

Submission to the Victorian Law Reform Commission

Review of Contempt of Court, Judicial Proceedings Reports Act 1958 and Enforcement Processes

To: Bruce Gardiner PSM, Acting Chair, Victorian Law Reform Commission

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LIST OF ABBREVIATIONS

Term	Abbreviation
Law Reform Commission, <i>Contempt</i> (Report No 35, 1987)	ALRC 1987 report
<i>Charter of Human Rights and Responsibilities Act 2006</i> (Vic)	Charter
Victorian Law Reform Commission, <i>Contempt of Court</i> (Consultation Paper, May 2019)	Consultation Paper
Law Council of Australia	LCA
Law Institute of Victoria	LIV
Law Reform Commission of Western Australia	LRCWA
Law Reform Commission of Western Australia, <i>Contempt by Publication</i> (Discussion Paper, March 2002)	LRCWA discussion paper
Law Reform Commission of Western Australia, <i>Review of the Law of Contempt</i> (Report, Project No 93, June 2003)	LRCWA report
New South Wales Law Reform Commission	NSWLRC
New South Wales Law Reform Commission, <i>Contempt by Publication</i> (Report No 100, 2003)	NSWLRC report
Victorian Law Reform Commission	VLRC

INTRODUCTION

The Law Institute of Victoria (**LIV**) is Victoria's peak body for lawyers and represents more than 19,500 people working and studying in the legal sector in Victoria, interstate and overseas. The fundamental purpose of the LIV is to foster the rule of law and to promote improvements and developments in the law as it affects the Victorian community. Accordingly, the LIV has a long history of contributing to, shaping and developing effective state and federal legislation, and has undertaken extensive advocacy and education of the public and of lawyers on various law reform and policy issues.

The LIV is grateful for the opportunity to provide a submission to the Victorian Law Reform Commission (**VLRC**) in response to the VLRC's Consultation Paper on Contempt of Court, Judicial Proceedings Reports Act 1958 and Enforcement Processes. The LIV has provided comment on some, but not all, of the questions contained in the Consultation Paper and has noted those questions it will address.

This submission has been prepared by representatives of the LIV's Administrative Law and Human Rights Section and Criminal Law Section, which are comprised of over 4,500 members practicing in human rights law, constitutional law and criminal law.

EXECUTIVE SUMMARY

The LIV submits the common law of contempt of court ought to be codified. The LIV acknowledges the existing common law of contempt of court is fraught with uncertainties and potential infringements of fundamental principles and rights. The LIV has identified four main issues with the common law approach to contempt:

- limitations on freedom of expression and the principle of open justice;
- uncertainty of scope and application of the offences;
- limitations on principles of procedural fairness; and
- effectiveness of existing or alternative measures.

The LIV submits that codification, largely in line with the Australian Law Reform Commission (**ALRC**) 1987 report's recommendations, will provide clarity and certainty to the law of contempt, two principles which are central to the LIV's ongoing interest in maintaining and promoting the rule of law.

The Victorian Charter gives legislative recognition and effect to fundamental principles, and civil and political rights and freedoms, to ensure a consideration of human rights pervades the work of the parliament, the executive, and the courts and tribunals of Victoria.¹ Therefore, the Victorian jurisdiction is uniquely placed to

¹ Alistair Pound and Kylie Evans, *Annotated Victorian Charter of Rights* (Thomas Reuters, 2nd ed, 2019) 1.

reform the law of contempt of court in such a way that ensures an appropriate balance between fundamental principles, rights and freedoms, and the proper administration of justice.

RECOMMENDATIONS

Recommendation 1: The common law of contempt of court be abolished and replaced by statutory provisions governing the substance and procedure of the law, as well as the penalties imposed.

- The common law principles of contempt of court be recast as criminal offences, to the extent that they do not already overlap with the criminal law.
- The codification of the law of contempt specify what forms of conduct are deemed unacceptable.

Recommendation 2: The rules relating to contempt be re-formed and the existing summary contempt procedures be replaced with procedural steps that are consistent with those that apply in criminal trials, with limited exceptions relating to contempt in the face of the court and disobedience contempt (discussed further [below](#)).

Recommendation 3: A statutory maximum penalty for contempt of court be introduced.

Recommendation 4: Reform to the laws of contempt be co-ordinated between the Commonwealth and the states to achieve uniformity.²

Recommendation 5: The recommendations of the ALRC 1987 report regarding contempt in the face of the court be adopted, replacing contempt in the face of the court with criminal offences to be tried summarily.

The law of contempt in the face of the court be replaced with statutory offences of:

- acting so as to cause substantial disruption of a hearing; and
- witness misconduct such as refusing to: appear; be sworn; make an affirmation; or answer a lawful question.³

Recommendation 6: A fault element be introduced to the offence of contempt in the face of the court, of an intention to cause disruption, or a reckless indifference to whether the conduct in question would have this effect.

Recommendation 7: The trial procedure for contempt in the face of the court be codified to generally reflect the recommendations of the ALRC 1987 report, that is, the matter should be tried before a different judicial officer unless the defendant elects to have the matter dealt with summarily before the judicial officer concerned.

² Law Council of Australia, Submission No 6 to the Senate and Legal Constitutional Affairs References Committee, *Law of Contempt* (13 November 2017) 8.

³ Law Reform Commission, *Contempt* (Report No 35, 1987), [116] 73.

The LIV considers the volume of litigation and the demands placed on judicial resources would make the requirement for a panel of three judges to hear a charge of contempt inefficient and impractical.⁴ The LIV submits that this recommendation of the ALRC 1987 report should therefore not be adopted.

Recommendation 8: The proposal of the ALRC 1987 report be adopted; replacing disobedience contempt with a statutory regime of non-compliance proceedings.

Recommendation 9: The rule of sub-judice contempt be codified and reformed.

Recommendation 10: The ‘substantial risk’ test proposed by the New South Wales Law Reform Commission (**NSWLRC**) be adopted in relation to sub-judice contempt.⁵

The publication of a matter should constitute 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 a 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.⁶

Recommendation 11: The recommendation of the Law Reform Commission of Western Australia (**LRCWA**) and NSWLRC reports be adopted, such that the statutory provisions relating to sub-judice contempt be drafted to include a limit on when criminal proceedings are considered ‘pending’, which closes at the time of conviction or acquittal, until such time as a re-trial is ordered.⁷

Recommendation 12: A *mens rea* requirement, in the form that the alleged contemnor knowingly intended to interfere with the administration of justice by influencing trial proceedings or was recklessly indifferent as to the likelihood of interference, be introduced to the codified offence of sub-judice contempt.

In the alternative, the LIV supports the implementation of recommendation 5 of the NSWLRC report that 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-

⁴ Law Council of Australia (n 2) [28] 10.

⁵ Ibid 11.

⁶ New South Wales Law Reform Commission, *Contempt by Publication* (Report No 100, 2003) recommendation 2, 71.

⁷ Law Reform Commission of Western Australia, *Review of the Law of Contempt* (Report, Project No 93, June 2003) 33; New South Wales Law Reform Commission (n 6) 175.

- 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.⁸

Recommendation 13: The broad construction of the public interest defence recommended by the NSWLRC report be implemented. That is, that legislation 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.⁹

Recommendation 14: An upper limit for fines that may be imposed on persons convicted of sub-judice contempt be enshrined in legislation.

Recommendation 15: Custodial sentences for the offence of sub-judice contempt be removed as a potential penalty.

In the alternative, an upper limit for a custodial sentence that may be imposed on a person convicted of sub-judice contempt be provided for in legislation.

Recommendation 16: • The law of sub-judice contempt be reviewed to ensure that it applies to circumstances where an Internet Service Provider or Internet Content Host has been made aware of the material, but thereafter fails or refuses to remove it.

Recommendation 17: The offence of scandalising contempt be abolished.

Please note: the LIV includes recommendations 18-22 to be considered only if recommendation 17 is not adopted.

Recommendation 18: If recommendation 17 is not adopted, in the alternative, the recommendation of the ALRC 1987 report be adopted.¹⁰ The law of scandalising contempt be retained, with significant limitations imposed and the common law be replaced by statutory provisions that outline an offence to publish an allegation imputing misconduct to a judge or magistrate, in his or her official capacity.

⁸ New South Wales Law Reform Commission (n 6) recommendation 5, 109.

⁹ Ibid recommendation 20, 198-199.

¹⁰ Law Reform Commission (n 3) 266-7 [460],

Recommendation 19: The codification of the law of scandalising contempt specify that, in addition to the publisher, the person who made the allegation should be liable if he or she knew, or ought reasonably to have known, that the allegation would be published in the manner in which publication actually occurred.

Recommendation 20: The codification of the law of scandalising contempt to introduce a *mens rea* requirement, that the alleged contemnor knew or ought reasonably to have known that the material would interfere with the administration of justice.¹¹

Recommendation 21: The statutory offence of scandalising contempt be accompanied by the introduction of three defences:

- fair, accurate and reasonably contemporaneous reporting of legal proceedings;
- fair, accurate and reasonably contemporaneous reporting of Parliamentary proceedings; and
- truth, or honest and reasonable belief in truth - a defendant should be entitled to plead and prove that the allegation was true, or that he or she honestly believed on reasonable grounds that it was true.

Recommendation 22: The statutory offence of scandalising contempt fall within the category of an indictable offence, which is capable of being tried summarily with the consent of all concerned.

¹¹ Law Reform Commission (n 3) 264 [458].

RESPONSE TO CHAPTER 3:

GENERAL ISSUES WITH THE LAW OF CONTEMPT OF COURT

The LIV has provided answers to the following questions contained in the Consultation Paper:

Uncertainty of scope

2 Do the courts need a general power to punish any conduct that has a tendency to interfere with the proper administration of justice? Alternatively, should the law specify the conduct subject to sanction? If so, should only conduct that is intended to interfere with the administration of justice be subject to punishment?

Procedural safeguards

3 Should the procedure for filing and prosecuting a charge of contempt of court be the same as for other criminal offences? If not, what are the reasons necessitating a different procedure for contempt of court and what should be the features of that procedure?

Overlap with criminal law

4 Is there a need for statutory guidance on when the court may exercise its power to punish for contempt of court in circumstances where the conduct is also a statutory offence? If so, what guidance should be provided?

Penalties

5 Should there be a statutory maximum penalty for contempt of court? If so:

- (a) What penalties should apply?
- (b) Should different penalties apply for different manifestations of contempt?

Uncertainty of scope

The LIV contends courts do not need a general unfettered common law power to punish conduct that has a tendency to interfere with the proper administration of justice. At present, courts can punish conduct, if it can be proved beyond reasonable doubt that an alleged contemnor wilfully engaged in conduct and the conduct had a tendency to interfere with the administration of justice, without the necessity of proving an intention to interfere with, or that the conduct did in fact interfere with, the administration of justice.¹²

The LIV acknowledges the special position the law of contempt holds in the judicial system and the necessity

¹² *R v Vasiliou* [2012] VSC 216 [13]–[20]; *DPP v Johnson & Yahoo!* [2016] VSC 699 [24].

of flexibility and some level of discretionary judicial power, to allow judicial officers to quickly and efficiently deal with conduct that threatens the proper administration of justice, as it arises. However, the LIV considers flexibility and discretion must be balanced with the need for certainty, so that members of the public have some indication of what kind of conduct may lead to conviction and punishment for contempt.

The broad and discretionary nature of the courts power under the common law, and as codified in disparate statutes, has created significant uncertainty surrounding the law of contempt. In particular, the LIV is concerned that it is currently impossible to ascertain what kind of conduct might be liable to conviction and punishment for contempt. Whether contempt has occurred or not is entirely up to the discretion of the individual judge. In short, what one judge considers contempt may not be considered contempt by another.

For example, Magistrate Simon Young recently threatened a man with contempt for wearing a pink t-shirt with the word 'villain' written in large white letters across it to the Proserpine Magistrates Court.¹³ The Magistrate initially questioned the man's choice of footwear, before asking the man to leave the courtroom and turn the t-shirt inside out.¹⁴ When the man questioned the seriousness of the request, the Magistrate ordered him to get into the dock and await the police.¹⁵ The Magistrate allegedly stated '[Y]ou wear a shirt that says villains. That's just insulting on the face of it'.¹⁶ In comparison, in *Anissa Pty Ltd v Parsons*, Cummins J held that it was not contempt of court for a litigant (who was also a solicitor) to 'describe a judge as a wanker'.¹⁷

The LIV echoes the view expressed in the LRCWA report:¹⁸

[I]t is important for laws not to be so vague as to give people very little idea whether any particular action will fall foul of them. The tendency of such a law is to 'over-deter'—people become overly cautious of contravening it so their freedom is more heavily circumscribed than the law or, presumably, the policy underlying it requires. However, certainty can only ever be achieved at the expense of flexibility.

