Submission to the Legal and Constitutional Affairs References Committee on the Law of Contempt

Prepared by the International Commission of Jurists (Victoria)

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1. Organisational Context:

1.1. The International Commission of Jurists Victoria (ICJV) is a volunteer organisation comprised of lawyers, judges and legal academics. It is committed to the primacy, coherence and implementation of international legal principles that advance human rights. The ICJV promotes an impartial, objective and authoritative legal approach to the protection and promotion of human rights through the rule of law.

1.2. The ICJV strives to:

a) Promote adherence to and observance of the *Universal Declaration of Human Rights* and other similar international instruments;

b) Promote the conclusion, ratification and implementation of conventions, covenants and protocols protecting human rights, especially in Australia and the nations of 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) Advise, help 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 organisation 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.

2. Focus of Submission:

2.1. **Scope:**

2.1.1. The ICJV welcomes this inquiry and report into Australian contempt laws. The ICJV considers that these laws are fundamental to the protection of the independence of the judiciary and that robust laws in this regard instil the public with confidence in the judicial process and in the court system. The ICJV considers that such an inquiry and report is an opportunity for all stakeholders to identify common issues in the law as it currently stands; to provide a platform for discussion around competing interests – such as freedom of the media and the righto a fair trial; and to develop creative solutions to those issues.

2.1.2. This submission will focus on the following areas as prompted by the Terms of Reference:

a) The recommendations of the 1987 Australian Law Reform Commission report on contempt, and in particular, the recommendation that the common law principles of contempt be abolished and replaced by statutory provisions;

And,

b) The recommendations of the 2003 New South Wales Law Reform Commission on contempt by publication and the need to achieve clarity and precision in the operation of the law on sub-judice contempt.

3. Background:

3.1.1. On 13 June 2017, an article was published in The Australian newspaper, where the Minister for Health, the Assistant Treasurer and the Minister for Human Services, respectively, the Honourable Greg Hunt MP, the Honourable Michael Sukkar MP and the Honourable Alan Tudge MP ('Ministers'), effectively attacked the Victorian judiciary, claiming that in the course of sentencing criminal offenders, Victorian judges were engaging in "ideology experiments" and as a consequence, criminal offenders – specifically, in this scenario, convicted terrorists – were receiving softer sentences.

3.1.2. The comments were made whilst two appeals before the Court of Appeal were on foot, namely the *Commonwealth Director v MHK* and the *Commonwealth Director v Besim* (the 'matters'). The Court of Appeal had reserved its decision after the hearing of the appeals on 9 June 2017. Fundamentally, the question before the court was whether the sentences imposed by the primary judge were manifestly inadequate in view of the relevant sentencing considerations in the *Sentencing Act 1991* (Vic).

3.1.3. On 16 June 2016, the Court convened a mention in both matters. The legal representatives for the Ministers attended to respond to the Court in relation to the content of the article.[1] Also in attendance at the mention were the publisher, the editor and the journalist responsible for the article.[2] Submissions were made by the Solicitor-General for the Commonwealth of Australia on behalf of the Ministers, whilst Counsel for the Australian parties – that is, the publisher, editor and journalist responsible – also made submissions.[3]

3.1.4. At the start of the mention, the Court expressed its concern with respect to the article and comments of the Ministers. The Court opined that the comments "…failed to respect the doctrine of separation of powers; breached the principle of *sub judice*; and reflected a lack of proper understanding of the importance to our democracy of the independence of the judiciary from the political arms of government".[4]

3.1.5. Consequently, the Court stated that it was concerned that the Ministers and the Australian parties had committed a contempt of court.[5]

3.1.6. The Ministers and the Australian parties apologised for the comments made and ultimately neither the Minsters nor the Australian parties were held in contempt.

