

# Law of Contempt

## Terms of reference and conduct of the inquiry

1.1 On 15 August 2017 the Senate referred the following matter to the Senate Legal and Constitutional Affairs References Committee (the committee) for inquiry and report by 25 November 2017:

- (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.<sup>1</sup>

1.2 In accordance with usual practice the committee advertised the inquiry on its webpage, and also wrote to a number of organisations and individuals inviting written submissions by 31 October 2017. The committee received six submissions, listed at Appendix 1.

## Australian Law Reform Commission report

1.3 On 7 April 1983, the Australian Law Reform Commission (ALRC) was referred an inquiry which sought to consider the following forms of contempt:

- improper behaviour in court;
- attempting to influence participants in proceedings;
- failing to comply with a court order or an undertaking given to a court; and
- contempt by publication...<sup>2</sup>

1.4 In June 1987 the ALRC tabled its final report, *Contempt*, which made 124 recommendations. The key recommendations, as outlined by the ALRC, are listed at Appendix 2 of this report. In essence, the ALRC recommended that the common law principles of contempt be abolished and replaced by statutory provisions which would

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1 *Journals of the Senate*, No. 53, 15 August 2017, p. 1708.

2 <https://www.alrc.gov.au/inquiries/contempt> (accessed 2 November 2017).

govern all Federal Courts except the High Court of Australia.<sup>3</sup> Additionally, while the report was focused on contempt at the Commonwealth level, it noted that most of its recommendations 'were suitable for use by state and territory governments.'<sup>4</sup>

## **New South Wales Law Reform Commission report**

1.5 On 14 July 1998, the Law Reform Commission of New South Wales (NSWLRC) was asked to inquire into the law of contempt by publication. Specifically, the terms of reference were:

To inquire into, and report on, whether the law and procedures relating to contempt by publication are adequate and appropriate, including whether and in what circumstances, a person against whom a charge of contempt is found proven should be liable to pay, an addition to any criminal penalty, the costs (of the government and of the parties) of a criminal trial aborted as a result of the contempt.<sup>5</sup>

1.6 The report, *Contempt by publication*, was published in June 2003 and subsequently tabled in the NSW Parliament on 16 September 2003. The committee made 39 recommendations which are listed at Appendix 3. The report noted that to codify contempt by publication, while leaving the common law to regulate other forms of contempt, would not have the effect of achieving clarity over the operation of contempt laws.<sup>6</sup> However, the report recommended significant legislative reform in the area of contempt by publication, 'while allowing the common law to continue to develop.'<sup>7</sup>

## **Codification of the law of contempt**

1.7 The views of submitters relating to whether or not contempt laws should be codified were mixed. The Legal Service's Commission of South Australia (LSC) supported the codification of contempt laws arguing that this would achieve greater clarity for defendants and consistency in the manner in which sanctions were being imposed.<sup>8</sup> The LSC made the following suggests if contempt laws were to be codified:

- that a catch all provision be included in the definition of contempt so that unforeseen incidents of contempt are not excluded;
- that contempt in the Family Courts take into account its unique role and be tailored to its unique priorities, such as the welfare of children; and

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3 <https://www.alrc.gov.au/inquiries/contempt> (accessed 2 November 2017).

4 <https://www.alrc.gov.au/inquiries/contempt> (accessed 2 November 2017).

5 New South Wales Law Reform Commission, *Report 100: Contempt by publication*, June 2003, p. xi.

6 New South Wales Law Reform Commission, *Report 100: Contempt by publication*, June 2003, p. 6.

7 New South Wales Law Reform Commission, *Report 100: Contempt by publication*, June 2003, p. 6.

8 Legal Services Commission of South Australia, *Submission 5*, p. 1.

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- if contempt is to be dealt with entirely in the criminal courts, then it should not be dealt with summarily and the defendant have the right to request the matter be heard by a different judicial officer.<sup>9</sup>

1.8 The Law Council of Australia (Law Council), expressed the view that contempt laws currently operate 'satisfactorily', although it was not opposed to the codification of contempt laws in line with the recommendations of the ALRC and the NSWLRC reports.<sup>10</sup> However, in noting its broad support for the codification of the law of contempt, the Law Council explained the importance of retaining certain principals such as flexibility and freedom of expression:

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.