The LIV considers that the current state of the law of contempt does not appropriately balance certainty and flexibility, but rather inappropriately privileges flexibility over consistency and certainty. As stated by Kirby J in *Hearne v Street*, the law of contempt 'lacks conceptual coherence and is replete with uncertainties, inadequacies and fictions'.¹⁹ Therefore, the LIV recommends the common law of contempt of court be abolished and replaced by statutory provisions governing the substance and procedure of the law, as well as the penalties to be imposed, and specifying the type of conduct that may be subject to sanction.

The LIV is in favour of the codification of contempt measures, due to four main issues with the common law approach, outlined throughout this submission:

- limitations on principles of procedural fairness;
- uncertainty of scope and application of the offences;

¹³ Monique Preston, 'Villains Shirt Lands Man in Trouble', *Whitsunday Times* (Web Page, 16 November 2018) <www.whitsundaytimes.com.au/news/villains-shirt-lands-man-in-court-trouble/3578005/>.

¹⁴ *Ibid.*

¹⁵ *Ibid.*

¹⁶ *Ibid.*

¹⁷ *Anissa Pty Ltd v Parsons* (on application of the Prothonotary of the Supreme Court of Australia) [1999] VSC 430, [22].

¹⁸ Law Reform Commission of Western Australia (n 7) 27.

¹⁹ *Hearne v Street* (2008) 235 CLR 125, [25].

- effectiveness of existing or alternative measures; and
- limitations on the right to freedom of expression and the principle of open justice.

Procedural safeguards

The LIV considers the procedure for filing and prosecuting a charge of contempt of court should be altered to reflect the procedure for other criminal offences. The LIV considers that by bringing the law of contempt within the operation of the codified criminal law, it will ensure existing procedural safeguards apply and matters such as the alleged contemnor's mental health and fitness to plead, would be appropriately managed under existing legislative means.²⁰

The LIV wishes to express its concern regarding the conflict between the law and procedure governing contempt, and fundamental principles of criminal law and procedure, including: certainty in the definition of offences; the presumption of innocence; lack of bias or partiality; adequate time and facilities to prepare a defence or communicate with a lawyer; the right to examine witnesses, or have witnesses examined, and the right to not be compelled to testify against him or herself.²¹

Currently, a person found guilty of contempt may be tried, convicted, and punished, without a consistent procedure being followed. Although proceedings are heard under order 75 of the *Supreme Court (General Civil Procedure Rules) 2015* (Vic) and the *County Court Civil Procedure Rules 2018* (Vic), considerable uncertainties surrounding procedural steps and safeguards remain.²² In particular, there is concerning uncertainty regarding what procedural safeguards traditionally available to an accused can be invoked in these circumstances.

The LIV notes that under the current law, a court, judge or magistrate may assume the right to deal directly with alleged contempt tending to threaten them or their operations, and can proceed against the alleged contemnor, declare them guilty and impose punishment.²³

The LIV shares the concerns expressed by others, that this may bring into question the independence and impartiality, or damage the perception of independence and impartiality, of the decision-making process under the existing contempt procedure.²⁴ The LIV notes that the purpose of the law of contempt is to preserve the system of the administration of justice. The LIV contends that in order to preserve public confidence in the system of justice, 'justice should not only be done, but should manifestly and undoubtedly be seen to be done'.²⁵

The LIV agrees with the ALRC 1987 report, that the current law tends to subvert the principal purpose for

²⁰ Law Council of Australia (n 2) [22].

²¹ *Charter of Human Rights and Responsibilities Act 2006* (Vic) section 25; Law Reform Commission (n 3) [112] 71.

²² *County Court Civil Procedure Rules 2018* (Vic) Order 75; *Supreme Court (General Civil Procedure) Rules 2015* (Vic) Order 75.

²³ Law Reform Commission (n 3) [32] 22.

²⁴ Law Council of Australia (n 2) [17] 8; *Law Reform Commission* (n 3), [111] 70.

²⁵ *R v Sussex Justices, ex parte McCarthy* [1924] 1 KB 256, 259.

which it stands.²⁶

Overlap with criminal law

The LIV notes conduct which may constitute contempt of court is increasingly criminalised under specific statutory offence provisions, such as the offence of intimidating or causing physical harm or detriment to a person because of their involvement in a criminal investigation or proceeding.²⁷ The LIV considers the codification of these offences alleviates the risk of confusion or uncertainty surrounding what conduct is considered so inappropriate as to warrant sanction, as well as what procedure and rights will attach to an action. The LIV further notes that any uncertainty regarding which law will be applied, whether the common law of contempt or the offences contained in statute, can be overcome through the codification of the common law of contempt.

The LIV is conscious that, while codification will go some way to minimising ambiguities and addressing procedural concerns, the law of contempt possesses special qualities that require careful consideration and accommodation should codification proceed.²⁸

Penalties

The LIV recommends the introduction of a statutory maximum penalty for contempt of court. The LIV is concerned about one of the most striking features of the unfettered powers of the court relating to contempt, that the common law imposes no upper limit on a fine or term of imprisonment that may be imposed for contempt.²⁹ Of particular concern is the existence of unlimited sentencing power, including the possibility of indefinite or open ended prison sentences for the purpose of enforcing compliance, where there has been a finding of disobedience contempt.³⁰

The LIV considers the current regulation of punishment for contempt of court in the County Court and Supreme Court rules is insufficient to alleviate this concern.³¹ The LIV notes that in prescribing the penalties available for contempt, the rules retain the incredibly broad discretion available at common law. For example, under rule 75.11(3), the court may commit the contemnor to prison until a fine is paid, enshrining the power to potentially indefinitely detain an alleged contemnor.

The LIV notes statutory maxima for contempt of court already exist in the Magistrates' Court, the Children's Court and the Coroners Court and recommends such provisions be introduced, alongside the codification of the law of contempt.³²

²⁶ Law Reform Commission (n 3) [112] 70.

²⁷ *Crimes Act 1958* (VIC) section 257(1).

²⁸ Law Council of Australia (n 2) [23] 9.

²⁹ *DPP (Vic) v Johnson* [2002] VSC 583 [56]; *Allen v R* (2013) 36 VR 565, 574; *Law Reform Commission* (n 3) , [37] 25.

³⁰ Law Reform Commission (n 3) [506] 299.

³¹ *Supreme Court (General Civil Procedure) Rules 2015* (Vic) r 75.11; *County Court Civil Procedure Rules 2018* (Vic) r 75.11

³² *Magistrates' Court Act 1989* (VIC) ss 133(4), 134(3); *Children, Youth and Families Act 2005* (VIC) s 528; *Coroners Act 2008* (VIC) s 103.

If the law of contempt is not codified, the LIV recommends in the alternative that the offence of contempt of court be included in the list of maximum terms of imprisonment for some common law offences in section 320 of the *Crimes Act 1958* (VIC).

The LIV is broadly supportive of efforts to codify the common law of contempt of court, but cautions pains should be taken to ensure such reforms reflect the unique nature of this area of law, including the need for judicial officers to be able to maintain the orderly administration of justice.³³

Recommendations

Recommendation 1: The common law of contempt of court be abolished and replaced by statutory provisions governing the substance and procedure of the law, as well as the penalties imposed.

- The common law principles of contempt of court be recast as criminal offences, to the extent that they do not already overlap with the criminal law.
- The codification of the law of contempt specify what forms of conduct are deemed unacceptable.

Recommendation 2: The rules relating to contempt be re-formed and the existing summary contempt procedures be replaced with procedural steps that are consistent with those that apply in criminal trials, with limited exceptions relating to contempt in the face of the court and disobedience contempt (discussed further [below](#)).

Recommendation 3: A statutory maximum penalty for contempt of court be introduced.

Recommendation 4: Reform to the laws of contempt be co-ordinated between the Commonwealth and the states to achieve uniformity.³⁴

³³ Law Council of Australia (n 2), [25] 9.

³⁴ Ibid 8.

RESPONSE TO CHAPTER 4: CONTEMPT IN OR NEAR THE COURTROOM—CONTEMPT IN THE FACE OF THE COURT

The LIV has provided answers to the following questions contained in the Consultation Paper:

Definitional issues and possible reforms

The need for statutory provisions

12 Is there a need to retain the law of contempt in the face of the court?

13 If the law of contempt in the face of the court is to be retained, should the common law be replaced by statutory provisions? If so, how should it be defined and what fault elements, if any, should be required?

Insulting or disrespectful behaviour

14 If the law of contempt in the face of the court is to be replaced by statutory provisions, should insulting or disrespectful behaviour be included within the scope of the offence?

Defining ‘in the face of the court’

15 If the law of contempt in the face of the court is to be replaced by statutory provisions, should it be limited to conduct which is directly seen or heard by the presiding judicial officer? In other words, should the underlying test be whether the judicial officer can decide the contempt on the basis of their own observations, without the need to receive evidence from other witnesses?

Conduct covered by other criminal offences

16 Should conduct covered by other criminal offences be excluded from any statutory offence of contempt in the face of the court?

Procedural issues and possible reforms

The procedure for contempt in the face of the court

17 Should the procedure for initiating, trying and punishing a charge of contempt in the face of the court be set out in statutory provisions? If so, what should the procedure be? In particular:

(a) Is there a need to preserve the power of the courts to deal with contempt in the face of the court summarily?

(b) Should the process for dealing with a disruption to proceedings be separated from the process for trying and punishing the disruptive behaviour?

(c) Who should try the offence? Should the offence be able to be tried by the judicial officer before whom the offence was committed?

A consistent approach to disruptive conduct

18 What measures, if any, are required to ensure there is a consistent approach by judicial officers to disruptive behaviour in the courtroom?

The impact on certain groups of people

19 Under the current law, does the actual or threatened use of the power to punish for contempt in the face of the court affect certain groups of people unfairly? If so, how should this be addressed?

Definitional issues and possible reforms

The need for statutory provisions

The LIV considers the common law of contempt in the face of the court must be replaced by statutory provisions.

The LIV considers there is a need to retain the capacity of judicial officers to control proceedings and behaviour in the courtroom. The LIV notes the need for regulation stems from the very nature of a court hearing, with parties to a dispute appearing at the same time, in the same space. This close and adversarial proximity requires a mechanism by which behaviour in the courtroom or in the vicinity of the courtroom that interferes with or tends to interfere with the proper administration of justice can be addressed. The LIV considers a hearing without the discipline that comes from maintaining order and authority in the courtroom, will most likely be disastrously inefficient, potentially unfair and damaging to public confidence in proceedings generally.

However, the LIV considers regulation and discipline must be balanced with tolerance for the idiosyncrasies of, and difficulties faced by, those before the court. If the power is exercised arbitrarily or vindictively, because contempt in the face of the court is not properly delineated, or because there is no requirement to observe fair procedure, it does not serve the proper administration of justice and may damage or diminish public confidence in the authority and integrity of the courts (discussed further below). Therefore, the LIV recommends that any law that regulates behaviour that amounts to contempt in the face of the court is applied sparingly, and only when absolutely necessary.

The LIV notes the current definition of contempt in the face of the court lacks precision, making it unclear and uncertain what type of conduct may constitute contempt in the face of the court.

The LIV agrees with the LRCWA report, which notes that '[S]uch a broad and potentially discretionary test can no longer be justified in light of contemporary demands to make the application of the law more certain and consistent.'³⁵

The LIV supports the recommendation in the ALRC 1987 report, that the law of contempt in the face of the court be replaced with statutory offences of:

- acting so as to cause substantial disruption of a hearing; and
- witness misconduct such as refusing to appear, to be sworn or make an affirmation or to answer a lawful question.³⁶

The LIV notes the further offences recommended by the ALRC 1987 report, of taking or publishing photographs, video tapes or films in court without the leave of the court, and publishing sound-recordings of court proceedings without the leave of the court, need not be adopted as section 4A of the *Court Security Act 1980* (VIC) already contains a statutory offence relating to this conduct.³⁷

Fault element

The LIV considers a fault element is an essential component of a finding of criminal liability, and therefore, an alleged contemnor should only be found guilty of the substantial disruption of a hearing if they intended to cause disruption to a hearing or were recklessly indifferent as to whether the conduct would have this effect.³⁸

Insulting or disrespectful behaviour

The LIV does not consider insulting or disrespectful behaviour should be included within the scope of the offence, unless it reaches the threshold of persistently insulting or disrespectful behaviour resulting in a substantial disruption.³⁹ The LIV notes this view is supported by many judicial comments, such as those in *Anissa Pty Ltd v Parsons*, where calling a judge a 'wanker' was considered offensive, but falling short of contempt of court, because such words do not undermine confidence in the administration of justice, rather they undermine confidence in the persona of the person who uttered them.⁴⁰

The LIV notes the particularity of the circumstances of the courtroom, where conduct which appears to offend judicial dignity may often arise because of misunderstandings or heightened emotion due to the critical importance of the proceedings for those appearing before the court.⁴¹ The LIV does not consider criminal penalties are an appropriate mechanism for attempting to maintain the dignity of the court or the

³⁵ Law Reform Commission of Western Australia (n 7) 59.

