County Court Submission: Contempt Reform

The following submission is provided to the Victorian Law Reform Commission ('*the Commission'*) in response to the review of contempt of court.

The Court provides this submission based on its experience and practice in applying the law of contempt as it currently exists. The Court considers that a number of issues raised in the review are matters of policy for Government. As such, the Court will not address all questions raised in the review.

The Court considers that contempt of court is central to the effective and efficient administration of justice. As the major trial court in Victoria, the Court considers that contempt law plays a critical role in its ability to manage its proceedings and enforce its orders.

At the outset, the Court wishes to stress the importance of contempt laws retaining their robust and flexible application. The Court considers that accessible and strong contempt laws are essential. Their rare application is not indicative of their utility. Indeed, the simple availability of sanctions is a potent deterrent. Its existence serves to reinforce the courts' authority. This authority is an essential element of ensuring the courts are able to maintain the rule of law, and adjudicate impartially and fairly.

The Court considers that the role of the media cannot justify restricting the scope or reducing the efficacy of contempt laws. The media do not have the skill or expertise to consider what is just and appropriate for publication. Indeed, the media are fundamentally conflicted. Their conflict of interest arises from their pecuniary interest in support of publication or by a motivation to find controversy or a newsworthy narrative. They are not solely concerned, as Courts are with a fair and impartial administration of justice. These financial and other motivations may often conflict with the rule of law, and the right to a fair trial. As such, the Court rejects any conclusion that the media can replace the role of the court in assessing what is fair, accurate and impartial reporting that would not negatively impact on the administration of justice. It is the duty of the court to ensure a fair trial and protect the interests of justice. As such, the courts must retain the discretion to determine, and enforce its determination of, what is just and fair through robust and reliable contempt laws.

The Court considers that it is incumbent on those seeking to argue that suppression orders have no utility in the age of modern, global media to demonstrate that with compelling data.

The Court considers that the law already provides sufficient flexibility in managing the appropriate balance between open justice and the preservation of the right to a fair trial. The solution lies in the media availing themselves of legal remedies in accordance with the rule of law, not by weakening the law itself.

Robust mechanisms currently exist that allow for suppression orders to be reviewed and appealed where they are speculative, or not soundly based upon evidence or reasonable information. Moreover media currently has the opportunity to place before the courts evidence and data that a suppression order is inutile.

General principles

Codification and consolidation

The Court is supportive of improving the certainty and clarity of contempt law across all its various manifestations. The law of contempt is fragmented and opaque, and the applicable procedure is often unclear. The Court considers that this can be most effectively achieved through the codification of the various common law manifestations of contempt. Further, these manifestations of contempt would be more accessible if they were consolidated in to a single instrument.

The Court wishes to stress the importance of retaining the flexibility of contempt law. In order to achieve this, any codification should be explanatory and not exhaustive. This provides the court with the ability to deal with the wide and varying range of conduct that can amount to contempt. The Court considers that broad and flexible powers to address contempt is crucial to ensuring the court has immediate control over its proceedings.

The Court would support the adoption of the current common law principles in a legislative format, with the inclusion of examples that provide a non-exhaustive list of conduct that could amount to contempt. This approach would acknowledge the importance of the court's ability to control its own proceedings and provide flexibility in the face of rapid cultural and technological change.

In relation to a potential source, the Court supports the creation of new instrument that would accommodate the substantive and voluminous nature of contempt law. This would bring the various forms to one central location, improving visibility and clarity. A provision in the Act could make it clear that contempt is criminal in nature, and indicate the ways in which contempt proceedings engage with the *Evidence Act 2008*, *Criminal Procedure Act 2009* and *Sentencing Act 1991*.

Summary contempt procedure

Summary procedures are utilised rarely. They are regulated by Order 75 of the *County Court Civil Procedure Rules 2018*. The Court considers that retaining summary contempt proceedings, without need for a jury trial, should continue to exist to ensure efficiency and flexibility.

In some cases, the Court must identify quickly, and respond immediately to conduct that represents a direct threat to the proper administration of justice. This would ensure that the Court is not solely reliant on external agencies to bring proceedings. This is critical, as it may be that the external agency is also the contemnor. Further, it ensures that all parties have equal standing before the court in relation to the question of contempt.

