VICTORIAN LAW REFORM COMMISSION

CONTEMPT OF COURT

SUBMISSION BY THE SUPREME COURT OF VICTORIA

July 2019

PREFACE

This submission

The Supreme Court of Victoria makes the following submission to the Commission's review of contempt of court. The submission is based on the experience of the Court in dealing with contempt matters and with proceedings more generally, against the backdrop of the current law of contempt.

Some of the topics raised by the consultation paper released by the Commission concern issues which properly fall within the realms of policy for determination by Government. The Court will not address these matters. However, the law of contempt concerns the inherent jurisdiction of the Court and its powers in the conduct of proceedings. It is therefore considered appropriate for the Court to make a contribution as part of the Commission's deliberations.

The Court does not comment on specific cases past or present, but draws on published judgments as illustrations of principle or practical issues.

Contempt of court in the Supreme Court

Fundamental to the rule of law is that cases can be brought before and decided by an independent, impartial and competent court or tribunal. Fundamental to the operation of the Court is that it can provide a fair hearing and that its orders are complied with and enforceable. The law of contempt in its various facets is directed to that end.

It underlies the Court's ability to ensure that

- proceedings are conducted fairly in an orderly and safe environment, free from disruption and intimidation;

- witnesses are compelled to attend and give evidence so that decisions can be made on the best evidence; and
- proceedings are conducted free from outside influence on the basis of the evidence before the Court

The law of contempt is not invoked with great frequency, but the operation of the Court relies upon there being contempt powers and sanctions available. Those powers and sanctions operate as a deterrent even when not exercised.

For all the jurisdiction and powers invested in the Court, ultimately it is the law of contempt which is the end point of the Court's authority.

PRINCIPLES OF LAW AND GENERAL ISSUES

Greater certainty

It is equally fundamental to the rule of law that those affected by a law— especially one which carries penalties for breach— should be able to ascertain its terms and understand what compliance requires. There is undoubtedly scope for the law of contempt to be made clearer and more certain, as the consultation paper makes clear.

The Court's view is that legislative action is necessary and appropriate. The categories of conduct which can constitute contempt of court (referred to in the consultation paper as "manifestations of contempt") should be clearly identified and defined. In particular, the mental element for each category should be specified.

Within each category, there should be a non-exhaustive definition of the types of conduct which can constitute that form of contempt. A definition of that kind recognises that it is not possible in advance to identify every form of behaviour which may have a tendency to interfere with the proper administration of justice.

An approach which meets the need for greater certainty and avoids the dangers of exhaustive categorical definition is to define contempt according to recognised principle but provide a non-exhaustive list of conduct which may constitute contempt.

This approach is also respectful of the fact that contempt is an inherent power of the Court to control its own proceedings.

Procedure

The procedure for contempt is different from that which applies to other offences because it derives from a very different basis and serves a particular purpose.

The Court's power to instigate a charge of contempt remains appropriate because it is fundamental to the Court's control of its proceedings. It therefore

must be able to be invoked in relation to any individual coming before the Court, including prosecutors. If prosecution agencies, who are parties before the courts, were the sole authority to instigate prosecutions for contempt, other parties coming before the Court might consider that they were not approaching the Court on equal terms.

The special summary procedure is a rarity, and the law on its use very clearly provides that this should remain so. The procedure derives from the need in some cases to immediately identify and respond in a public and transparent manner to conduct which is impacting on proceedings.

The need remains, even though in rare circumstances.

The law is clear that, while it is a summary procedure, both procedural fairness and fair hearing rights apply. Expressing the essential elements of the procedure in a legislative form will promote awareness and understanding, and ensure consistency of application.

Similarly, the ordinary summary procedure could be better described, and clarity provided regarding matters such as the applicable rules of evidence, standard of proof, the application of civil procedure rules and avenues of appeal.

It is not considered appropriate, however, that the ordinary procedures for criminal offences be adopted. Those procedures can be slow and the power to decide whether to invoke them lies with the executive rather than the Court.

Penalty

As noted in the paper, a number of cases have had regard to the *Sentencing Act 1991* to a greater or lesser extent. A provision which formally applied the *Sentencing Act 1991* to contempt offences would provide greater certainty in practice, ensuring the availability of a full range of sentencing orders and the framework within which orders are made.

It would be consistent with that approach to set a maximum penalty for the offence of contempt. However, it would need to be clear that this did not affect the procedure by which it was prosecuted. Contempt covers a broad range of behaviour but, on ordinary principles, the maximum penalty should reflect the most serious case. It is noted that the common law offence of attempting to pervert the course of justice has a maximum penalty of 25 years' imprisonment and perjury has a maximum penalty of 15 years' imprisonment.

