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# CONTEMPT IN MODERN NEW ZEALAND



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The Law Commission is an independent, central advisory body established by statute to undertake the systematic review, reform and development of the law of New Zealand. Its purpose is to help achieve law that is just, principled and accessible and that reflects the heritage and aspirations of the peoples of New Zealand.

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# Foreword

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The Law Commission was asked to undertake a first principles review of the law of contempt of court.

The contempt laws were developed by the courts over the centuries to protect the integrity of the justice system. Since they were first developed, there have been massive changes in technology around the world. Most New Zealand citizens have virtually unobstructed access to an almost limitless amount of information through the Internet, and this is changing the way people communicate and live their lives. The Internet poses a huge challenge to the law of contempt and our concept of what constitutes a fair trial.

As most of the law of contempt is not contained in any statute, it is inaccessible to the New Zealand public. Given the criminal nature of punishments for most contempts, the Commission thinks the time has come for the contempt laws to be set out in statute so they are as clear and as accessible to the public as possible.

In this Issues Paper, the Commission outlines its proposals for the modernisation and reform of the laws of contempt and looks forward to receiving public submissions in response.



*Sir Grant Hammond*  
President

# Acknowledgements

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The Judiciary

Emeritus Professor John Burrows

Professor ATH Smith

Associate Professor Rosemary Tobin

# Call for submissions

Submissions or comments (formal or informal) on this Issues Paper should be received by **22 August 2014**.

Emailed submissions should be sent to:  
**contempt@lawcom.govt.nz**

Written submissions should be sent to:  
**Contempt Project  
Law Commission  
PO Box 2590  
Wellington 6011  
DX SP 23534**

The Law Commission asks for any submissions or comments on this Issues Paper on the Review of Contempt of Court. Submitters are invited to focus on any of the questions. It is certainly not expected that each submitter will answer every question.

The submission can be set out in any format, but it is helpful to specify the number of the question that you are discussing.

A final report and recommendations to Government will be published in 2015.

## **Official Information Act 1982**

The Law Commission's processes are essentially public, and it is subject to the Official Information Act 1982. Thus, copies of submissions made to the Law Commission will normally be made available on request and may be published on the Commission's website. The Commission may refer to submissions in its reports. Any requests for withholding of information on grounds of confidentiality or for any other reason will be determined in accordance with the Official Information Act 1982.





# Contents

Foreword .....	iii
Acknowledgements .....	iv
<b>Chapter 1 Introduction .....</b>	<b>3</b>
Background .....	3
Scope of the review .....	4
Context of the review .....	5
Principles underpinning the review .....	5
<b>Chapter 2 General matters .....</b>	<b>6</b>
History of contempt .....	6
Features of contempt .....	7
Common issues .....	8
<b>Chapter 3 Contempt in the face of the court .....</b>	<b>15</b>
Introduction .....	15
Review of the Judicature Act 1908 .....	15
Judicature Modernisation Bill .....	16
Another process? .....	17
Tikanga, diversity and contempt .....	18
<b>Chapter 4 Reforming publication contempt .....</b>	<b>21</b>
Introduction .....	21
Current law and application .....	22
Issues and problems .....	30
Reforming the law .....	33
<b>Chapter 5 Jurors and contempt of court .....</b>	<b>38</b>
Introduction .....	38
Jurors accessing information .....	38
Disclosure of information by jurors .....	49
<b>Chapter 6 Scandalising the court .....</b>	<b>56</b>
Introduction .....	56
What is “scandalising”? .....	56
Scandalising issues .....	60
International approaches to the contempt of scandalising .....	61
Where to now for the contempt of scandalising? .....	64

<b>Chapter 7 The future of civil contempt</b> .....	<b>69</b>
Introduction .....	69
What is civil contempt? .....	69
Comparing civil and criminal contempt .....	75
Approach in other jurisdictions .....	81
Reform options .....	82
<b>Chapter 8 Replacing common law contempt with statutory offences</b> .....	<b>86</b>
Introduction .....	86
Statutory offences that were formerly common law criminal contempts .....	86
International approaches to codification .....	87
Codification in New Zealand? .....	88
<b>Questions</b> .....	<b>91</b>
<b>Appendix A</b> .....	<b>94</b>
Terms of reference .....	94
<b>Appendix B</b> .....	<b>95</b>
Table outlining courts' contempt jurisdiction .....	95
<b>Appendix C</b> .....	<b>97</b>
Statutory contempts .....	97

# Chapter 1

## Introduction

### BACKGROUND

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1.1 Public confidence in the justice system is essential for the courts to exercise their constitutional role of upholding the law and dispensing justice.

1.2 In *Siemer v Solicitor-General*, Elias CJ recently described contempt proceedings as follows:<sup>1</sup>

The “great coercive powers of proceedings for contempt” are common law jurisdiction possessed by courts to punish, including by imprisonment, conduct which risks undermining the administration of justice.

1.3 Celebrated English Judge Lord Diplock said the three requirements of the due administration of justice are that all citizens should:<sup>2</sup>

- have unhindered access to courts for the determination of disputes as to their legal rights and liabilities;
- be able to rely on the courts being free from bias against any party and for decisions based only on facts to be proved on evidence properly adduced; and
- once the dispute has been submitted to a court, be able to rely upon there being no usurpation by any other person of the function of the court to decide it according to law.

The New Zealand Bill of Rights Act 1990 (Bill of Rights Act) recognises requirements for the due administration of justice in this country by providing minimum standards of criminal procedure, including:<sup>3</sup>

- (a) the right to a fair and public hearing by an independent and impartial court;
- (b) the right to be tried without undue delay;
- (c) the right to be presumed innocent until proved guilty according to law; and
- (d) the right to be present at the trial and to present a defence.

1.4 Conduct calculated to prejudice any of the requirements of the due administration of justice or to undermine public confidence that these requirements will be observed is contempt of court.

1.5 Essentially, contempt is judge-made law designed to protect the integrity of the justice system. A major issue in this Issues Paper is the extent to which contempt should be provided for by statute.

1.6 Some of the ways in which the court’s authority and independence may be undermined – or held in “contempt” – are more obvious than others. For example, the courts cannot operate effectively if participants behave abusively in court or disobey a judge’s lawful instructions. In the same way, people who are brought before the court on a criminal charge cannot be

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1 *Siemer v Solicitor-General* [2013] NZSC 68, [2013] 1 NZLR 441 at [1].

2 *Attorney-General v Times Newspapers Limited* [1974] AC 273 (HL).

3 New Zealand Bill of Rights Act 1990, s 25.

assured of their fundamental right to a fair trial if, as a result of overwhelming prejudicial media coverage, a fair trial is at risk.

- 1.7 But there are also more subtle ways of interfering with the court's ability to uphold the rule of law than blatantly undermining an individual's right to a fair trial. For example, if judges are subjected to overt or covert bullying or pressure from politicians not observing the principle of comity between the different branches of government, or lobbyists, judges' independence may be called into question. Similarly, if they are subjected to personal ridicule or threats, their ability to adjudicate without "fear or favour" may be consciously or unconsciously compromised. The above examples are types of behaviours that may, in certain contexts, amount to "contempt". Although the ways in which a contempt may be committed differ, they all have in common a tendency to undermine the administration of justice.
- 1.8 For the purposes of the review, it is convenient to identify different types of criminal contempt. In this Issues Paper, "contempt in the face of the court" concerns jurisdiction to punish disruptive behaviour in court. We use the term "publication contempt" mainly to describe publications that may prejudice a particular trial and "scandalising the court" to describe publications that tend to undermine the judicial system generally. "Contempt by jurors" refers to contempt committed by jurors, such as conducting research and disclosing juror deliberations. In addition, we look at both civil and criminal contempt in the form of disobedience of court orders.

## SCOPE OF THE REVIEW

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- 1.9 The Terms of Reference for the Law Commission's review of contempt of court are set out in Appendix A.
- 1.10 The review mainly focuses on the following forms of the contempt of court powers in New Zealand:
- Publication contempt, which is the contempt that is the most difficult to articulate and has been significantly affected by the advent of new media.
  - Contempt by jurors, which is also facing significant challenges as a result of new media.
  - Scandalising the court, which is clearly outdated, as the name suggests.
  - Civil contempt, which may no longer be relevant.
- 1.11 The review will not consider in any detail the suppression of names and evidence, as the Commission has recently dealt with these matters, and the suppression laws were updated as part of the reforms included in the Criminal Procedure Act 2011.<sup>4</sup>
- 1.12 The protection of journalists' sources is now dealt with in section 68 of the Evidence Act 2006 and will not be discussed either.
- 1.13 Contempt in the face of the court is discussed in Chapter 3.
- 1.14 For each of the areas of contempt that are the focus of the review, the Commission considers the nature of the contempt, its purpose and whether it adequately reflects the values of the society it seeks to protect. That analysis considers the impact of the Bill of Rights Act, the Internet and new media and whether (or how) the common law could usefully be reflected in legislation.

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<sup>4</sup> Law Commission *Suppressing Names and Evidence* (NZLC R109, 2009). Legislative amendments incorporating the Government's response to the Commission's recommendations were included in the Criminal Procedure Act 2011.

## CONTEXT OF THE REVIEW

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- 1.15 In a country bound by the rule of law, only the courts have the authority to determine guilt according to the law and evidence put before the court. The jury trial plays a pivotal role in our justice system.
- 1.16 A number of statutory provisions protect the integrity of the jury trial process and, most crucially, citizens' fundamental right to a fair trial. These include the Bill of Rights Act, the Evidence Act and the Criminal Procedure Act. The principles underpinning this statutory framework distil many years of jurisprudence and are designed to ensure that citizens, who are at the mercy of the very considerable powers vested in the courts, are treated fairly and have all the necessary protections offered by due process.
- 1.17 Many of the underlying concepts in our justice system are being fundamentally challenged by the paradigm shift in communications and the way in which all citizens can exercise their right to freedom of expression. In time, this may transform the conduct of trials and the way evidence is gathered and communicated to those determining cases. However, the Commission's review of contempt of court must assess whether, within the constraints of the existing legal system (which includes the jury trial), it is possible to improve the ways in which the law of contempt of court supports the administration of justice.

## PRINCIPLES UNDERPINNING THE REVIEW

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- 1.18 The review will take a first principles approach, which will require the Commission to consider the fundamental basis for contempt of court. We set out below the key principles underlying the Commission's approach to the review:
1. As an independent branch of government, the judiciary must be able to regulate conduct that tends to undermine the administration of justice.
  2. In accordance with the rule of law, it is desirable that the laws of New Zealand be as clear and accessible to the country's citizens as possible.
  3. Parliamentary authority for all criminal offences is desirable from a constitutional perspective.
  4. Whether in statute or common law, certainty and predictability cannot always be achieved in areas of law where judgement must be exercised between competing values.
  5. Where a contempt is provided for by statute, the statute should be clear as to whether the old common law relating to that contempt is extinguished or remains relevant to assist interpretation.
- 1.19 In Chapter 2, we begin by looking at issues common to all types of contempt, before taking a closer look at the contempts that are the focus of the review.

