1; [1962] AC 220.

It has always been thought to be of primary importance that our law, and particularly our criminal law, should be certain: that a man should be able to know what conduct is and is not criminal, particularly when heavy penalties are involved.

8. The position is no different under Australia. Indeed, in *PGA v the Queen*,<sup>5</sup> the majority of the High Court said that “[t]hose who seek to foster the rule of law prize certainty”,<sup>6</sup> and Heydon J said that “people should be able to know, by recourse to a competent lawyer, what the legal consequences of a proposed course of action are before embarking on it”.<sup>7</sup>
9. The offence of scandalising contempt resoundingly fails this benchmark. The uncertainties referred to by the Commission are so dire, fundamental and widespread that it is impossible to construct a coherent definition of the offence, so that it is impossible to answer one of the most basic questions a person accused of an offence carrying an unlimited penalty is entitled to ask: what is the law I am accused of breaking?
10. In this section, I explain why clear expression of the offence, using the Australian authorities on scandalising contempt, is an arid prospect.

### **What is the actus reus of the offence?**

11. I begin with the actus reus of the offence.
12. As the Commission noted,<sup>8</sup> the actus reus of the offence was purportedly stated in *R v Dunbabin; Ex Parte Williams*.<sup>9</sup> In that case, Rich J defined contempt generally by saying that “[a]ny matter is a contempt which has a tendency to deflect the Court from a strict and unhesitating application of the letter of the law or, in questions of fact, from determining them exclusively by reference to the evidence”.<sup>10</sup> Rich J then defined scandalising contempt by reference to that definition:<sup>11</sup>

But such interferences may also arise from publications which tend to detract from the authority and influence of judicial determinations, publications calculated to impair the confidence of the people in the Court's judgments because the matter published aims at lowering the authority of the Court as a whole or that of its Judges and excites misgivings as to the integrity, propriety and impartiality brought to the exercise of the judicial office.

13. This statement of principle was the subject of agreement of a unanimous High Court.<sup>12</sup> It, as part of the principles in *Dunbabin*, has been re-endorsed by the High Court.<sup>13</sup> It was made in a case described as “the leading authority” on scandalising contempt.<sup>14</sup> And the passage appears to have been taken by the Australian Law Reform Commission<sup>15</sup> and by this Commission as the chief definition of scandalising contempt.<sup>16</sup>

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<sup>5</sup> (2012) 245 CLR 355.

<sup>6</sup> *Ibid* [124] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ).

<sup>7</sup> *Ibid* [137].

<sup>8</sup> *Consultation Paper* at [2.65], [8.13].

<sup>9</sup> (1935) 53 CLR 434 (*Dunbabin*).

<sup>10</sup> *Dunbabin* 442.

<sup>11</sup> *Ibid* 442.

<sup>12</sup> *Ibid* 447–448.

<sup>13</sup> See *Gallagher v Durack* (1983) 152 CLR 238 (Gibbs CJ, Mason, Wilson and Brennan JJ).

<sup>14</sup> *Viner v The Australian Building Construction Employees & Builders Labourers Federation* [1982] FCA 42.

<sup>15</sup> Australian Law Reform Commission, *Contempt* (Report No 35, 1997) 239.

<sup>16</sup> *Consultation Paper* at [2.65], [8.13].

14. But despite this definition's undoubtable authority, it is not the definition that is applied in many trials and appeals to determine whether the actus reus of scandalising contempt has been committed.
15. Rather, a "two category" approach towards the actus reus of scandalising contempt has relatively recently emerged in first instance and intermediate appellate decisions.<sup>17</sup> As the Commission notes (with my numbering added), "a comment about the courts or a judge may be scandalising contempt if it is either (1) 'scurrilous abuse' or (2) 'excites misgivings as to the integrity, propriety and impartiality brought to the exercise of judicial office'.<sup>18</sup>
16. These categories, problematically, capture qualitatively different conduct to the actus reus defined by the High Court.

### *Category 2*

17. Starting with the second category, its label (comments which "excite misgivings as to the integrity, propriety and impartiality brought to the exercise of judicial office") is a quote of approximately one quarter of the High Court's statement of when scandalising contempt may arise. Compare that statement to the full quote:<sup>19</sup>

But such interferences may also arise from publications which tend to detract from the authority and influence of judicial determinations, publications calculated to impair the confidence of the people in the Court's judgments because the matter published aims at lowering the authority of the Court as a whole or that of its Judges and excites misgivings as to the integrity, propriety and impartiality brought to the exercise of the judicial office.