³⁶ Law Reform Commission (n 3) [115] 72.

³⁷ Ibid [117] 73.

³⁸ Ibid [116] 73.

³⁹ Ibid [115] 72-3.

⁴⁰ *Anissa Pty Ltd v Parsons* [1999] VSC 430 [22].

⁴¹ Law Reform Commission (n 3) [115] 73

judicial officer, where nothing but dignity is at stake, and notes it may in fact diminish the dignity of the court if the court is seen as retaliating against, or acting vindictively towards, an alleged contemnor.⁴²

Defining 'in the face of the court'

The LIV considers the statutory provisions replacing the law of contempt in the face of the court should be limited to conduct which is directly seen, heard or otherwise sensed by the presiding judicial officer.⁴³

The LIV notes one of the key purposes of the existing procedure is that the judge can quickly and efficiently determine the matter on the basis of their own unaided perceptions. This purpose does not apply when the judicial officer must call and examine prosecution witnesses, often court officials, before re-assuming the mantle of a judicial officer to assess the evidence of the witnesses.⁴⁴

The LIV notes that much of the conduct which may constitute contempt in the face of the court, may still constitute other forms of contempt, and therefore will not go unanswered. In addition, some conduct may also be amendable to prosecution under statutory offence provisions or as a common law criminal offence, such as wilfully damaging property, or using profane, indecent or obscene language or threatening, abusive or insulting words.⁴⁵ The LIV considers it would be preferable for conduct to be tried under the other mechanisms available when it is not directly witnessed by the judicial officer.

The LIV concurs with the recommendations of the ALRC's 1987 report, that:⁴⁶

Where acts committed outside a courtroom have a disruptive effect on courtroom proceedings, as in the case of loud shouts in the corridor outside or the introduction of laughing-gas into the air-conditioning system, they should be deemed capable of falling within the recommended offence covering substantial disruption.

Conduct covered by other criminal offences

The LIV considers conduct covered by other criminal offences should not be excluded from any statutory offence of contempt in the face of the court, noting the rare circumstances where an alleged contempt must be dealt with immediately. However, this must be accompanied by a clear direction that conduct covered by other criminal offences should be dealt with under those other offences, except in exceptional circumstances that necessitate immediate action.

⁴² *Anissa Pty Ltd v Parsons* [1999] VSC 430 [22].

⁴³ *European Bank A-G v Wentworth* (1986) 5 NSWLR 445, 457–8; Law Reform Commission (n 3) [142] 84–85.

⁴⁴ Law Reform Commission (n 3) [142] 84.

⁴⁵ *Summary Offences Act 1966* (VIC) ss 9(1)(c) and 17(1)(c).

⁴⁶ Law Reform Commission (n 3) [142] 84.

Procedural issues and possible reforms

The procedure for contempt in the face of the court

The LIV considers the trial procedure for initiating, trying and punishing a charge of contempt in the face of the court should be set out in statutory provisions, which should generally reflect the recommendations of the ALRC 1987 report.⁴⁷

The LIV notes the current special summary procedure set out in the County Court and Supreme Court rules, where the presiding judicial officer may, on the court's own motion and without formal proceedings being instituted, assume the position of prosecutor, witness, judge and jury. The LIV further notes that the procedure undertaken remains largely a matter of discretion for the presiding judicial officer, and that the procedural safeguards in ordinary criminal proceedings are not guaranteed. The LIV considers it is particularly concerning that the alleged contemnor stands charged and is required to justify or otherwise defend their conduct, effectively reversing the onus of proof.⁴⁸ The LIV considers the assumed multiple roles of the judge and the lack of key safeguards may lead to a public perception of injustice, and thus diminish the authority of the court.⁴⁹

The LIV considers there is a need to preserve the power of the courts to deal with contempt in the face of the court summarily in exceptional circumstances that require immediate action, where both the alleged contemnor and the judicial officer consent. The LIV stresses such a power should be restricted to exceptional circumstances where the facts are virtually indisputable, and it is urgent and imperative to act immediately.⁵⁰ In addition, the LIV considers it is essential the alleged contemnor is afforded the opportunity to take legal advice, before electing one mode of trial over another.⁵¹

The LIV considers the process for dealing with a disruption to proceedings should be separated from the process for trying and punishing the disruptive behaviour, unless both the alleged contemnor and the judicial officer consent. Therefore, the LIV recommends the matter should be tried before a different judicial officer unless the defendant and judicial officer elect to have the matter dealt with summarily, before the judicial officer concerned.⁵² If the alleged contemnor and judicial officer elect to have the matter tried summarily, the LIV recommends the procedural safeguards outlined in paragraph 4.54 of the Consultation Paper should be codified, and there should be an unrestricted right of appeal against verdict or sentence.⁵³

The LIV considers, contrary to the recommendation in the ALRC 1987 report, that the volume of litigation and the demands placed on judicial resources would make the requirement for a panel of three judges to hear a

⁴⁷ Law Reform Commission (n 3) [130] 79.

⁴⁸ *Clampett v Attorney General of the Commonwealth of Australia* (2009) ALR 462, 470.

⁴⁹ *Ibid.*

⁵⁰ *Keeley v Mr Justice Brooking* (1979) 143 CLR 162, 174; *Fraser v The Queen* (1984) 3 NSWLR 212, 231.

⁵¹ Law Reform Commission (n 3) [130] 79.

⁵² *Ibid* [130] 79.

⁵³ *Ibid* [130] 80.

charge of contempt inefficient and impractical; it is sufficient that the matter is heard by a single judge from within the same court.⁵⁴

A consistent approach to disruptive conduct

The LIV considers the measures outlined in its recommendations will go some way to ensure there is a consistent approach by judicial officers to disruptive behaviour in the courtroom.

The impact on certain groups of people

The LIV considers that under the current law, the actual or threatened use of the power to punish for contempt in the face of the court affects certain groups of people unfairly, including:

- Self-represented litigants;
- People who have mental health issues;
- People who suffer from a disability, such as cognitive impairment;
- Children;
- People who suffer from drug or alcohol dependence;
- Domestic violence victims; and
- Victims of, and witnesses to, a crime. For example in *DPP v Garde-Wilson* the witness to a murder was held in contempt when they refused to answer any questions due to fear for their safety.⁵⁵

Gambaro v Mobycom Mobile Pty Ltd [2019] FCA 910

The LIV notes a recent highly publicised case where leave to appeal against the preliminary order of Judge Vasta was granted on the ground of apprehended bias or unfair conduct of the hearing.

The appeal was from a decision where Judge Vasta had a self-represented litigant removed from the courtroom for failing to answer a question, which the judge considered tantamount to contempt, noting ‘you are going to be removed from my court right now because you have failed to answer my question and you are treating this court with contempt.’ [14]

In addition, his honour took offence to perceived interruptions: ‘[D]o not ever interrupt me. Do not ever. You’ve been told many times when I talk your mouth goes closed. You do not ever interrupt me or you will be cited for contempt. I’m not putting up with your rubbish.’[14]

Mr Gambaro was removed from the courtroom despite protesting that he was a self-represented litigant on four separate occasions, and the hearing continued in his absence.

The appeal court determined that ‘a fair-minded lay-observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide’. [25], [29].

⁵⁴ Law Council of Australia (n 2) [28] 10.

⁵⁵ *DPP v Garde-Wilson* (2006) 15 VR 640 [4].

Recommendations

Recommendation 5: The recommendations of the ALRC 1987 report regarding contempt in the face of the court be adopted, replacing contempt in the face of the court with criminal offences to be tried summarily.

The law of contempt in the face of the court be replaced with statutory offences of:

- acting so as to cause substantial disruption of a hearing; and
- witness misconduct such as refusing to: appear; be sworn; make an affirmation; or answer a lawful question.⁵⁶

Recommendation 6: A fault element be introduced to the offence of contempt in the face of the court, of an intention to cause disruption, or a reckless indifference to whether the conduct in question would have this effect.

Recommendation 7: The trial procedure for contempt in the face of the court be codified to generally reflect the recommendations of the ALRC 1987 report, that is, the matter should be tried before a different judicial officer unless the defendant elects to have the matter dealt with summarily before the judicial officer concerned.

The LIV considers the volume of litigation and the demands placed on judicial resources would make the requirement for a panel of three judges to hear a charge of contempt inefficient and impractical.⁵⁷ The LIV submits that this recommendation of the ALRC 1987 report should therefore not be adopted.

⁵⁶ Law Reform Commission (n 3) [116] 73.

⁵⁷ Law Council of Australia (n 2) [28] 10.

RESPONSE TO CHAPTER 6: NON-COMPLIANCE WITH COURT ORDERS OR UNDERTAKINGS – DISOBEDIENCE CONTEMPT

The LIV has provided answers to the following questions contained in the Consultation Paper:

25 Is there a need to retain the law of disobedience contempt?

26 If the law of disobedience contempt is to be retained:

(a) What benefit does the distinction between civil and criminal contempt provide? Should this distinction be maintained?

(b) Should the common law of disobedience contempt be replaced by statutory provisions? If so, should it be replaced by statutory offence provisions and/or a statutory procedure for civil enforcement of court orders and undertakings? In either case,

i. Who should be responsible for and/or be able to commence proceedings?

ii. What should the party commencing proceedings be required to establish and to what standard of proof? iii. What penalties should apply?

The LIV endorses the proposal of the ALRC 1987 report to replace disobedience contempt with a statutory regime of non-compliance proceedings.⁵⁸ The LIV considers that a regime of civil compliance procedures is more likely to provide flexibility in achieving the intent of the order being enforced by working through the order, rather than requiring strict proof to the criminal standard of the alleged breach set out in a statement of charge in contempt proceedings.⁵⁹ This is particularly important in circumstances where, upon later examination, there is some perceived ambiguity in the original order.

The LIV considers that only the person entitled to the benefit of the relevant order should have standing to institute the civil compliance proceedings. The LIV considers the court should only institute proceedings or continue proceedings after the aggrieved party has discontinued the proceedings, if the disobedience constitutes a challenge to the court's authority.

⁵⁸ Law Council of Australia (n 2) [29] 10; Law Reform Commission (n 3) lxxxiv-vii.

⁵⁹ Law Council of Australia (n 2) [30] 10.

Fault element

The LIV considers the party commencing proceedings should be required to establish beyond a reasonable doubt, that the disobeying party intended to disobey, or to have made no reasonable attempt to comply with, the order and that it is necessary to invoke coercive sanctions rather than other enforcement remedies.

Recommendation

Recommendation 8: The proposal of the ALRC 1987 report be adopted; replacing disobedience contempt with a statutory regime of non-compliance proceedings.

RESPONSE TO CHAPTER 7:

CONTEMPT BY PUBLICATION (1) –

SUB-JUDICE CONTEMPT

The LIV has provided answers to the following questions contained in the Consultation Paper:

27 Is there a need to retain the law of sub judice contempt?

28 If the law of sub judice contempt is to be retained, should the common law be replaced by statutory provisions? If so:

(a) How should the law and its constituent elements be defined, including:

i. The ‘tendency’ test

ii. The definition of ‘publication’

iii. The beginning and end of the ‘pending’ period?

(b) Should fault be an element, or alternatively should there be a defence to cover the absence of fault?

(c) Should the public interest test be expressly stated?

(d) Should upper limits for fines and imprisonment be set?

29 Is there a need for greater use of remedial options, for example jury directions or trial postponement? If so:

(a) How should this be facilitated?

(b) Are other mechanisms, for example pre-trial questioning of jurors, also required?

30 Is there a need for education about the impact of social media on the administration of justice and sub judice contempt to be targeted to particular groups, for example judicial officers and jurors?

31 What other reforms should be made, if any, to this area of the law of contempt of court?

Definitional issues and possible reforms

The LIV considers the law of sub-judice contempt must be codified and reformed.

