Law Council
OF AUSTRALIA

Law of contempt

Senate Legal and Constitutional Affairs References Committee

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About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

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- Mr Konrad de Kerloy, Executive Member
- Mr Geoff Bowyer, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.

Acknowledgement

The Law Council is grateful for the assistance of its National Human Rights Committee, National Criminal Law Committee and Federal Court Liaison Committee, as well as input from the New South Wales Bar Association, the Law Society of South Australia, the Law Society of New South Wales and the Law Society of Western Australia in the preparation of this submission.

Executive Summary

1. The Law Council welcomes the opportunity to provide a submission to the Senate Legal and Constitutional Affairs References Committee (**the Committee**) in relation to its inquiry into the law of contempt.

2. On 15 August 2017, the Committee was asked to examine the law of contempt, guided by the following 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;*

    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;*

    c. *the development and operation of statutory provisions in Australia and overseas that codify common law principles of contempt;*

    d. *the importance of balancing principles, including freedom of speech and expression, the right of fair trial by an impartial tribunal, public scrutiny of the operations of the court system and the protection of the authority, reputation and due process of the courts; and*

    e. *any other related matters.*

3. It is noted that the Terms of Reference for this inquiry are broadly drafted, drawing on earlier recommendations across two extensive law reform reports, together with references to the codification of contempt laws generally, and the inherent balancing of competing rights and freedoms associated with such reforms.

4. Given the potential impact on the courts of any proposed reforms to the law of contempt, the Law Council recommends that they be consulted prior to reforms being introduced.

5. This submission is limited to the published Terms of Reference, namely, the codification of common law principles of contempt, with a particular focus on contempt by publication, both in the sub-judice context and the laws regarding scandalising of the court.

6. In general, the Law Council suggests that the law of contempt as it currently stands operates satisfactorily and is well equipped to manage the competing interests inherent within existing contempt measures. However, the Law Council is not opposed to the codification of contempt law in line with the proposals of the Australian Law Reform Commission (**ALRC**), and is broadly supportive of those reform measures contained in its 1987 report. Such proposals, if implemented appropriately, have the potential to provide clarity and certainty to the law of contempt, two principles that are central to the Law Council's policy and ongoing interest in maintaining and promoting of the rule of law.[1]

[1] Law Council of Australia Policy Statement 'Rule of Law Principles' (2011). Available at www.lawcouncil.asn.au/docs/f13561ed-cb39-e711-93fb-005056be13b5/1103-Policy-Statement-Rule-of-Law-Principles.pdf.

7. The Law Council is similarly supportive of measures identified in the 2003 report of the New South Wales Law Reform Commission (**NSWLRC**), which focussed specifically on issues arising within contempt by publication and rules regarding sub-judice contempt.

8. Despite its support for efforts to codify rules of contempt, the Law Council is conscious of the special role contempt plays in the judicial system and considers it to be critical that any measures to codify the law of contempt retain as much flexibility and discretion as possible to allow judicial officers to appropriately deal with issues arising from contempt of court on a case-by-case basis.

9. The nature of contempt demands a complex balancing of interests, most notably between freedom of expression on one hand and the integrity of the justice system on the other. In this regard, the Law Council emphasises the need for reform proposals to remain cognisant of the fundamental importance of the administration of justice and the contribution made by the law of contempt to preserving this. The reform proposals must also avoid unduly infringing principles of freedom of expression and open justice.

10. Should proposals to reform the law of contempt proceed, the Law Council recommends as follows:

    - Any reform to the laws of contempt should be co-ordinated between the Commonwealth and the States to achieve uniformity;
    - The recommendations of the ALRC that common law principles of contempt be recast as criminal offences should be implemented, to the extent that they do not already overlap with the criminal law;
    - The recommendations of the ALRC that contempt in the face of the court be replaced with a series of criminal offences to be tried summarily should be implemented;
    - The recommendations of the ALRC that civil contempt be replaced with a statutory regime of non-compliance proceedings should be implemented;
    - A "substantial risk" test proposed by the NSWLRC should be uniformly implemented in relation to contempt by publication;
    - Summary trial procedures for sub-judice contempt should be retained;
    - The public interest defence recommended by the NSWLRC in relation to contempt by publication should be implemented;
    - The law of contempt by publication should be reviewed to ensure that it applies to circumstances where an Internet Service Provider or Internet Content Host has been made aware of the material but, thereafter, fails or refuses to remove it.

