The Senate

Legal and Constitutional Affairs References Committee

Law of contempt

November 2017

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Recommendations

Recommendation 1

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

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.[1]

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...[2]

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.[3] 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.'[4]

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.[5]

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.[6] However, the report recommended significant legislative reform in the area of contempt by publication, 'while allowing the common law to continue to develop.'[7]

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.[8] 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.

- 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.[9]

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.[10] 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.[11]

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;

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.[12]

1.10 The Law Council also recommended that they be consulted prior to any reforms relating to the law of contempt being introduced.[13]

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.'[14] 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.[15] 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.'[16]

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…',[17] it argued against the broad codification of contempt laws.[18] The ICJ disagreed with criticism that the laws of contempt were difficult to determine and potentially lacking in procedural fairness.[19] 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'.[20] 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.[21]

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;[22] and
- that the point of view and lore of Australia's Aboriginal and Torres Strait Islander people be considered.[23]

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

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

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

Appendix 1

Public submissions

1 Mr Melville Miranda

2 Office of the Director of Public Prosecutions NSW

3 International Commission of Jurists (Victoria) Incorporated

4 Mr Dominic Kanak

5 Legal Services Commission of South Australia

6 Law Council of Australia

Appendix 2

Contempt (ALRC Report 35)

Key recommendations

- The common law principles of contempt should be abolished and replaced by statutory provisions that would govern all Federal Courts except the High Court. These wide-ranging reforms would overhaul each existing form of contempt.
- Current forms of contempt should be replaced by criminal offences. To establish that a person was criminally liable, however, specific criteria should be met. ALRC Report 35 provided a list of recommended criteria for each form of contempt, the main purpose of which was to clarify the law and limit liability to situations where the conduct was sufficiently severe.
- These offences should be tried in the same way as normal criminal offences, rather than by a compressed form of hearing (summary procedure) to ensure that an accused's rights were protected.
- There would be two exceptions to this practice: improper behaviour in court and disobedience contempt. Contempt in the face of the court should be treated as a criminal offence, but the matter should continue to be heard summarily. To overcome the concerns raised about the fairness of this practice, the accused person should be able to require the original judge not to be in charge of the trial.
- The law governing disobedience contempt should be replaced by a statutory system of 'non-compliance proceedings'. Where a person has disobeyed an order, the other party should be able to request that the court impose sanctions (such as imprisonment or fines) to punish disobedience or pressure the disobeying person into complying with the order.
- Where the abolition of the common law forms of contempt would otherwise leave the courts without power to punish certain forms of interference with the administration of justice, the Commission recommended that the *Crimes Act 1914* (Cth) be amended to remedy this situation.
- Specific recommendations were made in ALRC Report 35 for the reform of contempt in family law matters, including replacing the present system of contempt and quasi-contempt contained in the *Family Law Act 1975* (Cth) be replaced by single procedure for the enforcement of orders. A number of policy considerations should be kept in mind when enforcing orders: punishment should only be used as a last resort when counselling has failed to resolve the issue; a wider range of

sentencing options should be available; in punishing those who do not comply with orders, the court should consider how the disobeying person's conduct harmed others, but must also consider how the punishment would affect any children involved.

- A specific offence should be created for breach of a restraining injunction. Where a person has breached a custody order by abducting a child, the police should have explicit power to arrest the abductor.
- Each Family Court Registry should establish an 'enforcement list' to ensure that non-compliance proceedings are heard as quickly as possible.[1]

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

Appendix 3

Contempt by publication (NSW Law Reform Commission)

RECOMMENDATION 1 (page 44)

Liability for sub judice contempt should be retained.

RECOMMENDATION 2 (page 73)

The publication of matter should constitute a contempt if it creates a substantial risk, according to the circumstances at the time of publishing the matter, that:

(a) members, or potential members, of a jury, or a witness or witnesses, or potential witness or witnesses, in legal proceedings will:

  (i) become aware of the matter; and

  (ii) recall the content of the matter at the relevant time; and

(b) by virtue of those facts, the fairness of the proceedings will be prejudiced.