The LIV considers the scrutiny of the law of sub-judice contempt necessarily involves appropriately balancing the fundamental principles and rights it impacts upon. The LIV acknowledges the tension between these key principles and rights, including;

- the right to freedom of expression, including the freedom to report and comment on current cases before the courts and to criticise particular judicial officers;
- the principle of open justice;
- the right to fair a hearing;
- the public confidence in the administration of justice; and
- the right to privacy.⁶⁰

The Victorian Charter enshrines the right of every person to freedom of expression, which includes the freedom to seek, receive and impart information and ideas of all kinds, whether within or outside Victoria and whether orally, or in writing, or in print, or by way of art, or in another medium chosen by the person.⁶¹

The right to freedom of expression is acknowledged as ‘the foundation stone for every free and democratic society’ and ‘a necessary condition for the realisation of the principles of transparency and accountability that are ... essential for the promotion and protection of human rights’.⁶²

Importantly, freedom of expression is acknowledged as vital to maintaining the rule of law.⁶³ This right is integral to the principle of open justice, the right to a fair trial, and the maintenance of the rule of law, through exposing the conduct of legal proceedings to public scrutiny, by guaranteeing the freedom to seek, receive and impart information about legal proceedings.⁶⁴ Thus, freedom of expression and open justice, through the hearing of legal proceedings in open court, preserve public confidence in the proper administration of justice, through the assurance of a ‘fair and *public* hearing’.⁶⁵

However, neither the right to freedom of expression, nor the right to a fair and public hearing, are absolute. Freedom of expression is subject to the limitations set out in section 15(3) of the Charter. The right may be subject to lawful restriction if it interferes with the rights and reputations of other persons, which reflects the long held recognition that publicity may in some cases prejudice the possibility of an accused receiving a fair trial.⁶⁶ Similarly, the right to a fair and public hearing is limited by sub-sections 24(2) and (3), in order to

⁶⁰ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 13 (entered into force 23 March 1976) articles 14(1) and 19; *Charter of Rights and Responsibilities Act 2006* (VIC) articles 15 and 24; Law Council of Australia (n 2) [33] 11.

⁶¹ *Charter of Rights and Responsibilities Act 2006* (VIC) article 15(2).

⁶² United Nations Human Rights Committee, General Comment No 34, *Article 19: Freedom of Opinion and Expression* [2]-[3].

⁶³ *McDonald v Legal Services Commissioner (No 2)* [2017] VSC 89 [22].

⁶⁴ Pound and Evans (n 1) 152.

⁶⁵ *Charter of Rights and Responsibilities Act 2006* (VIC) article 24(1); *PQR v Secretary, Department of Justice and Regulation* (2017) 53 VR 45 [34]-[42].

⁶⁶ *Charter of Rights and Responsibilities Act 2006* (VIC) article 15(3)(a); Pound and Evans (n 1) 152-3; *Gisborne Herald Co Ltd v Solicitor-General* [1995] 3 NZLR 563, 575.

protect competing rights and interests, such as securing the proper administration of justice, by restricting the publication of material which might prejudice or influence the outcome of a trial.⁶⁷

The underlying rationale for sub-judice contempt is that influence or prejudice are likely to occur without the appropriate imposition of restraints.⁶⁸ Therefore, the right of an individual to a fair trial can override the community interest in freedom of expression and open justice.⁶⁹ While conscious of the tension between these fundamental rights and freedoms, the LIV wishes to express its support for the vital role sub-judice contempt has played in maintaining the administration of justice, by restraining conduct by publication, which interferes with the due administration of justice and equality before the law, by materially prejudicing the fair hearing of a criminal trial before a jury.⁷⁰

The LIV notes the NSWLRC report, endorsed by the LCA, concludes that the public interest in a fair trial will almost always outweigh the public interest in freedom of expression, particularly in relation to criminal trials where an individual's liberty and reputation are at stake;⁷¹ enlivening additional rights to privacy and reputation, and to liberty and security of the person.⁷² The NSWLRC report also notes the availability of numerous defences maintains an appropriate balance between the rights to freedom of expression and a fair hearing.⁷³ Further, the LIV notes the ALRC 1987 Report, in the balancing of these interests, emphasised the need to protect the judicial process from prejudicial influence.⁷⁴

Therefore, the LIV considers the ability of judicial officers to respond to behaviour amounting to sub-judice contempt should be retained, but the common law should be replaced by statutory provisions.

The 'tendency' test

The LIV considers a uniform threshold of 'substantial risk' should be adopted across Australia to improve the clarity and precision of the application of sub-judice contempt.⁷⁵

The LIV notes the significant uncertainty created by the broad scope of liability under the current differing formulations of the tendency test, such as; 'the publication must reveal as a matter of practical reality a tendency to interfere with the due course of justice in a pending trial'; and 'the publications interference with the proceedings is likely'.⁷⁶ Further, the LIV is conscious that the substantial risk test has been considered the most appropriate test by the NSWLR and the LRCWA, because it creates a higher threshold for liability, which is less likely to excessively infringe the right to freedom of expression.⁷⁷

⁶⁷ *Hogan v Hinch* (2011) 243 CLR 506, 531–2 [21].

⁶⁸ Law Reform Commission (n 3) [244] 133.

⁶⁹ *Ibid.*

⁷⁰ *DPP (Vic) v Johnson & Yahoo 7* [2016] VSC 699 [23]; Law Council of Australia (n 2) [34] 11.

⁷¹ New South Wales Law Reform Commission (n 6) [2.6] 14-15; Law Council of Australia (n 2) [36] 11.

⁷² *Charter of Rights and Responsibilities Act* 2006 (VIC) articles 13 and 24.

⁷³ New South Wales Law Reform Commission (n 6) [2.77] 38.

⁷⁴ Law Reform Commission (n 3) [247] 135.

⁷⁵ Law Council of Australia (n 2) [37] – [40] 11-12.

⁷⁶ *John Fairfax & Sons Pty Ltd v McRae* (1995) 93 CLR 351; *Bell v Stewart* (1920) 28 CLR 419, 432.

⁷⁷ New South Wales Law Reform Commission (n 6) 69 [4.13]; Law Reform Commission of Western Australia (n 7) 29.

Publication

The LIV considers the temporal and geographical parameters of the definition of publication should be determined by reference to the objective of sub-judice contempt; to ensure the administration of justice and a fair trial.

The LIV does not consider it is necessary to make any changes to the common law definition of publication. Therefore, publication occurs when the information 'is made available to the general public' or to 'a section of the public which is likely to comprise those having a connection with the case'.⁷⁸ The LIV considers it would be too onerous on publishers in new media if publication was defined as a continuing act, because of the permanent and accessible nature of online archived news.⁷⁹ In addition, the LIV considers there is significant complexity involved in attempting to codify the geographical parameters of 'publication', in light of significant issues of jurisdiction and enforcement.

The LIV notes the recent criminal trial of George Pell, where suppression orders were rendered largely ineffective due to significant international media coverage available online in Victoria. Therefore, the LIV does not consider there should be an attempt to codify the definition of 'place of publication'.⁸⁰

The 'pending' period

The LIV concurs with the LRCWA and NSWLRC and considers that proceedings should be regarded as ending upon a conviction or acquittal at first instance, and beginning again if a retrial is ordered.⁸¹

Fault element and defences

The LIV recommends the introduction of a *mens rea* requirement, that the alleged contemnor knowingly intended to interfere with the administration of justice by influencing trial proceedings or was recklessly indifferent as to the likelihood of interference.

The LIV notes that under the current law, in order to establish liability for sub-judice contempt it is not necessary to prove that an alleged contemnor intended to interfere with the administration of justice.⁸² Liability is established if an alleged contemnor is found to be 'responsible' for the contents, production, distribution or broadcasting of a publication, regardless of their knowledge of the material, as long as the publication had a tendency to interfere with the administration of justice.⁸³

The LIV notes that a finding of sub-judice contempt imposes criminal liability and carries criminal sanctions, but does not enliven any of the procedural safeguards that usually accompany such serious consequences. Instead criminal liability is imposed through summary procedures, in the absence of jury trials, and may

⁷⁸ Des Butler and Sharon Rodrick, *Australian Media Law* (Thomson Reuters, 5th ed, 2015) 373 [6.150].

⁷⁹ New South Wales Law Reform Commission, *Contempt by Publication* (Discussion Paper, 2000) 88 [3.15]-[3.16].

⁸⁰ New South Wales Law Reform Commission (n 6) [3.11] 49.

⁸¹ Law Reform Commission of Western Australia (n 7) 33; New South Wales Law Reform Commission (n 6) 175.

⁸² *John Fairfax & Sons Pty Ltd v McRae* (1955) 93 CLR 351, 371

⁸³ *A-G (NSW) v Willesee* [1980] 2 NSWLR 143, 155-7.

result in punishments at large. The LIV considers it is preferable for the law of sub-judice contempt to adhere to basic principles which govern our criminal law: '[A] person who engages in prohibited conduct is not criminally responsible for it unless the mental element is present'.⁸⁴ The LIV considers the existence of an intention of the alleged contemnor to interfere with the administration of justice is necessary for criminal responsibility to be imposed.⁸⁵

The LIV notes the weight of opinion favours creating a defence or defences to cover a situation where there is an absence of fault and reasonable care has been taken.⁸⁶ The LIV does not consider such a reversal of the onus of proof is necessary, and notes this approach continues to undermine fundamental rights in criminal proceedings, in particular, the right of a person to be presumed innocent until proven guilty.⁸⁷ However, if the LIV's recommendation to introduce a mental element into sub-judice contempt is not adopted, the LIV recommends in the alternative that recommendation 5 of the NSWLRC report be adopted.⁸⁸

The 'public interest' test

The LIV considers the public interest test should be expressly stated. The LIV notes the current articulation of the test, that a contempt will not arise if the publications was a fair and accurate report of proceedings or the publication relates to a matter of public interest.⁸⁹ This principle acknowledges there are situation where 'as between competing matters of public interest the possibility of prejudice to a litigant may be required to yield to other and superior considerations'.⁹⁰ The balancing approach enunciated by the High Court in *Hinch v Attorney-General*, whereby the court can consider whether the administration of justice is outweighed by the public's interest in the free discussion of public affairs, expanded the scope of the defence.⁹¹ However, considerable uncertainty remains regarding the scope and application of the test. The LIV favours the approach taken in *Hinch* with a more precise definition of what needs to be weighted to provide further guidance on how the balancing of principles should be carried out.

Therefore, the LIV considers the NSWLRC report's approach should be followed, that the codification of the law of sub-judice contempt be accompanied by a broad public interest defence.⁹²

⁸⁴ *He Kaw Teh v The Queen* (1985) 59 ALJR 620, 637.

⁸⁵ *Registrar of the Court of Appeal v Willesee* (1985) 3 NSWLR 650, 652–3.

⁸⁶ Law Reform Commission (n 3) 145 [262]; New South Wales Law Reform Commission (n 6) 181–2; Law Commission (New Zealand), *Reforming the Law of Contempt of Court: A Modern Statute* (Report No 140, 2017) 54 [2.93]; Law Reform Commission of Western Australia (n 7) 37–41.

⁸⁷ *Charter of Human Rights and Responsibilities Act 2006* (Vic) s25(1).

⁸⁸ New South Wales Law Reform Commission (n 6) recommendation 5, 109.

⁸⁹ *Ex parte Bread Manufacturers Ltd; Re Truth and Sportsman Ltd* (1937) 37 SR (NSW) 242, 249.

⁹⁰ *Ibid.*

⁹¹ New South Wales Law Reform Commission (n 6) 187 [8.8].

⁹² *Ibid* recommendation 20, 198–199.

Penalties

The LIV considers upper limits for fines and imprisonment for the offence of sub-judice contempt should be set out in legislation.

The LIV notes that under the current law, a contemnor can be fined or committed to prison, or both, and that there is no upper limit to either the potential fine or imprisonment.⁹³ The LIV agrees with the LRCWA discussion paper, that penalties for breach that are effectively ‘at large’ have a ‘chilling effect’ on publication because publishers are not able to appropriately balance the risk of being held in contempt against the need to publish information.⁹⁴ This tilts the balance between a fair trial and freedom of expression inappropriately away from freedom of expression.

Fines

The LIV notes the LRCWA report has recommended a maximum monetary penalty on conviction for sub-judice contempt be set at \$100,000 and the NSWLRC report has recommended the amount be set substantially higher than \$200,000.⁹⁵

Imprisonment

The LIV questions the need to retain the penalty of imprisonment in relation to sub-judice contempt. The LIV notes Victorian courts have only felt the need to impose a penalty of imprisonment once in their long history, which suggests that courts generally feel no need to have recourse to this penalty.⁹⁶ However, if the penalty is to be retained, the LIV considers an upper limit for a custodial sentence that may be imposed on a person convicted of sub-judice contempt should be provided for in legislation.