18. It is clear from the Court's syntax that the clause starting "publications calculated to impair the confidence..." further describes the clause starting "publications which tend to detract from...", rather than standing alone as another form of scandalising contempt. Put differently, it is clear the Court, when describing the circumstances in which a critical publication amounts to contempt, was speaking conjunctively; a publication must satisfy all parts of the description, rather than just one part, to constitute scandalising contempt.
19. To use an example, from the sentence "Tom went to the pet shop to buy a big dog, a dog that would be his best friend", we would not ordinarily understand Tom to be buying two dogs. But that is exactly the sort of strained interpretation required to read the Court's statement of principle as importing two alternative pathways to commission of the actus reus of scandalising contempt.
20. Ripped from context, "the second category" does exactly that. It elevates one half of one half of the High Court's conjunctive statement of principle to a test of sufficiency for scandalising contempt, thereby capturing a different subset of conduct to what was intended.
21. On the High Court's statement of principle:

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<sup>17</sup> See, eg, *Attorney General for New South Wales v Munday* [1972] 2 NSWLR 887, 910; *R v Hoser and Kotabi Pty Ltd (No. 2)* [2001] VSC 525 [15]; *Attorney-General for Queensland v Colin Lovitt QC* [2003] QSC 279 [56]; *Mahaffy v Mahaffy* [2018] NSWCA 42 [171], [223] (Simpson JA).

<sup>18</sup> *Consultation Paper* at [8.21].

<sup>19</sup> *Dunbabin* 442.

A person commits the actus reus of scandalising the court if he/she publishes material:

(a) tending to detract from the authority and influence of judicial determinations;  
**and**

(b) calculated to impair the confidence of the people in the Court's judgments because the matter published aims at lowering the authority of the Court as a whole or that of its Judges and excites misgivings as to the integrity, propriety and impartiality brought to the exercise of the judicial office.

22. Given the fundamental differences between (a) and (b), it is easy to think of examples of publications that might fall within one limb but not the other:
1. (a) speaks of an inherent tendency (“tending to”), whereas (b) speaks of design (“calculated”), so an outrageous and unbelievable statement about judges of a court clearly intended to have the effect in (b) would not fall within (a) because its outlandishness negates an inherent tendency to detract from the authority/influence of judicial determinations;
  2. the focus of (a) is on the authority and influence of judgments, whereas the focus of (b) is on the confidence of the people in the court, which means that a scurrilous statement to a small audience that tends to detract from the authority of a court’s determinations might fall within (a), but not (b), because the audience in question is less in number than that required for the group to be “the people” in (b); and
  3. (b) requires the excitation of misgivings as to the integrity, propriety and impartiality brought to the exercise of judicial office, which seems to exclude the excitation of misgivings as to other qualities – like intelligence, legal knowledge and stamina – that could have the effect described in (a).
23. Thus, because the second category (again for convenience, comments which “excite misgivings as to the integrity propriety and impartiality brought to the exercise of judicial office”) is essentially one half of (b), it both catches and misses conduct in opposition to how the High Court has defined the offence.

#### *Category 1*

24. This conclusion is even more true of the first category, the “scurrilous abuse” category (a publication is scandalising contempt if it is or contains “scurrilous abuse” of a judicial officer or court).
25. It is hard to see how, in and of itself, scurrilous abuse constitutes scandalising contempt within the meaning of the High Court definition. By its nature, scurrilous abuse does not appear to have real capability to bear on any of the matters described by the Court in its definition. This point was made by Cummins J in *Anissa Pty Ltd v Parsons* in finding the defendant in that case not guilty of contempt:<sup>20</sup>

It may be offensive, but it is not contempt of court, for a person to describe a judge as a wanker. The words uttered by the defendant, albeit particularised, say just that. The words spoken by the defendant do not undermine confidence in the administration of justice. They undermine confidence in the persona of the solicitor who spoke them.

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<sup>20</sup> *Anissa Pty Ltd v Parsons* [1999] VSC 430 [23].

26. There is substantial reason, therefore, to doubt the connection of this actus reus to the High Court's current theoretical justification of the existence of the offence:<sup>21</sup>

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

27. It appears that the origin of this separate category of scurrilous abuse was an English case from the turn of the twentieth century, *R v Gray*.<sup>22</sup>

28. In that case, the Queen's Bench Division heard charges of scandalising contempt brought by the Attorney-General for publication of scurrilous comments about a judge in a newspaper. Lord Russell explained the law applying to the trial:<sup>23</sup>

Any act done or writing published calculated to bring a Court or a judge of the Court into contempt, or to lower his authority, is a contempt of Court.