Background

11. In 1987, ALRC published a comprehensive report on the law of contempt in Australia.[2] The ALRC report was extensive, containing 124 recommendations across all aspects of contempt law in Australia. While recommendations covered a broad range of procedural and administrative proposals, the most dominant theme within the report was the abolition of the common law of contempt in favour of statutory provisions governing both substance and procedure.

12. While there has been notable implementation of the ALRC's proposed reforms in family law since the publication of the report, the remaining recommendations, directed to the overhaul of existing forms of contempt in other jurisdictions, have largely remained unimplemented.

13. In 2003, two separate law reform reports were published in relation to state-based contempt laws, one by the New South Wales Law Reform Commission (**NSWLRC**), the other by the Law Reform Commission of Western Australia (**LRCWA**).[3] The former had a distinct focus on the adequacy of existing measures addressing contempt by publication and sub-judice contempt, while the latter examined a broader concept of contempt as it applied in the Western Australia context. In both reports, the desirability of a codified, uniform approach to contempt is articulated, albeit, to differing degrees.

Response to Terms of Reference

The ALRC's recommendations that the common law principles of contempt be abolished and replaced by statutory provisions.

14. The Law Council recognises the extensive recommendations of the ALRC in its 1987 report and notes the dominant proposal of the ALRC to abolish the common law of contempt in favour of statutory provisions governing both substance and procedure.

15. In its report, the ALRC recommended that the majority of rules governing contempt (all except for contempt in the face of the court and disobedience contempt) be recast as criminal offences and proposed the introduction of procedural steps consistent with criminal trials to replace existing summary contempt procedures. For those remaining areas of contempt, the ALRC recommended, firstly, that contempt in the face of the court be replaced by a group of criminal offences maintaining that the mode of trial should continue to be a summary one and, secondly, that disobedience contempt be replaced by a statutory regime of 'non-compliance proceedings'.

16. In formulating its recommendations in favour of the codification of contempt measures, the ALRC highlighted four broad criticisms of the existing common law approach. These arguments may be summarised as: (i) limitations on freedom of expression; (ii) ambiguity of substantive provisions; (iii) procedural fairness; and (iv) effectiveness of existing measures.

17. The ALRC report provides a sound analysis of these alleged defects in the law of contempt. It notes that assertions that contempt laws place undue limits on freedom of

[2] Australian Law Reform Commission, Report No 35: '*Contempt*' (1987).
[3] See, New South Wales Law Reform Commission, Report 100: '*Contempt by Publication*' (2003) and Law Reform Commission of Western Australia, Project No 93: '*Review of the Law of Contempt*' (2003).

expression and are overly vague are predominantly raised in the context of contempt by the media.[4] In relation to procedural fairness, the ALRC highlights that, in many instances, a court at which an alleged contempt is directed may assume the right to try and punish the contempt. This, together with the lack of upper limits on the sentencing powers of superior courts, raises questions about the independence and appropriateness of the decision-making process under existing contempt proceedings. Finally, the ALRC noted that contempt law may lack effectiveness, particularly, in instances where a court seeks to pursue contempt proceedings in respect of scandalising remarks, suggesting that such steps may serve to damage public confidence in the administration of justice rather that preserve it.

