Chapter 8 - Contempt

Introduction

8.1 When a journalist refuses to comply with the order of a judicial or quasi-judicial body to answer questions for fear of disclosing the identity of a confidential source, is proceeding against him or her for contempt of court the appropriate response? Would the answer to this question be different if the recommendations of chapter 7 of this report were in operation? If the solution to the conflict engendered by journalists' determination to keep their sources secret and the justice system's insistence that they be revealed allows for the justice system to prevail in certain circumstances, then unless the authority of the court is acknowledged and respected by journalists, the risk of confrontation between them remains.

8.2 To successfully eliminate conflict, this solution will need recognition in the Code of Ethics of the AJA. There would then be no legitimate argument, whether legal or moral, for a journalist to defy an order to disclose. Such defiance would clearly be contempt in the face of the court.

Disobedience Contempt

8.3 In 1987 the Law Reform Commission of Australia (LRC) published its Report No 35 on Contempt. That report described non-compliance with court orders as "disobedience contempt". 'It involves the imposition of sanctions for the purpose of enforcing orders made by, and undertakings given to, courts, and for the punishment of disobedience of

those orders."[1] The LRC recommended the abolition of the common law of contempt in those circumstances, and its replacement by a statutory procedure for the imposition of sanctions upon witnesses who refuse to answer a question lawfully put to them.[2] The recommendations go on to provide that sanctions for the purpose of enforcement should only be imposed where compliance is within the capacity of the person concerned and only to the extent that they are likely to be effective.

8.4 The LRC's recommendation 66[3] favours punitive sanctions only to the extent that they are necessary to uphold the effectiveness of court orders. Courts are still the ultimate arbiters of disputes in our society. Penalties are therefore relevant in the context of enforcement. If enforcement is not an issue, penalties can only serve as vindication for the injured party, or as a specific or general deterrent.[4] This means that one particular journalist would be punished to encourage other journalists in a similar situation to reveal their confidential source.

A Separate Court

8.5 The LRC Report contemplates that proceedings for disobedience contempt be conducted by the presiding judge or by a separate

1 *Law Reform Commission, Report No. 35, p. lv*

2 *LRC, Report No 35. p.lxxxv*

3 *LRC, Report No 35, p.lxxxiv*

4 *LRC, Report No 35, p. 307*

tribunal constituted from the same court but excluding the presiding judge[5]. The decision about which mode should be followed is left to the presiding judge. Professor Chesterman, during evidence to the Committee, urged that, if a journalist is to be dealt with for contempt for failing to comply with a court order, that subsequent proceeding should take place before a different judge. His view was that the basic issue in a trial for contempt is that it be fair. He said:

> Even as the law stands, it is not inevitable that it be dealt with by the same judge because you can prosecute these witness refusals as separate criminal offences, in which case they will go under a statutory offence provision to usually summary trial before a magistrate. Where the refusal occurs, as with Deborah Cornwall, in front of a commission investigatory body, that body will never be the one that imposes liability and punishment; it will have to be referred across to a court, just as Deborah Cornwall was referred across to the Supreme Court and dealt with there.
> But I would like you to consider making the procedure whereby, at least if the journalist requires it, the issue of his or her ultimate liability and sentence be referred to a separate court; that that be common form for all of these sorts of cases and not just depend on the way it happens to develop.[6]

8.6 At another point in the public hearings, Professor Chesterman argued that if a court has reached a decision that the journalist should reveal her or his source and the journalist refuses, there is a conflict between the relevant judge and journalist, before the issue of what is an appropriate remedy is ever considered. The judge her or himself is a party to the conflict and may well be seen to view the matter from a partisan

5 *LRC, Report No 35, p. 79*

6 *Evidence (Prof Chesterman), p. 143*

position. The issue of the journalist's ultimate liability and punishment should therefore, in Professor Chesterman's view, be referred to a separate court where the issues will be determined by a disinterested adjudicator.[7]

8.7 This position was supported by the Communications Law Centre which drew attention to the possibility that such separate consideration of punishment for contempt could operate as a 'review', presumably of the exercise of the judge's discretion pursuant to the guidelines. The following extract from the Centre's submission articulates the relevant issues:[8]

> Separate trial in a separate court ensures a fair trial for the journalist and provides all of the safeguards which are usually available to an accused person. The judge or magistrate whose demands for disclosure have been openly defied can too easily feel that her or his authority is in issue and therefore may be unable to approach the issues of "necessity" and "importance of purpose" with total impartiality. ... If a separate court is used there is, in effect, a review stage for the journalist - for a conviction to occur, two fora must agree that "necessity" and "importance of purpose" have been established.