The LIV notes the NSWLRC report recommended the upper limit be set at five years, the LRCWA report recommended the upper limit be set at 2 years, and the ALRC 1987 report declined to specify a timeframe.⁹⁷ The LIV wishes to express its preference for a shorter maximum sentence, noting the only imposition of a penalty of imprisonment in Victoria to date was for 6 weeks (later reduced to 28 days), which suggests the upper limit in the Victorian context should be significantly less than that suggested for different jurisdictions.

New media

The LIV agrees with the LCA that the traditional scope of sub-judice contempt is encountering substantial new challenges with the rise of ‘new media’, and rapid developments in information and communications

⁹³ *Supreme Court (General Civil Procedure) Rules 2015* (Vic) r. 75.11 (1); *Smith v The Queen* (1991) 25 NSWLR 1, 15.

⁹⁴ Law Reform Commission of Western Australia, *Contempt by Publication* (n 79) (ii).

⁹⁵ Law Reform Commission of Western Australia (n 7) recommendation 22, 51; New South Wales Law Reform Commission (n 6) recommendation 28, 320.

⁹⁶ *Hinch v A-G (Vic)* [1987] VR 721, 749–50.

⁹⁷ New South Wales Law Reform Commission (n 6) recommendation 29, 325; Law Reform Commission of Western Australia (n 7) 50; Law Reform Commission (n 3) 282 [482].

technology.⁹⁸ These developments are impacting on the speed of publication, and the availability, nature and reach of criticism of judicial officers.⁹⁹ The LIV notes judicial concerns regarding the inability of the courts or other external authorities to control, filter, police, censor or manage new forms of media which they consider to be out of control, such as social media comments.¹⁰⁰

The LIV further notes the NSWLRC report recommendation that where an Internet Service Provider (ISP) or Internet Content Host (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.¹⁰¹

The LIV notes the NSWLRC report recommendation appears consistent with Schedule 5, Pt 9, clause 91(1)(a) of the *Broadcasting Services Act 1992* (Cth) which effectively prevents a State or Territory from imposing liability on an ISP or ICH where the host was not aware of the nature of the content.¹⁰² However, the LIV notes the LCA considers this defence should be limited in relation to ISPs and ICHs, to make it clear that it is confined to when an ISP or ICH has been made aware of the materials, but after being made aware, fails or refuses to remove the material.¹⁰³

Further, the LIV note the LCA's concern regarding the online distribution of material, via intermediaries such as social media platforms and search engines. The LIV contends the ability for these intermediators to control potentially contemptuous content requires further attention, and any reform to the law of sub-judice contempt should include an investigation of a form of defence that includes consideration of whether a reasonable precautionary system has been put in place.¹⁰⁴

Recommendations

Recommendation 9: The rule of sub-judice contempt be codified and reformed.

Recommendation 10: The 'substantial risk' test proposed by the New South Wales Law Reform Commission (**NSWLRC**) be adopted in relation to sub-judice contempt.¹⁰⁵

The publication of a matter should constitute 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 a potential witness or witnesses, in legal proceedings will:
 - (i) become aware of the matter; and

⁹⁸ Law Council of Australia (n 2) 13.

⁹⁹ Kathy Mack, Sharyn Roach Anleu and Jordan Tutton, 'The Judiciary and the Public: Judicial Perceptions' (2018) 39 *Adelaide Law Review* 1, 17.

¹⁰⁰ Mack, Roach and Tutton (n 99) 16.

¹⁰¹ New South Wales Law Reform Commission (n 6) [2.65].

¹⁰² Law Council of Australia (n 2) 14.

¹⁰³ *Ibid.*

¹⁰⁴ *Ibid.*

¹⁰⁵ *Ibid* 11.

- (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.¹⁰⁶

Recommendation 11: The recommendation of the Law Reform Commission of Western Australia (LRCWA) and NSWLRC reports be adopted, such that the statutory provisions relating to sub-judice contempt be drafted to include a limit on when criminal proceedings are considered 'pending', which closes at the time of conviction or acquittal, until such time as a re-trial is ordered.¹⁰⁷

Recommendation 12: A *mens rea* requirement, in the form that the alleged contemnor knowingly intended to interfere with the administration of justice by influencing trial proceedings or was recklessly indifferent as to the likelihood of interference, be introduced to the codified offence of sub-judice contempt.

In the alternative, the LIV supports the implementation of recommendation 5 of the NSWLRC report that 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.¹⁰⁸

Recommendation 13: The broad construction of the public interest defence recommended by the NSWLRC report be implemented. That is, that legislation 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.¹⁰⁹

Recommendation 14: An upper limit for fines that may be imposed on persons convicted of sub-judice contempt be enshrined in legislation.

Recommendation 15: Custodial sentences for the offence of sub-judice contempt be removed as a potential penalty.

¹⁰⁶ New South Wales Law Reform Commission (n 6) recommendation 2, 71.

¹⁰⁷ Law Reform Commission of Western Australia (n 7) 33; New South Wales Law Reform Commission (n 6) 175.

¹⁰⁸ New South Wales Law Reform Commission (n 6) recommendation 5, 109.

¹⁰⁹ Ibid recommendation 20, 198-199.

In the alternative, an upper limit for a custodial sentence that may be imposed on a person convicted of sub-judice contempt be provided for in legislation.

Recommendation 16: The law of sub-judice contempt be reviewed to ensure that it applies to circumstances where an Internet Service Provider or Internet Content Host has been made aware of the material, but thereafter fails or refuses to remove it.

RESPONSE TO CHAPTER 8:

CONTEMPT BY PUBLICATION (2) –

SCANDALISING THE COURT

The LIV has provided answers to the following questions contained in the Consultation Paper:

32 Is there a need to retain the law of scandalising contempt?

33 If the law of scandalising contempt is to be retained, should the common law be replaced by statutory provisions? If so:

(a) How should the law and its constituent elements be described, including:

i. The ‘tendency’ test

ii. What constitutes ‘fair comment’?

(b) Should truth be a defence?

(c) What fault elements, if any, should be required?

(d) What weight, if any, should be given to an apology?

34 In stakeholders’ experience, is criticism of the judiciary on social media a problem that should be dealt with by a law such as scandalising contempt or is it best managed outside of the law?

35 What other reforms, if any, should be made to this area of law?

Definitional issues and possible reforms

The LIV has formed the view that the optimal approach is to abolish the offence of scandalising contempt.

The LIV notes the law of scandalising contempt addresses actions or publications that have a tendency to undermine public confidence in the administration of justice and diminish the authority of the courts.¹¹⁰ In other words, scandalising contempt applies to:¹¹¹

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.

¹¹⁰ *Hoser v The Queen* [2003] VSCA 194, [36].

¹¹¹ *R v Dunbabin; Ex Parte Williams* [1935] 53 CLR 434, 442.

Scandalising contempt is predicated on the idea that the ‘authority of the law rests on public confidence’ and therefore, it is critical for the stability of society that public confidence is not ‘shaken by baseless attacks on the integrity or impartiality of courts or judges’.¹¹²

The LIV wishes to express its concern regarding considerable uncertainties as to the scope and application of the law of scandalising contempt, which are compounded by intrinsically vague concepts such as ‘public confidence’ and ‘scandalising’.

The justification for the law of scandalising contempt is also open for re-consideration, in so far as it asserts that the judiciary as a whole needs special protection against criticism, beyond the protection conferred on all government institutions and private citizens.¹¹³ The main argument for abolition of the offence of scandalising contempt is that the system of the administration of justice is resilient and robust, and can withstand criticisms and disparagement without special protections.¹¹⁴ In fact, it can be argued that special protections may have a counter-productive effect on the judiciary’s reputation and public confidence in the administration of justice (discussed further below).¹¹⁵

The ALRC 1987 report states the response to their discussion paper was ‘generally in favour of the proposal for abolition’, but ultimately recommended the offence not be abolished, and a limited offence be retained.¹¹⁶ The key limitation preventing the ALRC from recommending abolition appears to be that judicial officers are ‘inhibited to a unique degree’ from seeking other remedies, and the ALRC’s proposal to amend criminal libel to address this inhibition was rejected as being outside of the terms of reference.¹¹⁷ The LRCWA report seems to suggest that the ALRC’s reticence to recommend abolition due to the fact that, at the time, ‘no common law country had abolished the offence’.¹¹⁸ This is certainly no longer the case, since the United Kingdom has abolished the offence, and the United States and Canada found the offence to be incompatible with the constitutional right to freedom of expression.¹¹⁹

The LRCWA report also refrained from recommending abolition, on the basis that section 361 of the *Criminal Code* provided similar special protections to parliamentarians.¹²⁰ However, the LIV notes that this section has since been repealed.¹²¹

Therefore, the stated reasons of previous inquiries for refraining from recommending the abolition of the offence are no longer relevant, and therefore the LIV considers the offence of scandalising contempt should

¹¹² *Gallagher v Durack* (1983) 152 CLR 238, 243

¹¹³ Law Reform Commission (n 3) 260 [449].

¹¹⁴ *Ibid* 264 [457].

¹¹⁵ *Ibid*.

¹¹⁶ *Ibid* 266 [459]–[460].

¹¹⁷ *Ibid* 264 [457].

¹¹⁸ Law Reform Commission of Western Australia (n 7) 115.

¹¹⁹ Law Commission (England and Wales), *Contempt of Court: Scandalising the Court*, Report No 335 (2012) 26; *Crime and Courts Act 2013* (UK) section 33 ‘Abolishment of scandalising the judiciary as form of contempt of court’; *R v Kopyto* (1987) 62 OR (2d) 449; *Bridges v California*, 314 US 252 (1941).

¹²⁰ Law Reform Commission of Western Australia (n 7) 116–7.

¹²¹ *Defamation Act 2005* (WA) section 53.

be abolished.

The LIV considers the existence of the Victorian Charter, which enshrines the right to freedom of expression, the principle of open justice through the right to a fair and public hearing, and some crucial procedural safeguards in criminal proceedings, makes the case for abolition in Victoria stronger than for other jurisdictions.

Uncertainty of scope and application

The LIV agrees with the dissenting judgment of Justice Murphy in *Gallagher v Durack*, that the 'tendency' test is so 'vague and general that it is an oppressive limitation on free speech'.¹²² The LIV notes that criminal liability and sanctions are imposed without the offence being properly defined and without the necessity of establishing that the public, or any individual or institution, have been harmed or put in any significant jeopardy.¹²³

The LIV considers criminal offences must be defined clearly and unambiguously, which is reflected in the use of the word 'lawful' in section 15(3) of the *Charter* in describing permissible restrictions on freedom of expression.¹²⁴ Use of the word 'lawful' means the limitation must be 'adequately accessible and formulated with sufficient precision to enable a person to regulate his or her conduct by it'.¹²⁵

The LIV considers this uncertainty and imprecision has a chilling effect on publishers, who cannot weigh up their potential liability against the need to publish the information, such that much material may remain unpublished that would not be found to be in contempt if tested in court.¹²⁶ As noted by former High Court Justice Dyson Heydon AC, the threat of contempt proceedings may 'create an atmosphere inducing those with legitimate complaints to feel unable to make them without risking public embarrassment and possibly criminal sanctions'.¹²⁷

The uncertainty consists of four major parts:

- The phrase 'inherent tendency' is uncertain as to how substantial the tendency must be, fitting somewhere in between a 'remote possibility of harm' and a substantial 'real risk';
- The phrase 'public confidence' is vague, abstract, beset with ambiguities and capable of many varying interpretations:
 - the concept of 'public' itself is complex and problematic, with no definition of who or what constitutes 'the public', amidst a society that consists of various publics or audiences;

¹²² *Gallagher v Durack* (1983) 152 CLR 238, 248 (Murphy J).

¹²³ Law Reform Commission (n 3) 264 [457].

¹²⁴ Law Reform Commission (n 3) 167 [289]; *Charter of Human Rights and Responsibilities Act 2006* (Vic) section 15(3), see also *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 13 (entered into force 23 March 1976) article 19(2) 'provided by law'.

¹²⁵ *Sunday Times v United Kingdom* (1979) 2 EHRR 245 [49] quoted in Pound and Evans (n 1) 149; *Charter of Human Rights and Responsibilities Act 2006* (Vic) section 7(2).

¹²⁶ Law Reform Commission (n 3) 167 [289].