18. The Law Council acknowledges these alleged defects and is not opposed to the codification of contempt law in line with the proposals of the ALRC. In this regard, the Law Council is broadly supportive of those reform measures proposed in the 1987 report. Such proposals, if implemented appropriately, have the potential to provide clarity and certainty to the law of contempt, two principles that are central to the Law Council's policy and ongoing interest in maintaining and promoting of the rule of law.[5]

19. However, the Law Council is conscious of the special role contempt has in the judicial system and considers it critical that any measures to codify the law of contempt retain as much flexibility and discretion as possible to allow judicial officers to appropriately deal with contempt issues on a case-by-case basis. This tension between certainty and flexibility is aptly summarised by the LRCWA in its 2003 review of the law of contempt:

> *It is important for laws not to be so vague as to give people very little idea whether any particular action will fall foul of them. The tendency of such a law is to 'over-deter'—people become overly cautious of contravening it so their freedom is more heavily circumscribed than the law or, presumably, the policy underlying it requires. However, certainty can only ever be achieved at the expense of flexibility.*[6]

20. Reports of the ALRC, NSWLRC and LRCWA into contempt law have each highlighted a need for reform, suggesting that the current balance of certainty versus flexibility has not been appropriately struck. This reflects the sentiments of Justice Kirby, who has suggested that the law of civil contempt, as conventionally understood, "lacks conceptual coherence and is replete with uncertainties, inadequacies and fictions".[7]

21. In this regard, the Law Council endorses the need for uniformity in contempt law, and asserts that it is desirable for reforms be co-ordinated between the Commonwealth and the States to achieve such uniformity.

Recommendation:

- **Any reform to the laws of contempt should be co-ordinated between the Commonwealth and the States to achieve uniformity.**

[4] Australian Law Reform Commission, '*Contempt*' Report No 35 (1987), at [10].
[5] Law Council of Australia Policy Statement 'Rule of Law Principles' (2011). Available at www.lawcouncil.asn.au/docs/f13561ed-cb39-e711-93fb-005056be13b5/1103-Policy-Statement-Rule-of-Law-Principles.pdf.
[6] Law Reform Commission of Western Australia '*Review of the Law of Contempt*' (2003) at page 27.
[7] *Hearne v Street* (2008) 235 CLR 125, at [25].

Codification of common law contempt

22. The Law Council supports the general recommendation of the ALRC that common law principles of contempt be recast as criminal offences, to the extent that they do not already overlap with the criminal law.[8] In this regard, the bringing of contempt within the operation of the criminal law allows for matters such as the mental health and fitness to plead of an alleged contemnor to be better managed under existing statutory provisions.[9]

23. The Law Council submits however that, while codification may go some way to minimising ambiguities and addressing procedural concerns, the law of contempt possesses special qualities that require careful consideration and accommodation should codification proceed.

24. To illustrate, the ALRC makes note of the unique features of contempt in its 1987 report, highlighting the use of summary proceedings and the existence of unlimited sentencing powers, including the possibility of open ended gaol sentences where a person is found guilty of disobedience contempt.[10] With regards to the latter, an open-ended prison sentence terminating only when an order has been obeyed is sometimes imposed for this purpose. This highlights that sentencing for contempt serves a purpose wholly different and distinct to sentencing for other offences. As such, contempt can be seen sit outside usual sentencing principles.

25. The Law Council notes that sentencing legislation, generally, is designed for purposes beyond contempt and must balance a number of competing sentencing considerations such as rehabilitation, deterrence, punishment, protection of the community, accountability, denunciation, and recognition of harm. Not all of these considerations are relevant to sentencing for contempt of court and caution should be applied when applying normal sentencing principles to situations involving contempt of court.[11]

26. In pursuit of greater clarity and certainty within the existing laws of contempt, the Law Council is supportive of efforts to codify the common law in this area, so long as such reforms continue to observe and reflect the unique characteristics of contempt, as well as the specific needs of judicial officers required to maintain the orderly administration of justice.

Recommendation:

- **The recommendations of the ALRC that common law principles of contempt be recast as criminal offences should be implemented, to the extent that they do not already overlap with the criminal law.**

Contempt in the face of the court

27. The Law Council endorses the approach of the ALRC in its 1987 report in which it proposed that contempt in the face of the court be replaced with a series of criminal offences to be tried summarily.[12]

[8] The Law Council is grateful to the New South Wales Bar Association for this input.
[9] See e.g. *Mental Health (Forensic Provisions) Act 1990* (NSW).
[10] Australian Law Reform Commission, '*Contempt*' Report No 35 (1987), at [2].
[11] The Law Council is grateful to the Law Society of South Australia for this input.
[12] Australian Law Reform Commission, '*Contempt*' Report No 35 (1987), at [112].