The Court notes that summary contempt has been considered by the High Court as only occurring in exceptional cases.[1] The Court does not consider that summary contempt proceedings should be restricted to exceptional circumstances.[2] Such a restriction would

[1] Keeley v Brooking (1979) 143 CLR 162, 174
[2] As defined in R v Ioannou (2007) 17 VR 563, 568

place too great a limit on its use, and adversely affect the utility and efficiency of summary contempt.

General procedure

The Court supports the codification of all manifestations of contempt (including summary contempt). This would include references to fair trial rights, rules of evidence, and standards of proof. This would improve transparency, certainty and fairness for an accused contemnor. Further, it would ensure consistency in the way contempt is applied.

Penalty

The Court recognises that the imposition of a maximum penalty could provide guidance when sentencing for contempt offences. However, it should be noted that contempt can cover a broad range of seriousness, and the maximum penalty should be capable of reflecting this.

The application of the *Sentencing Act 1991* is already capable of being used as a guide in sentencing for contempt. However, the Court supports the formalisation of this process to provide certainty of practice, and enhancing the number of sentencing options available.

Further, the Court considers that apologies play a critical role in the effective and efficient functioning of contempt. Allowing a contemnors to purge their contempt can obviate the need for lengthy proceedings and punishment.

Warnings

Despite the fact that contempt proceedings are rare, and summary procedures rarer still, the Court considers that this is partially a result of effective contempt warnings. The Court does not consider that warnings should be subject to restriction. While warnings may be capable of misuse, past appellate decisions, such as *Magistrates Court of Victoria (Heidelberg) v Robinson* demonstrate that they are in fact subject to scrutiny.

Warnings can and must occur under the court's broad discretion in order to take in to account the unique circumstances that may prevail. The Court considers that a pre-emptive warning does not amount to a finding, and is not a formal procedural step. Further, a show cause warning provides transparency in allowing the party to respond. This provides an opportunity to either outline a defence, make admissions or provide and apology, or to remain silent.

If a judge considers that conduct may constitute contempt, procedural fairness would dictate that a judge provide a warning. To restrict warnings would result in a reduction in their usage, and subsequently a loss of efficacy. However, the Court acknowledges that warnings should be adopted only when no other means of regaining authority and control are appropriate.

Contempt in the face of the court

Maintaining order and authority in response to actions that seek to undermine the court is vital to protecting the integrity of the court's process. Circumstances can arise where '*it is urgent or imperative to act immediately to maintain the authority of the court, prevent disorder and to enable those with duties to the court to perform them free of fear*.'[3]

The Court would support the creation of two procedures for contempt in the face of the court:

a. Special summary procedure;

b. A referral to the Director by the judge, where an alternative procedure is adopted.

Retaining the court's discretion in identifying what amounts to contempt in the face of the court is critical to recognise that some behaviour will vary in seriousness depending on the context in which it is exhibited. Flexibility is preferred over consistency to ensure that the process fairly takes in to account the unique features of each case.

As outlined above, any codification should include a non-exhaustive list of conduct that may give rise to such contempt. Any legislation should not be restrictive so as to avoid inadvertently excluding conduct that is uncommon.

Defining "in the face of the court" to include only matters directly seen or heard by the judge is too narrow. The Court supports a broader view of the meaning, which covers inside a court room, within the court building, or other areas that are physically proximate to the County Court, provided they are connected with the administration of justice.

The Court considers that conduct covered by other criminal offences should not be excluded from the application of a statutory offence of contempt in the face of the court. This ensures that the court can deal immediately with issues that arise.

Juror contempt

The provisions of the *Juries Act 2000* refer to limited examples of conduct which may amount to contempt. The common law of juror contempt is capable of acting as a catch all, particularly given the potential for juror misconduct to cover a broad array of potential actions. The Court is supportive of codification in this area, provided that the provisions are not restrictive to certain types of conduct.

The Court is supportive of recommendations to improve jury education and engagement. Currently, some judges in the County Court will provide additional explanations to jurors regarding their ability to ask questions if they do not understand certain issues. Improved education of jurors and judicial officers regarding both the impact of prejudicial material on the administration of justice, and the importance of allowing juries to ask questions, may be an effective way to reduce contamination.

[3] *Balogh v St Albans Crown Court* [1975] QB 73, 85 (Lord Denning MR).

Disobedience contempt

The retention of disobedience contempt is critical to the court's ability to ensure that orders are complied with and to give parties confidence in the legal system.