¹²⁷ Dyson Heydon, 'Does Political Criticism of Judges Damage Judicial Independence: Judicial Power Protect Policy Exchange' (2018) 37 *University of Queensland Law Journal* 179, 189.

- the phrase may be interpreted as referring to the public opinion at this precise moment, or long-term feelings entertained by the public over time, or something in between;
- there is next to no empirical data as to what the Australian public expects of judges, or what sorts of allegations will cause public expectations to be disappointed, or shake public confidence in the administration of justice; and
- in the absence of such data, it is up to the individual judge to surmise the public expectations on a matter;
- The term ‘scandalising’ is not sufficiently delineated and invites subjective moral judgements of individual judicial officers; and
- It is unclear whether the test of scandalising requires the material to be ‘calculated to undermine public confidence in the administration of justice’.¹²⁸

The LIV considers any lack of consistency in determining what does or does not constitute an ‘inherent tendency’, or the application of the phrase ‘public confidence’, and what constitutes ‘scandalising’ will in itself undermine the integrity and authority of the courts.

The Victorian Court of Appeal case of *DPP (Cth) v Besim; DPP (Cth) v MHK*¹²⁹ illustrates the considerable uncertainties regarding the definition, scope and application of the offence:

DPP (Cth) v Besim; DPP (Cth) v MHK (No 2) (2017) 52 VR 296:

On 13 June 2017, *The Australian* published an article ‘Judiciary “Light on Terrorism”’ regarding a recent appeal by the Commonwealth Director of Public Prosecutions to the Victorian Court of Appeal against the sentences in two terrorism cases on the ground of manifest inadequacy.

The article was published while the decision was reserved, and contained statements from three Ministers that the judges were ‘divorced from reality’, hard-left activists, conducting ‘ideological experiments’ and eroding any trust that remained in our legal system.

The Australian newspaper parties apologised to the Court and retracted the publication at the mention hearing. However, the Ministers declined to apologise. The Court reserved its decision after hearing submissions. Four days later, the Ministers indicated they were willing to make a full apology and retract their statements.

The Court’s judgment on 23 June 2017 was that there would be no prosecution for contempt, because ‘the Ministers have sufficiently acknowledged and accepted their contempt of Court and sufficiently purged their contempt. [31]

As noted by his Hon Dyson Heydon, the judgment does not contain either the full comments of the Ministers in the article, nor the comments in the Court of Appeal case the Ministers were reacting to. His Hon Dyson

¹²⁸ Law Reform Commission (n 3) 249-50 [431], 251 [434]; Mack, Roach and Tutton (n 99) 2, 5.

¹²⁹ *DPP (Cth) v Besim; DPP (Cth) v MHK (No 2)* (2017) 52 VR 296 and see Heydon (n 127). Although the court characterises the contempt under consideration in this case as *sub judice* contempt, the LIV considers this more appropriately sits under the consideration of scandalising contempt, because the court reasons as if they are dealing with scandalising contempt, the ‘statements purported to scandalise the court ... by being calculated to improperly undermine public confidence in the administration of justice’ Supreme Court of Victoria, Statement of the Court of Appeal in Terrorism Cases (online, 16 June 2017) <<https://www.supremecourt.vic.gov.au/news/statement-of-the-court-of-appeal-in-terrorism-cases>>.

Heydon considered this incompatible with the idea that comprehensive and understandable reasons must be given for decisions, capable of being read in their own right, without referring to other transcripts or newspaper articles.¹³⁰ Further, the Court not only failed to particularise the offending behaviour, it did not articulate how or why the behaviour could have been a contempt.¹³¹

His Hon Dyson Heydon further notes that comments such as those used by the Ministers were cliché and commonplace and did not reach the level of extreme offence expressed by the Court, which characterised the behaviour as ‘appalling’, ‘fundamentally wrong’ and a ‘grave matter for the administration of justice’.¹³²

Finally, his Hon Heydon considers the decision appears to vacillate between the contradictory assertions that there was an *actual* contempt of court or merely a *prima facie* contempt of court; ‘a strong prima facie case ... [W]e have formed the view that the publication and the statements involved a serious breach of the *sub-judice* rule’.¹³³ The Court concludes that ‘the Ministers have sufficiently acknowledged and accepted their contempt ... sufficiently purged their contempt’, which appears to be a finding of contempt, because the Ministers cannot logically have purged their contempt without first having committed contempt.¹³⁴ The language used suggests the Ministers and newspaper had been found guilty of contempt, despite the lack of usual procedural steps and safeguards that would generally be afforded in these circumstances.¹³⁵

The proceedings and resolution in *Besim* demonstrate that there is no set procedure in contempt hearings, but rather a global discretionary exercise, without distinct stages, such as determining a prima facie contempt, determining to commence contempt proceedings, determining the offence is proven, and determining the penalty.¹³⁶ As stated by Brooking JA:¹³⁷

when called upon to exercise the summary jurisdiction in contempt the judge does have what appears to be a unique discretion at common law: he may in his discretion decline to adjudge the respondent guilty of contempt, that is, decline to convict, notwithstanding that, as judge of the facts and the law, he is satisfied that a contempt has been committed.

The LIV considers the uncertainty of the scope and application of the prohibition necessarily precludes any restrictions on communication based on the speculative notion of scandalising contempt.

Fault element and defences

Fair comment and the truth defence

¹³⁰ Heydon (n 127) 183.

¹³¹ Ibid 188.

¹³² *DPP (Cth) v Besim; DPP (Cth) v MHK (No 2)* (2017) 52 VR 296, 301 [27]; Heydon (n 127), 185.

¹³³ *DPP (Cth) v Besim; DPP (Cth) v MHK (No 2)* (2017) 52 VR 296, 302 [33]; Heydon (n 127), 183.

¹³⁴ *DPP (Cth) v Besim; DPP (Cth) v MHK (No 2)* (2017) 52 VR 296, 301-302 [31]; Heydon (n 127), 186.

¹³⁵ Heydon (n 127), 186.

¹³⁶ Victorian Law Reform Commission, *Contempt of Court* (Consultation Paper, May 2019) 38 [3.93]-[3.94].

¹³⁷ *Re Perkins; Mesto v Galpin* [1998] 4 VR 505, 514.

The LIV notes the well-established principle that 'no wrong is committed by any member of the public who exercises the ordinary right of criticising, in good faith, in private or public, the public act done in the seat of justice'¹³⁸ Therefore, if scandalising remarks amount to fair comment on a matter of public interest, this constitutes a defence.¹³⁹ The LIV further notes judicial comments to the effect that the revelation of truth, for the public benefit, and the making of fair comment based on fact does not constitute scandalising contempt.¹⁴⁰

However, there is an inherent uncertainty in this principle, 'the boundary between what is and what is not contempt involves questions of degree, and therefore uncertainty'.¹⁴¹ Unfortunately, it cannot be conclusively stated that there is an established formal defence for fair comment on matters of public interest, in light of countervailing judicial statements that the truth or falsity of the criticism is irrelevant.¹⁴²

The LIV notes that without a defence of justification, well founded allegations of judicial misconduct based on sound evidence may be punished, and / or people may be restrained from publicly revealing the information for fear of being found in contempt.¹⁴³

Public scrutiny is essential to ensuring the proper functioning of the courts, and if the law does not recognise a defence of justification, it runs the risk of victimising people who bring to light legitimate issues with the judiciary.¹⁴⁴

If the law of scandalising contempt is to be retained, the LIV considers the common law should be replaced by statutory provisions.

The LIV concurs with the ALRC 1987 report recommendation that three defences be introduced to the reformulated statutory test of scandalising contempt.

The three defences are:

- fair, accurate and reasonably contemporaneous reporting of legal proceedings;
- fair, accurate and reasonably contemporaneous reporting of Parliamentary proceedings; and
- truth or honest and reasonable belief in truth - a defendant should be entitled to plead and prove that the allegation was true, or that he or she honestly believed on reasonable grounds that it was true.¹⁴⁵

Fault element

The LIV notes that to be liable for scandalising contempt a person must intend to publish the relevant

¹³⁸ *Ambard v Attorney-General for Trinidad and Tobago* [1936] AC 322, 335.

¹³⁹ *R v Nicholls* (1911) 12 CLR 280, 286.

¹⁴⁰ *Nationwide News Pty Ltd v Wills (Free Speech Case)* (1992) 177 CLR 1, 39.

¹⁴¹ *Attorney-General v Munday* [1972] 2 NSWLE887, 910.

¹⁴² Law Reform Commission (n 3) 249-50 [431], 242 [416]; *Re Evening News* (1880) 1 LR (NSW) 211,241-242; *Viner v Australian Building Construction Employees' & Builders' Labourers' Federation* (1982) 2 IR 177, 183.

¹⁴³ Law Reform Commission (n 3) 255 [439].

¹⁴⁴ *Ibid.*

¹⁴⁵ *Ibid* 266-7 [460].

statement, but it is not necessary to prove that the person had the intention, motive or purpose, to undermine public confidence in the administration of justice.¹⁴⁶

A finding of scandalising contempt imposes criminal liability and carries criminal sanctions, but does not enliven any of the procedural safeguards that usually accompany such serious consequences. Instead criminal liability is imposed through summary procedures, in the absence of jury trials, and may result in punishments at large.

The LIV considers it is preferable for the law of scandalising contempt, if it is to be retained, to adhere to basic principles which govern our criminal law: '[A] person who engages in prohibited conduct is not criminally responsible for it unless the mental element is present'.¹⁴⁷ The LIV believes the existence of an intention of the alleged contemnor to interfere with the administration of justice is necessary for criminal responsibility to be imposed.¹⁴⁸

Therefore, the LIV recommends the introduction of a *mens rea* requirement into the statutory provision outlining scandalising contempt, that the alleged contemnor knew or ought reasonably to have known that the material would interfere with the administration of justice.¹⁴⁹

Adapted and relevant

Assumptions regarding public confidence

The LIV does not consider the law of scandalising contempt to be adapted and relevant to a modern context. As stated above, scandalising contempt is predicated on the idea that the 'authority of the law rests on public confidence' and therefore, it is critical for the stability of society that public confidence is not 'shaken by baseless attacks on the integrity or impartiality of courts or judges'.¹⁵⁰

The LIV agrees with the ALRC 1987 report, noting that there is a lack of clear evidence behind the assumption that to ensure the proper administration of justice, public confidence in the judiciary must be maintained. The LIV considers that, rather than a rapid and severe drop in public confidence causing the system to be destroyed by political action, it is more likely that such a grand scale overhaul of the system would be predicated on a number of factors.¹⁵¹

The LIV agrees it is paranoiac to justify repressing information and keeping the public in a state of 'innocent delusion', based on a belief that the community will 'rise up' in a destructive fury, and favours the view that public education, including through genuine and informed criticism, would be far more effective in

¹⁴⁶ *Attorney General (NSW) v Munday* [1972] 2 NSWLR 887, Hope JA at 911–912; Law Reform Commission (n 3) 249–50 [431], 241 [414].

¹⁴⁷ *He Kaw Teh v The Queen* (1985) 59 ALJR 620, 637.

¹⁴⁸ *Registrar of the Court of Appeal v Willesee* (1985) 3 NSWLR 650, 652–3.

¹⁴⁹ Law Reform Commission (n 3) 264 [458].

¹⁵⁰ *Gallagher v Durack* (1983) 152 CLR 238, 243

¹⁵¹ Law Reform Commission (n 3) 246 [424].

maintaining confidence in the courts.¹⁵²

Further, the LIV notes criticism of judicial officers and the courts, including robust criticism of individual judges, is not a modern invention and has a long history dating back before the inception of the High Court.¹⁵³ The administration of justice has survived and thrived amidst such criticism.

Therefore, the justifications for maintaining the offence of scandalising contempt rely upon unverified assumptions regarding the nature of public expectations, and the effect a shift in public expectations can have on the administration of justice.

Robust and resilient

The offence of scandalising contempt, rather than protecting the judiciary, the courts and the administration of justice, portrays the judiciary as a fragile and 'specially favoured institution', entitled to, and requiring, special protection from criticism and disparagement, beyond those protections conferred on other public institutions and individuals.¹⁵⁴

The LIV notes that the reality is very different to this representation. Judicial officers possess the capacity to 'shrug off' criticism, including unfair, misinformed or personal criticism, because it 'goes with the territory' of being the embodiment and public face of the courts as a public institution.¹⁵⁵ The LIV commends the work of the Judicial College of Victoria and the courts in providing training and support to help develop and sustain this judicial resilience and wellbeing.¹⁵⁶

The LIV notes that there is no suggestion that judicial decisions are influenced by negative criticism or comments; 'no judge would be influenced in his judgment by what may be said by the media. If he were, he would not be fit to be a judge.'¹⁵⁷ Therefore, criticism of the courts and the judiciary is unlikely to actually interfere with the functions of the court.