8.8 The Committee understands this proposal. However, the Committee does not consider it appropriate to depart from the conclusions reached by the Australian Law Reform Commission in its exhaustive review of the law of contempt. The LRC recommended that there should be two possible modes of trial for the offence of contempt in the face of the court, namely trial by the presiding judge or trial by a separate bench from within

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7 *See Evidence (Prof Chesterman), p. 125*

8 *Submission 113, p. 1213*

the same court, but excluding the presiding judge. The Committee has concluded that it is appropriate to leave the option in the hands of the presiding judge who has the duty to make her or his court operate effectively.

Recommendation 3

The committee recommends that any contempt proceedings be dealt with in the manner recommended by the Australian Law Reform Commission in its report on Contempt, namely that the presiding judge have the option either of dealing with the matter himself or herself or of referring the matter to a separate court. (Para 8.9)

Penalties

8.9 Assuming that contempt proceedings for disobedience are to be retained, there appear to be a number of ways of addressing the issue of punishment for it.

Statutory offence

8.10 In addition to making recommendations about proceedings in respect of disobedience contempt the LRC Report recommended the creation of a new indictable offence of wilful failure to comply with a court order in such a way as to constitute a flagrant challenge to the authority of

the court.[9] Indictable offences usually attract a penalties which include a term of imprisonment.[10]

8.11 Where the behaviour of a journalist is found by a court to be so serious as to constitute such an offence, should the recommendation of the LRC be implemented. The Committee sees no reason why he or she should not be subjected to the relevant punishment, appropriately decided by the court. Ideally, the situation should not arise if the structured discretion discussed in Chapter 7 is enacted, and the AJA Code of Ethics amended to recognise the law which would then apply. In all those circumstances, a journalist who continues to defy the court should not have the protection of the law. The LRC found in their inquiry that imprisonment would continue as a sentencing option.

8.12 The Committee's attention was drawn to the situation where a journalist refuses to reveal a confidential source and is by such refusal knowingly aiding a crime which carries a penalty of 5 years.[11] The Committee considers that such a situation would result in the journalist being prosecuted for participating in the relevant crime. It would not be a proper case to bring proceedings for disobedience contempt.

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9 LRC, Report No 35 p.lxxxvi, para 561.

10 Section 4G of the Crimes Act 1914 (Cth) defines an indictable offence as one with a penalty of more than 12 months imprisonment. Some statutory offences which do not carry a term of imprisonment are specifically defined as indictable by the legislation which creates the offence.

11 Submission 125, p. 1541; Evidence (Mr Hellaby), p. 382 - 383

Imprisonment

8.13 There may be cases where a journalist refuses to comply with an order in circumstances which do not constitute a 'flagrant challenge of the court's authority'[12]. The Committee needs to consider the issue of penalties in the context of the present law, where there is no statutory protection for confidential sources. The important question in that context is: should journalists go to gaol for refusing to disclose information, in circumstances where they regard themselves as bound by their professional ethics and as acting in the proper course of their employment? In its Discussion Paper of August 1993, the New South Wales Opposition said it "does not believe workers should be sent to gaol for doing their jobs".[13]

8.14 The Committee is firmly of the view that an open ended penalty, that is, a term of imprisonment until the person complies with the order, should never be an option. The arguments against open ended sentences were canvassed in the LRC's Report. They included:

- a coercive sentence may cease to be coercive,
- the potential for unnecessary publicity for 'martyrs', and
- the potential for comparatively harsh outcomes.[14]

8.15 The cases this Committee has looked at have shown that open ended imprisonment does not work. The sources have remained unknown

12 *LRC, Report No 35, para 561*

13 *New South Wales Opposition, "Journalists and their Sources", August 1993, p.13*

14 *LRC, Report No 35, paras. 541-544*

despite Mr Nicholls, Mr Hellaby and Mr Budd spending time in prison. Professor Chesterman had this to say:

> Then the other thing we took up in that report [LRC Report No 35] was the matter of the possibility of sentence until you disclose, until you give the evidence, and we said very firmly - and I think with a fair degree of unanimity from people whom we consulted - that in any type of situation where a witness refuses to give an answer in a court the penalty, ultimately, should be a limited one; under ordinary sentencing principles it should be set with an upper limit and you should never have a court saying, 'You go to gaol until you give is the information we are seeking'.[15]

