



Submission to the Victorian Law Reform Commission's Consultation Paper on the Law of Contempt

Prepared by the International Commission of Jurists Victoria

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1. The International Commission of Jurists Victoria (“**ICJV**”) welcomes the opportunity to provide a submission responsive to the Victorian Law Reform Commission’s Consultation Paper on Contempt of Court (“**Consultation Paper**”).
2. The ICJV is a volunteer organisation supported by judges, lawyers and academics. It is committed to promoting judicial independence and the rule of law. It is also committed to the implementation of international legal principles that advance human rights through the rule of law.
3. The ICJV strives to:
 - a) promote adherence to, and observance of, the *Universal Declaration of Human Rights*¹ and other similar international instruments;
 - b) promote the conclusion, ratification and implementation of conventions, covenants and protocols protecting human rights, especially in Australia, Southeast Asia and the Pacific;
 - c) provide an organisation through which the legal profession and others interested in human rights can protect and sustain the rule of law and promote the observance of human rights and fundamental freedoms;
 - d) help, advise and encourage all who seek to achieve, by means of the rule of law, universal respect for the observance of human rights and fundamental freedoms;
 - e) co-operate with similar organisations in Australia and other countries through the channels provided by ICJ Geneva and other available means; and
 - f) examine new proposals that affect the administration of justice, both domestic and abroad.
4. This submission seeks to make three broad responses to the Consultation Paper on the basis that, if requested, the ICJV will participate in further consultation and provide a more detailed response.
5. *First*, it is necessary to recognise that common law contempt is not just another law. It is not like most laws that provide rights or entitlements or prohibit wrongs occasioned by one person on another. The law of contempt fulfils a distinct function. It is a law at the heart of the administration of justice designed to maintain the integrity and authority of the courts and thereby public confidence in both the judiciary and the system of justice which it administers. No process of law reform should fail to appreciate the fundamental significance of the law of contempt and the substantial risk to the proper administration of justice which may result from either unnecessary or unwise reform.
6. The contempt power is integral to the exercise of judicial power. It is an inherent power of a superior court. Although a power of last resort, it is an essential tool required by a court to control its own proceedings,

¹ *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, UN Doc A/810 (10 December 1938).

effectuate its own processes and enforce its own orders. Contempt powers are crucial for maintaining the integrity and authority of our courts. Without that, public confidence in the judiciary will be lost and the administration of justice will be irreparably damaged.

7. Australian courts have maintained public confidence in the judiciary's capacity to administer justice. Public confidence in the judiciary is founded in its independence including from both Parliament and the Executive. As the third arm of government, courts require a contempt power free from the control of any other arm of government.
8. Like the courts, Parliament has its own contempt power.² That power is exercised and controlled independently of any interference from the courts.³ Similarly, the courts should be unimpeded in their capacity to formulate for themselves the mechanism for controlling their own processes and guarding against their own authority being diminished. Considering the imposition of a prosecuting authority for prosecuting contempt, Hayne J in *Re Colina; Ex parte Torney* (1999) 200 CLR 386 observed (at [112]) that a "cardinal feature" of punishing for contempt is that it is an exercise of "judicial power *by the courts*...not one to be exercised or controlled by the executive".
9. The independence provided to our courts to both formulate and control the law of contempt has not been shown to be significantly problematic. If the law is less than perfect and requires some repair, the courts should be left to address the imperfections. Law reform bodies may provide appropriate guidance. There can be nothing wrong with that. But replacement is not repair and common law contempt is an ancient power that has stood the test of time. It ought not be replaced or reformed in the absence of some compelling case.
10. No compelling case for any significant change is made out by the case put in support of change in the Consultation Paper. None is apparent.
11. *Second*, the Consultation Paper fails to address whether the kind of change there contemplated as a possibility, is constitutionally valid. Reform ought not be considered which is potentially constitutionally invalid. Reform should only be proceeded with where its constitutional validity is clear and beyond question.
12. In that respect, any State legislation which purported to remove or impede the inherent contempt power of the Supreme Court of Victoria, is likely to be invalid under the *Commonwealth Constitution* because it would purport to remove a defining characteristic of the Supreme Court of a State ('the Kirk Principle')⁴. Further, it is also possible that the 'Kable Principle' may be engaged, that a State cannot substantially impair the institutional integrity of a court of a State, which is incompatible with the role of such a court under Chapter

² Section 19(1) *Constitution Act 1975* (Vic).