29. Lord Russell then said this statement was subject to a qualification of fair comment:<sup>24</sup>

Judges and Courts are alike open to criticism, and if reasonable argument or expostulation is offered against any judicial act as contrary to law or the public good, no Court could or would treat that as contempt of Court. The law ought not to be astute in such cases to criticize adversely what under such circumstances and with such an object is published; but it is to be remembered that in this matter the liberty of the press is no greater and no less than the liberty of every subject of the Queen.

30. Finally, Lord Russell then explained his conclusion on the charge in the case, and critically, used the words "scurrilous abuse" that Hope JA appears to have picked up:<sup>25</sup>

Now, as I have said, no one has suggested that this is not a contempt of Court, and nobody has suggested, or could suggest, that it falls within the right of public criticism in the sense I have described. It is not criticism: I repeat that it is personal scurrilous abuse of a judge as a judge.

31. In context, it is clear that Lord Russell was not saying that scurrilous abuse of a judge was equivalent to scandalising contempt. So much is apparent from Lord Russell explicitly defining scandalising contempt, defining the scope of the right of fair comment, concluding that the comment in question was a contempt of court not falling within the right of fair comment and only then referring to the comment as "scurrilous abuse". The term was not related to Lord Russell's conclusion. His conclusion was based on a concept of scandalising contempt as related to the authority of the court, not a standalone prohibition against scurrilous abuse of a judge.

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<sup>21</sup> *Gallagher v Durack* (1983) 152 CLR 238, 243.

<sup>22</sup> [1900] QB 36.

<sup>23</sup> *Ibid* 40.

<sup>24</sup> *Ibid*.

<sup>25</sup> *Ibid*.

32. Nonetheless, *Reid* appeared to have contributed to a catena of authorities endorsing scurrilous abuse as a test of sufficiency for scandalising contempt, both in England<sup>26</sup> and in Australia.<sup>27</sup>
33. What is most important for our purposes, though, is the existence of a parallel streams of rules for defining the actus reus of scandalising contempt: one – the authoritative *Dunbabin* definition – tied to the maintenance of the authority of the court and one – “scurrilous abuse” – not.

### *Conclusion*

34. The above analysis demonstrates that under Australian common law there are two competing ways of expressing the actus reus of scandalising contempt.
35. We can use the *Dunbabin* definition and say:
- A person commits the actus reus of scandalising the court if he/she publishes material:
- (a) tending to detract from the authority and influence of judicial determinations;  
**and**
- (b) calculated to impair the confidence of the people in the Court's judgments because the matter published aims at lowering the authority of the Court as a whole or that of its Judges and excites misgivings as to the integrity, propriety and impartiality brought to the exercise of the judicial office.
36. Or we can use the “two category” approach and say:
- A person commits the actus reus of scandalising the court if he/she publishes material:
- (a) with scurrilous abuse of a court or judicial officer; or
- (b) that excites misgivings as to the integrity, propriety and impartiality brought to the exercise of judicial office
37. But, as been argued above, these statements of law are qualitatively different to one another other, yet are both often cited and quoted in trials and appeals concerning scandalising contempt. There are two implications of this position.
38. The first is that there is a parallel stream of law of scandalising contempt that appears to have arisen in opposition to how the High Court has defined the offence, which goes to the question of whether the precedential foundation of this stream of the law is so fragile as to warrant removal.
39. The second goes to the benchmark of certainty. The existence of different and unreconciled standards for judging the actus reus of scandalising contempt renders it difficult to answer the aforementioned question that accused persons are entitled to ask: what is the law I am accused of breaking?

### **The problem of fair comment**

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<sup>26</sup> See David Eady and A.T.H. Smith, *Arlidge, Eady & Smith on Contempt* (Thomson Reuters, 4<sup>th</sup> ed, 2011) 414–417.

<sup>27</sup> See, eg, *Attorney General for New South Wales v Munday* [1972] 2 NSWLR 887, 910; *R v Hoser and Kotabi Pty Ltd (No. 2)* [2001] VSC 525 [15]; *Attorney-General for Queensland v Colin Lovitt QC* [2003] QSC 279 [56]; *Mahaffy v Mahaffy* [2018] NSWCA 42 [171], [223] (Simpson JA).