Warnings and apologies

Informal warnings regarding potential contempts are a useful and appropriate approach in a number of situations, particularly in the context of inappropriate courtroom behaviour. They inform an individual that their behaviour is inappropriate in circumstances where they may not be aware. A

warning can alert them to the potential consequences of their actions, for example where a witness initially refuses to give evidence.

A warning will often be sufficient to avoid the need for further action because the individual will modify their behaviour in response. Warnings are based on observations of the court and are not given lightly, but they are not conclusive findings.

The show cause procedure is a useful additional fairness mechanism, particularly where the individual is not presently before the court. It discloses to the individual the concern of the court and offers an opportunity to respond in whatever way they consider appropriate.

There is no obligation on the individual to put any matters forward. An opportunity is provided to make submissions on the law, evidence may be provided which sheds a different light on matters, and should the party wish, an apology may be made. There is a parallel here with the process whereby a suspect interviewed by police is afforded the opportunity to put their version of events, make admissions, express contrition or remain silent.

Apologies serve an important role in contempt and should remain capable of being assessed by the court as purging contempt. The vice of certain contempts can often be more effectively be remedied by a public apology than prosecution of the prior actions. A show cause process is a public means through which an apology can be offered. This is a very transparent process, certainly no less so that the exercise of prosecutorial discretions.

Whether an apology purges a contempt can only be determined in the circumstances as they arise. In other instances an apology may be evidence of remorse and can be taken into account in determining the appropriate penalty.

CONTEMPT IN THE FACE OF THE COURT

The ability to control the conduct of proceedings before the Court is fundamental to ensuring the proper administration of justice. It is the Court's duty to ensure a fair hearing and part of doing so is maintaining an environment where all parties are heard, witnesses give evidence and juries can deliberate free from intimidation or disruption or threats to the proper process of the Court.

For the reasons given earlier, a non-exhaustive definition should be used

There would be benefit defining what is required for a contempt to be "in the face of the court". One option would be that the actions are sufficiently proximate to affect a pending case.

JUROR CONTEMPT

While juror contempt is uncommon, there are a range of actions which would fall outside the statutory offences in the *Juries Act 2000* which may constitute contempt.

The Court agrees that jury directions and education play a very important role. Ideally jurors should be informed not only about what they must do and what they cannot do, but also about why those rules exists.

The Court is continuously looking at ways to improve communication with juries and ensure juror engagement and comprehension. The strategy of directing jurors about asking questions and encouraging them to do so, as recommended by the Law Commission of England and Wales, is considered very worthwhile. This acknowledges the natural urge of jurors committed to the fact finding task to seek out answers, but directs it in an appropriate way.

Extending the oath/affirmation taken by jurors is not considered likely to be an effective means of reinforcing obligations on the jury. In directing the jury about their obligations, the judge will often advert to the oath/affirmation to deliver a true verdict according to the evidence and elaborate on what that means and why the verdict must be limited to the evidence. Those engagements with the jury are considered a better means of reinforcing the obligation than a recitation of additional words.

NON-COMPLIANCE WITH COURT ORDERS AND UNDERTAKINGS

Non-compliance with orders of the court undermines the essence of our system of law. Orders of the court are the means by which rights and laws are given ultimate effect. They are the backdrop against which obligations are kept and laws obeyed.

While various other means of enforcement are available, contempt remains an important option and, in some instances, the only option. For parties, other means of enforcement are clearly to be preferred because they offer a tangible remedy for the party (recovery of assets or payment of debts). Contempt is, however, an important remedy in the context of injunctive or mandatory orders.

It remains appropriate for there to be a means for parties— and the Court of its own motion— to initiate contempt proceedings in these circumstances. A party should not be reliant on persuading a prosecuting agency to use its resources to pursue the party's legally enforceable right. Likewise, in exceptional cases where disobedience with a Court order affects not only the parties to a proceeding but also has implications for the rule of law more generally, it is important that the Court is able to initiate contempt of court proceedings even if the affected party is not prepared to do so.

As with other forms of contempt, the Court would support the inclusion of this as one of the categories (or manifestations) of contempt set out in

legislation. The types of conduct which can constitute this form of contempt should be defined non-exhaustively.

The Court's experience accords with the body of judicial commentary about the illusory and unhelpful nature of attempts to distinguish civil and criminal contempt. Formal abolition of the distinction would seem desirable.