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.<sup>11</sup>

1.9 Should reforms to the law of contempt proceed, the Law Council made the following recommendations:

- 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;

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9 Legal Services Commission of South Australia, *Submission 5*, pp. 1–2.

10 Law Council of Australia, *Submission 6*, pp. 5–6.

11 Law Council of Australia, *Submission 6*, p. 6.

- 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.<sup>12</sup>

1.10 The Law Council also recommended that they be consulted prior to any reforms relating to the law of contempt being introduced.<sup>13</sup>

1.11 The NSW Office of the Director of Public Prosecutions (ODPP) did not comment on the recommendations of the ALRC's report, however, stated that it 'supports the development of uniform statutory provisions governing the law of sub judice contempt.'<sup>14</sup> The ODPP noted that since the NSWLRC's report of 2003, social media platforms such as Facebook and Twitter were launched, which have significantly changed the media landscape, including in the manner and form in which media is being reported.<sup>15</sup> As such, the ODPP suggested that '[t]he proposed legislation will need to take account of the changing media environment to ensure that all manner of publications are covered by the sub judice provisions, including the new and emerging social media platforms.'<sup>16</sup>

1.12 While the International Commission of Jurists Victoria (ICJ) described the NSWLRC's report as 'an extremely useful and comprehensive tool in discerning the relevant issues with respect to contempt by publication laws...',<sup>17</sup> it argued against the broad codification of contempt laws.<sup>18</sup> The ICJ disagreed with criticism that the laws of contempt were difficult to determine and potentially lacking in procedural fairness.<sup>19</sup> It noted that the flexibility of the current law allows the courts to appropriately tailor their responses and that courts have shown that they are able to apply their powers in a 'fair and nuanced way'.<sup>20</sup> Finally, the ICJ argued that it was essential that courts are able to initiate contempt proceedings on their own motion as this is vital to the exercise of their independence.<sup>21</sup>

1.13 A couple of submitters did not offer a view as to whether or not the law of contempt should be codified, however made the following observations:

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12 Law Council of Australia, *Submission 6*, p. 6.

13 Law Council of Australia, *Submission 6*, p. 5.

14 Office of the Director of Public Prosecutions (NSW), *Submission 2*, p. 2.

15 Office of the Director of Public Prosecutions (NSW), *Submission 2*, p. 2.

16 Office of the Director of Public Prosecutions (NSW), *Submission 2*, p. 2.

17 International Commission of Jurists Victoria, *Submission 3*, p. 11.

18 International Commission of Jurists Victoria, *Submission 3*, pp. 7–10.

19 International Commission of Jurists Victoria, *Submission 3*, pp. 9–10.

20 International Commission of Jurists Victoria, *Submission 3*, pp. 9–10.

21 International Commission of Jurists Victoria, *Submission 3*, p. 10.

- the right to freedom of expression and the right to have a fair hearing can sometimes compete with one another but freedom of expression should not be misused to prejudice the prospects of a person obtaining justice before the courts;<sup>22</sup> and
- that the point of view and lore of Australia's Aboriginal and Torres Strait Islander people be considered.<sup>23</sup>

## **Committee view**

1.14 The committee thanks all organisations and individuals who made submissions to this inquiry, though it notes that the number of submissions received is far lower than it had anticipated. Having received such limited input, the committee does not feel that it is in a position to properly inquire into this complex issue, or to form a considered view as to whether the laws of contempt should be codified. However, having regard to the important and considered views expressed in the submissions received, the committee recommends that the submissions be referred to any future Senate inquiry into contempt.

### **Recommendation 1**

**1.15 The committee recommends that the submissions received to this inquiry be referred to any future Senate inquiry into contempt.**

**Senator Louise Pratt**

**Chair**

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22 Ms Melville Miranda, *Submission 1*, p. 5.

23 Mr Dominic Kanak, *Submission 4*, pp. 2–5.