40. However unsatisfactory this position, though, my expressions of the law do not yet accommodate the fair comment exception or defence.
41. The existence of such a concept is not in doubt. In *R v Fletcher; Ex parte Kisch*, Evatt J listed a set of principles applicable to scandalising contempt and qualified the scope of the offence by saying that:<sup>28</sup>
- Fair criticism of the decisions of the Court is not only lawful, but regarded as being for the public good; but the facts forming the basis of the criticism must be accurately stated, and the criticism must be fair and not distorted by malice.
42. In *Dunbabin*, a unanimous Court approved Evatt J's statement of principles:<sup>29</sup>
- The law permits in respect of Courts, as of other institutions, the fullest discussions of their doings so long as that discussion is fairly conducted and is honestly directed to some definite public purpose. The jurisdiction exists in order that the authority of the law as administered in the Courts may be established and maintained. The cases are collected and the principles expounded in the judgment of Evatt J. in *R. v. Fletcher; Ex parte Kisch*.
43. In *Gallagher v Durack*, the Court said:<sup>30</sup>
- The principles which govern that class of contempt of court which is constituted by imputations on courts or judges which are calculated to bring the court into contempt or lower its authority had been discussed by this Court in *Bell v. Stewart* [1920] HCA 68; (1920) 28 CLR 419 and *R. v. Fletcher; Ex parte Kisch* [1935] HCA 1; (1935) 52 CLR 248 before *R. v. Dunbabin; Ex parte Williams* was decided, and the judgment of Rich J. in the last mentioned case is consistent with what had been said in the earlier decisions.
44. We can therefore take from High Court endorsement of this statement of fair comment – binding on all other Australian courts – that a criticism which would otherwise constitute the actus reus of scandalising contempt will avoid that status if (a) the facts forming the basis of the criticism are accurately stated; (b) the criticism is fair; and (c) the criticism is not distorted by malice.
45. It may be said that there are problems in principle attending this rule, particularly in respect of (c). In particular, if a person accurately states the facts underlying the criticism and makes a fair criticism, why should the state of mind of the person matter? In any event, what does it mean for a criticism to be “distorted by malice”? For example, does it mean the content of a criticism has been influenced in any way by malice, or that malice has actuated the creation of criticism disproportionate to the event in question? The authorities do appear to provide answers to these questions.
46. More problematically insofar the certainty of these rules are concerned, though, is whether a publication status as a fair comment means the publisher has successfully invoked a defence or that the publication does not fall within the scope of the offence at all.
47. The distinction matters because it goes to the question of the burdens of proof and standard of proof to be applied.

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<sup>28</sup> *R v Fletcher; Ex parte Kisch* (1935) 52 CLR 248, 257–8 (Evatt J).

<sup>29</sup> *Dunbabin* 442–3.

<sup>30</sup> (1983) 152 CLR 238.

48. So far as the persuasive burden goes, it is probably the law that the prosecutor must negative the proposition that a publication is fair comment beyond reasonable doubt, in order to be consistent with the statement in the context of scandalising contempt that “respondents are ... entitled to invoke the principle that guilt should be proved beyond reasonable doubt”.<sup>31</sup> That conclusion is not closed to doubt, though, as “guilt” might only refer to the elements of the offence. We can credibly say, for example, that the offence of murder must be proven beyond reasonable doubt, without qualifying the statement that the accused must demonstrate the defence of insanity on the balance of probabilities.

49. In addition, what about an/the evidential burden? As the High Court said in *Braysich v The Queen*:<sup>32</sup>

There are some "defences" in respect of which the accused bears no evidential burden because the negating of such defences is an integral part of the prosecution's positive case, on which it bears the legal burden. It is not necessary here to discuss which defences fall into that category and which defences give rise to an evidential burden on the accused.

50. Although I would happily be corrected, whether the fair comment concept attracts an evidential burden does not appear to have ever been explained, despite its apparent importance to achieving clarity as to whether an accused must adduce evidence supporting each of the necessary ingredients of fair comment for it to be considered by the trial judge.

51. With these uncertainties in mind as to the burdens and standards of proof attending the offence, it remains to add fair comment to the previous definitions of the actus reus.

52. If the *Dunbabin* definition applies, then we can say:

A person commits the actus reus of scandalising the court if he/she publishes criticism:

(a) tending to detract from the authority and influence of judicial determinations;  
**and**

(b) calculated to impair the confidence of the people in the Court's judgments because the matter published aims at lowering the authority of the Court as a whole or that of its Judges and excites misgivings as to the integrity, propriety and impartiality brought to the exercise of the judicial office.

unless the facts forming the basis of the criticism are accurately stated, the criticism is fair and the criticism is not distorted by malice.