# Chapter 2

## General matters

### HISTORY OF CONTEMPT

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- 2.1 Today's contempt laws were developed by the courts over the centuries to prevent or punish conduct that may interfere with the administration of justice.
- 2.2 Historically, the law of contempt developed out of the King's power as a source of justice to punish abuses and affronts to the King's peace and the King's courts. As early as the 12th century, actions or words that interfered with the administration of justice could be punished by the King's courts as contempt against the King's peace. The rolls and year books contain references to contempts of court.<sup>5</sup>
- 2.3 From these earliest times, the superior courts of common law in England exercised jurisdiction over contempt emanating from the sovereign's power. Power to punish contempt, together with a range of other unrelated powers, came to be called the "inherent jurisdiction" of the superior courts.
- 2.4 The writ of attachment appeared regularly in the early contempt cases. The writ ensured the court had some control over a party to secure that party's appearance in court, either by imprisonment of the body or by the taking of securities.
- 2.5 In the 16th and 17th centuries, the Star Chamber took on some of the jurisdiction of the King's Council and punished contempts of the common law courts. The Star Chamber dealt with contempts by a summary process rather than by the common law procedure. When the Star Chamber was abolished in 1640, the King's Bench acquired all the lawful power that had been vested in the Star Chamber and also adopted the summary procedure of the Star Chamber.<sup>6</sup>
- 2.6 In New Zealand, inherent jurisdiction now resides in the High Court. The Judicature Act 1908 amended and consolidated the law relating to the Supreme Court (the forerunner of today's High Court) and the Court of Appeal.<sup>7</sup> The Judicature Act recognises and affirms that the High Court has "all the jurisdiction which it had on the coming into operation of this Act and all judicial jurisdiction which may be necessary to administer the laws of New Zealand".<sup>8</sup> By virtue of the earlier provisions of the Supreme Court Acts of 1860 and 1882, the High Court has all the jurisdiction possessed by the superior courts in England at the time the 1860 Act came into force.<sup>9</sup>
- 2.7 The remaining vestiges of the historic power of the sovereign to punish contempt by committal to prison consequently reside now in the High Court. Joseph Williams J helpfully summarised the position:<sup>10</sup>

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5 For a full historical account, see David Eady and ATH Smith (eds) *Arlidge, Eady and Smith on Contempt* (4th ed, Sweet & Maxwell, London, 2011).

6 R Joseph "Inherent Jurisdiction and Inherent Powers in New Zealand" (2005) 11 *Canta LR* 220 at 228.

7 Spiller, Finn and Boast *A New Zealand Legal History* (2nd ed, Brookers, Wellington, 2001) at 209.

8 Judicature Act 1908, s 16.

9 Supreme Court Act 1882, s 16; Supreme Court Act 1860, ss 4–6.

10 *P v F* (2009) 27 FRNZ 603 (HC).

... the superior Court, known today in New Zealand as the High Court, has additional jurisdiction in respect of contempt and other matters. That jurisdiction arises out of the origins of the High Court. That is, it was originally an emanation of the sovereign and still carries vestiges of the original attributes of the sovereign. These vestiges predate the creation of a representative legislature in England and are described today in New Zealand as the inherent jurisdiction of the High Court.

- 2.8 The inherent jurisdiction of the High Court in respect of contempt has been supplemented by Acts of Parliament. For example, contempt in the face of the court and civil contempt are now subject to some statutory provisions. However, much of contempt remains within the common law and is still dealt with by the High Court in its inherent jurisdiction.

## FEATURES OF CONTEMPT

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- 2.9 Punitive measures for contempt of court were typically the imposition of a fine or a term of imprisonment. At common law, there was no limit upon the sentence of imprisonment. It could be for any finite period determined by the judge or for an indeterminate period, ending only when the person held to be in contempt complied with the relevant order of the court.
- 2.10 Today, following the Supreme Court decision in *Solicitor-General v Siemer*,<sup>11</sup> the maximum penalty must be less than that specified in the New Zealand Bill of Rights Act 1990 (Bill of Rights Act), which guarantees a person charged with an offence the right to a jury trial where the sentence that may be imposed is two years' imprisonment or more.<sup>12</sup>
- 2.11 Traditionally, forms of contempt were regarded as either criminal or civil, depending on their purpose. Conduct requiring punishment for undermining the administration of justice was regarded as criminal contempt, while civil contempt was reserved for situations involving the need to coerce compliance with a court order or judgment in a civil action. As discussed in Chapter 7, that distinction has less relevance today.
- 2.12 The most distinguishing feature of the contempt jurisdiction is that it is summary. This means that contempt matters are dealt with by a judge alone, rather than a judge and jury, and may be actioned by the judge immediately on the spot. The summary procedure allows prompt intervention, as judges need to control their courtroom and ordinary criminal processes were historically regarded as too slow and cumbersome to provide adequate protection for the administration of justice. McGrath J recently described the summary procedure, noting that:<sup>13</sup>
- [6] Under the summary procedure, there is no preliminary inquiry, committal procedure or requirement for an indictment. Historically the judge could take the initiative in the proceeding, determine the grounds of complaint, identify witnesses and inquire into what they had to say. The judge would then determine guilt or innocence and the sentence to be imposed. More recently, when out of court conduct is involved, contempt proceedings have been brought by a law officer, usually the Solicitor-General.
- [7] Over the years, the summary process has come to include the safeguards normally available to accused persons to protect their rights with the exception of the right to trial by jury.
- 2.13 At common law, there was no appeal in cases of criminal contempt, but that has been superseded by legislative amendment.<sup>14</sup>

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11 *Siemer v Solicitor-General* [2010] NZSC 54, [2010] 3 NZLR 767.

12 New Zealand Bill of Rights Act 1990, s 24(e).

13 *Siemer v Solicitor-General*, above n 11.

14 Criminal Procedure Act 2011, pt 6, subpt 5.



- 2.14 Unlike other conduct that results in criminal penalties, criminal contempt cases are given a civil file number in the court system, as they are commenced by way of an originating or interlocutory application, and convictions are not recorded on the offender's criminal record. Proceedings are generally brought by a Crown counsel in the name of the Solicitor-General, rather than by the police prosecution service, but the court can act of its own motion also.

## COMMON ISSUES

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- 2.15 Although there are a number of unsatisfactory aspects of our current law of contempt, it was not suggested to the Law Commission in preliminary consultation meetings that the protection of the administration of justice and of the authority of the courts is no longer desirable at all.
- 2.16 In the recent Supreme Court decision in *Siemer v Solicitor-General*, a finding that the defendant was in contempt for breach of suppression orders was upheld by the majority of the Court, which said “contempt of court operates to uphold the authority of the court, which is of fundamental importance to maintaining the rule of law in our society”.<sup>15</sup>
- 2.17 Many aspects of society have changed since the contempt powers were first developed and exercised, however.
- 2.18 All of the different forms of contempt we consider in this review involve their own distinct legal and policy problems, but they all share the same policy rationale – the protection of the administration of justice – and similar issues arise in respect of each form of contempt.

## Procedure and punishment

- 2.19 The summary jurisdiction places wide powers of investigation and punishment in the hands of judges who use it.<sup>16</sup> It has often been said that the contempt power of a judge is the single most powerful authority a judge has. In 1877, Sir George Jessel MR referred to the jurisdiction of committing for contempt being “practically arbitrary and unlimited” and said it should be “most jealously and carefully watched” and exercised with the greatest anxiety on the part of judges where there is no other option.<sup>17</sup>
- 2.20 This sentiment was echoed in 1974 by the United Kingdom Phillimore Committee, which said it regarded contempt as essentially a “residual jurisdiction”<sup>18</sup> to be invoked only where urgency requires immediate action to be taken.

## Jurisdiction

- 2.21 While there is no question that the High Court has jurisdiction to deal with all forms of contempt, other courts do not have jurisdiction over some categories of contempt.
- 2.22 The District Courts, for example, are constituted under the District Courts Act 1947. The jurisdiction of District Courts is limited to that conferred on them by statute. They do not have inherent jurisdiction like the High Court.<sup>19</sup> However, District Courts, like all courts, have inherent powers that enable them to do that which is necessary to exercise their statutory functions, powers and duties and to control their own processes.<sup>20</sup> There has been some

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15 *Siemer v Solicitor-General* [2013] NZSC 68, [2013] 1 NZLR 441 at [229].

16 Henry Phillimore *Report of the Committee on Contempt of Court* (House of Commons, Cmd 5794, 1974) at 5.

17 *In re Clements, Republic of Costa Rica v Erlanger* (1877) 46 LJ Ch 375 at 383.

18 Phillimore, above n 16, at 5.

19 Joseph, above n 6, at 238.

20 *McMenamin v Attorney-General* [1985] 2 NZLR 274 (CA).



confusion over the extent to which the inherent powers of courts created by statute enable them to address contempt.<sup>21</sup>

- 2.23 Currently, any perceived jurisdictional “gap” in this area is filled by the High Court’s protective jurisdiction. The High Court’s inherent jurisdiction extends to upholding the authority of lower courts and tribunals.<sup>22</sup> Under its inherent jurisdiction, subject to any qualification by statute or statutory rule, the High Court has power to punish for contempt of a lower court’s processes in order to enable that court to act effectively as a court.<sup>23</sup> Where the High Court possesses inherent jurisdiction to do something that cannot be done by a District Court, the High Court may use its powers in aid of the District Court.<sup>24</sup> Appendix B contains a table outlining the contempt powers of each of the New Zealand courts.

### Uncertain scope

- 2.24 Another common feature of various forms of contempt is a lack of certainty as to what conduct actually amounts to committing contempt and the requisite mental element in respect of that behaviour.
- 2.25 Given the criminal nature of contempt offences, it is important that members of the public are able to discern what behaviour is unacceptable and what the consequences of such behaviour may be. It is therefore problematic that these matters remain unclear.
- 2.26 It is also unclear whether a judge is able to impose a community sentence and award reparation to the Crown to recover the costs of a trial that must be delayed or abandoned as a result of the committal of a contempt. Further, there is uncertainty as to whether general statutory sentencing and parole provisions apply to a sentence of imprisonment for contempt.
- 2.27 Over the years, in New Zealand, as in other Commonwealth countries, there have been a number of statutory incursions into the common law of contempt, most notably by the provisions in Part 6 of the Crimes Act 1961, which deal with crimes affecting the administration of law and justice, the name and evidence suppression provisions in the Criminal Procedure Act 2011 and the various provisions relating to contempt in the face of the court.<sup>25</sup> As a result, the law is now a complex mix of statutory and common law powers, which creates difficulties for the public, the legal profession and even the judiciary.<sup>26</sup>
- 2.28 Contempt of court encroaches upon a number of individual freedoms, particularly freedom of expression and freedom of information. On the other hand, it protects the right to a fair trial, which is regarded as the bedrock principle for the criminal justice process.
- 2.29 The Commission will need to take into account the sometimes competing rights and freedoms when considering how the law of contempt should best reflect the values of modern New Zealand.

### Codification of contempt?

- 2.30 Contempt is now the only criminal offence in New Zealand not provided for by statute. When the general criminal law of New Zealand was codified in the Criminal Code Act 1893, it

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21 This issue is discussed in Joseph, above n 6.