The LIV concurs with the observation of Murphy J in the dissenting judgment of *Gallagher v Durack* that the authority of the courts 'can only be lowered if it allows itself to become the vehicle of unexplained selective prosecutions for contempt of itself'.¹⁵⁸

The Law Reform Commission (England and Wales) has labelled scandalising contempt as 'inherently suspect' due to its status as an offence created and enforced by judicial officers that targets offensive

¹⁵² *Ibid.*

¹⁵³ John Williams, 'Of 'Fragile Bastions', 'Political Judges' and 'Robust Debates': Judges and Their Critics' in Rebecca Ananian-Welsh & Jonathan Crowe (eds), *Judicial Independence: Contemporary Challenges, Future Directions* (The Federation Press, 1st ed, 2016) 210-212.

¹⁵⁴ Law Reform Commission (n 3) 260 [449], 264 [457].

¹⁵⁵ Damien Carrick, interview with Chief Justice Robert French (ABC Radio National, 'Retiring Chief Justice Robert French', *The Law Report*, 13 December 2016) quoted in Mack, Roach and Tutton (n 99) 16, 17.

¹⁵⁶ Judicial College of Victoria, *Judicial Wellbeing* <<http://www.judicialcollege.vic.edu.au/judicial-wellbeing>>.

¹⁵⁷ *Attorney-General (UK) v British Broadcasting Corporation* [1980] 3 All ER 161, 169.

¹⁵⁸ *Gallagher v Durack* (1983) 152 CLR 238, 253.

remarks about judicial officers.¹⁵⁹ The ALRC 1987 report noted there is a real possibility of bias under the current procedures, which carries a high risk of infringing the right to a fair trial before an ‘impartial court or tribunal’.¹⁶⁰ The ALRC considers this real possibility of bias threatens public confidence in the administration of justice more than any allegedly scandalising remark is capable of doing, because it may appear that the court is acting in a retaliatory manner, rather than evincing the impartiality which all judicial officers bring to their work.¹⁶¹ This sentiment is mirrored in Murphy J’s assertion that ‘[I]t is undesirable that guilt and sentence be finally decided by the court alleged to be offended’.¹⁶² The LIV agrees with the ALRC 1987 report, that the current law tends to subvert the principal purpose for which it stands.¹⁶³

Regarding the case of *DPP (Cth) v Besim*; *DPP (Cth) v MHK* (discussed above) former his Hon Dyson Heydon queried: ‘[E]ven if the Court’s intention in doing what it did was to vindicate respect for the law, can it be said that what it did in fact actually engendered less respect for the law?’¹⁶⁴

The LIV concurs with Keane J, that professionalism is the basis for the claim to legitimacy of our system of administration of justice, and that the public perception of the administration of justice is best protected through judicial officers making decisions based on ‘the rational application of predetermined laws to facts found on evidence adduced by the litigants in open court.’¹⁶⁵

The LIV considers the recent highly publicised case of *Gambaro v Mobycom Mobile* (outlined above) is a good example of where the imposition of a charge of contempt may be viewed as bias and open up judicial officers and the court to increased scrutiny and allegations of unfair processes.¹⁶⁶

Another recent Victorian example of where a highly publicised case regarding allegations of scandalising contempt has brought intense media scrutiny to Victorian courts is the proceedings against members of media following the trial of Cardinal George Pell.

The overwhelming local and international interest in the George Pell trial resulted in a vast array of traditional, online and social media publications. On 15 April 2019, a directions hearing took place in the Supreme Court of Victoria regarding proceedings against 36 members of the media, with 16 of the respondents accused of scandalising contempt.

Local and international media reports expressed astonishment that proceedings for scandalising contempt had been instituted, noting the offence was ‘[M]ore common in ages past’ and characterising the proceedings as nothing other than ‘a concerted and strategic attack on the media, rather than an upholding

¹⁵⁹ Law Commission (England and Wales) (n 119) 15 (63).

¹⁶⁰ Law Reform Commission (n 3) 279 [477]; *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 24(1).

¹⁶¹ Law Reform Commission (n 3) 279 [477].

¹⁶² *Gallagher v Durack* (1983) 152 CLR 238, 253.

¹⁶³ Law Reform Commission (n 3) 70 [112].

¹⁶⁴ Heydon (n 127) 189.

¹⁶⁵ Justice P A Keane, ‘The Idea of the Professional Judge: The Challenges of Communication’ (2015) 12 *Judicial Review* 301, 314.

¹⁶⁶ Michaela Whitbourn, ‘Serious concerns: judge faces scrutiny over alleged unfairness’, *The Age* (online, 24 June 2019) <<https://www.theage.com.au/national/serious-concerns-judge-faces-scrutiny-over-alleged-unfairness-20190619-p51z4v.html?cspt=1561417112|ea1add1992e1824b6cba299d3a1a2a95>>.

of the law'.¹⁶⁷

As one publication noted:¹⁶⁸

the Pell case will be a continuing illustration of an issue that runs far wider than Australia: how to adapt old legal doctrines to the realities of a new communications environment. Trying to bend the latter to the former seems to distort both.

The LIV notes the charges of scandalising the court have since been dropped by the Director of Public Prosecutions.¹⁶⁹

The LIV considers judicial officers, the courts and the administration of justice to be robust and resilient, and not the fragile bastions the law of scandalising contempt portrays. Further, the perception of 'special treatment' for the judiciary and the courts is likely to have a counter-productive effect on the public perception of the judiciary.

New Media

The LIV acknowledges that the rise of 'new media' is creating novel issues regarding the nature and reach of criticism of judicial officers.¹⁷⁰ The LIV contends that scandalising contempt is more suited to a bygone era, and does not reflect the 'nature of the harm caused by the offence or what the punishment is meant to achieve' in a modern context.¹⁷¹ In particular, the LIV notes judicial concerns regarding the inability of the courts or other external authorities to control, filter, police, censor or manage new forms of media which they consider to be out of control, such as social media comments.¹⁷²

Victorian Charter of Rights and Responsibilities

The LIV submits that in the Victorian context, where the Victorian Charter enshrines the right to freedom of expression, the principle of open justice through the right to a fair and public hearing, and some crucial procedural safeguards in criminal proceedings, the abolition, or sever restriction, of the law of scandalising contempt is imperative.

The LIV contends there is a real risk that the present law of scandalising contempt in Victoria infringes the standards laid down in the Charter.

¹⁶⁷ Paul Chadwick, 'The Australian court ban on reporting George Pell's trial was bound to fail', *The Guardian* (online 22 April 2019) <<https://www.theguardian.com/commentisfree/2019/apr/21/australia-court-ban-george-pell-trial-fail-media-law>>; Clay Lucas, 'Dozens of Australian journalists threatened with contempt of court over Pell stories' *The Sydney Morning Herald* (online, 26 February 2019) <<https://www.smh.com.au/national/dozens-of-australian-journalists-threatened-with-contempt-of-court-over-pell-stories-20190226-p5109j.html>>.

¹⁶⁸ Chadwick (n 167).

¹⁶⁹ Tessa Akerman, 'Contempt charges dropped over Pell reporting', *The Australian* (online, 20 May 2019) <<https://www.theaustralian.com.au/business/media/contempt-charges-dropped-over-pellreporting/news-story/2e60d44323806faf6673ef525cb91cc3?btr=df08b7e36869971dc27f0fae072d198>>.

¹⁷⁰ Mack, Roach and Tutton (n 99) 17.

¹⁷¹ Law Commission (New Zealand), *Contempt in Modern New Zealand* (Issues Paper, 2014) 60 [6 29].

¹⁷² Mack, Roach and Tutton (n 99) 16.

Freedom of expression

In Victoria, the right to freedom of expression is enshrined in section 15 of the Victorian Charter and includes the freedom to seek, receive and impart information and ideas of all kinds, whether within or outside Victoria and whether orally; or in writing; or in print; or by way of art; or in another medium chosen by the person.¹⁷³ This right applies to both individual freedom of speech and freedom of the press.

The LIV notes the fundamental importance of freedom of expression in a democratic society has been acknowledged by the courts in scandalising contempt cases, such as in *Gallagher v Durack* where it was considered of cardinal importance, ‘speech should be free, so that everyone has the right to comment in good faith on matters of public importance, including the administration of justice, even if the comment is outspoken, mistaken or wrong-headed’.¹⁷⁴

(a) Implied constitutional right

The LIV recognises the well-established principle of the democratic right to criticise the courts and the judiciary, as stated by Lord Atkin:¹⁷⁵

no wrong is committed by any member of the public who exercises the ordinary right of criticising, in good faith, in private or public, the public act done in the seat of justice ... [J]ustice is not a cloistered virtue: she must be allowed to suffer the scrutiny and respectful, even though outspoken, comments of ordinary men.

The LIV notes that effective democracies rely on the right of citizens to criticise public institutions, such as the courts, which constitute a branch of our government, and the judicial officers who embody and publicly represent the courts.

The LIV notes the argument that such criticism is impliedly protected under section 72 of the Australian Constitution.¹⁷⁶ Implicit in the entrenchment of security of tenure under section 72(i) and (ii) is the connection between judicial independence and the principles of responsible government and the guarantee of political communication; the existence of tenure provides significant protection to judicial officers in the exercise of their functions, and such protections anticipates a high level of scrutiny and debate.¹⁷⁷ Rather than leading to the destruction of public confidence in the courts and the judiciary, robust criticism by may form a constituent element of the administration of justice.

(b) Proportionality

After its assertion that ‘speech should be free’, the court in *Gallagher v Durack* went on to consider the need to balance this principle with the competing principle that ‘it is necessary ... [to repress] ... imputations upon

¹⁷³ *Charter of Rights and Responsibilities Act 2006* (VIC) article 15(2)

¹⁷⁴ *Gallagher v Durack* (1983) 152 CLR 238, 243 (Gibbs CJ, Mason, Wilson and Brennan JJ).

¹⁷⁵ *Ambard v Attorney-General for Trinidad and Tobago* [1936] AC 322, 335.

¹⁷⁶ Williams (n 153) 212.

¹⁷⁷ Williams (n 153) 212-215; cf *APLA Limited v Legal Services Commissioner* (NSW) (2005) 224 CLR 332, 360 [63].

courts of justice, which, if continued, are likely to impair their authority.¹⁷⁸

The LIV reiterates the unique position of the right to freedom of expression, as the ‘the foundation stone for every free and democratic society’ and a vital element to maintaining the rule of law.¹⁷⁹ Such a foundational principle of our democracy cannot be limited on the basis of a questionable assumption that public confidence in the administration of justice can be deleteriously altered by public criticism, that a diminution of public confidence would lead to the destruction of the system, or that public confidence is a measurable absolute (discussed above).

As noted above, no right under the *Charter* is absolute. The right to freedom of expression is subject to the limitations set out in section 15(3), that the right may be subject to lawful restriction, if such restriction is ‘reasonably necessary to respect the rights and reputation of other persons; or for the protection of national security, public order, public health or public morality’.¹⁸⁰ It has been suggested that the reference to ‘rights and reputations of other persons’ reflects the long held recognition that publicity may in some cases prejudice the possibility of an accused receiving a fair trial.¹⁸¹

However, the LIV contends the broad, uncertain and unfettered principle of liability for scandalising contempt does not satisfy the test of reasonable necessity established in paragraph 3.¹⁸² Neither does it satisfy the proportionality test of reasonable limitation that can be ‘demonstrably justified’ set out in section 7(2):

[A] human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors.¹⁸³

Although it has been found in other examinations of the law of contempt that the individual’s right to a fair trial will outweigh the right to freedom of expression, the law of scandalising contempt is too broad, too uncertain and too potentially damaging to the public perception of the administration of justice to be allowed to infringe the right to freedom of expression. The LIV concurs with the ALRC 1987 report’s conclusion that the current law of scandalising contempt infringes the right to freedom of expression ‘to an unjustifiable degree’ due to the insufficient precision in defining liability for the offence, and the potential imposition of criminal liability without any need to prove actual harm to a person, institution or the community.¹⁸⁴

The insufficient precision in defining liability is discussed at length above, including the examination of the broad and uncertain ‘inherent tendency’ test, vague, broad and uncertain concept of ‘public confidence’, the inherently morally subjective term ‘scandalise’, and the irrelevance of *mens rea*. The LIV does not consider

¹⁷⁸ *Gallagher v Durack* (1983) 152 CLR 238, 243 (Gibbs CJ, Mason, Wilson and Brennan JJ).