SUB JUDICE CONTEMPT

The Court takes issue with the Commission's description of sub judice contempt as being based on a mistrust of jurors or an assumption that they are fragile or susceptible. The Court has great respect for, and trust in, jurors and the jury system.

The essence of matters which are prejudicial is that they have the tendency to assume undue significance in the human reasoning process, be that of a juror or a judge. The cognitive process of excluding prejudicial information from a reasoning process is a difficult one, even for the judiciary.

While the Court has every faith in jurors' conscious determination to fulfil their oath, the presence of unavoidable highly prejudicial material in the public domain can nevertheless threaten the fairness of a trial. Recognising the practical difficulties arising from publication on the internet and social media, the objective of minimising the risk of prejudice remains very important.

Potential jurors are asked during the empanelment process to indicate if they feel they cannot bring an impartial mind to the trial for any reason. If sub judice contempt were abolished, the composition of the jury pool might become distorted as more individuals were exposed to prejudicial material and must be excused. One of the aims of sub judice contempt is to ensure that the jury pool reflects a broad cross-section of the community, and is not narrowed by exclusions made necessary by pre-trial publicity.

Sub judice is one of the areas of contempt where legislative exposition would offer the most benefit. It is the area where breaches are most likely to be negligent or inadvertent rather than deliberate. Providing clearer guidance would provide clarity and certainty for media organisations, and should improve compliance. The New Zealand model of a clear rule against disclosure of prior convictions is a helpful example.

Inclusion of an element of intent would, however, undermine the current effect of the law in imposing a positive obligation on publishers to avoid contempt.

SCANDALISING THE COURT

The Court favours retaining a category of contempt that protects against conduct that may lead to perceptions of a lack of authority or impartiality in

the judicial process. To better reflect the basis of the contempt, and improve community understanding, the category should be expressed in terms of "undermining the integrity of the judicial process". The formulation recommended in New Zealand aptly captures this notion.

Mere criticism and insult are not to be criminalised. But conduct seemingly directed at influencing decisions, thereby threatening the perception of impartiality, or statements that seek to de-legitimise the courts and undermine their authority pose a real risk.

There are plenty of examples in other countries and through history where campaigns have been mounted to undermine the authority of the courts, as a means of negating their ability to operate as a check on the illegitimate exercise of power.

Courts and judicial officers are ethically constrained in responding to public accusations in a way that other institutions are not. Defamation proceedings offer a personal remedy, not an institutional one. Contempt remains the appropriate means of enforcement in those rare cases where it is necessary.

PROHIBITIONS ON PUBLICATION UNDER THE JUDICIAL PROCEEDINGS REPORTS ACT

Divorce proceedings

The consultation paper raises the question whether s 3(1)(b) of the *Judicial Proceedings Reports Act 1958*, prohibiting certain disclosure in relation to divorce proceedings, should be repealed. One issue which should be considered in that context is the impact on historical matters — prior to s 121 of the *Family Law Act 1975* (Cth).

The Court holds historical divorce files and from time to time receives requests to access those files. The files are not made automatically available for search, on the basis that they should generally remain confidential between the parties. This approach is informed by the approach taken in the federal jurisdiction.

Applications made to access files are considered on an individual basis, having regard to the person seeking access, the purpose for which they seek such access and the privacy interests of the parties and anyone else who may have an interest.[1] Although privacy concerns are diminished in circumstances where parties are no longer alive, consideration is still given to those matters.

The Commission may wish to take into consideration that parties are still alive from proceedings covered by these provisions and may have operated with the benefit of this provision for some years.

[1] *Re Proceeding No 291 of 1944* [2006] VSC 50.

Directions hearings and sentence indications

The management and conduct of criminal proceedings has changed significantly over time. Case management techniques have developed which involve much more proactive involvement by the Court in ensuring that matters are conducted fairly and efficiently. Pre-trial hearings may canvass matters such as plea discussions and evidentiary disputes. Where bail is discussed this may involve discussion of prior convictions or unrelated pending charges. There is therefore a significant potential for reporting to involve material that could be prejudicial to the ultimate trial.

That said, of the hundreds of such hearings conducted each year, the Court has experienced very few instances of problematic reporting.

Whether this is the result of s 3(1)(c) of the *Judicial Proceedings Reports Act 1958* or media understanding of sub judice contempt is difficult to know, but it is more likely the latter. There do appear to be instances where information beyond that provided for in s 3(1)(c) is reported, such as the plea entered.

From the Court's perspective a concern only arises in relation to reporting that might adversely impact on the trial process.