22 *Quality Pizzas Ltd v Canterbury Hotel Employees Industrial Union* [1983] NZLR 612 (CA) at 616; *Samleung International Trading Co Ltd v Collector of Customs* [1994] 3 NZLR 285 (HC) at 290; *Psychologists Board v Geary* [2013] NZHC 1039, [2013] NZAR 845 at 849.

23 *Quality Pizzas Ltd v Canterbury Hotel Employees Industrial Union*, above n 22, at 616.

24 *Samleung International Trading Co Ltd v Collector of Customs*, above n 22, at [29].

25 The Judicature Modernisation Bill 2013 (178-1) contains a generic contempt in the face of the court provision (cl 161).

26 See for example *Siemer v Solicitor-General*, above n 15, where the Supreme Court judges were divided on the extent to which inherent powers existed in combination with Criminal Procedure Act 2011 provisions.

was considered that, as a matter of principle, the scope of the criminal law was a matter for Parliament rather than the courts. Notwithstanding this, the Criminal Code Act 1893 did not mention the law of contempt. It did, however, contain a provision that stated:<sup>27</sup>

Every one who is a party to any crime or misdemeanour shall be proceeded against under some provision of this Act, or under some provision of some statute not inconsistent therewith and not repealed, and shall not be proceeded against at common law.

It is certainly arguable that this provision abolished the contempt jurisdiction, but that was not the approach taken by the courts.<sup>28</sup>

- 2.31 In line with the interpretation favoured by the courts, a proviso was added by Parliament to the relevant section in 1961, which stated that:<sup>29</sup>

[N]othing in this section shall limit or affect the power or authority of the House of Representatives or of any court to punish for contempt.

Thus, the inherent power of the High Court to punish for contempt at common law remains in existence alongside the offences in the Crimes Act and other statutes.

- 2.32 The interrelationship between common law contempt and statutory provisions continues to cause difficulties, however, which could be more easily clarified by statute than incremental rulings of the senior courts.
- 2.33 Codification of contempt would bring contempt offences in line with every other criminal offence in New Zealand.
- 2.34 The rule of law means that the country's laws should be able to be ascertained by its citizens, particularly if a breach of those laws could result in a significant fine or prison sentence. It cannot presently be said that the laws relating to contempt are clear or accessible to the public, and it is difficult to see why these laws should not be provided for by statute.
- 2.35 From a constitutional perspective, replacing current common law contempt with statutory offences would enable the public to have their say on the shape of the contempt laws and the values the laws embody. If the contempt laws had the stamp of Parliament, this would encourage public "buy-in" for the laws and ultimately give rise to greater public confidence in the administration of justice.
- 2.36 Whether the common law contempt powers should be codified is an issue that underlies every aspect of the Commission's review of contempt of court. We discuss this issue in more detail in Chapter 8.

### Restriction on freedom of expression

- 2.37 In New Zealand, as in other common law jurisdictions, arguments about whether or not a particular action amounts to contempt will often be framed as a contest between fundamental rights and policy interests. Foremost among these are the importance of freedom of expression to the health of a democracy and, as discussed earlier, the importance of protecting the administration of justice and the rule of law.
- 2.38 The potential for these rights and interests to conflict – or to appear to conflict – is often most acute in the context of a criminal trial where the right to freedom of expression and the right to a fair trial are both of critical importance. In New Zealand, both these rights are guaranteed

<sup>27</sup> Criminal Code Act 1893, s 6.

<sup>28</sup> See *Nash v Nash, In re Cobb* [1924] NZLR 495 (SC).

<sup>29</sup> Now s 9 of the Crimes Act 1961.

- under the Bill of Rights Act. Section 5 states that the various rights and freedoms contained in the Bill of Rights Act are “subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society”.
- 2.39 While publication contempt is a critical area of the law of contempt and a major focus of this review, it is evident that freedom of expression and whether there is a justifiable case for permanently or temporarily curtailing such rights emerges as a vital policy question in almost every context in which the law of contempt is engaged.
- 2.40 The protection of freedom of expression is critical in a democratic society.
- 2.41 Justice Brennan in *New York Times v Sullivan* said “debate on public issues should be uninhibited, robust and wide-open” even if it includes “vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials”.<sup>30</sup> Prosecution for statements alone should only be permitted where it is justifiable to prevent a greater harm than abridgement of freedom of expression and then only in proportion to the aim of preventing the harm.
- 2.42 In New Zealand, the freedom is now recognised in section 14 of the Bill of Rights Act as follows:
- Everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form.
- 2.43 In *Moonen v Film and Literature Board Review*, which was a case concerning the relationship between freedom of expression and the censorship of objectionable publications, Tipping J said the right of freedom of expression is “as wide as human thought and imagination”. That statement is the starting point for any inquiry about the scope of freedom of expression in New Zealand.<sup>31</sup>
- 2.44 Section 14 raises several questions about which views may differ. The first question is what “expression” means. Does it, for example, include conduct? Is posting an obscene photograph on a website “expression”? We prefer to take a wide view of “expression”, consistent with the Commission’s stance in our report on new media.<sup>32</sup> Our courts have held that flag burning<sup>33</sup> and lying down in front a car<sup>34</sup> as a protest are forms of “expression”, so we take the word “expression” as being wide enough to cover all types of communication.
- 2.45 The second question is whether all types of expression, however objectionable or harmful they may be, come within the cover of section 14. This raises the question of the scope of section 14. One view is that each right in the Bill of Rights Act must be interpreted in light of the values it was enacted to protect. On this view, it might be argued that speech that has no legitimate value and serves no legitimate purpose does not fall within the protection of section 14 at all. Thus, for example, images of child pornography or gratuitously offensive personal comments would not be within the scope of section 14, and laws prohibiting their communication would raise no Bill of Rights Act issues at all.

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30 *New York Times v Sullivan* 376 US 2254 (1964) at [9].

31 *Moonen v Film and Literature Board Review* [2000] 2 NZLR 9 (CA) at [15].

32 Law Commission *The News Media Meets ‘New Media’: Rights, Responsibilities and Regulation in the Digital Age* (NZLC R128, 2013).

33 *Morse v Police* [2011] NZSC 45, [2012] 2 NZLR 1.

34 *Geiringer v Police* (1991) [1990–92] 1 NZBORR 331. See however the comment by Paul Rishworth and others *The New Zealand Bill of Rights* (Oxford University Press, Melbourne, 2003) at 313.

- 2.46 The other view is that all expression falls within section 14, in which case, the question becomes whether a law prohibiting certain types of expression (for example, child pornography or offensive personal comments) is a justified limitation under section 5.<sup>35</sup>
- 2.47 It is very difficult to envisage a case of a truly objectionable message where the end result would be any different, whichever approach was taken. There is at least one New Zealand case (involving contempt of court) where the Court took both approaches in the alternative and reached the same result.<sup>36</sup> While acknowledging that there is another view, for the purposes of this Issues Paper, it is convenient to take the second approach and assume that even the most offensive and objectionable communications fall within the ambit of section 14 and that restrictions placed on them by the law must be justified in terms of section 5.
- 2.48 Having said that, the approach we are taking does not assume that all types of communication are of equal value. International jurisprudence has moved towards a view that there are a number of levels of speech value. The highest value is accorded to political speech, the lowest to hate speech and gratuitously offensive personal comments without any legitimate purpose. Restrictions on speech of high value require much stronger justification under section 5. Restrictions on speech at the bottom of the “value pyramid” require minimal justification.<sup>37</sup>
- 2.49 The third question is, taking all of the foregoing into account, how one applies the section 5 test, that is, whether the limitation proposed is reasonable, prescribed by law and as such “can be demonstrably justified in a free and democratic society”. The application of section 5 by the courts has led to some of the most complex jurisprudence in our law. That is unfortunate, because it makes understanding of the process very difficult for persons, particularly lay adjudicators, who have to apply it. For present purposes, it may be said the crucial elements are as follows:<sup>38</sup>
- (a) The purpose of the proposed limitation on the freedom must relate to “concerns which are pressing and substantial”.
  - (b) The measures adopted to limit the freedom must be rationally connected to that purpose.
  - (c) The limiting measures must not impair the right more than reasonably necessary.
  - (d) The limiting measures must be proportionate to the purpose sought to be achieved. This element is particularly important. One should not “use a sledgehammer to crack a nut”.
- 2.50 As Tipping J summarised in *R v Hansen*: “Whether a limit on a right or freedom is justified under s 5 is essentially an inquiry into whether a justified end is achieved by proportionate means.”<sup>39</sup>
- 2.51 Freedom of expression, unlike the right to a fair trial, is a right that is qualified under the International Covenant on Civil and Political Rights.<sup>40</sup> The justifications identified under the Covenant include measures to protect the rights or reputations of others and the protection of national security, public order, public health or morals. General Comment No 34 of the Human Rights Committee of the United Nations, in referring to the restrictions that may legitimately

35 See the discussions in Paul Rishworth and others *The New Zealand Bill of Rights* (Oxford University Press, Melbourne, 2003) at ch 12; and Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (LexisNexis, Wellington, 2005) at ch 13.

36 *Solicitor-General v Radio New Zealand Ltd* [1994] 1 NZLR 48 (HC).

37 Jacob H Rowbottom “To Rant, Vent and Converse: Protecting Low Level Digital Speech” (2012) 71 CLJ 355.

38 Based on the Canadian case *R v Oakes* [1986] 1 SCR 103. New Zealand Courts have commonly adopted that test: see *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1 at [64] per Blanchard J and at [103]–[104] per Tipping J.

39 At [123].

40 International Covenant on Civil and Political Rights 999 UNTS 171 (signed 16 December 1966, entered into force 23 March 1976), art 19(3).

be placed on freedom of speech, makes the point that the requirement of prescription “by law” may include laws of parliamentary privilege and contempt of court.<sup>41</sup>

- 2.52 In *Hosking v Runting*, the Court of Appeal was confronted with a question about whether the news media could publish photographs of the children of celebrities.<sup>42</sup> The Court weighed the right to freedom of expression against the values underlying privacy. Within this balancing exercise, Gault J recalled that freedom of expression is fundamental to the democratic process.<sup>43</sup> Keith J emphasised that it is of highest importance to a modern democracy and recognised that the purpose and values behind the right are widely accepted. They include “liberty and self-fulfilment, the value of the marketplace of ideas and the protection and advancement of democratic self-government”.<sup>44</sup>
- 2.53 In *Brooker v Police*, which dealt with a charge of disorderly behaviour where the offender had been publicly protesting against a police officer in the street outside her house, McGrath J observed that “freedom of expression is a right which is basic to our democratic system”. In terms of the rationales underpinning freedom of expression, McGrath J cited the statement of the Supreme Court of Canada in *Ching RWDSU, Local SS8 v Pepsi-Cola Canada Beverages (West) Ltd.*<sup>45</sup>

The core values which free expression promotes include self-fulfilment, participation in social and political decision making, and the communal exchange of ideas. Free speech protects human dignity and the right to think and reflect on one’s circumstances and condition. It allows a person to speak not only for the sake of expression itself, but also to advocate change, attempting to persuade others in the hope of improving one’s life and perhaps the wider social, political, and economic environment.