28. However, as previously cautioned, such reforms must not diminish the capacity of judicial officers to control proceedings and behaviour in court.[13] The trial procedure for these offences should generally reflect the recommendations of the ALRC report, that is, the matter should be tried before a different judicial officer unless the defendant elects to have the matter dealt with, summarily, before the judicial officer concerned.[14] There is, however, doubtful utility in requiring a panel of the three judges to hear a charge of contempt as was suggested by the ALRC. The volume of litigation and the demands placed on judicial resources are powerful reasons not to take this approach.[15]

Recommendation:

- **The recommendations of the ALRC that contempt in the face of the court be replaced with a series of criminal offences to be tried summarily should be implemented.**

Disobedience contempt

29. The Law Council endorses the approach of the ALRC in proposing that civil contempt be replaced with a statutory regime of non-compliance proceedings.

30. In support of this proposition, it is suggested that a regime of civil compliance procedures is more likely to provide flexibility in achieving the intent of the order being enforced by working through the order rather than requiring strict proof to the criminal standard of the alleged breach set out in a statement of charge in contempt proceedings.

31. This is particularly the case where, upon later examination, there is some perceived ambiguity in the original order. The point at which contempt is characterised as technical, wilful or contumacious is problematic. The moving party in a contempt proceeding may allege that the contempt is contumacious and hence criminal but a court may ultimately characterise the contempt, differently. A party may also bring proceedings on the basis that it wishes orders to be enforced (suggesting the contempt is civil) while also arguing that the conduct of the defendant has been contumacious and warrants punishment (suggesting the contempt is criminal). The introduction of a system of civil compliance procedures should avoid the difficulties surrounding characterisation of the contempt as the focus will be on the enforcement of the original order.

32. Even when disobedience contempt is characterised as criminal, the contempt proceedings are still civil proceedings and the civil costs regime will apply.[16] This has the consequence that failure to prove contempt to the criminal standard carries with it the risk that the moving party may suffer an adverse costs order without having achieved the purpose of enforcing the original order. Ordinary criminal costs rules should apply to contempt related proceedings.[17]

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[13] Ibid, at [113].
[14] Ibid, at [130].
[15] The Law Council is grateful to the New South Wales Bar Association for this input.
[16] See *Hinch v The Attorney-General for Victoria* (1987) 164 CLR 15 costs judgment at page 89.
[17] The Law Council is grateful to the New South Wales Bar Association for this input.

Recommendation:

- **The recommendations of the ALRC that civil contempt be replaced with a statutory regime of non-compliance proceedings should be implemented.**

Contempt by publication and operation of the law on sub-judice contempt.

33. The Law Council is conscious of the tension between the freedom to report and comment on current cases in the courts and to criticise individual judges and magistrates and the 'chilling effect'[18] of the principles of contempt law which prohibit publications which may prejudice a current or forthcoming trial (the sub-judice doctrine) and publications which may undermine public confidence in the administration of justice (the law of scandalising).[19]

34. While acknowledging this tension, the Law Council reemphasises the fundamental role of contempt laws in preserving the administration of justice and equality before the law through its continued focus on conduct that impairs, or threatens to impair these principles.

35. In any consideration of the operation of the sub-judice rule, a balancing exercise must occur between the competing public interests of the administration of justice, specifically, the right to a fair trial and freedom of expression. The ALRC points out that, in the balancing of these interests, the emphasis is placed on the need to protect the judicial process from prejudicial influence.[20] This approach is endorsed by the NSWLRC which reports:

> *Support for this view comes from both the weight of general opinion and from judicial authority. As to the first, the belief that the public interest in a fair trial will almost always outweigh the public interest in freedom of expression, generally goes unchallenged. It is particularly justified in relation to criminal trials where an individual's liberty and/or reputation are at stake, and where the public have an interest in securing the conviction of persons guilty of serious crime.*[21]

36. The Law Council endorses the approach of the NSWLRC's 2003 report in relation to contempt by publication and sub-judice contempt, in particular, the recommendation that a sub-judice rule be retained, albeit subject to reform in line with the below discussion.