53. If the two-category approach applies, then we can say:

A person commits the actus reus of scandalising the court if he/she publishes material:

(a) with scurrilous abuse of a court or judicial officer; or

(b) that excites misgivings as to the integrity, propriety and impartiality brought to the exercise of judicial office

unless the facts forming the basis of the criticism are accurately stated, the criticism is fair and the criticism is not distorted by malice.

54. I now move to the mens rea of the offence.

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<sup>31</sup> *R v Fletcher; Ex parte Kisch* (1935) 52 CLR 248, 259 (Evatt J).

<sup>32</sup> *Braysich v The Queen* (2011) 243 CLR 434 [34] (French CJ, Crennan and Kiefel JJ).



## The mens rea

55. According to the Commission:<sup>33</sup>

There is also no requirement that there be any intention to interfere [with the administration of justice] on the part of the publisher but it appears that an intention to publish is needed.

56. The Commission is right to use careful language to make this statement, because the position is far from clear.

57. The authority cited by the Commission for the proposition that an intention to publish is needed was *Wade v Gilroy*.<sup>34</sup>

58. In *Wade*, the appellants appealed their convictions for scandalising contempt arising out of publication of an illustrated brochure which caustically asserted that a Family Court judge had been influenced by a wealthy litigant.

59. One of the grounds of appeal was that “one of the ingredients of the offence to be established by the prosecutor was that the appellants had intended to scandalise the Court”.<sup>35</sup>

60. The Full Court referred to inherent tendency of a publication to scandalise as the focus of the inquiry and then made the following statements (emphasis added):<sup>36</sup>

**Intention to publish may be an element of the offence** (*State (D.P.P.) v. Walsh* (1981) I.R. 412). From the reference by the High Court in *Gallagher v. Durack* (*supra*) at p. 244 to the offending statement having been made at an unexpected interview, it would seem that lack of forethought might be an exculpatory circumstance. And intent is always relevant as to penalty (*R. v. Editor of New Statesman* (*supra*)).

The situation as to the relevance of intent might not be quite clear in England (cf. *Attorney-General v. Butterworth* (1963) 1 Q.B. 696 at p. 722; *R. v. Oldhams Press* (1957) 1 Q.B. 73 at p. 80; *Mcleod v. St Aubyn* (1899) A.C. 549; *Perera v. R.* (1951) A.C. 482). See also *Solicitor-General v. Radio Avon Ltd.* (1978) 1 N.Z.L.R. 225 at pp. 231-233. But the situation in Australia is clear, **and in my view his Honour correctly had regard to the inherent tendency of the publication.**

61. From the above (“intention to publish **may** be an element of the offence”), it is tolerably clear that *Wade* is not authority for the proposition that intention to publish **is** an element of the offence.

62. Curiously, the authority cited by the Full Court – *State (D.P.P.) v Walsh* – for its proposition does not appear to contain any obvious reference to the status of intention in scandalising contempt, either. Even if it did, as an Irish case, it does not affect the content of the common law of Australia until expressly incorporated.

63. Consequently, without intending to be critical, I do not think that the Commission can conclude from these cases that intention to publish is an element of the offence.

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<sup>33</sup> *Consultation Paper* at [8.14].

<sup>34</sup> (1986) 83 FLR 14, 20.

<sup>35</sup> *Wade v Gilroy* [1986] FamCA 6 [78].

<sup>36</sup> *Wade v Gilroy* [1986] FamCA 6 [82]–[83].

64. Is there a mens rea of the offence, then? It appears that there are two Australian authorities shedding light on this question in the context of scandalising contempt.<sup>37</sup>
65. The first is *Attorney-General for New South Wales v Munday*.<sup>38</sup> On the mens rea of scandalising contempt, Hope JA said the following, as part of a discussion of the law of scandalising contempt (citations omitted):<sup>39</sup>

The application of the doctrine of mens rea to criminal contempt is not entirely clear.

...

In the present case, I think that the question whether the defendant's statement constituted contempt must be determined by reference to their inherent tendency to interfere with the administration of justice, and that the defendant's intention, while of some relevance in this regard, is of importance mainly in relation to whether the matter should be dealt with summarily, if any of the statements did constitute contempt, and in relation to the question as to what penalty, if any, should be imposed.