The Court acknowledges the nature of disobedience contempt as falling within two categories, civil and criminal, and the judicial commentary regarding its opaque nature. The Court is supportive of reform and codification, which could effectively remove the distinction between civil and criminal contempt. However, the Court considers that any reform should retain contempt on the court's own motion, as well as the power for parties to seek relief.

Ensuring that parties need not engage with an independent prosecutorial body in order to seek relief is important. Parties are in the best position to assess whether or not it is necessary to seek injunctive relief through contempt proceedings. However, the court must also be empowered to bring proceedings in circumstances where the administration of justice is threatened more broadly.

The Court also notes that in abolishing civil contempt, it is necessary to ensure that a process is still available to the parties that can avoid the imposition of a criminal finding of contempt, and the consequences that a conviction can carry. As outlined above, this could be properly moderated by the application of *Sentencing Act 1991* to contempt proceedings. The availability of diversion or findings that charges are proven and dismissed are available to summary offences, and may be appropriate outcomes for matters that are low level in seriousness.

Sub judice contempt

Retaining sub judice contempt is vital to ensuring that the Court has access to an efficient and effective mechanism to deal with contempt that may pose an immediate threat against ongoing proceedings.

The Commission refers to a number of studies and judicial comments that suggest jurors are in some way distrusted, or that it is a starting point that jurors are vulnerable to interference. The Court wishes to correct this misconception and stress the fact that, in reality, jurors are considered to be true to their oath, and to follow the directions of law they are given. However, the law recognises that some information has a tendency to create a cognitive bias that is difficult to overcome on a subconscious level. As such, the need for robust powers to prevent contamination continue to be necessary.

The Court supports codification of sub judice contempt, which would bring a greater degree of clarity and consistency. Any legislative regime should retain the flexibility with which sub judice contempt operates at common law. The Court would support the clarification of the tendency test in any legislative regime. However, this test should remain sufficiently broad in order to retain the elasticity that is needed to attach to the many different forms contempt can take.

The Court supports clarification of the when a matter is considered pending. The approach adopted by Western Australia and New South Wales is that it ceases upon conviction or acquittal at first instance, arising again if a trial is re-ordered. This recognises

that appellate time frames are uncertain, and subject to change, and to apply to principles beyond conviction or acquittal would be too onerous. The Court also supports a non-exhaustive list of examples of when a matter is considered pending for the purposes of clarity.

The Court does not support a voir dire process in the empanelment of juries. This approach is unnecessary, time consuming, and intrusive.

Scandalising the court

The Court considers that this particular manifestation of contempt is of particular significance. In recent years the Court has come under greater media scrutiny than ever before. With a greater degree of scrutiny on judges and the decisions they make, there is a greater need to ensure that unfounded or malicious criticism is guarded against. Further, attempts to put pressure on the decision making process of judicial officers[4] enhances the need to ensure that justice is seen to be done. Protecting the reputation of the courts, and the impartiality of their decisions, is vital to their capacity to retain authority and legitimacy.

The Court does not consider that defamation proceedings, or other remedies, are sufficient to replace this form of contempt.

The retention of scandalising the court is necessary due to its important role in protecting the administration of justice, and the community's perception of it. Certain actions can cause significant damage to the court, including attempts to incite others to defy lawful authority, or contempt aimed at influencing judicial decision making.

However, the Court supports the codification of scandalising contempt, and recommends a change in nomenclature to use more modern terminology. The Court also recommends that the procedure be capable of being dealt with expeditiously. It is possible that scandalising contempt can occur while proceedings are ongoing, and as such a remedy must be readily available to the court.

Publications under the Judicial Proceedings Reports Act ('*JPRA*')

Indecent material

The Court acknowledges the rare application and limited utility of section 3(1)(a) of the JPRA.

The Court has inherent jurisdiction over what material is released to the media upon application. The Court's practice is that indecent material or surgical evidence is not released. As such, this provision is given effect by convention.

The Court supports the consolidation of this provision, however considers that retention is necessary. This need arises to protect against material that is inadvertently released, to ensure that a prohibition still exists on its publication. The Court would also support a

[4] Director of Public Prosecution (Cth) v Besim (No 2); Director of Public Prosecutions (Cth) v M H K (a Pseudonym (No 2) [2017] VSCA 165

modernisation of the current terminology of 'indecent matters which might injure public morals'.