- 2.54 Similarly, Thomas J stated that the right of freedom of expression “provides and secures a democratic form of government in which the individual possesses the autonomy to thrive as a citizen treated with equal concern and respect”.<sup>46</sup>
- 2.55 Legislative developments subsequent to the passing of the Bill of Rights Act have seen an increasing emphasis given to freedom of expression in New Zealand. For example, defamation is no longer a crime,<sup>47</sup> and former seditious offences of defaming or libelling the government have also been repealed.<sup>48</sup>

## New media

- 2.56 The Internet means we can now use, collect, store, copy and share information with an ease and level of sophistication that would have been unimaginable even 20 years ago. Most citizens have virtually unobstructed access to an almost limitless amount of information through the Internet, and this is changing the way people verify information and make decisions.
- 2.57 Digital communications can take many forms, including communicating through emails, texts, blog sites, forums and social media sites such as Facebook and Twitter.

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41 Human Rights Committee *General Comment No 34, Article 19: Freedoms of Opinion and Expression* CCPR/C/GC/34 (2011) at [24].

42 *Hosking v Runting* [2005] 1 NZLR 1 (CA).

43 At [112] per Gault J.

44 At [178] per Keith J.

45 *Brooker v Police* [2007] NZSC 30, [2007] 3 NZLR 91 at [114] citing *Ching RWDSU, Local SS8 v Pepsi-Cola Canada Beverages (West) Ltd* [2002] 1 SCR 156.

46 At [181] per Thomas J.

47 Defamation Act 1992.

48 Crimes (Repeal of Seditious Offences) Amendment Act 2007.

2.58 Like the advent of the print media, the development of new media has changed the way we live our lives. Modern technology has provided new ways to commit contempt of court and new challenges to the law of contempt. This is due to:

- the ubiquity and ease of access to technology in modern life;
- the ease and speed of dissemination and the potential to go “viral” to a global audience;
- the persistence of information and the difficulty in removing such information; and
- the facility for anonymity.



# Chapter 3

## Contempt in the face of the court

### INTRODUCTION

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- 3.1 “Contempt in the face of the court” generally refers to a court’s powers to deal with a person who is disrupting the court while it is sitting.
- 3.2 This contempt is currently provided for in a number of statutes.<sup>49</sup> As an example, section 56C of the Judicature Act 1908 provides:

#### **56C Contempt of court**

- (1) If any person—
- (a) assaults, threatens, intimidates, or wilfully insults a Judge, or any Registrar, or any officer of the court, or any juror, or any witness, during his sitting or attendance in court, or in going to or returning from the court; or
  - (b) wilfully interrupts or obstructs the proceedings of the court or otherwise misbehaves in court; or
  - (c) wilfully and without lawful excuse disobeys any order or direction of the court in the course of the hearing of any proceedings—
- any constable or officer of the court, with or without the assistance of any other person, may, by order of the Judge, take the offender into custody and detain him until the rising of the court.
- (2) In any such case as aforesaid, the Judge, if he thinks fit, may sentence the offender to imprisonment for any period not exceeding 3 months, or sentence him to pay a fine not exceeding \$1,000 for every such offence; and in default of payment of any such fine may direct that the offender be imprisoned for any period not exceeding 3 months, unless the fine is sooner paid.

### REVIEW OF THE JUDICATURE ACT 1908

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- 3.3 In the Law Commission’s review of the Judicature Act 1908,<sup>50</sup> the Commission looked at several statutory contempt in the face of the court provisions governing the High Court, Court of Appeal, Supreme Court and District Courts. The Commission noted that, on the whole, litigation in New Zealand courts proceeds in a temperate and appropriate way. Although the subject matter of litigation can be highly charged, there are few outbursts in court. However, there will always be exceptional cases, and courts need powers to deal with them immediately. The Commission recommended there be a generic provision in new courts legislation based on section 365 of the Criminal Procedure Act 2011, rather than the wider Crimes Act 1961 and Judicature Act 1908 provisions.<sup>51</sup>
- 3.4 The Commission said counsel and judges – understandably burdened with an already difficult body of law – were sometimes inclined to proceed on the basis that they could rely on the

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49 See for example District Courts Act 1947, s 112; Judicature Act 1908, s 56C; and Supreme Court Act 2003, s 35.

50 Law Commission *Review of the Judicature Act 1908: Towards a New Courts Act* (NZLC R126, 2012).

51 At [9.10].

inherent jurisdiction *or* a statutory provision in a contempt in the face of the court situation.<sup>52</sup> In the Commission's view, it was not intended that the court could still use its inherent jurisdiction to hold people in contempt when the matter already falls within the scope of a contempt in the face of the court section.<sup>53</sup> The Commission said the new legislative provision should clarify that it extinguishes the common law powers relating to contempt in the face of the court but that all other common law contempt powers remain untouched by the provision.

- 3.5 In concluding that a relatively narrow contempt in the face of the court provision based on section 365 of the Criminal Procedure Act was appropriate, the Commission noted that assaults and threats (included in other contempt in the face of the court provisions)<sup>54</sup> are offences that may be prosecuted and, if proved, punished under the criminal law.<sup>55</sup> In the Commission's view, it would be preferable for those matters to be dealt with by the ordinary criminal process rather than by way of contempt. Otherwise, a person who assaults a juror or witness, for example, could potentially be taken into custody, imprisoned or fined without the benefit of a trial or any of the other protections that would attach if he or she were charged under the general criminal law.<sup>56</sup>
- 3.6 The Commission said if there is a generic contempt in the face of the court provision in new courts legislation, there would be no need for section 365 of the Criminal Procedure Act.<sup>57</sup> A broad provision, applying in all courts, could adequately deal with contempt in the face of the court in criminal as well as civil proceedings.

## JUDICATURE MODERNISATION BILL

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- 3.7 The Commission's recommendations on the contempt in the face of the court provisions in new courts legislation were accepted by the Government in April 2013.<sup>58</sup> The relevant provisions in the Judicature Modernisation Bill state:<sup>59</sup>

### Contempt of court

- (1) This section applies if any person—
- (a) wilfully insults a judicial officer, or any Registrar, or any officer of the court, or any juror, or any witness, during his or her sitting or attendance in court, or in going to or returning from the court; or
  - (b) wilfully interrupts the proceedings of a court or otherwise misbehaves in court; or
  - (c) wilfully and without lawful excuse disobeys any order or direction of the court in the course of the hearing of any proceedings.

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52 Law Commission *Review of the Judicature Act 1908: Towards a consolidated Courts Act* (NZLC IP29, 2012) at [5.20].

53 At [5.19].

54 For example, the then s 401(1) of the Crimes Act 1961 and s 56C of the Judicature Act 1908.

55 *Review of the Judicature Act 1908: Towards a consolidated Courts Act*, above n 52, at [5.18].

56 See Law Commission *Suppressing Names and Evidence* (NZLC R109, 2009) at 70.

57 *Review of the Judicature Act 1908: Towards a New Courts Act*, above n 50, at [9.6].

58 Cabinet Minute "Government Response to the Law Commission's Report: Review of the Judicature Act 1908: Towards a New Court Act" (15 April 2013) CAB Min (13) 12/18.

59 Judicature Modernisation Bill 2013 (178-1), cl 161.



- (2) If this section applies,—
  - (a) any constable or officer of the court, with or without the assistance of any other person, may, by order of a judicial officer, take the person into custody and detain him or her until the rising of the court; and
  - (b) the judicial officer may, if he or she thinks fit, sentence the person to—
    - (i) imprisonment for a period not exceeding 3 months; or
    - (ii) a fine not exceeding \$1,000 for each offence.
- (3) Nothing in this section limits or affects any power or authority of a court to punish any person for contempt of court in any case to which—
  - (a) this section does not apply; and
  - (b) the criminal law does not apply.

### ANOTHER PROCESS?

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- 3.8 The Commission flagged that its wider contempt reference would likely include consideration of issues such as whether the maximum penalty for contempt in the face of the court should be changed and whether a process for hearing contempt applications should be provided by statute or otherwise.<sup>60</sup>
- 3.9 In looking at the procedure for dealing with contempt in the face of the court in the context of contempt procedure generally, the Commission has some unease about the procedure that is often, but not always, utilised by the courts whereby the judge in front of whom the conduct took place deals not only with the immediate disruption by having the relevant person(s) removed from the courtroom and incarcerated until the court rises but punishes the person(s) on the spot also. In this type of situation, the judge is effectively acting as complainant, witness, prosecutor and judge,<sup>61</sup> and the punishment is meted out when there is likely to be a lot of emotion in the courtroom. Further, the defendant's rights to a lawyer and natural justice under the New Zealand Bill of Rights Act 1990 may be compromised.
- 3.10 Some District Court Judges are imposing relatively high sentences for contempt in the face of the court cases. A recent example was *McAllister v Solicitor-General*, where a potential juror was held in contempt and imprisoned for 10 days.<sup>62</sup> On appeal, the High Court found that the District Court Judge had gone too far in punishing the offender. The sentence was quashed and a fine of \$750 imposed instead. More recently, in an oral judgment dated 24 March 2014, a District Court Judge imposed a sentence of three weeks' imprisonment on an offender who refused to face the front of the courtroom and recognise the authority of the judge.<sup>63</sup> These cases have led the Commission to consider whether it might be more appropriate for any contempt in the face of the court provision to specify that the judge may have the disruptive person removed from the court and incarcerated until the court has finished its business for the day but that any further punishment for the disruption be dealt with at another time, possibly by another judge, and with the usual criminal law protections operating.

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60 *Review of the Judicature Act 1908: Towards a consolidated Courts Act*, above n 52, at [5.9].

61 *McAllister v Solicitor-General* [2013] NZHC 2217, [2013] 3 NZLR 708.

62 *McAllister v Solicitor-General*, above n 61.

63 *R v Rollo* DC Whangarei CRI-2013-088-002381, 26 March 2014.

- 3.11 As the use of other forms for undertaking court hearings, such as via Skype and video conferencing, becomes prevalent and given the summary nature of such hearings, we consider there are practical ways in which another judge could hear this type of procedure.<sup>64</sup>
- 3.12 We envisage that a person convicted on the contempt charge would have a conviction on their criminal record.

### TIKANGA, DIVERSITY AND CONTEMPT

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- 3.13 In preliminary consultation discussions, the issue of Māori tikanga in the court environment being classed as a contempt of court was raised with the Commission.
- 3.14 Tikanga and the use of te reo Māori in the courts has not always been welcomed. In *Mair v Wanganui District Court*,<sup>65</sup> the undertaking of a karakia (prayer), despite the judge's directions not to, resulted in a finding of contempt by the judge and the imposition of a prison sentence. So too in *Kohu v Police*,<sup>66</sup> a District Court Judge found Māori defendants who wished to include tikanga in the courtroom to be in contempt and they were fined heavily.
- 3.15 Today, there has been some movement in the recognition of tikanga and te reo by judges, but there is still more that could be done to acknowledge their importance to Māori participants in court and to reduce the likelihood of contempt becoming an issue in the courtroom.
- 3.16 Every Family Court across the country now opens each day with the following words:
- Turituri mō tōnā Hōnore te Kaiwhakawā, taki tū.
- Kua tūwhera te Kōti ā Whānau.
- Silence for His/Her Honour the Judge. All stand.
- This Family Court is now open.
- 3.17 A similar opening is replicated in each District Court and each division of the District Courts (with variations to describe accurately the particular court in question).
- 3.18 When a District Court adjourns at the end of the sitting day, the registrar says:
- Turituri, taki tū. Kua hiki te Kōti.
- Silence. All stand. The Court is adjourned.
- 3.19 This use of te reo was introduced by the Heads of Bench in the District Courts to reinforce the importance of tikanga and to properly recognise section 4 of the Māori Language Act 1987, which provides for the right to speak Māori in legal proceedings.
- 3.20 New Zealand's multiculturalism and the need to embrace diversity are well illustrated in the results of the 2013 census on ethnicity, which provides that 14.9 per cent of the population is Māori and 7.4 per cent of the total New Zealand population are Pacific peoples.<sup>67</sup> It is therefore unsurprising that the Commission is looking at the importance of judges creating a court environment where participants feel their traditions are being respected.