66. It is difficult, to say the least, to see how a person's state of mind could be relevant to an objective tendency of a statement to have a particular effect, much less to know when it *is* relevant to this question, as opposed to being *maybe* relevant.
67. The second authority is *Attorney-General for State of Queensland v Colin Lovitt QC*,<sup>40</sup> in which the respondent, a barrister, was accused of scandalising contempt for turning to journalists observing proceedings and calling the presiding magistrate a cretin.
68. In *Lovitt*, the trial judge, Chesterman J, was satisfied that the conduct constituted "a scurrilous attack upon a judicial officer's mental capacity"<sup>41</sup> and was therefore satisfied that the respondent had committed the actus reus of the offence.
69. On the mens rea element, Chesterman J made the following statement:<sup>42</sup>

The question whether the respondent intended his remark to be published is more difficult. Proof beyond reasonable doubt is required and I am not prepared to infer, to that standard, that the respondent meant his criticism to be republished in the media. I am prepared to infer, beyond reasonable doubt, that the respondent knew that such publication was a distinct possibility and that he was indifferent to that occurrence.

...

Here the respondent initiated the criticism and made it to journalists reckless of the outcome and with no basis for believing that all of the news organisations would decline to publish his remarks.

Accordingly I am satisfied that the respondent is guilty of contempt of court.

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<sup>37</sup> Compare with authorities that discuss the mens rea in the context of other forms of contempt, like contempt sub judice in the case of *John Fairfax & Sons Pty. Ltd. v McRae* (1955) 93 CLR 351 at 371 (Dixon CJ, Fullagar, Kitto and Taylor JJ).

<sup>38</sup> [1972] 2 NSWLR 887.

<sup>39</sup> *Ibid* 911.

<sup>40</sup> [2003] QSC 279.

<sup>41</sup> *Ibid* [61].

<sup>42</sup> *Ibid* [62], [63], [64].

70. Thus *Lovitt* stands as authority for the proposition that foresight of a distinct possibility of a publication is sufficient to fulfill an apparent mens rea of the offence.
71. The conclusion in *Lovitt* is troubling, as it appears Chesterman J assumed the inclusion of a mens rea element in the offence, but did not cite any authority for the proposition that foresight of a distinct possibility satisfied that mens rea element, nor offered a clear explanation as to why this foresight was or should be sufficient.
72. Regardless, the combined effect of *Mundey* and *Lovitt* is that currently, the common law of scandalising contempt is irreconcilable on the question of the mens rea of the offence.
73. If *Mundey* is correct, the intention of the accused (to do what?) *may* be relevant to the inherent tendency of the publication to interfere with the administration of justice.
74. If *Lovitt* is correct, it appears that there is a mens rea element that is at least satisfied by foresight as to the distinct possibility of publication.
75. Applying these conclusions to the definitions of the offence we most recently constructed, we can say, if the *Dunbabin* definition prevails:

A person commits the offence of scandalising the court if he/she publishes (with foresight as to the distinct possibility of publication?) criticism that (having regard to the intention of the person?):

(a) tends to detract from the authority and influence of judicial determinations;  
and

(b) is calculated to impair the confidence of the people in the Court's judgments because the matter published aims at lowering the authority of the Court as a whole or that of its Judges and excites misgivings as to the integrity, propriety and impartiality brought to the exercise of the judicial office.

unless the facts forming the basis of the criticism are accurately stated, the criticism is fair and the criticism is not distorted by malice.

76. But if the two-category approach applies, then we can say:

A person commits the offence of scandalising the court if he/she publishes (with foresight as to the distinct possibility of publication?) criticism that (having regard to the intention of the person?):

(a) contains scurrilous abuse of a court or judicial officer; or

(b) excites misgivings as to the integrity, propriety and impartiality brought to the exercise of judicial office

unless the facts forming the basis of the criticism are accurately stated, the criticism is fair and the criticism is not distorted by malice.

77. In my view, it cannot be sensibly argued that either statement of the law is acceptable.
78. Both are marred with fundamental uncertainties that combine to produce an offence that is, as things currently stand, incoherent – and there remains the even more fundamental question of which of the two qualitatively different statements is correct.

79. I do not think that the offence is susceptible to judicial clarification on a sensible timeframe, purely because judicial clarification requires a prosecution for scandalising contempt, an argument as to the uncertainty of the offence and probably, given the competing authorities, a forum of the High Court to bring determinative clarity.
80. Thus, my position is that if the law is to be best it can possibly be, the Commission should not recommend retention of the status quo. The dire uncertainty of the law means that creation of a statutory offence or abolition are the only sensible options.