A uniform threshold of risk

37. The Law Council considers it desirable to have a uniform standard by which contempt by publication is assessed. The decision of Mason CJ in *Hinch v Attorney-General (Vic) & Anor*[22] (***Hinch***) makes it clear that the "balancing approach should protect the

[18] See *Galagher v Durack* (1983) 152 CLR 238.
[19] Australian Law Reform Commission, '*Contempt*' Report No 35 (1987), at [10].
[20] Ibid, at [26].
[21] New South Wales Law Reform Commission, Report 100: '*Contempt by Publication*' (2003), at [2.6].
[22] (1987) 164 CLR 15.

administration of justice from any substantial risk of serious interference."[23] His Honour went on to express the view that formulations such as "a tendency to interfere substantially with a fair trial" were synonymous or virtually synonymous with "substantial risk of serious interference with a fair trial".[24]

38. The 2003 report of the NSWLRC did not recommend the risk of "serious" prejudice as this was seen as imposing too high a threshold to prove to the criminal standard.[25] The Law Council agrees with this view, noting that the object of the law of contempt by publication is to prevent publications which may actually interfere with the administration of justice. Too high a threshold will be unlikely to achieve this object and is likely to unreasonably tip the balance of competing interests away from administration of justice.

39. If a uniform approach is taken across Australia and the "substantial risk" test is adopted, such an approach is likely to achieve most clarity and precision.[26] In its discussion of this recommendation, the NSWLRC noted that other common law jurisdictions have adopted a substantial risk formulation and referred to similar recommendations by three other law reform commissions.[27]

40. While the Law Council considers codification in this area to be desirable, it is noted that contempt under the common law, as it currently is applied, provides for a notably high threshold and is generally striking a reasonable balance. Courts have demonstrated an acute awareness of the tension between freedom of speech and expression and the need to protect the authority, reputation, and due process of the judiciary.[28] Under the existing approach, courts do not rush to find contempt in the actions of persons and organisations. Rather, there is an acceptance that the jurisdiction of the courts with respect to contempt "is to be exercised with great caution".[29]

Recommendation:

- **A "substantial risk" test proposed by the NSWLRC should be uniformly implemented in relation to contempt by publication.**

Sub-judice contempt: procedural matters

41. A function of the sub-judice rule is to preserve confidence in the judicial system by protecting against the appearance of decisions having been influenced by published material as opposed to being impartial and based on the evidence presented in court.

42. The Law Council notes that NSWLRC's 2003 report recommended that the summary trial procedure for sub-judice contempt be retained, noting that it is "the peculiar character of the offence – that it strikes at the foundation of the administration of

[23] Ibid at 27.
[24] Ibid, at 28.
[25] New South Wales Law Reform Commission, Report 100: '*Contempt by Publication*' (2003), at [4.24].
[26] The Law Council is grateful to the New South Wales Bar Association for this input.
[27] New South Wales Law Reform Commission, Report 100: '*Contempt by Publication*' (2003), at [4.10].
[28] See, eg, *Gallagher v Durack* (1983) 152 CLR 238, 243; *Director of Public Prosecutions v Francis* (2006) 92 SASR 302, 311; *Ex parte Bread Manufacturers Ltd: Re Truth & Sportsman Ltd* (1937) 37 SR (NSW) 242, 249-50.
[29] *John Fairfax & Sons Pty Ltd v McRae* (1955) 93 CLR 351, at 370. The Law Council is grateful to the Law Society of South Australia for this input.

justice – which commends the summary mode of dealing with it".[30] The Law Council agrees with the policy rationale underpinning the desirability of summary trial procedures in this area.

43. The Law Council therefore supports the recommendations of the NSWLRC that the summary trial procedure is appropriate for sub-judice contempt and that this procedure should be retained.

