Submission to the Victorian Law Reform Commission

Contempt of Court Consultation Paper, June 2019

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Focus on contempt in the face of the court This submission focuses on the topic of Contempt in the Face of the Court, covered in paragraphs 2.46 - 2.51 and Chapter Four of the Consultation Paper. Specifically, it focuses on Question 19 posed at page 57 of the Consultation Paper: "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?"

Reforms should aim to advance good mental health of all participants In this Submission it is agreed that the law governing contempt in the face of the court in Victoria should be reformed, to ensure that judges retain the power to control order in the court and its vicinity, and that people alleged to have engaged in contemptuous behaviour are dealt with fairly (para 4.5). However the advancement of good mental health is a vital normative goal in any reform of the law in this area (or in any other) and, given the significant amount of time that can elapse between attempts to reform the law, and the relatively unreformed quality of law and practice in this area, it is respectfully submitted that the advancement of the good mental health of participants in the courts should be given more weight by the Commission in its theorising about reforms: not only for people who are being dealt with for contempt (para 4.5, bullet point 3, and para 4.82), but also for judges who experience contemptuous behaviour.

Reforms to the law of contempt in the face of the court should address the stressful nature of court proceedings Litigation can be very stressful. Liberty, livelihoods and reputations can be at stake. The cost of litigation can be high, and that, in and of itself, can create stress for participants. Lawyers use tactics to maximise stress, and deliberately aim to place litigants off-balance in order to improve their negotiating position. People who are experiencing mental health challenges, let alone significant mental health challenges, may be more prone to the stress of litigation, or can be triggered by their experiences in court. For some people in some circumstances, their mental health challenges may be so significant that they are unaware of their behaviour or oblivious to the effect of their behaviour on others. Others may be aware of their behaviour but find it difficult to control, which has a bearing on culpability and questions relating to appropriate penalties. In addition, there are some litigants whose mental ill-health draws them to querulous behaviour. The law of contempt in the face of the court requires contemnors to apologise and purge their contempt to avoid punishment. But this may not always be possible. Legal reforms to the principles and practice of contempt in the face of the court should recognise these challenges and address them.

Reforms should include mechanisms for diversion to treatment While punishment by way of removal from the courtroom or court precinct may serve the immediate aim of preserving the due administration of justice and removing a cause of stress to other litigants, court workers and judges, punishment may do little or nothing to address the causes of the contemptuous behaviour in question. Contemnors may and perhaps often will need treatment for mental health challenges. Reforms to the law governing contempt in the face of the court should at least in part focus on ways that courts can divert people to mental health services to address that need. Treatment can not only advance recovery, it can produce better outcomes for the courts, by helping to minimise further problematic behaviour.

Judges and court workers may also need mental health first aid People who are assaulted or have been sworn at – judges and other people who work in courts – should also be supported. Such conduct would be characterised as misconduct or even serious misconduct in any workplace, and should not be tolerated in the courts, which, while a unique workplace in constitutional terms, are nevertheless workplaces in every other sense. In reforming the law of contempt in the face of the court in Victoria, we need to be mindful of the fact that judges experience mental health challenges, and these challenges can sometimes lead to catastrophic outcomes. Reform of the law governing contempt in the face of the court in Victoria should recognise the impact of contemptuous behaviour on judges and co-workers, to help make courts safe places to work.

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? As the Commission has observed (at paragraphs 4.78 and 4.79), there is an absence of empirical evidence available directed toward answering these questions. As the Commission also acknowledges (at paragraph 4.80), the case law suggests there may be some people with mental health issues who may be disproportionately more likely to be warned about or punished for contempt (paragraph 4.81). The case studies reviewed in *I Find You in Contempt: Contempt in the Face of Court in Australia* do not provide evidence of the volume of cases where contemnors have mental health issues. But that work does indicate that even a single contemnor can return to the courts again and again, giving rise to the spectre of further contemptuous conduct, with its attendant impacts on the courts and court workers. This is certainly a problem that should be addressed, for the benefit of all concerned.

If so, how should this be addressed?

The Rules Committees of Victorian Courts might consider the development of a formal procedure to manage alleged contemnors, along the following lines. Depending on the circumstances, when a judge charges a person with contempt, or adjourns the court to do so, the judge could direct the Registrar or a delegate to provide the relevant person with either of two instruments: one, a Notice of Intention to Charge a Person with Contempt, or two, a Notice of Charge of Contempt. These instruments would include at least the following information: the statutory underpinning of the charge or proposed charge, advice that contempt is a serious criminal offence, the range of possible punishments, advice regarding the desirability of legal representation (including, preferably, advice regarding sources of legal advice, such as Legal Aid), and an observation that litigation causes stress and that mental health and wellbeing is important, in conjunction with a recommendation that the person to whom the Notice is directed should secure the services of a psychologist or psychiatrist to discuss the events in court and, if mutually agreed, prepare a report for consideration by the judge.

The courts, perhaps via the Australian Judicial Conference or the Australian Institute of Judicial Administration, could support efforts by researchers to access judges, court workers and litigants in order to establish an empirical evidence-base to inform any future reforms.

In *I Find You in Contempt: Contempt in the Face of Court in Australia* I undertake an analysis of the law of contempt across four Commonwealth jurisdictions (the High Court, Federal Court, Family Court and Federal Circuit Court) as well as each of the eight states and territories. I conclude that the Family Court's approach to contempt in the face of the court, under the *Family Law Rules*, offers the most comprehensive set of procedural safeguards for people charged with contempt. I also consider reforms to the law of contempt by reference to human rights principles. I conclude that the summary procedure for contempt in the face of the court adopted in many jurisdictions – including Victoria – falls foul of article 14 of the ICCPR. This is because summary procedure can truncate fairness to the accused and worse, can be used as an instrument of oppression. It is uncertain to what extent a

Victorian court's power to punish for contempt in the face of the court is affected by the *Charter of Human Rights and Responsibilities* but I submit that any recommendations should ensure compliance with the ICCPR, and also be mindful of Australia's international obligations to advance the right to health, including mental health.