### **Other problems with the law of scandalising contempt**

81. Because of other problems with the offence, though, I think retaining the offence in statutory form is undesirable and that abolition is the only way forward.
82. I agree with the Commission that “[t]he central question when considering the future of scandalising contempt is whether judicial officers should be subject to special treatment”.<sup>43</sup> Why should the ordinary principles of freedom of speech that prevail in our society be abrogated so as to stifle robust, harsh or even uncouth criticisms of courts or judges?
83. The rationale for the offence was offered by the High Court in *Gallagher v Durack*:<sup>44</sup>
- The authority of the law rests on public confidence, and it is important to the stability of society that the confidence of the public should not be shaken by baseless attacks on the integrity or impartiality of courts or judges.
84. While it may be accepted that the authority of the law rests on public confidence, the onus falls on proponents of the offence in this review to offer empirical support for the far-reaching claim that the offence of scandalising contempt is required to prevent that confidence from being shaken by baseless attacks, so as to preserve the stability of society.
85. I think the logic falters on the first step: that an offence of scandalising contempt is required to prevent public confidence in the authority of the judiciary or the law from being materially shaken.
86. In my view, the public is more than capable of evaluating competing opinions and ideas. That is one fundamental premise of democratic society; we permit a free flow of speech so that the ideas contained in that speech can be discussed, debated and dissected. With very limited exceptions, we do not stifle speech, however objectionable.
87. Proponents of retaining the offence in this review may argue that criticism of judges or courts is exceptional in this regard because judges and courts cannot offer a response in the normal way, thereby requiring a different means to contest contrary ideas.
88. The Commission should not be swayed this argument, because it is not factually correct. Judges and courts have several options at their disposal to non-coercively respond to criticism. For example:

Dignified silence: “Dignified silence” is a term occasionally used to describe the preferred approach of courts to stay silent in the face of criticism.

This tactic was effectively deployed by the High Court when, after declaring the Malaysian Solution unconstitutional, it was criticised by Prime Minister Gillard for

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<sup>43</sup> *Consultation Paper* at [8.88].

<sup>44</sup> *Gallagher v Durack* (1983) 152 CLR 238, 243.

making a decision representing a “missed opportunity” and turning the law “on its head”.<sup>45</sup> The Prime Minister also criticised French CJ directly:<sup>46</sup>

The current Chief Justice of the High Court, his Honour Mr Justice French, considered comparable legal questions when he was a judge of the Federal Court and made different decisions to the one the High Court made yesterday.

French CJ was later interviewed about what his response was to these sorts of comments and what goes through the mind of a judge when these criticisms are made.<sup>47</sup> The following is an illuminative excerpt of that interview:

French CJ: The first thing is no response. Generally speaking it is a very bad idea for judges who have been criticised to engage in some sort of public debate with the critic. There are in fact plenty of protagonists on either side of the debate out in the community, and there were certainly at that time, there were responses to what the Prime Minister said, there were people who were defending her criticism, there were others who were attacking it. For the Court to get dragged in to that sort of exchange, I think it's a bad look. And so my personal position has been not to respond to such criticism, and I think that's the position of most judges.

Damien Carrick: Can I put the question slightly differently; when these comments are made, do judges feel under pressure from politicians?

French CJ: Well, of course it's human nature perhaps for people to not enjoy criticism. On the other hand the judiciary, if you don't have the capacity to, as it were, shrug off that kind of criticism and just say...it's like the weather, you know, it goes with the territory every now and again, it doesn't happen very often, fortunately...it goes with the territory and just get on with the job, then you really shouldn't be in judicial office. You should not feel pressured by what external critics say because there will always be external critics. That goes with being a public figure, putting out reasons into the public arena, justifying your decisions, and those reasons are properly open to scrutiny and comment in the public sphere.

In my opinion, these views of the Chief Justice of the High Court of Australia on criticism of the judiciary attracting advocates in the community on both sides, and the dangers of courts becoming entangled in those debates, should weigh heavily in the Commission's assessment of whether to retain an offence of scandalising contempt.

Temperately responding: Nonetheless, if a court or judge is so inclined, there is no legal prohibition on directly responding to criticism. This course was recently adopted by a court of high authority, the Supreme Court of the United States, after President Trump

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<sup>45</sup> Ben Packham, 'Julia Gillard attacks High Court's asylum ruling', *The Australian* (online), 1 September 2011 <<https://www.theaustralian.com.au/national-affairs/immigration/labors-asylum-solution-all-at-sea-after-high-court-vetoes-malaysia-solution/news-story/e7e6b32c1957b474756cb55820a47b72>>.