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64 See for example *Hammond J in Solicitor-General v Van der Kaap* HC Hamilton M155/97, 30 May 1997.

65 *Mair v District Court* [1996] 1 NZLR 556 (HC).

66 *Kohu v Police* (1989) 5 CRNZ 194 (HC).

67 Statistics New Zealand "2013 QuickStats about national highlights" (December 2013) < [www.stats.govt.nz](http://www.stats.govt.nz) > at 14.

- 3.21 Courts will, of course, attract insults, outbursts and interruptions. The hurly-burly of the District Courts' criminal lists, in particular, will invariably result in raised emotions, frustrations and times when a judge's patience is sorely tested.
- 3.22 For the most part, judges are able to avoid formal use of the power to invoke contempt. As a result of discussions with a number of judges in different courts, we believe that, generally, there is a high threshold to be met before a judge regards behaviour as sufficiently unacceptable so as to require a formal response.
- 3.23 We think it helpful to explore behaviour that might appear at first blush to be interrupting or a type of misbehaviour but, in a cultural context, should not be seen that way at all.
- 3.24 A clear and understandable tension exists between the efficient disposition of court work on the one hand and the exercise of sufficient due process so as to ensure that everyone appearing in a court feels that they have been treated with dignity and have been listened to on the other. Naturally, judges vary in their boundaries and some may regard reducing delay and resolving the day's cases quickly as the single most important consideration.
- 3.25 However, for many Māori, process is as important as outcome. A court appearance is not seen as a "business transaction" but rather as an event that requires proper protocol and observance of appropriate steps. Māori are not alone in this respect. For Pacific peoples, recognition of those in authority to prepare the way for what follows may be a crucial part in the process. For Māori and Pacific peoples, the attention paid to such things at the outset is designed to bring about mutual respect and to "settle" those present in readiness for the formalities to follow.
- 3.26 In the Māori Land Court, it is assumed that, at the outset of the Court's business, there will be a karakia and a mihi whakatau (formal welcome). Equally, most Māori judges encourage the use of such tikanga where it seems right and proper, for instance, in parts of the country where there is a significant Māori population and where Māori might constitute a fair proportion of those attending court for the day.
- 3.27 In contemporary New Zealand, where te reo is recognised as an official language and where its use is accepted and supported in Parliament, it might be thought that the wish to observe tikanga and use the Māori language in our courts could be taken for granted, but that is not always the case.
- 3.28 It is understandable why non-Māori speaking judges might have a great deal of apprehension at allowing processes to be undertaken in relation to a court over which they preside but over which they may not have full control.
- 3.29 The Commission considers judges should be encouraged to have a greater understanding of tikanga and the use of the Māori language so they feel more confident in accommodating elements of tikanga in their courtrooms.
- 3.30 By its very nature, the concept of contempt conjures up a notion of one party disrespecting another sufficiently as to cause a real concern. It is right and proper that a judge requires non-interference with the administration of justice, but so too should a judge have respect for the culture and thereby the dignity of those appearing before the judge on the day. In other words, justice is best served if there is mutual respect.
- 3.31 It has been said to us, in the case of Māori, that it may well be more efficient for the conduct of the court's business if a "settling" occurs at the outset. If Māori litigants understand that they will be listened to, the ensuing process is bound to be less fractious. There is, of course, a difference between being listened to and being agreed with.

- 3.32 In view of the very wide way in which contempt of court is expressed and the fact that, in the past, recourse to culture has not always been welcomed by judicial officers, it would be helpful if judges were trained to encourage the incorporation of culture in the courtroom and to recognise that reasonable attempts by participants to do so should be outside the scope of contempt of court.
- 3.33 There will be practicable considerations that must be taken into account however. At times, a compromise will need to be struck between the time ordinarily taken up by the speaking of a karakia and mihi whakatau and the available time the judge has to undertake the day's business, but where there is no tension in this respect, we would like to think that, as in the Māori Land Court, karakia and mihi whakatau will be seen as acceptable in all courts.
- 3.34 We acknowledge that some judges will feel more comfortable with this than others and that, until the Māori language becomes more known and used, some judges may be anxious that an abuse of process is occurring, especially when time begins to be consumed.
- 3.35 Judges too must feel sufficiently confident to interrupt when they take the view that reasonable time has been used. Interruption should not be seen as culturally insensitive. Having registrars who are well versed in Māori language and tikanga would assist with this.

#### QUESTIONS

- Q1 Do you think that contempt in the face of the court provisions in courts legislation should separate the need to deal immediately with an in-court interruption from the process of punishing a person for that disruptive behaviour?
- Q2 If so, what should the procedure be?
- Q3 Do you agree that all courts should open and close with directions in both English and Māori?
- Q4 Do you think judges should be encouraged to allow a short introduction/mihi whakatau or prayer/karakia by the key participants in their courts?

# Chapter 4

## Reforming publication contempt

### INTRODUCTION

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- 4.1 Publishing material that interferes in some way with the administration of justice may be a contempt of court. This chapter deals mainly with the publication contempt of interfering with the right to a fair trial. While this is only one form of publication contempt,<sup>68</sup> it is by far the most important and also the most topical at present. The new media environment in which almost anyone can publish material on the Internet or post material using social media poses a whole range of new challenges for this form of contempt.
- 4.2 In this chapter, we also deal briefly with the related publication contempt of “prejudging” the case or “trial by media”. The contempt of scandalising the court (which is also a form of publication contempt) is considered separately in Chapter 6.

### Publication of prejudicial material

- 4.3 Two public interests clash in this area of contempt: the public interest in freedom of expression and the public interest in preserving the right to a fair trial. Both are indispensable rights in a free and democratic society and both are guaranteed by the New Zealand Bill of Rights Act 1990 (Bill of Rights Act).
- 4.4 The power of the courts to control information both in the lead-up to and during a criminal trial is considered fundamental to the integrity of the trial process. Judges have both statutory and inherent powers to determine what information can be disclosed publicly and at what point before and during a trial. They also have jurisdiction to punish those who disregard these prohibitions. The courts have inherent power to protect “the fair trial rights of an accused”<sup>69</sup> from the point when the laying of charges is “highly likely”.<sup>70</sup> From that point onwards, a case is described as “sub judice” or literally “[b]efore the court or judge for determination”.<sup>71</sup>
- 4.5 Throughout the protected fair trial period, which, in New Zealand, typically lasts more than a year, the law of contempt (including pre-emptive injunctions) together with suppression powers seeks to:<sup>72</sup>
- prevent the general public, from whom the jury pool will eventually be drawn, from being exposed to information that is prejudicial and may make it difficult for jurors to approach the trial with open minds;
  - ensure the court’s authority to determine what evidence will be admitted at trial is not pre-empted by the media; and

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68 There are other forms of common law contempt by publication such as pressurising a litigant, breaching suppression orders or injunctions by publication, which we are not discussing in this chapter.

69 *Siemer v Solicitor-General* [2013] NZSC 68, [2013] 1 NZLR 441 at [114].

70 *Siemer v Solicitor-General*, above n 69, at [114]; *Television New Zealand Ltd v Solicitor-General* [1989] 1 NZLR 1 (CA) at 3.

71 Bryan A Garner (ed) *Black’s Law Dictionary* (9th ed, Thomson Reuters, Boston, 2009) at 1562.

72 For example, the courts have suppression powers under s 19 of the Bail Act 2000 and s 138 of the Criminal Procedure Act 2011, and the High Court has inherent jurisdiction to make orders suppressing publication of its judgments. See *Siemer v Solicitor-General*, above n 69, at [175].

- preserve the integrity of evidence including, for example, the reliability of witness statements about matters such as identity.
- 4.6 For the generation who have grown up with the Internet and mobile communication technologies, the idea that the flow of information and opinions can or should be stemmed even temporarily may well seem counter-intuitive. However, the integrity of our justice system and the citizen's right to a fair trial remain fundamental to our conception of a free and democratic society. The fact that the law is struggling to uphold these principles in the age of the Internet cannot be determinative of the substance of our laws. That said, the law is not static. It is a reflection of our society's fundamental values and culture, and there can be no doubt that the current information revolution is having a profound impact on both.
- 4.7 In this chapter, we examine the law relating to publication contempt and consider particularly what new communication technology means for the future of this form of contempt. In approaching this question, we have assumed that the jury trial will remain central to the adversarial criminal justice system and that the courts will therefore continue to need to control what information is publicly disclosed before a trial is concluded.

## CURRENT LAW AND APPLICATION

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### What constitutes publication contempt?

- 4.8 We are primarily dealing, in this chapter, with the form of contempt involving publications that risk prejudicing or interfering with the right to a fair trial. We therefore generally use the term “publication contempt” in the chapter to refer to that form of contempt.
- 4.9 At present, the established legal test New Zealand judges are to apply in determining whether a publication amounts to a contempt is whether “there [is] a real risk, as distinct from a remote possibility, [that the publication interferes] with the ... [right to] a fair trial”.<sup>73</sup> Real risk has been defined as a risk that is “more than speculative. It must be likely that the administration of justice could be prejudiced.”<sup>74</sup> (Note, not “would” be prejudiced.) The standard of proof is the criminal standard of beyond reasonable doubt.<sup>75</sup>
- 4.10 Critically, this assessment is not dependent on whether the more than remote risk associated with a publication actually materialises.<sup>76</sup> New Zealand courts have been clear that a publication can be contemptuous even though a fair trial eventuated.<sup>77</sup>
- [T]here is no inconsistency in upholding a conviction in the criminal trial, alongside a finding of contempt in respect of the publication in question. This is because the trial Court, or an appellate Court considering the issue on appeal after conviction, is concerned with whether there has been actual prejudice, its extent, and whether there has been a miscarriage of justice, or a real risk one has occurred. A finding of contempt would be possible ... even had the trial resulted in an acquittal, or if on appeal the Court had reached the opposite conclusion.
- 4.11 The current test also does not require proof of an intention to interfere with the administration of justice. A Full Court of the High Court in *Solicitor-General v Radio New Zealand* held that:<sup>78</sup>

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<sup>73</sup> *Gisborne Herald Co Ltd v Solicitor-General* [1995] 3 NZLR 563 (CA) at 567.