3.1.7. However, the Court stated that it had "…formed the view that there is a strong prima facie case with respect to the Ministers. We have formed the view that the publication and the

[1] *Statement of the Court of Appeal in DPP v MHK and DPP v Besim*, dated 23 June 2017 <http://www.supremecourt.vic.gov.au/home/law+and+practice/judgments+and+sentences/judgment+summaries/statement+of+the+court+of+appeal+in+dpp+v+mhk+and+dpp+v+besim+23+june+2017>..
[2] Ibid.
[3] Ibid.
[4] Ibid.
[5] Ibid.

statements involved a serious breach of the *sub judice* rule. It must be understood that *sub judice* is designed to protect litigants' right to have their cases decided on their merits without external intervention, influence and commentary. Furthermore, it was of significant concern to the Court that three Ministers of the Crown would make the statements they did. The Court further notes that at some point, possibly within 48 hours before the Court hearing on 16 June and thus shortly before the announcement of the partial retraction already described, the Ministers publicly stated that they stood by their statements in the article".[6]

3.1.8. This saga has reignited the conversation around contempt laws in Australia. The Committee's inquiry and report provide an opportune occasion to consider the current regime.

4. Australian Law Reform Commission Report

4.1. In 1987, the Australian Law Reform Commission published a report on contempt ('ALRC 35').[7] It recommended that common law contempt be abolished and replaced with a series of statutory criminal offences with set maximum penalties. It further recommended that ordinary criminal procedures, rather than summary common-law procedures, should be used to deal with alleged contempt. Having considered the recommendations of ALRC 35, ICJV considers that any move to abolish or diminish common-law contempt should done with great care. Further, it does not believe there is a need to make broad brush changes to the law of contempt. It is imperative that courts retain flexible and broad powers to assert their independence, effectively administer justice and maintain public confidence. This can be, and is, effectively done through the current common law. Accordingly, any codification should complement rather than replace the status quo.

4.2. **Common-law contempt:**

[6] Ibid.

[7] Australian Law Reform Commission, Contempt (ALRC Report 35), published 3 June 1987. ("ALRC 35")

4.2.1. Principles of contempt have been developed by the courts as a means of exercising independence and maintaining public confidence in the judiciary. Contempt can be committed in a number of forms, including contempt in the face of the court (misbehaviour at hearings), contempt by publication, scandalising the court and failing to comply with court orders. There are also contempt procedures for dealing with those who interfere with jurors, and for jurors who misbehave, by, for example, conducting their own research or disclosing the nature of deliberations.[8] Contempt law has been formulated by judges to deter criticisms and interferences which would hamper public confidence in the administration of justice.

4.2.2. As Sir Anthony Mason states, public confidence in the administration of justice is imperative to upholding rule of law:

> Absence of public confidence in the administration of justice would bring unwanted and untold consequences in its train. It would result in non-compliance with the court orders and greater difficulty in enforcing them. It would lead us down a path away from the peaceful settlement of legal disputes into a world in which people would be inclined to take the law into their own hands. It would take us back to an earlier stage in the development of civilised society when disputes were resolved by brute force.[9]

4.2.3. Superior courts exercise power to initiate contempt proceedings under their inherent jurisdiction.[10] Although contempt overlaps with the criminal law, it operates as a separate body of the common law. It contains unique features such as summary procedure, the lack of the need to prove a mental element or, unlimited sentencing powers and open-ended gaol terms. Despite this, all elements of contempt are required to be proven to the criminal standard of proof, being beyond reasonable doubt.

4.3. **Criticisms of the current contempt regime:**

4.3.1. In concluding that common-law contempt should be abolished, ALRC 35 makes a number of criticisms of the status quo. Principally, the report suggests that contempt law is too vague

[8] Some jurisdictions have created statutory criminal offences for misbehaviour towards and by jurors. See for eg. Pt 10 of the *Juries Act 2000* (Vic).

[9] Hon Sir Anthony Mason AC KBE, 'The Courts and Public Opinion', National Institute of Government and Law Lecture, 20 March 2002.

[10] Ian Cram (ed), Borrie and Lowe: The Law of Contempt (LexisNexis Butterworths, 4th ed, 2010), 3.

and contains unfair procedures for dealing with very serious offending.