<sup>46</sup> Ibid.

<sup>47</sup> Damien Carrick and Anita Barraud, 'Retiring Chief Justice Robert French', *Law Report*, 13 December 2015 <<https://www.abc.net.au/radionational/programs/lawreport/retiring-chief-justice-robert-french/8105828#transcript>>.

referred to a lower court judge making a decision adverse to the President's immigration policy as an "Obama judge".<sup>48</sup>

Chief Justice Roberts responded that "[w]e do not have Obama judges or Trump judges, Bush judges or Clinton judges. What we have is an extraordinary group of dedicated judges doing their level best to do equal right to those appearing before them. That independent judiciary is something we should all be thankful for".<sup>49</sup>

The option of temperate response would continue to remain available to Australian courts if the offence of scandalising contempt were abolished.

Responses from professional associations: But even if these options are deemed unacceptable, there remains the option of a response made by a professional association, such as the Law Council of Australia, a state Bar Association or the Judicial Conference of Australia, all of which to their credit frequently respond to criticism on behalf of judges.<sup>50</sup> These bodies will continue to be able to serve in this capacity if the offence of scandalising contempt is abolished.

89. There also remains *legal* options for responding to criticism: civil defamation and in serious cases, criminal defamation. The latter should not be overlooked as a means of responding to unjustifiable and pernicious criticism. This offence currently exists under s 10 of the *Wrongs Act 1958* (Vic), which provides:
- (1) Every person who maliciously publishes any defamatory libel knowing the same to be false shall be liable to imprisonment for a term of not more than two years and to pay such fine as the court awards.
  - (2) Every person who maliciously publishes any defamatory libel shall be liable to fine or imprisonment or both as the court may award such imprisonment not to exceed the term of one year.
90. This offence is preferable to the offence of scandalising contempt because it removes the problem of the recipient of criticism often being the initiator and adjudicator of a prosecution of a person for the criticism. If the law no longer contains the offence of scandalising contempt, then a judicial officer who is the subject of criticism within the meaning of s 10(1) and (2) can make a complaint to the police in the ordinary way, leaving it to an independent body to investigate, and if appropriate, prosecute the offence.
91. Criminal defamation continues to be prosecuted across Australia. Earlier this month, for example, a man in Queensland was charged with the offence for allegedly distributing leaflets falsely claiming that a former sporting associate was a paedophile.<sup>51</sup> The Victorian equivalent similarly serves to protect judges, in common with other members of the community, from malicious and serious defamation about them personally.

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<sup>48</sup> Adam Liptak, 'Chief Justice Defends Judicial Independence After Trump Attacks 'Obama Judge'', *The New York Times* (online), 21 November 2018 <<https://www.nytimes.com/2018/11/21/us/politics/trump-chief-justice-roberts-rebuke.html>>.

<sup>49</sup> Ibid.

<sup>50</sup> See, eg, the responses of the Judicial Conference of Australia and the Law Council of Australia in Ebony Bowden, Benjamin Preiss and Fergus Hunter, "'Dangerously close to contempt of court": Judges hit back at Turnbull government', *The Sydney Morning Herald* (online), 13 June 2017 <<https://www.smh.com.au/politics/federal/dangerously-close-to-contempt-of-court-victorian-government-hits-back-at-turnbull-government-20170613-gwptlk.html>>.

<sup>51</sup> 'Man charged for allegedly falsely accusing Noosa teammate of being paedophile after falling out', *ABC News* (online), 5 June 2019 <<https://www.abc.net.au/news/2019-06-05/man-falsely-accuses-team-mate-of-being-paedophile/11180010>>.

92. Accordingly, I think there is sufficient symmetry of power between judicial officers/courts and critics, such that criticism of judicial officers/courts can be challenged in the ordinary way and that the conventional presumption against criminalising speech applies.
93. As a result, because of the uncertainty attending the offence used to prosecute publishers of criticism, the unproven empirical rationale for the offence and the offence's incursion into free speech, my position is that the Commission should abolish the offence.
94. For the avoidance of doubt, I should acknowledge that this conclusion does not derive from any endorsement of the often uniformed and ugly ways that hardworking judicial officers can be attacked for doing their job.
95. Please let me know if I can be of any further assistance.

Sincerely,  
Tim Smartt