RECOMMENDATION 3 (page 89)

Section 129(5)(b) of the *Evidence Act 1995* (NSW) should be amended to allow for a trial judge's decision to dismiss, or not to dismiss, a jury in a criminal trial following the publication of matter, and the reasons given for that decision, to be admissible in the related contempt proceedings, subject to s 135 of the *Evidence Act 1995* (NSW). The mere fact that the trial judge cannot be cross-examined should not be considered in itself to cause unfair prejudice to a party for the purpose of s 135. Evidence of the decision, and the reasons for the decision, should be admissible as relevant to the issue of liability for sub judice contempt, but should not be determinative of the question of liability.

RECOMMENDATION 4 (page 93)

Legislation should provide that the risk of prejudice presented by the publication of matter is not reduced by reason only that matter containing similar contents has been published on a previous occasion.

RECOMMENDATION 5 (page 112)

Legislation should provide that it is a defence to a charge of sub judice contempt, proved on the balance of probabilities, that the person or organisation charged with contempt, as well as any person for whose conduct in the matter it is responsible:

(a) did not know a fact that caused the publication to breach the sub judice rule;

and

(b) before the publication was made, either

(i) took reasonable steps to ascertain any fact that would cause the publication to breach the sub judice rule; or

(ii) relied reasonably on one or more other person to take such steps and to prevent publication of any such fact was ascertained.

RECOMMENDATION 6 (page 120)

Legislation should provide that it is a defence to a charge of sub judice contempt if the accused can show, on the balance of probabilities:

(a) that the offending matter was published pursuant to an agreement or arrangement whereby the content of matter to be published by the accused was to be determined by a person or persons other than the accused or any employee or agent of the accused; and

(b) that either:

(i) at the time of the publication, having made such inquiries as were reasonable in the circumstances, neither the accused or any servant or agent of the accused knew or had any reason to suspect that the material to be published would comprise or include the offending matter or any like matter; or

(ii) prior to the publication, having become aware, or having reason to suspect, that the material to be published would or might comprise or include the offending matter or any like matter, the accused, or a servant or agent of the accused, took reasonable steps to endeavour to prevent such matter from being published.

RECOMMENDATION 7 (page 122)

Legislation should provide for costs penalties if a defendant does not disclose evidence of the availability of a defence under Recommendation 7 to the prosecutor within 14 days of being served with summons commencing contempt proceedings.

RECOMMENDATION 8 (page 127)

Legislation should make it clear that mere intent to interfere with the administration of judice does not constitute sub judice contempt, in the absence of a publication that creates a substantial risk of prejudice to the administration of justice.

RECOMMENDATION 9 (page 137)

The sub judice rule should continue to apply to civil proceedings in the terms recommended in Recommendation 2.

RECOMMENDATION 10 (page 149)

Legislation should provide that, having regard to the circumstances of publication, a person or organisation that publishes material that gives rise to a substantial risk that a person of reasonable fortitude in the position of a party to civil or criminal proceedings will make a different decision in relation to those proceedings, for the reason that it vilifies the person in their character of a party to the proceedings, is liable for contempt.

"Party" in this context includes a prospective party, being a person who reasonably believes that they may become a party to the proceedings, or who is or appears to be in a position to institute the proceedings, whether or not they are minded to do so.

"Decision" in this context means a decision to institute, not to institute, to discontinue, to participate, or to participate further or to take a particular step in proceedings.

"Vilifies" in this context means inciting hatred towards, serious contempt for, or severe ridicule of the party through unfair comment and/or material misrepresentations of fact.

The "defences" available in other cases of sub judice contempt should be available in this case.

RECOMMENDATION 11 (page 154)

Legislation should make it clear that liability for sub judice contempt cannot be founded simply on the basis that a publication prejudges issues at stake in proceedings.

RECOMMENDATION 12 (page 158)

Subject to one exception relating to influence on prospective parties, the sub judice rule should not apply to a publication unless the proceedings to which it relates are pending at the time of the publication.

RECOMMENDATION 13 (page 164)

Legislation should provide that, for purposes of the sub judice rule, criminal proceedings should become pending, and the restrictions on publicity designed to prevent influence on juries, witnesses or parties should apply, as from the occurrence of any of these initial steps of the proceedings:

(a) the arrest of the accused;

(b) the laying of the charge;

(c) the issue of a court attendance notice and its filing in the registry of the relevant court; or

(d) the filing of an ex officio indictment.