<sup>74</sup> *Solicitor-General v W & H Specialist Publications Ltd* [2003] 3 NZLR 12 at [19].

<sup>75</sup> *Solicitor-General v Wellington Newspapers Ltd* [1995] 1 NZLR 45 (HC).

<sup>76</sup> See for instance Eichelbaum CJ's comments in *Solicitor-General v TV3 Network Services Ltd* HC Christchurch M 520/96, 8 April 1997 at 7.

<sup>77</sup> *Solicitor-General v TV3 Network Services Ltd* (1998) 16 CRNZ 401 (HC) at 410. See also *Solicitor-General v Fairfax New Zealand Ltd* HC Wellington CIV-2008-485-705, 10 October 2008 at [84].

<sup>78</sup> *Solicitor-General v Radio New Zealand Ltd* [1994] 1 NZLR 48 at 55–56.



[T]he mens rea element is satisfied by proof that the defendant knowingly carried out the act or was responsible for the conduct in question. Proof of an intention to interfere with the due administration of justice may assist the conclusion that the publication had the required tendency, and its presence or absence would be relevant to penalty; but the absence of such an intention will not necessarily lead to a conclusion that no contempt has been committed.

- 4.12 There are good reasons for the conceptual separation of cause and effect and for liability to not turn on whether there was an intention. First, there is no way of establishing empirically whether a jury's deliberations were in fact improperly influenced by exposure to prejudicial pretrial publicity. A precautionary approach is therefore deemed to be justified. Second, this form of contempt is considered to be a prophylactic jurisdiction concerned with protecting the administration of justice by preventing a risk to the trial from eventuating. It regulates "the tendency of"<sup>79</sup> conduct to cause harm. The threshold at common law is therefore relatively low. The conduct that is prohibited is that which creates a "real risk" to the administration of justice, so whether there was any intention to interfere with the administration of justice or whether any harm to the trial actually eventuated is not particularly relevant, given the preventative function of the contempt.
- 4.13 Conceptually, the distinction between "could cause" and "actually caused" may be clear. However, divorcing the "real risk" of prejudice from "actual" prejudice has proved to be problematic when applying the law.

#### **Application of the test – assessing "real risk"**

- 4.14 While the current test is simple to state – Is there a real risk as opposed to a remote possibility that the publication interferes with the right to a fair trial? – it is not possible to formulate from the common law any bright-line rule as to what will constitute contempt in any given context.<sup>80</sup> Whether, in the particular instance, a publication meets the threshold for contempt is highly circumstantial.
- 4.15 A review of the case law in this area identifies what judges have considered relevant when assessing whether or not a publication amounts to contempt. However, none of the factors discussed below, on their own, are determinative as to whether a publication is in contempt. Rather, the courts have held that it is a combination of factors relating to a specific publication that determines whether it interferes with the right to a fair trial. As the High Court has concisely put it, "what counts is the overall impact".<sup>81</sup>

#### *Previous convictions or concurrent charges*

- 4.16 Publication of a defendant's prior convictions or concurrent charges before their case is heard is as close to a bright-line rule as it is possible to get in publication contempt. Traditionally, the common law has excluded evidence of previous convictions (with some exceptions) as unduly prejudicial and therefore contrary to a fair trial. There are exceptions to this general principle, and the Evidence Act 2006 provides specific guidance to the courts when determining whether or not to allow the Crown to introduce evidence of prior convictions in the instant trial. Such

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<sup>79</sup> *Solicitor-General v Wellington Newspapers*, above n 75, at 47.

<sup>80</sup> See generally John Burrows and Ursula Cheer *Media Law in New Zealand* (6th ed, LexisNexis, Wellington, 2010) at 530: "... it is not possible to lay down an exhaustive check-list of items which it is contemptuous to publish. Attempts have been made to do so, but are subject to objection for at least two reasons. In the first place, it is impossible for anyone to foresee accurately and with omniscience every type of publication which is capable of creating prejudice. In the second place, it is not just the *type* of publication which is relevant, but also the circumstances of its publication."

<sup>81</sup> *Solicitor-General v TV3 Network Services Ltd*, above n 76, at 10.

evidence, now called “propensity evidence”, is governed by sections 40–43 of the Evidence Act. Propensity evidence is defined as evidence:<sup>82</sup>

[T]hat tends to show a person’s propensity to act in a particular way or to have a particular state of mind, being evidence of acts, omissions, events, or circumstances with which a person is alleged to have been involved.

- 4.17 In the context of contempt, the position would seem to be that, once they have become aware of an accused person’s criminal record (where it is similar to the current charges), there is more than a remote risk that members of the public who might serve on a jury would struggle to disregard this information if called to serve. In what is still regarded as one of New Zealand’s leading contempt cases, *Gisborne Herald Co Ltd v Solicitor-General (Gisborne Herald)*, the Court of Appeal said:<sup>83</sup>

[T]o publish the criminal record of an accused or comment on the previous bad character of an accused before trial is a prime example of interference with the due administration of justice and, subject to considerations such as time and place, almost invariably is regarded as a serious contempt.

- 4.18 It is easy to see that there is a real risk of interference with a fair trial if potential jurors are exposed to information that a court has or is likely to rule inadmissible.

#### Context and impact

- 4.19 Judges considering contempt cases are often attempting to assess the risk that a particular publication may have some lingering impact on jurors at a time in the future when they are empanelled to decide the case. Hence, judges must consider both the tone and content of the publication and also the broader context in which it is published. Sensational aspects of facts may make the publication more enduring.<sup>84</sup> The High Court in *Solicitor-General v TV3 Network Services Ltd* held that both incorrect and sensational reporting can result in contempt. While errors of fact can generally be corrected by a subsequent judicial direction, sensationalism will be more difficult to eradicate.<sup>85</sup>
- 4.20 The courts have also distinguished between the impact serious news reportage and “soft” content may have. For example, in one contempt case, the High Court categorised the *Woman’s Weekly* magazine as “light entertainment or escapism”.<sup>86</sup> The potentially contemptuous article related to a former police officer who had previously been convicted of assault and sexual violation but was subsequently granted a retrial on appeal. The Court dismissed the risk the article presented to fair trial rights by saying it “was a transparently shallow piece in a magazine which carries many items of gossip. It is likely to have been seen in that light.”<sup>87</sup>
- 4.21 The medium of publication is also relevant. In *Solicitor-General v Smith*, the Court said that “television is widely acknowledged to have a more powerful reach than does radio, or the print media”, due to television’s “ability to depict people and places in a way that can manipulate the emotions of viewers”.<sup>88</sup>

82 Evidence Act 2006, s 40(1)(a).

83 *Gisborne Herald Co Ltd v Solicitor-General*, above n 73, at 568.

84 See for example *Gisborne Herald v Solicitor-General*, above n 73, in which the publication detailed an attack on a police officer by a person who was on bail at the time. The officer’s wife gave birth on the night of the attack and was sent to the spinal unit where the officer was being treated. The sensational aspect of the facts was relevant to the finding of contempt.

85 *Solicitor-General v TV3 Network Services Ltd*, above n 76, at 9.

86 *Solicitor-General v W & H Specialist Publications Ltd*, above n 74, at [2].

87 At [34].

88 *Solicitor-General v Smith* [2004] 2 NZLR 540 (HC) at [97].



4.22 However, even sensational and sustained reporting on high-profile cases has not always been held to be contempt. The most significant example of this was the publication of intercepted communications relating to the Rūātoki raids in *Solicitor-General v Fairfax New Zealand Ltd (Fairfax)*.<sup>89</sup> The raids generated a substantial amount of publicity and public interest due to the use of roadblocks and the prospect of New Zealand's first prosecutions under the Terrorism Suppression Act 2002. Notwithstanding this, the Court concluded, albeit somewhat reluctantly, that it:<sup>90</sup>

[H]as not been proved beyond reasonable doubt that, as a matter of practical reality, the actions of the respondents in publishing the Fairfax articles caused a real risk of interference with the administration of justice by compromising the fair trial rights of the accused.

This was despite finding that the respondents knew that the intercepted communications that were published were inadmissible at the trials of the accused and also knew there were suppression orders in place so could not have had any reasonable doubt that it was unlawful to publish that material. The Court considered that the breaches of suppression orders and unlawful conduct by the respondents should have resulted in the respondents' prosecution.<sup>91</sup> The Court also explicitly sounded a warning in respect of contempt, saying:<sup>92</sup>

Nothing in this judgment should be treated as a licence to publish inadmissible material in relation to criminal proceedings. Nor should we be taken as suggesting that publications of this kind, in other circumstances, may not amount to a contempt of court.

4.23 At the other end of the spectrum, the fact that an alleged offence and any media coverage may not have been particularly memorable may create greater leeway, as noted by McGechan J in *Solicitor-General v Wellington Newspapers Ltd (Wellington Newspapers)*:<sup>93</sup>

It could be that in relatively minor cases, of no particular public interest, and with prospective trial dates for existing and latest offences still well into the future, the risk of eventual jury recollection is acceptably low. Minor crime, of no particular public concern, readily fades in the memory.

4.24 The courts are also concerned where publications canvass issues that are likely to be disputed in court including, for example, questions of identity. Publications of photographs of suspects or the accused may create a risk where identity is in issue. Similarly, witness statements published in the media can be problematic if they traverse matters that may prove either critical or inadmissible in court.

#### *Timing of publication in relation to trial*

4.25 In many cases, the timing of a publication has been regarded as the most significant factor in determining whether the publication is contemptuous. In *Gisborne Herald*, the Court of Appeal said that, while "the exact lapse of time is not the touchstone", a trial that is six to eight months distant will make it difficult to justify the conclusion "that the influence of the article would have survived the passage of time".<sup>94</sup> The Court upheld a finding of contempt on a trial that was to occur in Gisborne about seven months from the date of publication.

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89 *Solicitor-General v Fairfax New Zealand Ltd*, above n 77.

90 At [134].

91 At [135]–[138].

92 At [139]. See also the Court of Appeal's comment in *Iti v R* [2012] NZCA 492 at [54] (related judgment on the defendants' appeals against conviction) that the contempt outcome "may be seen as a fortunate one for Fairfax given that all that needed to be proved was a real risk of interference".

93 *Solicitor-General v Wellington Newspapers Ltd*, above n 75, at 58.

94 *Gisborne Herald Co Ltd v Solicitor-General*, above n 73, at 570–571.

- 4.26 *Solicitor-General v TV3 Network Services Ltd* involved a programme detailing Mr Wickliffe's escape from a maximum security prison. It gave the impression that he was a highly dangerous criminal. It was aired during the first week of his trial for murder. The High Court said that:<sup>95</sup>

It is one thing for a juror to have some recollection of reading or hearing about an accused's previous criminal conduct ... But it is quite another to have all kinds of prejudicial information packaged and thrown in the jurors' faces in the middle of a trial.