Recommendation:

- **Summary trial procedures for sub-judice contempt should be retained.**

Contempt by publication: the defence of public interest[31]

44. Presently, liability for contempt by publication may be avoided even where a publication has a tendency to prejudice particular legal proceedings if a court finds that the prejudice is outweighed by the public interest arising from the dissemination and discussion of information on a matter of public importance.[32]

45. The NSWLRC, in its report, considered the significant uncertainty under the common law as to the scope and operation of the public interest principle.[33] The High Court's decision in *Hinch* suggests that the balancing exercise involved in assessing the public interest starts from the premise that the balance is tipped in favour of the administration of justice through the need to ensure a fair trial.[34] However, Spigelman CJ's judgment in the New South Wales Court of Appeal decision of *Attorney General v X*[35] does not support the proposition that there is a pre-determined balance in favour of the administration of justice where the published material implied or suggested guilt, or canvasses guilt. Spigelman CJ noted that, since *Hinch*, the High Court has recognised an immunity in the Commonwealth Constitution relating to the freedom of communication on governmental and political matters.[36]

46. The NSWLRC's recommendation in its 2003 report was that a public interest defence should involve a balancing exercise between the competing public interests of the administration of justice, specifically a right to fair trial, and freedom of expression. The proposal was for the public interest to operate as a true defence for the defendant to prove on the balance of the probabilities.[37]

47. In making this recommendation, the NSWLRC rejected the "good faith" approach taken by the ALRC in the 1987 report by which the publisher would be required to show that the publication had been made in good faith in the course of a continuing discussion of a matter of public affairs or otherwise of public interest.[38]

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[30] New South Wales Law Reform Commission, Report 100: '*Contempt by Publication*' (2003), at [12.70].
[31] The Law Council is grateful to the New South Wales Bar Association for this input.
[32] See *Ex parte Bread Manufacturers Ltd* (1937) 37 SR (NSW) 242.
[33] New South Wales Law Reform Commission, Report 100: '*Contempt by Publication*' (2003), at [8.16] to [8.24].
[34] (1987) 164 CLR 15.
[35] (2000) 49 NSWLR 653.
[36] *Attorney General v X at* [112] (Spigelman CJ) referring to the need for the law of contempt to adapt in the same way that the common law of defamation (*Lange v Australian Broadcasting Commission* (1997) 189 CLR at 520) and choice of law rules (*John Pfeiffer Pty Ltd v Rogerson* [2000] HCA 36) must adapt.
[37] New South Wales Law Reform Commission, Report 100: '*Contempt by Publication*' (2003), at [8.34], recommendation 20 at [8.45] and clause 15 of the draft bill at Appendix A.
[38] Ibid, at [8.28].

48. The Law Council supports the approach of the NSWLRC regarding the adequacy and extent of a public interest defence.

> **Recommendation:**
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> - **The public interest defence recommended by the NSWLRC in relation to contempt by publication should be implemented.**

Online content and social media

49. The traditional scope of contempt by publication faces significant challenges in the age of rapidly developing information and communications technology. Such developments increase the availability of content, as well as the speed at which publishing occurs, and presents clear issues for the application of sub-judice contempt laws.

50. The NSWLRC considered the application of the sub-judice rule to website content, recommending that, where an Internet Service Provider (**ISP**) or Internet Content Host (**ICH**) becomes aware of some contemptuous publication which it carries or hosts, it should then have an obligation to take steps within its means to prevent the material from being further published.[39] This approach appears consistent with the relevant provisions of the *Broadcasting Services Act 1992* (Cth)[40] (**Broadcasting Service Act**) which has the effect of preventing a State or Territory from imposing liability on an ISP or ICH where the host was not aware of the nature of the content.

51. The Law Council considers that this defence should be more limited in relation to ISPs and ICHs so that it is clear that it is confined to circumstances where an ISP or ICH has been made aware of the material but, thereafter, fails or refuses to remove it.[41]

52. In this respect, the possible risk of conflict between contempt by publication liability under common law and the provisions of the Broadcasting Services Act reinforces the need for uniformity between Commonwealth and State laws regarding the application of sub-judice contempt to those responsible for online content.