RECOMMENDATION 14 (page 165)

Legislation should provide that: (a) where the accused is not in New South Wales but is in another Australian jurisdiction, criminal proceedings become pending from the arrest of the accused in the other jurisdiction; and (b) where the accused is overseas, the criminal proceedings become pending from the making of the order for the extradition of the accused.

RECOMMENDATION 15 (page 170)

Legislation should provide that in its application to publications which create a substantial risk of prejudice by virtue of influence to witnesses in civil or coronial proceedings, the sub judice rule should apply as from the issue of a writ or summons.

In its application to publications which create a substantial risk of prejudice by virtue of influence on jurors, the sub judice rule should apply as from the time when it is known that a jury will be used in the civil or coronial proceedings.

In its application to publications which create a substantial risk of prejudice by virtue of influence on parties, the sub judice rule should apply as from the issue of a writ or summons.

RECOMMENDATION 16 (page 171)

Legislation should provide that, in its application to publications which create a substantial risk of influence on prospective parties to criminal or civil proceedings, the sub judice rule may apply even though no proceedings have commenced.

RECOMMENDATION 17 (page 180)

Legislation should provide that for purposes of determining whether there has been contempt of court on the ground of influence on jurors or potential jurors, a criminal proceeding remains "pending" and sub judice restrictions remain operative until:

(a) the verdict of the jury in the proceedings is handed down, or

(b) the making of an order, or any other event, having the effect of the offence or offences charged will not be tried before a jury, or not at all.

For purposes of determining whether there has been contempt of court because of influence on parties, witnesses or potential witnesses, a criminal proceeding remains

"pending" and sub judice restrictions remain operative until the conclusion of appeal proceedings or the expiry of any period of appeal or further appeal.

Where a re-trial before a jury is ordered following a successful appeal against a conviction, the sub judice rule as it applies to all types of publications (including those that create risks of influence on a jurors, potential jurors, witnesses, potential witnesses and/or parties) begins to operate again from the time the order for a re-trial is made.

RECOMMENDATION 18 (page 181)

Legislation should provide that publications relating to civil and coronial proceedings cease to be subject to the sub judice rule when the proceedings are disposed of by judgment at first instance, settled or discontinued. The rule should become operative again only when and from the time a re-trial, or another inquest or inquiry in the case of coronial proceedings, is ordered.

RECOMMENDATION 19 (page 182)

Legislation should provide that the same time limits for the operation of sub judice restrictions apply whether or not there was an actual intention to interfere with the administration of justice.

RECOMMENDATION 20 (page 202)

Legislation should provide that a person charged with sub judice contempt on account of responsibility for the publication of material should not be found guilty if:

(a) the material relates to a matter of public interest; and

(b) the public benefit from the publication of the material, in the circumstances in which it was published, and from the maintenance of freedom to publish such material, outweighs the harm caused to the administration of justice by virtue of the risk of influence on one or more jurors, potential jurors, witnesses, potential witnesses and/or litigants created by the publication.

RECOMMENDATION 21 (page 209)

Legislation should provide that a person charged with sub judice contempt on account of responsibility for the publication of material should not be found guilty if the publication the subject of the charge was reasonably necessary or desirable to facilitate the arrest of a person, to protect the safety of a person or of the public, or to facilitate investigations into an alleged criminal offence.

RECOMMENDATION 22 (page 239)

A new provision should be introduced into the *Evidence Act 1995* (NSW) which provides that any court in any proceedings, has the power to suppress the publication of reports of any part of the proceedings (including documentary material), where this is necessary for the administration of justice, either generally, or in relation to specific proceedings (including proceedings in which the order is made). The power should apply in both civil and criminal proceedings and should extend to suppression of publication of evidence and oral submissions, as well as material that would lead to the identification of parties and witnesses involved in proceedings before the court. The new section should not replace the common law, and should operate alongside existing statutory provisions that restrict publication unless a successful application has been made rendering such a provision inapplicable in the circumstances. However, section 119 of the *Criminal Procedure Act 1986* (NSW), together with any other provisions contained in other statutes which give courts discretion if grounds are affirmatively made out to impose suppression orders, should be repealed.