³ See *R v Richards; Ex parte Fitzpatrick and Browne* (1955) 92 CLR 157 at 162 and John Waugh, 'Contempt of Parliament in Victoria' (2005) 26 *Adelaide Law Review* 29.

⁴ *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531.

III of the *Constitution*⁵. It is important to note that the Kable Principle is founded upon maintaining public confidence in the judiciary.

13. The High Court has not directly considered whether the contempt power is a “defining characteristic” of a Supreme Court of a State. However, observations made by the High Court indicate by analogy that contempt is a “defining characteristic” of a Supreme Court of a State. In *DJL v The Central Authority* (2000) 201 CLR 226 at [27], Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ said that the exercise of the judicial power of the Commonwealth has, as an incident arising by necessary implication from Ch III of the *Constitution*, the power to punish for contempt. Further, in *Re Colina* at [16]-[17], speaking about the contempt power of the Family Court, Gleeson CJ and Gummow J⁶ characterised the power as “inherent” and as a self-protective power “incidental” to the Courts’ function of superintending the administration of justice. Their Honours then endorsed the following observation of Lord Steyn in *Ahnee v Director of Public Prosecutions* [1999] 2 AC 294 (at 303) made in the context of the *Constitution of Mauritius*:

[T]he Constitution gave to each arm of government such powers as were deemed to be necessary in order to discharge the functions of a legislature, an executive and a judiciary [and] in order to enable the judiciary to discharge its primary duty to maintain a fair and effective administration of justice, it follows that the judiciary must as an integral part of its constitutional function have the power and the duty to enforce its order and to protect the administration of justice against contempts which are calculated to undermine it.

14. Furthermore, that the power of contempt is likely to be regarded as a “defining characteristic” of a Supreme Court of a State is suggested from the nature of those characteristics determined to have that quality such as the reality and appearance of decisional independence and impartiality; the application of procedural fairness; adherence as a general rule to the open court principle; and the provision of reasons for the Court’s decisions: *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 252 CLR 38 at [67] (French CJ).
15. The following observation made by Deane J in *Hammond v Commonwealth* (1982) 152 CLR 188 at 206 expresses in broad terms the likely legal position:

It suffices, for present purposes to say that it is, in my view, clear that neither the Parliament nor the Executive Government of the Commonwealth or of a State is competent to prevent or prejudice the judicial exercise by a court of part of the judicial power of the Commonwealth by the type of interference with the due administration of justice in a particular case which would ordinarily constitute contempt of court.

16. *Third*, there appear to be two main factors put forward by the Consultation Report as potential justifications for change – that the law of contempt impedes freedom of expression and that the law is uncertain.
17. We turn first to consider freedom of expression.
18. The starting point in any consideration of freedom of expression is that it is recognised by law as both a fundamental right and a qualified right. As discussed in *Eatoock v Bolt* (2011) 197 FCR 261 at [227]-[239]

⁵ See *Kable v The Director of Public Prosecutions for the State of New South Wales* (1996) 189 CLR 51.

⁶ With whom Hayne J agreed at [109].

by reference to both international and Australian sources, freedom of expression is a central component of democracy in the modern era. It is justified by the three pillars of the pursuit and discovery of truth (also known as the ‘argument from truth’); the harvest of self-fulfilment (also known as the ‘argument from autonomy’); and thirdly, the enablement of democratic governance (also known as ‘the argument from democracy’). Freedom of expression is a positive rather than a residual right which at common law enjoys special recognition as a fundamental common law right. Additionally, its importance is recognised in the international sphere and, though not recognised as an individual right, freedom of communication on matters of government and politics is recognised as an indispensable incident of the representative government which the *Commonwealth Constitution* has created.