53. Finally, the distribution of material via online sources has changed dramatically in recent times with the prolific sharing and distribution of publications via social media and search engines. The ability for these intermediaries to control content that may be contemptuous raises issues requiring further consideration, and should reform be undertaken in this area, thought should be given to a defence that gives consideration as to whether some form of reasonable precautionary system is in place.

> **Recommendation:**
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> - **The law of contempt by publication should be reviewed to ensure that it applies to circumstances where an Internet Service Provider or Internet Content Host has been made aware of the material, but thereafter fails or refuses to remove it.**

[39] Ibid, at [2.65].
[40] Schedule 5 Pt 9 Clause 91(1)(a).
[41] The Law Council is grateful to the New South Wales Bar Association for this input.

Balancing of principles

54. As identified by the ALRC in its 1987 report, together with the subsequent reports of the NSWLRC and LRCWA, any program of reform in the area of contempt requires the balancing of broad competing interests, most notably, a balance between freedom of speech and open justice and ensuring the right to a fair trial and the preservation of the integrity and public confidence in the judicial process.[42]

55. The need to balance competing considerations of freedom of expression; the right of fair trial by an impartial tribunal; public scrutiny of the operations of the court system; and the protection of the authority, reputation and due process of the courts is, similarly, reflected at international law. For example, the right to freedom of expression is enshrined in the *International Covenant on Civil and Political Rights* (**ICCPR**) to which Australia is a signatory.[43] However, this right is not absolute or unqualified, and may be constrained if the law reasonably serves a countervailing public purpose, including for the respect of the rights or reputations of others.[44]

56. Further, laws of contempt may be permitted as legitimate restrictions on freedom of expression and have been considered permissible and compatible with the ICCPR, provided that any contempt of court proceedings relating to forms of expression are "shown to be warranted in the exercise of a court's power to maintain orderly proceedings".[45]

57. Finally, Article 14 of the ICCPR provides individuals with a guaranteed right to equality before the courts, and a "fair … hearing by a competent, independent and impartial tribunal".[46] As such, reform to the law of contempt must have regard to the extent to which freedom of expression may be sought to be relied upon in instances where the administration of justice may be influenced or prejudiced.

58. The Law Council submits that the principle of equality before the law must remain a central focus of discussion regarding potential changes to the law of contempt and an overarching principle that underpins reform in this area. This is a complex balancing task, and one that requires careful consideration as freedom of expression and open justice are fundamental pillars of our society. Freedom of expression, however, as pointed out by Justice Brennan "is not the only hallmark of a free society and, sometimes, it must be restrained by laws designed to protect other aspects of the public interest."[47]

59. To this end, both the ALRC and the NSWLRC were cognisant of the principles of freedom of speech and of open justice in preparing their reports and produced sensible recommendations that maintain an emphasis on a legal system that is free from prejudicial influences, whilst putting forward recommendations that maintain respect and protection for open justice.

60. Future reform that builds on those recommendations of earlier reports, including those supported within this submission, should facilitate the sound development of Australian law by enabling contempt law to function in a way that provides for a careful

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[42] See Australian Law Reform Commission, Report No 35: '*Contempt*' (1987), summary at page xxx, New South Wales Law Reform Commission, Report 100: '*Contempt by Publication*' (2003), at [2.5], and Law Reform Commission of Western Australia '*Review of the Law of Contempt*' (2003) at 18.
[43] International Covenant on Civil and Political Rights, Article 19.
[44] Ibid, Article 19(3).
[45] Human Rights Committee, *General Comment No 34: Article 19: Freedoms of opinion and expression*, 102nd session, UN Doc CCPR/C/GC/34 (21 July 2011).
[46] International Covenant on Civil and Political Rights, Article 14(1).
[47] *R v Glennon* (1992) 173 CLR 592 at 611-612.

balance between the administration of justice, on the one hand, and freedom of speech and expression, on the other.