¹⁷⁹ United Nations Human Rights Committee, General Comment No 34, *Article 19: Freedom of Opinion and Expression* [2]-[3]; *McDonald v Legal Services Commissioner (No 2)* [2017] VSC 89 [22].

¹⁸⁰ *Charter of Human Rights and Responsibilities Act 2006* (Vic) section 15(3).

¹⁸¹ *Charter of Human Rights and Responsibilities Act 2006* (Vic) article 15(3)(a); Pound and Evans (n 1) 152-3; *Gisborne Herald Co Ltd v Solicitor-General* [1995] 3 NZLR 563, 575.

¹⁸² *Charter of Human Rights and Responsibilities Act 2006* (Vic) section 15(3).

¹⁸³ *Charter of Human Rights and Responsibilities Act 2006* (Vic) section 7(2); Pound and Evans (n 1) 61, 148; *McDonald v Legal Services Commissioner (No 2)* [2017] VSC 89, [30]-[36].

¹⁸⁴ Law Reform Commission (n 3) 248 [428].

the existing offence of scandalising contempt is sufficiently well defined to comply with the phrase 'lawful restriction'.¹⁸⁵

Regarding the need to prove actual harm, other jurisdictions, when assessing the concept of necessity under article 19 of the ICCPR, have concluded that necessity is not made out in the absence of a 'clear and present danger' to the administration of justice.¹⁸⁶ Similarly, in the United States, the Supreme Court has applied this test and concluded this leaves absolutely no scope for an offence of scandalising contempt 'the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished'.¹⁸⁷

As stated by Murphy J, '[A]t stake is not merely the freedom of one person; it is the freedom of everyone to comment rightly or wrongly on the decisions of the courts'.¹⁸⁸

Open justice and the right to a fair and public hearing

The right to freedom of expression is integral to the principle of open justice, the right to a fair trial, and the maintenance of the rule of law, through exposing the conduct of legal proceedings to public scrutiny by guaranteeing the freedom to seek, receive and impart information about legal proceedings.¹⁸⁹ Under the Victorian Charter the common law principle of open justice is reflected in the right to a fair trial, that every person has the right to be heard by a 'competent, independent and impartial court or tribunal after a fair and public hearing'.¹⁹⁰ The importance to the community of the 'public' aspect of this right is stated by Lord Diplock:¹⁹¹

If the way the courts behave cannot be hidden from the public ear and eye this provides a safeguard against judicial arbitrariness and idiosyncrasy and maintains the public confidence in the administration of justice.

The principle of open, justice through the hearing of legal proceedings in open court, preserves public confidence in the proper administration of justice, through the assurance of a 'fair and *public* hearing'.¹⁹² Therefore, this principle is indispensable to the rule of law in a democratic society and supports the reality and appearance of independence and impartiality, while maintaining public confidence in the courts.¹⁹³

As with the right to freedom of expression, the right to a fair trial has a constitutional dimension. The High Court has found the conduct of proceedings in public, in accordance with rules of procedural fairness and the

¹⁸⁵ *Charter of Rights and Responsibilities Act 2006* (VIC) article 15(3); Law Reform Commission (n 3) 249 [430].

¹⁸⁶ Law Reform Commission (n 3) 249 [430].

¹⁸⁷ *Bridges v California* 314 US 252, 263 (1941).

¹⁸⁸ *Gallagher v Durack* (1983) 152 CLR 238, 248.

¹⁸⁹ Pound and Evans (n 1) 152.

¹⁹⁰ *Charter of Rights and Responsibilities Act 2006* (VIC) article 24(1);

¹⁹¹ *Attorney-General v Leveller Magazine Ltd* [1979] AC 440, 450.

¹⁹² *Charter of Rights and Responsibilities Act 2006* (VIC) article 24(1); *PQR v Secretary, Department of Justice and Regulation* (2017) 53 VR 45 [34]-[42].

¹⁹³ *News Digital Media Pty Ltd v Mokbel* (2010) 30 VR [35]; Pound and Evans (n 1) 224

appearance and reality of independence and impartiality constitute some of the essential and defining characteristics of a court, enshrined in, and protected by, the Australian Constitution.¹⁹⁴

The right to a fair and public hearing is limited by sub-sections 24(2) and (3) of the Charter, in order to protect competing rights and interests, such as securing the proper administration of justice, by restricting the publication of material which might prejudice or influence the outcome of a trial.¹⁹⁵ As noted above, the LIV considers the right of an individual to a fair trial, free from the potentially prejudicial influence of published material, should be centred in any assessment of the proportionality of a restriction on the right to a fair and public hearing. However, the real risk of perceived bias discussed above illustrates that the law of scandalising contempt infringes the fundamental principle that the law must be seen to be done.

Therefore, the LIV considers the limitation imposed by the law of scandalising contempt is not proportionate to either the importance of the right to freedom of expression or the right to a public and fair trial.

Alternative (and preferred) methods of maintaining public confidence

The LIV considers that, if the offence of scandalising contempt were to be abolished, the conduct it seeks to regulate would still be subject to a considerable degree of legal regulation.

The LIV notes that under the *Crimes Act 1958* (Vic), it is an offence to publish threats to kill, inflict serious injury, or assault, or threaten to destroy or damage property.¹⁹⁶ It is also an offence under the *Criminal Code Act 1995* (Cth) to use a carriage services in such a way that reasonable persons would regard as menacing, harassing or offensive.¹⁹⁷

The LIV notes defamation is an alternative that has been used to address publications containing unwarranted or false criticisms about judicial officers.¹⁹⁸

The LIV considers there are alternative, and preferred, methods for maintaining public confidence in the administration of justice and defending against improper criticism.

The Attorney-General has traditionally taken on the role of defending the judiciary and judicial decisions against unjustified public criticism.¹⁹⁹ However, the LIV notes it is now widely acknowledged that the Attorney-General will no longer undertake this role.²⁰⁰ For example, amidst the criticism surrounding the case of *DPP (Cth) v Besim*; *DPP (Cth) v MHK* (discussed above), the Attorney-General actually spoke in support of the Ministers who

¹⁹⁴ *Condon v Pompano* (2013) 252 CLR 38 [67]; *Hogan v Hinch* (2011) 243 CLR 506, 531–2 [26]; Pound and Evans (n 1) 212, 242.

¹⁹⁵ *Hogan v Hinch* (2011) 243 CLR 506, 531–2 [21].

¹⁹⁶ *Crimes Act 1958* (Vic) sections 20, 21, 31, 198.

¹⁹⁷ *Criminal Code Act 1995* (Cth) section 474.

¹⁹⁸ Law Reform Commission (n 3) 261 [452].

¹⁹⁹ Mack, Roach and Tutton (n 99) 18–19.

²⁰⁰ *Ibid.*

had criticised the judiciary, rather than defending the judicial officers involved.²⁰¹

In the absence of defence from the Attorney-General, there remain other groups that have taken up this mantle. For example, professional organisations of lawyers, such as the LIV, and the judges' trade union, the Judicial Conference of Australia, rose to the defence of the judges involved in the case of *DPP (Cth) v Besim*; *DPP (Cth) v MHK*.

The LIV notes an increasing tendency of the Courts and individual judicial officers to communicate with the public, in particular with respect to decisions and the role of the courts in the justice system. Heads of respective jurisdictions have also been public in defending their courts against unreasonable criticism.

As noted by Chief Justice Warren, there is a move towards direct community engagement by the courts 'in order to preserve the operation of open justice'.²⁰² This sentiment is echoed by Chief Justice Bathurst:²⁰³

the days when judges could speak solely through their judgments and expect the confidence of the community are ... gone. If judges do not take an active role in explaining what we do and why, criticisms of the administration of justice are likely to go unanswered and thus be accepted by many as unanswerable. Community confidence ... is too important to allow that to occur.

The LIV considers communication about specific decisions and the work of the court more broadly, is the best alternative method for enhancing public confidence in the administration of justice and answering any ill-informed or false criticism. The LIV notes the considerable body of evidence that suggests that once members of the public are provided with information beyond that able to be captured in a newspaper headline, their views align quite closely with those expressed by the court.²⁰⁴ The LIV commends the judiciary and the courts collectively, which have developed a myriad of ways to communicate effectively with a diverse public.

The LIV notes the courts have undertaken many commendable projects of direct communication with the public, including providing summaries of judgments, detailed sentencing remarks, detailed information about the courts on websites and on site, and even publishing media releases in response to certain news articles.²⁰⁵ The LIV commends the highly successful podcast produced by the Supreme Court of Victoria 'Gertie's Law', which tackled sentencing in Episode 2, explaining one of the most misunderstood and controversial aspects of the courts work to the public.²⁰⁶ Further, the LIV considers the County Court of Victoria's decision to broadcast Chief Judge Peter Kidd's sentencing of George Pell, successfully demonstrated 'transparent and open justice and an accessible communication of the work of the court'.²⁰⁷

²⁰¹ Heydon (n 127), 181.

²⁰² Chief Justice Marilyn Warren, 'Open Justice in the Technological Age' (2014) 40 *Monash University Law Review* 45.

²⁰³ Chief Justice T F Bathurst, 'Community Confidence in the Justice System: The Role of Public Opinion' (2014) 12 *Judicial Review* 27, 42.

²⁰⁴ Mack, Roach and Tutton (n 99) 13.

²⁰⁵ *Ibid* 21.

²⁰⁶ <www.supremecourt.vic.gov.au/podcast>.

²⁰⁷ County Court of Victoria, 'Sentencing Remarks in DPP v George Pell' (Web Page, 19 March 2019) <www.countycourt.vic.gov.au/news-and-media/news-listing/2019-03-13-sentencing-remarks-dpp-v-george-pell>.

Individual judicial officers have also found avenues for direct communication with some public audiences, including delivering oral decisions in open court, or written decisions that are publicly available, providing public presentations to schools or community groups, and sometimes even through statements on social media.²⁰⁸ However, the appropriateness of judicial officers using social media to make statements is questionable in light of the advice contained in the *Guide to Judicial Conduct* and *Judicial Ethics in Australia* urging caution in the use of social media by individual officers, and stressing the role of the Chief Justice to speak publicly for the court.²⁰⁹

Recommendations

Recommendation 17: The offence of scandalising contempt be abolished.

Please note: the LIV includes recommendations 18-22 to be considered only if recommendation 17 is not adopted.

Recommendation 18: If recommendation 17 is not adopted, in the alternative, the recommendation of the ALRC 1987 report be adopted.²¹⁰ The law of scandalising contempt be retained, with significant limitations imposed and the common law be replaced by statutory provisions that outline an offence to publish an allegation imputing misconduct to a judge or magistrate, in his or her official capacity.

Recommendation 19: The codification of the law of scandalising contempt specify that, in addition to the publisher, the person who made the allegation should be liable if he or she knew, or ought reasonably to have known, that the allegation would be published in the manner in which publication actually occurred.

Recommendation 20: The codification of the law of scandalising contempt to introduce a *mens rea* requirement, that the alleged contemnor knew or ought reasonably to have known that the material would interfere with the administration of justice.²¹¹

Recommendation 21: The statutory offence of scandalising contempt be accompanied by the introduction of three defences:

- fair, accurate and reasonably contemporaneous reporting of legal proceedings;
- fair, accurate and reasonably contemporaneous reporting of Parliamentary proceedings; and
- truth, or honest and reasonable belief in truth - a defendant should be entitled to plead and prove that the allegation was true, or that he or she honestly believed on reasonable grounds that it was true.

²⁰⁸ Mack, Roach and Tutton (n 99) 24.

²⁰⁹ Ibid 31.

²¹⁰ Law Reform Commission (n 3) 266-7 [460].

²¹¹ Ibid 264 [458].

Recommendation 22: The statutory offence of scandalising contempt fall within the category of an indictable offence, which is capable of being tried summarily with the consent of all concerned.

CONCLUSION

The LIV acknowledges the importance of promoting and maintaining the freedom of expression, but considers this must be balanced with upholding a fair and objective justice system while promoting open justice. The damaging consequences of contemptuous behaviour undermines a system designed to ensure fairness and avoid prejudicial material which may influence decision makers. Future reform must ensure the maintenance of this balance, as reflected in the above recommendations for the consideration of the Commission.

If you would like to discuss the matters raised in this submission further, please contact Anna Gaskin, Policy Officer for the Administrative Law and Human Rights Section of the Law Institute of Victoria at AGaskin@liv.asn.au or on (03) 9607 9445.