19. However, in all of those spheres – the constitutional, the international and at common law – it is unequivocally acknowledged that freedom of expression is a qualified right. In the constitutional sphere, laws which intrude upon free political discourse may nevertheless be constitutionally valid because those laws serve a countervailing public purpose.⁷ At the international level, freedom of expression is subject to restrictions which serve to protect greater public purposes including public order. In the case of the European Convention on Human Rights, an explicit qualification on freedom of expression is made in Art 10 “for maintaining the authority and impartiality of the judiciary”: for relevant case law see *Sunday Times v. United Kingdom* (1979) 2 EHRR 245, *De Haes v Belgium* (1998) 25 EHRR 1, *Worm v Austria* (1997) 25 EHRR 454 and *Prager v Austria* (1996) 21 EHRR 1.
20. The right of freedom of expression at common law is by definition qualified by exceptions otherwise provided by law. The right to freedom of expression gives way to a host of laws which either the legislature or the courts have accorded primacy to as serving a countervailing public or private purpose. These laws include laws dealing with blasphemy, confidential information, the torts of negligent misstatement, deceit and injurious falsehood. Further, a wide range of legislative provisions dealing with defamation, obscenity, public order, copyright, censorship and consumer protection place restrictions on the exercise of the right of freedom of expression.
21. The law of contempt is also a law serving a countervailing public purpose to which the right to freedom of expression must give way. When that occurs, it occurs in a considered and balanced way. The judiciary in Australia has shown itself well capable of appreciating that scrutiny of the courts and of their decisions is a perfectly legitimate exercise of the right to freedom of expression. Courts will recognise that a robust approach to criticism is both necessary and appropriate. Fair and objective criticism – even exceptionally harsh criticism – of court decisions on the ground of error of reasoning, facts, or exercise of judicial discretion is, a perfectly valid and beneficial exercise of the right to freedom of expression. There is no case, let alone

⁷ See the cases cited in *Eatock v Bolt* at [236].

a compelling case, for thinking that the contempt power has been inappropriately used to restrict expression of that kind. However, the denigration of courts through unbalanced, ill-informed, inaccurate, biased, superficial or sensational criticism is apt to undermine public confidence in the judiciary and, as a last resort and sparingly utilised, the law of contempt can provide an appropriate response to the public harm in question.

22. What is it that those who contend that the law of contempt infringes upon their freedom of expression want the capacity to say? As it appears that *Director of Public Prosecutions (DPP) (Cth) v Besim; Same v MHK (No 2)* (2017) 52 VR 296 has reignited the conversation around contempt laws in Australia, the comments made by three federal politicians the subject of threatened contempt proceedings in that case, are a useful example.
23. The Ministers concerned attacked the Victorian judiciary, variously claiming that in the course of sentencing criminal offenders, Victorian judges were engaging in “ideological experiments” and as a consequence, criminal offenders – specifically convicted terrorists – were receiving softer sentences; that the soft attitude of judges has eroded any trust that remained in the legal system; and that the continued appointment of hard-left activist judges had come back to bite Victorians.
24. If those comments are to be regarded as exercises of freedom of expression warranting protection, it might be asked which of the pillars underlying the principle of freedom of expression justifies them? Were these comments made in furtherance of the pursuit and discovery of truth? Did they involve the harvest of self-fulfilment? Did the comments facilitate the enablement of democratic governance? The comments made are not justified by the principle of freedom of expression and, in those circumstances, it would be wrong to regard the action taken by the Supreme Court of Victoria in *Besim* as infringing or impairing freedom of expression. To the contrary, the Court’s conduct in that case demonstrates how important it is for courts to have the flexibility of tailoring the use of their contempt power to the particular threat to the administration of justice in question.
25. In May 2015, ICJV convened a roundtable discussion focusing on unwarranted criticism of the courts. The roundtable was attended by senior members of the judiciary and other senior members of the legal profession.
26. The roundtable discussion accepted that scrutiny of courts and their judgments is legitimate and ought not be discouraged. Judicial officers cannot be overly sensitive to criticism and some unfair criticism must be borne, but concern was expressed that examples multiply of criticisms that ought not stand unanswered. It was remarked that the tone of media coverage of the courts has taken a negative turn and that parts of the internet-based commentariat are unrestrained and vitriolic. It was recognised that intemperate, and unwarranted attacks on courts are deleterious to public confidence in the judiciary and therefore to judicial independence and the rule of law. The morale of the courts and their judges is also detrimentally affected.