A section should be introduced into the *Crimes Act 1900* (NSW) making breach of an order a criminal offence. The offence created by this section should be one of strict liability.

The *Evidence Act 1995* (NSW) should also expressly provide that a person with a sufficient interest in the matter should be eligible to apply to the court for the making, variation or revocation of a suppression order. The applicant for a suppression order, together with the media and anyone else regarded by the court as having a sufficient interest may be heard on the application. The same categories of persons should also be able to appeal in relation to a suppression order. Such a person, if heard previously on the original application, should be entitled to be heard on the appeal. Any other person with a sufficient interest may seek leave to be heard. An appeal against a decision should be heard by a single judge of the Supreme Court, except where a suppression order was made in the Supreme Court, in which case an appeal should be heard by the Court of Appeal.

The court should also be empowered to make an interim suppression order, having a maximum duration of seven days, before proceeding to a final determination. The court should have the power to grant subsequent interim suppression orders.

RECOMMENDATION 23 (page 273)

Legislation should provide that, subject to (a) any statute, (b) any order of the court prohibiting or restricting access to the relevant document or prohibiting or postponing reporting of the proceedings, or of the relevant part of the proceedings, and (c) any objection by a party or a person having a sufficient interest, the public should have a right of access to any document in one or more of the following categories:

(1) pleadings to the extent their content is relied on in open proceedings and referred to as forming the basis of the case argued by a party;

(2) judgments and orders;

(3) documents that record what was said or done in open court;

(4) documents that were admitted into evidence in proceedings other than bail and committal proceedings and coronial inquiries;

(5) written submissions, to the extent their content is relied on in open proceedings and referred to as forming the basis of the case argued by a party; and

(6) documents recording the offences with which a person has been charged in open court.

Where an objection is made, the court must prohibit or limit access only if the person objecting establishes that a grant of access would be contrary to the due administration of justice.

In relation to all other categories of document, applications for access to a document must be made to the court in which the proceedings are taking place. The applicant must establish grounds for a grant of access.

The word "document" should be defined to mean any record of information including:

(a) anything on which there is writing;

(b) anything on which there are marks, figures, symbols or perforations having a meaning for persons qualified to interpret them;

(c) anything from which sounds, images or writings can be reproduced with or without the aid of anything else; or

(d) a map, plan, drawing or photograph.

RECOMMENDATION 24 (page 274)

The court in which the proceedings are taking place should have the power to prohibit or impose conditions on access to, or reporting of, a document referred to in Recommendation 23, including a condition restricting the purpose for which the document is to be used.

RECOMMENDATION 25 (page 275)

Legislation should provide that, subject to any rule of common law or statute or any order of the court prohibiting or postponing reporting of the proceedings, or of the relevant part of the proceedings, the public should have the right to publish the contents of, or a fair and accurate summary of the contents of, a document referred to in Recommendation 23.

RECOMMENDATION 26 (page 293)

Legislation should provide that a private person may commence proceedings for the punishment of contempt.

This is subject to two provisos.

First, the person must, prior to the commencement of such action, notify the Attorney General and the parties to the proceeding (if any) allegedly involved.

Second, the Attorney General (or the Solicitor General or Crown Advocate acting under a delegation from the Attorney General) and the Director of Public Prosecutions shall have the discretion to take over the matter and:

(a) carry on the proceeding,

(b) cause the termination of the proceeding,

(c) carry on, on behalf of the prosecution or as respondent, an appeal in any court in respect of the contempt,

(d) cause the termination of an appeal in any court in respect of a contempt,

(e) institute and conduct, on behalf of the prosecution, an appeal in any court in respect of the contempt, and

(f) conduct, as respondent, an appeal in any court in respect of the contempt.

RECOMMENDATION 27 (page 309)

The hearing and decision of an appeal against a conviction and/or sentence for criminal contempt, and of a review of a question of law submitted by the Attorney General, should be assigned to the Court of Criminal Appeal.

RECOMMENDATION 28 (page 321)

Legislation should provide an upper limit for fines that may be imposed on persons convicted of criminal contempt. The maximum amount to be set in legislation should be substantially more than $200,000, the highest amount imposed so far in New South Wales in sub judice cases, to enable courts to deal with the worst class of criminal contempt cases. The legislation need not distinguish between the maximum fines that may be imposed on corporate offenders on the one hand, and individuals on the other.