8.16 This approach is supported by the Communications Law Centre in the following terms:

> In addition, it is unacceptable that the penalty for contempt takes the form of an indefinite sentence until such time as the witness caves in and obeys. In any event, such coercive punishment appears to be futile, as journalists have refused to disclose their source despite being imprisoned, as was the case with Barrass and Budd. We adopt the Australian Law Reform Commission's proposal that there should instead be a fixed maximum sentence.[16]

8.17 Other witnesses pointed out that penalties do not work, they do not correct the situation by obtaining the information sought by the court, they simply punish.[17] In that event the resolution of the case in which the issue arose is not advanced. On the other hand the administration of justice

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15 Evidence (Prof Chesterman), p. 143-144

16 Submission 113, p. 1213

17 Evidence (Mr Hurst), p. 203

may be served in the general sense as the authority of the court is vindicated. Some of these arguments are, of course, applicable in the wider debate about sentencing in criminal matters generally.

8.18 The Committee agrees with the LRC that open ended imprisonment until disclosure should not be imposed upon a journalist who refuses to comply with a court order. The Committee also concludes that penalising a refusal to answer in circumstances less than flagrant should not include imprisonment.

Proportional penalties

8.19 A number of witnesses referred the Committee to the unsatisfactory situation which arises in those cases where journalists have been ordered to answer questions about the identity of a confidential source, have refused to do so, and the punishment they have ultimately received has been more severe than that which is imposed upon the person to whom the original proceedings related. The Barrass case was the most prominent of these. As noted in Chapter 4 Mr. Luders, the accused in the prosecution, was convicted of official corruption and fined $6,000. Mr. Barrass was convicted of contempt and fined $10,000 even though his refusal to reveal the identity of his source did not prevent the successful conviction of the accused. In the case involving David Hellaby the journalist was fined $5,000 but the case was settled confidentially.

8.20 The Committee is concerned that a person who has demonstrated a commitment to his or her code of ethics, even though they

are not enshrined in law, is punished for that commitment with a heavier penalty than the person who is before the court for engaging in criminal conduct, such as official corruption. Such a result does not sit comfortably with common notions of fairness.

Other Possible Sanctions

8.21 Leaving aside the question of whether or not there ought be an indictable statutory offence of failure to comply with a court order in circumstances which involve a 'flagrant challenge to the authority of the court', it seems there is a range of responses to disobedience contempt the courts could consider. If the recommendations in Chapter 7 are enacted, this issue will arise only when the court has concluded that the information is essential to the resolution of the issue it is dealing with. As suggested by the LRC, the ideal response would be one which will obtain the information required.

8.22 If there is no consequence for the non-compliant journalist for the refusal to disclose the source of information, that journalist and others will have no incentive to comply with such an order on a subsequent occasion. The LRC favours the retention of punitive sanctions 'to the extent that they are necessary to uphold the effectiveness of court orders'.[18] So if there are to be sanctions, other than imprisonment, what are the options?

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18 LRC, Report No 35, para. 519

Fines

8.23 Monetary penalties have the potential to be an effective punishment for a journalist but, as previously discussed, it is important that the level of that fine bear some relationship to the seriousness of the offence. It should be commensurate with the subject matter of the proceedings in which the order was made.

8.24 Monetary fines are usually paid by the journalist's employer.[19] However, if the journalist has acted contrary to the employer's accepted standards, it is possible that the fine will be left to the journalist. Assuming that is not the case, it is quite likely that the employer will make the payment. Liability should also be acknowledged by the journalist. However, it would be difficult for the court to ensure that a fine imposed was actually paid by the person on whom it is imposed.

Community Service

8.25 A busy journalist may be suitably chastened by having to give up some of his or her time to provide voluntary service to the community. This should be an option for the sort of cases discussed in this report even when not an alternative to imprisonment. The Law Council's view was that both monetary penalties and imprisonment were inappropriate and suggested something along the lines of community service.[20]

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19 *Evidence (Mr Bartlett), p. 201*

20 *Evidence (Mr Bartlett), p. 201*

8.26 Deborah Cornwall was subjected to a suspended gaol sentence, with community service as an alternative. The Committee does not accept that gaol terms should be imposed when the journalist has acted in an ethical manner. It ought to be possible for a court to proceed straight to a community service order.