Victims of sexual offences

Victims are in the best position to speak to whether the protections afforded by these provisions made it easier for them to make complaints to police and to give evidence in prosecutions. While individual experiences will differ, if at least a proportion of victims found the prohibition beneficial, that would weigh heavily in favour of retention.

The statutory prohibition provides a means of protection before the courts are seized of a matter. It avoids placing a burden on individuals to seek such orders and provides consistent protection. It provides protection to children who may have no capacity to seek an order.

The section prohibits publication of particulars likely to lead to identification. This is an important means of ensuring that the protection is truly effective. While not absolutely definitive, it is readily interpreted and applied with a common sense approach.

A practical consequence of the current regime is the effective suppression of the identity of many offenders. One common example is that the identity of the alleged perpetrator is not published where the offence charged is one of incest against the perpetrator's child.

The Court has internal processes which seek to continue the protection of these provisions, by using pseudonyms in its description of cases and publication of judgments, and avoiding the use of potentially identifying information wherever possible.

The capacity for victims to consent to their own identification is, however, recognised as equally important.

Requiring the court's involvement and approval for the removal of the protection in pending cases potentially serves several different purposes, as follows.

- It allows a formal recording in court of the victim's consent, perhaps providing an opportunity to ensure informed consent.
- It provides an opportunity to consider whether there are other individuals whose interests may be affected and whether any orders are needed to protect those interests (e.g. other victims[2]).
- It provides an opportunity to consider any application for suppression orders, e.g. a victim may consent to be identified but wish to have other details suppressed, or may consent only to certain forms of identification (their name but not their image) and seek to have orders prohibiting other forms of identification.

The individual victim's wishes are the central basis for allowing identification. The issue that arises is whether there needs to be a process around this.

From the Court's perspective, there is value in having a process for the victim to provide consent and for the Court to be made aware of that consent, so that it can adjust its internal processes (designed around a default position of non-identification) to reflect the victim's position.

In theory, consent by one victim to identification should not impact on other victims. Identification would remain prohibited if to do so would identify those other victims, unless they too had consented. This relies on the publisher appreciating how this might occur in a particular circumstance.

It remains open for suppression orders to be sought at any time on appropriate grounds.

The prohibition on identification could be conveniently moved to the *Open Courts Act 2013*. Consideration may need to be given to appropriate transitional provisions and education to ensure awareness of the continuing prohibition. It should be noted that the provision is relevant in reporting on both criminal and civil proceedings. The Court currently has a large number of civil proceedings relating to historical child sexual abuse allegations.

ENFORCEMENT

Court processes regarding suppression orders

The traditional process when making suppression orders was, following the making of the order, to attach a copy to the door of the Court. This process is still followed, but for many years now the Court has had a further process whereby suppression orders are provided to the Public Affairs team and then

[2] Note the soon to be inserted s 4(1CB) specifically requires the Court not to grant permission under new subsection (1CA) where another victim would be identified and they do not give their permission.

distributed to a cross-jurisdictional email list of media outlets and media lawyers.

Practice Note SC GEN 9 describes how that email list was re-formed, following the *Open Courts Act 2013,* to provide for distribution of applications and orders once made. The process itself predates that Act, however, and was preceded by a process of faxing order prior to that.

The Court established a database of orders a number of years ago which is utilised across the jurisdictions. The Public Affairs team answers queries from the media and others regarding orders by reference to the database.

The Court has identified shortcomings in the current design and operation of the database. There is a need to upgrade and improve it and explore how it might be made a more useful tool.

A project has been established for the creation of a new database for use across the courts. Part of that project will look at the process of migrating orders from the current database. There is an opportunity in that process to look at orders and establish whether they have expired, been revoked or subsequently varied. This would enable a more accurate picture to be created of extant orders. It will, however, require appropriate resourcing.

A substantive review of legacy orders would require much more substantial resources. It is not clear how this process would be undertaken, in particular how those with an interest would be contacted and provided an opportunity to make submissions. Orders made prior to the *Opens Courts Act 2013* will not necessarily record the basis on which they were made. Some information may be available from retrieved files and transcript where available, but it would be a significant logistical exercise.

The Court's experience to date is that a significant number of orders remain in place and, upon review, remain justified.[3] A legislative approach deeming them to expire poses significant risks including to individual safety. This approach also raises questions of legislative usurpation of the judicial function which would need to be considered. The Court draws no conclusion on this point, as it may be called upon to determine such an issue.

[3] *Chairperson of the Royal Commission into the Management of Police Informants v Chief Commissioner of Victoria Police* [2019] VSCA 154.