- 4.27 Although there have been cases where doubt has been expressed as to the curative nature of time,<sup>96</sup> the general tenor of the case law is very much to emphasise that time causes memory to fade and is a significant factor in determining whether the prejudicial effect of the offending publication will dissipate to an acceptable level by the time the trial is due to begin.<sup>97</sup>

#### *Locality of publication*

- 4.28 In the past, the physical radius of distribution has been considered relevant in assessing whether there is a risk to a fair trial. In the *Gisborne Herald* case, articles published in The Gisborne Herald paper, which included information about a defendant's previous convictions and other charges, were held not to be in contempt in relation to a trial the accused faced in Napier because that paper did not circulate in the Hawke's Bay. It was considered "highly unlikely" that prospective jurors would have read it. However, the Court found that the article was nevertheless in contempt because there was a real risk of it interfering with a fair trial on different charges in Gisborne. The Court considered that location may also be relevant because a crime or publication is more likely to be remembered in smaller communities.<sup>98</sup>

[W]hat passes relatively unnoticed amongst the plethora of grim incidents in a metropolitan centre may have a more enduring impact in a smaller community where an accused may, because of close networks, become a victim of prejudice.

The Court considered that Gisborne was a "small, loyal community" and this was relevant to the finding of contempt.<sup>99</sup>

- 4.29 It is unclear the extent to which location continues to be relevant in the Internet era. The Court of Appeal made the comment in *R v Smail* (a change of venue case and not a contempt case) that:<sup>100</sup>

The Internet has no geographical bias; online information is the same whether sourced from Christchurch or Wellington or Tokyo. A change in venue can do nothing to obviate the risk to the appellant posed by information on the Internet.

Likewise, the High Court, in another change of venue case, *Mahutoto v R*, noted that a change of venue is unlikely to be an appropriate remedy where prejudicial publicity is nationwide.<sup>101</sup>

95 *Solicitor-General v TV3 Network Services Ltd*, above n 77, at 409.

96 *TV3 Network Services Ltd v Broadcasting Standards Authority* [1992] 2 NZLR 724 at 737.

97 See for example *Solicitor-General v Broadcasting Corporation of New Zealand* [1987] 2 NZLR 100 (HC); *Solicitor-General v Fairfax New Zealand Ltd*, above n 77; *Television New Zealand Ltd v Solicitor-General*, above n 70; *Mwai v Television New Zealand Ltd* HC Auckland CP 630/99, 19 October 1993; *Rahimi v Television New Zealand* (2000) 6 HRNZ 79 (HC); and *Burns v Howling at the Moon Magazines Ltd* [2002] 1 NZLR 381 (HC).

98 *Gisborne Herald Co Ltd v Solicitor-General*, above n 73, at 570.

99 *Gisborne Herald Co Ltd v Solicitor-General*, above n 73, at 571.

100 *R v Smail* [2009] NZCA 549 at [30].

101 *Mahutoto v R* HC Auckland T000515, 20 June 2000 at [12].

### *Reach of publication*

4.30 As well as the physical distribution of the publication, the courts may also consider its likely audience and reach – all factors that may be relevant to the possible impact on a potential juror. There are a number of considerations that can be grouped together as the “reach of a publication”. The court must try to assess the degree of risk that potential jurors could have seen or read the publication at issue and are likely to remember it. Courts have referred to the following factors:

- The likely audience of the publication.<sup>102</sup> In *Solicitor-General v Broadcasting Corporation of New Zealand*, the High Court found it relevant that the statements at issue were made during a talkback radio show at 11pm, meaning the chances of a person who heard the broadcast actually sitting on the jury “were very small indeed”.<sup>103</sup>
- Whether the comments are repeated in subsequent publications.<sup>104</sup>
- The length or prominence of the offending part of the publication. In *Solicitor-General v TV3 Network Services*, it was relevant that the scenes and script that were objected to formed a minor proportion of the broadcast item as a whole.<sup>105</sup> In the injunction case of *Mwai v Television New Zealand Ltd*, the Court noted that the interview that was objected to formed only two minutes and 41 seconds of the programme and was “not a significant broadcast time”.<sup>106</sup>

### *Prejudice must be to a specific trial*

4.31 To come within this category of publication contempt, the more than remote risk of interference must be in respect of a specific trial.<sup>107</sup> It is not necessary to name the defendant if it is immediately apparent who a publication relates to.<sup>108</sup>

### *Do the publications add to prejudice arising from other publications?*

4.32 In *Gisborne Herald*, the Court of Appeal noted that the particular newspaper article came after radio, television and other newspaper reporting and could therefore be said to have added little to what was already in the public domain. However, “adding to, reviving or reinforcing prejudices and preconceptions originating from other sources all bear on the risk to a fair trial”.<sup>109</sup>

4.33 This approach was applied in the *Woman’s Weekly* case in which the High Court stated:<sup>110</sup>

Where there has already been extensive pretrial publicity, which may in itself have created a risk of prejudice, a further publication may nevertheless create further risk by reviving the prejudice or otherwise reinforcing it ... It is not a defence that others have published the same material without contempt proceedings being brought against them.

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102 *Gisborne Herald Co Ltd v Solicitor-General*, above n 73, at 569.

103 *Solicitor-General v Broadcasting Corporation of New Zealand*, above n 97, at 114.

104 *Gisborne Herald Co Ltd v Solicitor-General*, above n 73, at 570.

105 *Solicitor-General v TV3 Network Services Ltd*, above n 76.

106 *Mwai v Television New Zealand Ltd*, above n 97, at 11.

107 *Solicitor-General v Broadcasting Corporation of New Zealand*, above n 97.

108 *Solicitor-General v Broadcasting Corporation of New Zealand*, above n 97, at 106.

109 *Gisborne Herald Co Ltd v Solicitor-General*, above n 73, at 571.

110 *Solicitor-General v W & H Specialist Publications Ltd*, above n 74, at [29].

However, the Court acknowledged that “prior publication is part of the context in which assessment of whether a real risk exists falls to be made”.<sup>111</sup>

- 4.34 The existence of prior publicity was relevant to the High Court’s assessment in *Fairfax* that “[a]ny additional prejudice arising from the publication of the intercepted communications would not add materially to any potential prejudice from other sources”.<sup>112</sup>
- 4.35 There is, of course, an issue where several publications independently do not create a real risk of prejudice to a fair trial but may create that risk cumulatively. It seems counter-intuitive that it should be more difficult to prove contempt simply because a case has generated such widespread publicity that it is difficult for a court to be satisfied beyond a reasonable doubt that a particular publication added to the risk of prejudice. Arguably, this seems precisely where the contempt remedy could be most useful, as pervasive publicity creates the greatest risk to a fair trial.

### Injunctions to restraint a contempt

- 4.36 Although there is a high threshold for prior restraint, the courts have the power to grant an injunction to prevent publication of contemptuous material that poses a risk to a fair trial.<sup>113</sup> The legal basis for making such an injunction is the courts’ inherent power to prevent a contempt of court. The Court of Appeal in *Television New Zealand Ltd v Solicitor-General* stated that:<sup>114</sup>

In our opinion the law of New Zealand must recognise that in cases where the commencement of criminal proceedings is highly likely the Court has inherent jurisdiction to prevent the risk of contempt of Court by granting an injunction. But the freedom of the press and other media is not lightly to be interfered with and it must be shown that there is a real likelihood of a publication of material that will seriously prejudice the fairness of the trial.

- 4.37 While injunctions have occasionally been granted,<sup>115</sup> the courts have repeatedly cautioned that prior restraint on freedom of expression will only be appropriate in the clearest of cases.<sup>116</sup> For example, Robertson J stated in *Beckett v TV3 Network Services* that “[a]ny prior restraint of free expression must pass a high threshold”.<sup>117</sup> As the Court of Appeal said in *Bouwer v Allied Press Ltd*:<sup>118</sup>

[P]rior restraint on publishing material which may constitute contempt is usually more intrusive on freedom of speech than the subsequent punishment of offending publications. That is because the Court is almost invariably unaware of the precise content of what the media wishes to publish. The injunction may cover material which in hindsight was legitimate.

- 4.38 The test for granting an injunction is consequently much higher than the real risk test for contempt following publication. The courts have held that, in order to justify interference with

111 At [29]. See also *Solicitor-General v Fairfax New Zealand Ltd*, above n 77, at [119] where the Court held that the issue of risk “must be considered in the context of the other material in the public domain at the relevant time and in the light of all the surrounding circumstances”.

112 *Solicitor-General v Fairfax New Zealand Ltd*, above n 77, at [127].

113 These are known as *quia timet* (“because he fears”) injunctions. The Crown or defendant in a criminal trial may apply for an injunction. In other contexts, other parties to litigation may also seek *quia timet* injunctions to prevent other forms of contemptuous publication.

114 *Television New Zealand Ltd v Solicitor-General*, above n 70, at 3.

115 For example, in *Television New Zealand Ltd v Solicitor-General*, above n 70, an *ex parte* injunction was originally granted restraining Television New Zealand from broadcasting certain material. The injunction was later rescinded on appeal by the Court of Appeal. See also *Attorney-General v TV3 Network Services Ltd* HC Invercargill, CP2/96, 8 March 1996, in which an injunction was granted to restrain TV3 from showing a documentary. Later, the High Court declined to extend the injunction in *Attorney-General v TV3 Network Services Ltd* HC Invercargill, CP2/96, 16 August 1996.

116 See generally Burrows and Cheer, above n 80, at 531 and Jesse Wilson “Prior Restraint of the Press” [2006] NZ L Rev 551. See also *Beckett v TV3 Network Services* (2000) 6 HRNZ 84 (HC) at [21], in which Robertson J stated that “[a]ny prior restraint of free expression must pass a high threshold”, and his reference to the need for “clear and substantial evidence” for an injunction to prevent contempt in *Hickmott v Television New Zealand Ltd* HC Auckland CP213/93, 31 March 1993.

117 *Beckett v TV3 Network Services*, above n 116, at [21].

118 *Bouwer v Allied Press Ltd* (2001) 19 CRNZ 119 (CA) at [10].

the freedom of the media, it must be shown there is “a real likelihood of a publication of material that will seriously prejudice the fairness of the trial”.<sup>119</sup>

### The contempt of “prejudging” the case or “trial by media”

4.39 In Chapter 1, we set out the often quoted statement of Lord Diplock from *Attorney-General v Times Newspapers*, listing the three requirements for the due administration of justice. As explained in Chapter 1, conduct that breaches one or more of these three requirements or undermines public confidence that they will be observed is contempt of court.<sup>120</sup> Lord Diplock went on to say that:<sup>121</sup>

“[T]rial by newspaper”, i.e., public discussion or comment on the merits of a dispute which has been submitted to a court of law or on the alleged facts of the dispute before they have been found by the court upon the evidence adduced before it, is calculated to prejudice the third requirement: that parties to litigation should be able to rely upon there being no usurpation by any other person of the function of that court to decide their dispute according to law.

4.40 Importantly, however, Lord Diplock then said that:<sup>122</sup>

[I]t is only where a case is to be heard by a tribunal which may be regarded as incapable of being influenced by public criticism ... or discussion of the merits or the facts ... that conduct of this kind does not also offend against the second requirement for the due administration of justice.

That second requirement is, of course, the right to a fair trial free from bias and based on the evidence presented in court.