Suspension/ Professional discipline

8.27 If a journalist fails to comply with an order to reveal a source after enactment of the recommended structured discretion and amendment of the AJA Code of Ethics, it would be open to his or her professional body to take action to punish that journalist. (Such a journalist would have failed to abide by the new code.) Such action by the professional disciplinary body could include fines, suspension or prohibition from practice as a journalist, depending upon the conclusions about the seriousness of the offence. If the court has already imposed a punishment for contempt, care would need to be taken by the professional body to avoid impinging upon rules against double jeopardy. It might be possible for a court to merely refer the matter to the relevant professional body for consideration and appropriate action. This is sometimes done with recalcitrant lawyers.

8.28 The structure for disciplinary processes and the role and content of the journalistic code of ethics are discussed shortly in the next chapter and will be dealt with more thoroughly in a subsequent report of this inquiry.

Publicity

8.29 A further option could be the making of an order for publication of the conclusions reached by the court and the professional disciplinary body about the behaviour of the journalist concerned. Several witnesses told the Committee that journalists are jealous of their reputation because much of their work and advancement in their careers arises from the reputation they build.[21] The threat of bad publicity arising from a failure to comply with a court order and an amended code of ethics may act as an incentive to journalists to avoid giving indiscriminate undertakings as to confidentiality which a court may subsequently order them to break. The journalist will have to consider the possible view of a court about the undertaking at the time of giving it. The disadvantage of reliance upon such publicity as the main sanction is that some of the less reputable media outlets may prefer to engage journalists prepared to take risks.

Proceed on the basis there is no source

8.30 A number of witnesses drew attention to the possibility that the court might, when it was unable to ascertain the source of evidence given by a journalist because of an undertaking as to confidentiality, proceed on the basis there was no source. Such a procedure would not be in the character of punishment for contempt. It would operate quite independently of that. The device has been developed in the United States where, in a libel case in New Hampshire, it was presumed that where the defendant refused to reveal a source when so ordered there was no such

21 *Evidence (Mr Crocker), p.291, (Mr Hippocrates), p.385, (Mr Briscoe), p. 386*

source[22].

8.31 The Attorney-General's Department suggested that such a presumption might go some way to redressing the injustice resulting from a refusal to identify the source and could apply in a wider range of proceedings than defamation.[23] Professor Flint of the Australian Press Council suggested that it might be a more suitable response than seeking to punish the journalist.[24] The effect of such an assumption on the proceedings would need to be carefully considered.

8.32 There is a danger that such an approach might skew the result of the case. Professor Chesterman pointed out that the journalist may come into the case as a witness not linked with any party.[25] The assumption may in fact be false. This could lead to an injustice. Professor Chesterman put these issues succinctly:[26]

> ... if the source, for whatever reason, has not been disclosed, it is likely to weaken the evidence that is given, but it may not destroy it. ... the jury may still believe that the evidence is credible and give it due weight. I would think, though, that in the ordinary course of events the failure to reveal the source and have the source come forward and testify to his or her part in the affair is going to weaken the overall story that the journalist is telling. To move from there to a presumption that there was no source may be bringing into the evidence in the

22 *Downing v Monitor Publishing Company Inc (NH 415 A 2d 683)*

23 *Submission 115, p.1340*

24 *Evidence (Prof Flint), p. 126*

25 *Evidence (Prof Chesterman), p. 127*

26 *Evidence, p. 128-129*

> case an item of fact which is just not true. There may be some cases where there was a real source but the privilege was denied. There may be other cases where the privilege is granted to the journalist but there was not, in fact, a source. The two things are at odds with each other.

8.33 The Committee does not favour the creation of an assumption that where a journalist refuses to reveal a source then there is no source. It is an assumption which may well not be the truth. This could lead to an injustice being done. Further, such an assumption would conflict with the recommended structured discretion.

Recommendation 4

8.34 The Committee has concluded that there remains a place for contempt in dealing with the conflict between the journalist's intent to preserve confidential sources and the court's determination to see to the administration of justice. Any solution which calls for an overriding order by the court must have a sanction for the failure to comply with it. The situations where enforcement procedures will be necessary will be significantly reduced by the adoption of the solution recommended in Chapter 7.

The Committee recommends:

- After the tests set out in Chapter 7 have been satisfied, if a court orders disclosure of a confidential source and the journalist refuses to comply, that failure should be dealt with as contempt of court.

- When such failure to comply is so treated, the presiding judge should have the option either of dealing with the matter himself or herself or of referring it to a separate court. (See recommendation 3.)

- The appropriate punishment for such contempt should be a matter for the discretion of the court from a wide range of options. If the proceedings during which the alleged contempt occurred are criminal, the journalist should never be subjected to a greater penalty than the accused in the criminal proceedings.