RECOMMENDATION 29 (page 328)

Legislation should provide that the upper limit for a custodial sentence that may be imposed on a person convicted of criminal contempt should be 5 years.

RECOMMENDATION 30 (page 333)

Legislation should expressly provide that the various methods of and alternatives to serving custodial sentence, such as community service orders, good behaviour bonds, dismissal of charges and conditional discharge of the offender, deferral of sentencing, suspended sentences, periodic detention orders, home detention orders and parole, are available for the sentencing courts to use in criminal contempt proceedings.

RECOMMENDATION 31 (page 337)

The Attorney General should create and maintain a registry of court outcomes of criminal contempt proceedings. The information in the registry should be used only for sentencing purposes.

RECOMMENDATION 32 (page 342)

Legislation should provide that a private individual who intends to apply for an injunction to stop an apprehended criminal contempt shall, prior to such application, notify the Attorney General and the parties to the proceedings (if any) allegedly involved.

RECOMMENDATION 33 (page 343)

Legislation should provide that the Director of Public Prosecutions may apply for an injunction to restrain the publication of material relating to criminal proceedings which would be in breach of the sub judice principle or which would be a repetition of such breach.

RECOMMENDATION 34 (page 363)

The *Costs in Criminal Cases Act 1967* (NSW) should be amended to enable the Supreme Court to make an order for costs against a publisher of material, in contempt of any court at which a criminal trial is held before a jury, if the publication causes the discontinuance of the trial.

RECOMMENDATION 35 (page 379)

The amending legislation should substantially be in the form set out in the Costs in *Criminal Cases Amendment Bill 1997* (NSW) but with the following modifications:

The application of the legislation should not be restricted to media organisations.

An order for compensation should only be made where there has been a conviction for contempt.

An order for compensation should only be made where the contemptuous publication was either the sole or a substantial cause of the trial being discontinued.

Reference in the *Costs in Criminal Cases Amendment Bill 1997* to "printed publication" and "radio, television or other electronic broadcast" should be omitted. "Publication" for the purposes of the legislation should be defined to mean a "publication in respect of which a conviction for contempt has been entered".

The legislation should provide that the Court, in determining the amount of any fine to be imposed and the amount of a costs order, should take account of the total sum to be paid by the contemnor.

The Court should have a discretion to order an amount which is "just and equitable in all the circumstances", providing that the amount ordered does not exceed the actual wasted costs. The legislation should provide that the matters to which the court should have regard in the exercise of this discretion should include:

(a) the financial resources of the contemnor; and

(b) the degree of culpability of the contemnor.

The costs in respect of which an order may be made should exclude the cost to the State of the remuneration of judicial and other court staff and any other ongoing State expenses not directly referable to the aborted trial.

The "legal costs" of the parties and the provision of "legal services" to the accused should include disbursements directly related to the aborted trial.

Where the Attorney General attaches or tenders a certificate setting out the costs that relate to the discontinued proceedings, the party against whom a costs order is to be made should be able to challenge the accuracy of the contents of the certificate. However, the certificate should amount to prima facie evidence of the costs, in the absence of contrary evidence produced by the contemnor.

The Attorney General's certificate of costs should include the costs claimed by the accused affected by the discontinued trial.

An order for costs which is less than the amount claimed in the Attorney General's certificate should, nonetheless, include the full amount of the accused's costs.

RECOMMENDATION 36 (page 391)

A media information officer should be appointed in New South Wales with the specific function of liaising between the media and the Supreme Court (including the Court of Appeal), the Court of Criminal Appeal, the Land and Environment Court, the Children's Court, the District and Local Courts, the Coroner's Court, the Industrial Relation Commission, and the Dust Diseases Tribunal.

RECOMMENDATION 37 (page 391)

A Courts Media Committee should be established in New South Wales, comprising representatives of both the media and the courts, based on the courts media committee in Victoria.

RECOMMENDATION 38 (page 391)

There should be a protocol to the effect that, when a court makes a suppression order, the terms of that order are to be posted on the court's web page within a specified period of time.

RECOMMENDATION 39 (page 391)

The registry of the court in which a suppression order is made should make available to the public the terms of the order.