Directions Hearings and Sentence Indications

The Court acknowledges the purpose of section 3(1)(c) of the JPRA and supports its retention. This provision is designed to ensure that directions hearings and sentence indications can be conducted candidly, without the risk of prejudicing a future trial. The effectiveness of this provision is difficult to gauge, and should not be measured by how often it is referred to.

As the major trial court in Victoria, the Court considers that this provision plays a central role in supporting its case management functions. Rather than asking practitioners to put reliance on the media's understanding of sub judice contempt principles, this provision provides clear and unambiguous guidance on the restriction against publication. As such, it assists the court in conducting effective and efficient case management.

However, the Court would support the consolidation of this provision to join other contempt laws that may be codified. This would improve visibility and potentially increase compliance.

Sexual offence cases

The prohibitions in relation to reporting on sexual offence cases in the JPRA ensure that fair trial rights are protected, but also serve to encourage reporting and prosecution of sexual offence cases.

However, the Court supports the consolidation of these provisions to join the other contempt laws that may be codified. Further, non-exhaustive legislative guidance on the scope of the prohibition would provide clarity to the media and complainants.

In relation to the need to accommodate a victim's ability to speak, the Court considers that the incoming reforms to the Open Courts Act may partially address this concern. The new section 4(1CA) of the *JPRA* will provide a defence to the prohibition in circumstances where:

a. The accused has been convicted of the offence;

b. The MCV, CCV or SCV has given permission for publication;

c. The complainant was 18 years of age or over when permission was given.

New section 4(1CB) provides protection against disclosure in cases with multiple victims who do not consent.

Further, the Court also notes Supreme Court decisions that held that a child can give permission to be identified if they have capacity to comprehend what it means to identify

themselves as a victim of a sexual offence, and understand the consequences of losing their anonymity.[5]

Enforcement

Fault elements and defences

The Court considers that codification of the various manifestations of contempt should closely mirror the principles that currently exist at common law. Any attempt to restrict these provisions, or to include additional elements, would stand as an obstacle to the courts utilising contempt as a tool to maintain the effective administration of justice.

In more clearly delineating the application of contempt laws, the Court also supports the inclusion of non-exhaustive examples in support of these provisions.

Publish and publication

The Court acknowledges the varying definitions that apply to publish and publication across various Acts and the common law. The Court would support the creation of a more consistent definition. Further, the definition could be supported by a non-exhaustive list of examples that would provide clarity and certainty.

Public awareness of restrictions

Suppression orders are currently disseminated by the Court's Communications Team. The Court supports the creation of a centralised process of distribution for suppression orders. The Court is currently engaging with other Victorian jurisdictions to establish a new database, and to develop new procedures in relation to the distribution of orders.

However, caution regarding how publically accessible such a database should be is essential. The Court also recognises that it must retain control over how suppression orders are disseminated, and the information that is redacted or de-identified.

Instituting and monitoring proceedings

Monitoring and enforcing compliance with orders occurs in a number of different ways.

In civil proceedings, the Court considers that the parties are sufficiently capable of alerting the courts to circumstances that may amount to a breach. In these cases it is also prudent that the aggrieved party bring any contempt proceedings, given they are the party directly affected.

However, as outlined above, the Court considers it necessary to retain a power to bring contempt proceedings on its own motion. The Court considers that retaining a robust and efficient summary contempt process is necessary to the Court's ability to protect its proceedings and enforce its orders.

[5] Hinch v DPP (Vic); Television and Telecasters (Melbourne) Pty Ltd v DPP [1996] 1 VR 683, 695.

Take down orders

The Court actively uses take down orders as a means to protect its proceedings. The Court considers that take down orders provide a speedy resolution to issues as they arise, and ultimately avoids complex and costly contempt proceedings.

Legacy suppression orders

The auditing of current orders would be a significant undertaking and require substantial resources. Further, the creation of a statutory deeming provision that would expire past orders raises a constitutional issue. The Court considers that it may not be appropriate for a legislative provision to revoke a court order. Further, should this reform be pursued, any review should be conducted by an external body, to avoid the court reviewing the otherwise valid orders of its own judges.

Finally, the broad imposition of a deeming provision could result in persons being identified that are put at considerable risk, such as the identification of informers, persons in protection, or persons subject to supervision orders. This is also complicated by the fact the Court may not have access to the material needed to allow a review of the merits of an order.