4.3.2. ALRC 35 argues that the criteria for some forms of contempt are highly uncertain. As a result, media organisations are often not willing to publish valuable information that would contribute to the public discourse, choosing to 'play it safe'.[11] For example, with respect to *sub judice* contempt, the law focuses on publications that have a 'tendency' to interfere with a court proceeding. Exactly what constitutes a 'tendency' is not always clear. According to the report, the test is simply 'too vague and uncertain to be an appropriate basis for defining what is in effect a criminal offence, punishable by sanctions such as imprisonment or a fine'.[12] The absence of a precise definition is, arguably, at odds with the principle that members of the community should be able to know exactly what conduct will attract criminal penalties.

4.3.3. The report also makes criticisms of the procedure used to deal with alleged contempt. It suggests the current summary procedure lacks the procedural fairness that should be expected for such serious offences. The current procedure provides for trial by judge alone. For alleged contempt that takes place in the courtroom, a summary hearing can take place immediately, before the very judge who witnessed the contempt. There are no committal proceedings and there is no opportunity to cross-examine a judge who may be the principle witness. This means that a single person effectively performs the role of complainant, witness, prosecutor, and, ultimately, sentencer.

4.3.4. Finally, unlike all other criminal offences, there are no set maximum penalties for contempt. Indeed, in a situation where a person fails to comply with a court order, the common law allows for the imposition of open-ended imprisonment and/or accruing fines to coerce a person into compliance. However as discussed below, ICJ Victoria submits that these features, while unique, contain strengths are not in immediate need to legislative reform.

4.4. **The strength of common-law contempt:**

[11] ALRC 35, 135.
[12] ALRC 35, 166.

4.4.1. The current law has clear advantages. Firstly, they embody the inherent power of a court to operate and function as a separate arm of government. The principles are long-established and deeply rooted in common law.

4.4.2. Most importantly, the current law is highly flexible and gives courts discretion in exercising its power. It allows courts tailor responses in order to protect its standing in the community. The conferral of wide ranging discretionary powers 'gives the presiding judge maximum flexibility in determining a response to improper behaviour'.[13] Additionally, it does not follow that just because the common law powers are discretionary and wide ranging, they will be used in a harsh or authoritarian way. Indeed, the case of the Ministers, the Court ruled that, while a prima-facie case of 'aggravated contempt' had been made out, the apology by the Ministers and acknowledgment of wrongdoing 'purged the contempt'.[14] The court exercised its discretion and declined to pursue the matter further, notwithstanding its undoubted powers to take strong action. This is but one example of the court using its broad powers with care and consideration.

4.4.3. As discussed above, the current law has been criticised as difficult to determine, and accordingly ordinary citizens are unable to determine what constitutes an offence. ICJV believes these criticisms are somewhat unfounded. In Victoria, for example, the Judicial College of Victoria publishes a detailed guide on contempt which is available to the public online.[15] It lists in clear terms the kinds of contempt of court, and the elements of each offence. It also summarises the purposes for the law and general principles that underpin it. Ordinary citizens and media outlets are capable of educating themselves on contempt through this easily accessible resource.

4.4.4. Although the procedures for dealing with alleged contempt are unique, ICJV believes it is incorrect to describe them as lacking in procedural fairness. A number of safeguards, expected in a free and democratic society, are adopted in the common law. For example, there is an expectation that a judge should only deal with contempt in the face of the court by immediate summary procedure in 'rare and serious cases'.[16] In all other cases, the matter should proceed before another judge by way of summons or originating motion, and heard in the ordinary

[13] ALRC 35.
[14] *DPP (Cth) v Besim*; *DPP (Cth) v MHK* (No 2) [2017] VSCA 165, 31.
[15] Judicial College of Victoria, *Victorian Criminal Proceedings Manual*, Ch 8 – Contempt of Court.
[16] *Lewis v Ogden* (1984) 153 CLR 682, 293.

business of the court. Additionally, a person may not be punished for contempt of court unless the specific charge is distinctly stated, and the accused is given a reasonable opportunity to make submissions of fact and law.[17]

4.4.5. ICJV believes it imperative that the court is able to initiate contempt proceedings on its own motion. This is vital to the exercise of its independence. As ARLC 35 states:

> An advantage of the contempt procedure, when compared with indictment for trial, is that the court has power to commit the alleged contemnor on its own motion. (Alternatively, the matter can be referred directly to the Registrar, Attorney-General or Director of Public Prosecutions.) However, the court has no analogous power in relation to ordinary criminal proceedings, save in the case of perjury, where, in some jurisdictions, it has been given power to commit an alleged offender for trial directly, an indictment can only be filed by a representative of the Director of Public Prosecutions.[18]

4.4.6. Likewise, the Director of Public Prosecutions has no power to file a notice of discontinuance or *'nolle prosequi'* with respect to contempt proceedings. This distinguishes it from ordinary criminal offences; a distinction which ICJV believes should be maintained as a way of keeping contempt proceedings at arm's length from normal prosecutorial decisions.

4.5. **Conclusion:**

4.5.1. ICJV does not believe the broad brush recommendations of ALRC 35 should be adopted. For courts to be able to effectively manage proceedings and deliver justice, broad and flexible options are needed. These are available in the common law. Courts have shown that, while they possess extraordinary powers with respect to contempt, they are able to apply them in a fair and nuanced way. Any statutory scheme creating criminal offences should complement rather than take precedence over traditional options. This was done in Victoria when codifying juries offences in through the *Juries Act 2000*. In creating new offences, the Victorian Parliament inserted a provision decreeing that 'nothing in this Part affects the power of a court to deal with a contempt of court summarily of its

[17] *Coward v Stapleton* (1953) 90 CLR 573, 579
[18] ALRC 35, 91.

own motion'.[19] Any legislate scheme should include that caveat.

4.5.2. ICJV reiterates that the inherent jurisdiction of the court cannot be ousted by by statue. Federal courts and state courts exercising federal jurisdiction are established under the Chapter III of Constitution. ALRC 35 recognises that contempt powers are integral part of judicial power in the sense in which the phrase is used in the Constitution. This power is viewed, on historical grounds, as an aspect of judicial power.[20]

5. Contempt by Publication:

5.1. In June 2003, the New South Wales Law Reform Commission (Commission) published a report entitled Contempt by Publication. The report was conducted as a response to the introduction in the New South Wales Parliament on 14 May 1997 of the Costs in Criminal Cases Amendment Bill.[21] The object of the Bill was to provide for "payment of compensation by the media for the expenses incurred when a criminal jury trial has been discontinued because of concern that the jury may have been prejudiced by a contemptuous publication or broadcast".[22]

5.2. The Commission made 39 recommendations with respect to the law of contempt, including, for example, liability for *sub judice* contempt[23], the relevant test to be applied in discerning whether a contempt has been perpetrated[24], and defences to the charge of *sub judice*.[25]

5.3. ICJV considers that the Commission's report is an extremely useful and comprehensive tool in discerning the relevant issues with respect to contempt by publication laws and *sub judice* which require consideration.

[19] S 84 *Juries Act 2000.*
[20] ALRC 35, 31.
[21] Contempt by Publication, June 2003, 2 [1.3) (and citations therin).
[22] Ibid (and citations therein).
[23] Ibid, Recommendation 1.
[24] Ibid, Recommendation 2.
[25] Ibid, Recommendation 6.

5.4. After a considered review of the Commission's report, ICJ Victoria considers that there are two issues which fall for consideration. Specifically, ICJV considers that any law of contempt by publication should articulate:

a. The meaning of publication; and

b. The meaning of "matter".

5.5. **Publication:**

5.5.1. A wide, all-encompassing definition should be adopted when construing the term "publication".

5.5.2. Information is produced and digested in significant quantities, aided of course by technology. In view of this, any laws which prescribe contempt by publication should be cognizant of the need to capture the multiplicity of ways in which information can be published. For example, information is no longer simply published in hard copy newspapers, but also through social media and via email. Therefore, it is imperative that any laws which prescribe what "publication" is should be cautious to capture the wide array of publishing mediums.

5.5.3. In this regard, ICJV proposes that the definition of "publication" should not be exhaustive.