27. No suggestions were made to reform the law of contempt and in particular scandalising contempt. However, there was broad recognition that the law of contempt needed to be supplemented with a range of strategies designed to assist courts in maintaining public confidence in the judiciary. It was recognised that a greater direct interaction by courts with the public is appropriate and that maintaining public confidence requires a long term strategy for courts to effectively communicate with the public. It is necessary for the public to have a better understanding of what courts do so that they are able to recognise and dismiss illegitimate criticism. Education must be of the right kind – it need not be deep, but it must be ongoing. Members of the public who have close associations with the courts (for example jurors) are its best ambassadors. The more the public know about the courts and the work of their judges, the more respect they are likely to have. Furthermore, engagement with the media was seen as fundamentally important. In that respect it was recognised that the media has its own agenda and that courts must therefore become their own explainers. The days of highly-trained, specialist court reporters are gone. Generally, there is a constant churn of journalists and a proliferation of opinion pieces with their own agendas. The audience of old media is declining at a time when the reach of social media is increasing. Social media engagement by courts has been successful, but many approaches are required to take advantage of the new media.
28. Undesirable as it may be, the meeting recognised that it is no longer prudent for courts to rely on a response to unwarranted criticism of the courts from the relevant Attorney-General. It is necessary that other potential responders be identified given the difficulty that courts have in responding themselves. There is a need for organisations within and outside of the law to promote the rule of law and respond to unwarranted criticism of the judiciary. A need for more professional advice and academic research was identified.
29. Many useful insights were provided by the roundtable discussion, the detail of which cannot be given here. However, in the view of the ICJV, the exercise demonstrated two matters of relevance to issues raised by the Consultation Paper. *First*, the value of broad consultation with the legal profession and others. *Second*, that this is not the time to diminish the capacity of the contempt power to protect the administration of justice. It is, however, the time for mechanisms to be developed which can usefully supplement that power. A Discussion Paper prepared for the ICJV Roundtable is attached to this submission (at Appendix A) and may be of some assistance to the Commission.
30. We then turn to address the call for more certainty in the law of contempt. Certainty is a desirable objective. But certainty often comes at the cost of inflexibility, and one of the defining characteristics of the exercise of the contempt power is the need to flexibly balance competing considerations.
31. As the European Court of Human Rights (“**ECtHR**”) has held, legal certainty can be assessed by reference to the principles of accessibility and foreseeability. Simply because an area of law is not entrenched in statute

does not render it uncertain and certainty does not require absolute clarity and specificity. The ECtHR has written:

Firstly, the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a “law” unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able - if need be with appropriate advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice.⁸

32. Whilst statute can assist in defining the scope and parameters of the law, the law of contempt is subject to unique considerations regarding what is necessary to uphold the proper administration of the law. This is difficult to define with precision and any attempt to do so risks introducing rigidity and thereby restricting the protective jurisdiction of the courts.
33. Determining what poses a risk to the proper administration of justice is contingent upon an understanding of what is necessary to uphold the proper administration of justice. As the proper administration of justice is complex, nuanced and maintained through a delicate balancing of a myriad of variables, the measures necessary to protect the administration of justice are not amenable to precise definition. It is not at all clear that through statute, rather than the common law, better definition can be provided. The risks of attempting to do so includes the risk that the flexibility essential to the proper exercise of the contempt power will be compromised.
34. To conclude, whilst the ICJV welcomes the scrutiny of law reform of the law of contempt and recognises that through such scrutiny the law may be improved, the ICJV cautions against attempts to reform that which is not broken. The importance to the administration of justice of courts not being impeded in their capacity to flexibly formulate for themselves the means by which their own processes are to be controlled and their own authority is maintained, should not be underestimated. Australian courts have maintained public confidence in the judiciary and its capacity to administer justice. Courts have shown themselves to be adept at negotiating the boundaries between fair criticism and communications which undermine the due administration of justice. Whilst more certainty in the law is desirable, the cost of greater precision will likely be a loss of essential flexibility. No significant change to the law of contempt is warranted in the absence of constitutional certainty and a compelling case for change.

⁸ *Sunday Times* at [49].