4.41 This means that, in the context of a criminal trial before a jury, a publication that may be contemptuous may mix an element of “prejudging” guilt with the risk of prejudice to a fair trial. In *Wellington Newspapers*, Eichelbaum CJ commented on this notion of trial by media in the criminal context, stating that:<sup>123</sup>

If Joe Public is accused of an offence of which he believes he is innocent he will not wish to be tried in the media. When charges are laid in Court the public must be assured the issues will be decided in the Courts and nowhere else.

However, as the rest of the decision in that case indicates, the Court was still essentially concerned with and applied the test of whether the publication “as a matter of practical reality” posed a real risk to the trial rather than a hypothetical one.<sup>124</sup> The focus was on preserving the rights of the ordinary citizen to a fair trial before a jury free of bias and preconception, and any element of prejudging was only relevant to the extent it put this at risk.

4.42 We think that the current position is probably that deference to freedom of expression, particularly post the Bill of Rights Act, means that the freedom of the press and other media is not lightly interfered with. Suggestions from some older cases, like *Attorney-General v Times Newspapers*, that prejudgment and comment on cases that are before the courts or the disclosure of material that forms part of a pending court case prior to trial are unlikely to in itself constitute contempt now.<sup>125</sup> We suggest that, for a publication to be contemptuous, it must do more

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119 *Television New Zealand Ltd v Solicitor-General*, above n 70, at 3.

120 See [1.3].

121 *Attorney-General v Times Newspapers Ltd* [1974] AC 273 (HL) at 310.

122 *Attorney-General v Times Newspapers Ltd*, above n 121, at 311.

123 *Solicitor-General v Wellington Newspapers Ltd*, above n 75, at 47.

124 *Solicitor-General v Wellington Newspapers Ltd*, above n 75, at 47.

125 See the discussion on whether this aspect of *Attorney-General v Times Newspapers*, above n 121, is still part of the law of contempt in New Zealand in *Greenpeace New Zealand Inc v Minister of Fisheries* [1995] 2 NZLR 463 (HC) at 470–471.



than simply prejudge; it must risk the creation of some harm to the particular case or to the administration of justice or to people's confidence in it.

## ISSUES AND PROBLEMS

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### Formulation and application of the real risk test

- 4.43 The test, as we have discussed, is one of real risk, as distinct from a remote possibility, of interference with a fair trial. The court must assess the tendency of the publication to prejudice a fair trial. The bar is set at “could” rather than “would” prejudice a trial. There is, certainly as we understand the test, no requirement for the publication to actually compromise fair trial rights in order to find a publisher guilty of contempt, although some more recent cases seem to suggest that this may be required.<sup>126</sup>
- 4.44 It has become apparent to us in the course of our research and preliminary consultation on this issue that a successful contempt prosecution must logically raise at least the possibility that the subsequent trial (because the identified risk could eventuate) will be subject to challenge on the same grounds. On a number of occasions, the courts have emphasised the public interest in ensuring that criminal trials are not derailed by granting stays. We think there is consequently something of an inherent tension between the interests protected by the law of contempt and the interest of the efficient administration of the trial itself.
- 4.45 The similarity of the language used in the different tests for prejudice that apply in these two different contexts also raises a risk that the tests will be conflated; the test for contempt of court interpreted as requiring the substantially higher threshold that applies for a miscarriage of justice.<sup>127</sup>
- 4.46 These difficulties raise a real question as to whether the current test is the right one and also whether it is being consistently applied. There may be a case for reframing the test for publication contempt using different terminology to try and better encapsulate the essence of contempt and also to distinguish it more clearly from the test applying to a stay of prosecution. There may not be sufficient separation between these different tests because they currently use similar language. Any reframing of the test would inevitably make it apparent that the test for contempt is a lesser test and that the bar is set at whether the publication or conduct creates more than a remote risk to the trial.
- 4.47 Conceptually, we think there should also be more separation between assessing whether something poses a risk and whether that risk can be or was mitigated. We suggest these two points are relevant respectively to determining whether a prosecution should be stayed or whether there has been a miscarriage of justice but should not be relevant to whether a publication is contemptuous. The question of whether a publication is contemptuous and the question of whether the risk it poses can be ameliorated so the trial is ultimately a fair one are separate questions. We think that they have become confused on occasions.
- 4.48 The purpose of contempt is to maintain public confidence in the administration of justice and to preserve an effective and impartial system of justice.<sup>128</sup> However, the reasoning in some contempt cases shows that, when deciding whether contempt is proven beyond reasonable

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126 Randerson J said in *Solicitor-General v Fairfax New Zealand Ltd*, above n 77, at [139] that:

“It may be necessary in future cases to consider whether contempt may be established where a publication has a general tendency to interfere with the administration of justice even where it cannot be demonstrated that the publication has compromised fair trial rights in a particular case.”

127 *R v Matenga* [2009] NZSC 18, [2009] 3 NZLR 145.

128 ATH Smith *Reforming the New Zealand Law of Contempt: An Issues/Discussion Paper* (Crown Law Office, April 2011) at [1.2].

doubt, the court will invariably consider whether or not any prejudicial effects that may arise can be mitigated at trial. We suggest that this approach of not finding a publication in contempt because the court has been able to manage the risk posed when empanelling the jury or by relocating the trial conflates the real risk test with actual prejudice.

### Controlling information in the new communications era

- 4.49 No matter how restrained the mainstream media may be in their reporting of an alleged crime, it is indisputable that, in the age of the Internet and social media, the idea that the law can prevent information from being disseminated seems to be fundamentally at odds with reality.<sup>129</sup> The mainstream media and new media sources are increasingly interdependent. Citizens today access information from a multiplicity of sources, and while they still look to mainstream sources for authenticated news, they increasingly interpret this within the context of information/gossip/allegations exchanged in social media forums.
- 4.50 The fact that these myriad sources of information, official and unofficial, can be accessed instantly, years after first publication, by anyone with an Internet connection also presents enormous challenges for the courts when applying their conventional reasoning in contempt cases. For example, as we discussed earlier, in determining whether a specific publication created a real risk of prejudice at the time of publication, the courts have placed great emphasis on its proximity to the time and place of trial. However, the concepts of “time and place” have far less relevance in the digital era as search technologies mean “publishing” is a continuous act and content is effectively not erasable.
- 4.51 When assessing risk, the courts have also taken into consideration the type of publication (print, television or radio), its reach and its credibility as a medium. While it is still possible to draw meaningful distinctions between a news item broadcast on free-to-air television and an anonymous comment on a blog site, it is increasingly difficult to make such bright-line distinctions across the wide spectrum of online content providers. Sharing, linking and repackaging content is a defining feature of the new media environment, and the same content will often be distributed via numerous channels and platforms, including mobile applications, social media forums, Twitter and Facebook.
- 4.52 Another challenge that the High Court grappled with in the *Fairfax* contempt proceedings concerning media coverage of the Rūātoki raids was how to accurately assess the prejudicial tendency of the particular publication given the avalanche of content publicly available in both mainstream and social media. In that case, which involved the publication of excerpts of intercepted communications that had been ruled inadmissible during a pretrial hearing, the Court also had to confront the fact that the affidavit containing the prohibited content was posted on a number of publicly accessible websites. The Judge commented that managing the risk of jurors accessing the affidavit from websites was “a normal trial risk in today’s electronic environment which would usually be addressed by appropriate jury direction”.<sup>130</sup>
- 4.53 The courts can and are beginning to adapt the orthodox tests to the new media environment. For example, when assessing the reach or prominence of prejudicial content, some will consider how high the item was ranked on a Google search and whether the item was pushed out to audiences via linear media (for example, a television broadcast) or whether it would have required a potential juror to actively search out the offending material.

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129 *R v Rickards (No 2)* HC Auckland CRI-2005-063-1122, 25 May 2006.

130 *Solicitor-General v Fairfax New Zealand Ltd*, above n 77, at [126].

- 4.54 However, while adapting the tests in such ways may go some way to addressing the complexities of the new publishing environment, they do not address the more fundamental challenge of controlling the flow of information.
- 4.55 The law of publication contempt applies to “the whole world”. Now that almost anyone can publish information on a website, or in networked public spheres such as Twitter, the application of the law of contempt has broadened. Anyone who publishes prejudicial information may potentially commit this contempt. We consider that this reinforces the need for the law of contempt to be clear. Readily understandable information on obligations in this area needs to be clear and assessable.

### Limiting freedom of expression

- 4.56 Case law has determined that the point at which the courts have jurisdiction to restrain or prohibit the publication of information pertaining to a forthcoming trial begins when the laying of charges is “imminent”.<sup>131</sup>
- 4.57 Chilling public expression in an imprecise and far-reaching manner is not in the public interest. It may also not be consistent with the right to freedom of expression in the Bill of Rights Act. Although the courts often point out that restricting publication during the trial period only imposes a temporary constraint on freedom of expression, the difficulty is that, at the early stages of a criminal investigation, including the period when police may be gathering evidence about a suspect, the media has a vital role to play. Not only can the news media play a crucial role assisting police to obtain information about the crime from members of the public and witnesses, but news media have a critical role in scrutinising police investigations.
- 4.58 The media’s role both as investigator and scrutineer was expressly acknowledged by the Australian Chief Justice Gleeson in the context of a defamation case:<sup>132</sup>

The idea that the investigation and exposure of wrongdoing is, or ought to be, the exclusive province of the police and the criminal justice system, bears little relation to reality in Australia, or any other free society. There are heavily governed societies in which the police and other public authorities have the exclusive capacity to make, and pursue, allegations of misconduct; but not in ours. Indeed, in our society allegations of misconduct are sometimes made against the police and public officials.

Secondly, it may well be in the public interest that inaction on the part of the police and prosecuting authorities be called publicly into question. It is certainly in the public interest that it is open to be called into question.

- 4.59 In this respect, the courts have always been clear that the pretrial restriction is not intended to stifle discussion of issues of public importance or even prevent criticism of the ways in which police and other law officers exercise their powers or perform their duties. The Supreme Court recently said:<sup>133</sup>

New Zealand courts have recognised that the right of freedom of expression supports contemporaneous discussion of events in the criminal justice process and must be taken into account along with the right of an accused person to a fair and public hearing by an independent court. Both

131 We may need a similar definition to that in the Contempt of Court Act 1981 (UK), sch 1, cl 4, in which criminal proceedings are commenced when any of the following occur:

- (a) Arrest without warrant.
- (b) The issue or, in Scotland, the grant of a warrant for arrest.
- (c) The issue of a summons to appear or, in Scotland, the grant of a warrant to cite.
- (d) The service of an indictment or other document specifying the charge.
- (e) Except in Scotland, oral charge.

132 *Australian Broadcasting Corporation v O’Neill* (2006) 227 CLR 57 at [26]–[27].

133 *Siemer v Solicitor-General*, above n 69, at [158].



values must be given serious consideration and, so far as possible, fair trial rights and freedom of expression should each be accommodated.

- 4.60 However, “contemporaneous discussion” does not necessarily allow publication of certain information that could give rise to a real risk of prejudice to a fair trial. The Supreme Court also said that temporary limitation by a suppression order in order to avoid risk to a fair trial “recognises the special importance of fair trial rights”.<sup>134</sup> Some of the contemporaneous discussion must therefore take place at arm’s length from the specifics of the case in question. Hence, in *Gisborne Herald*, the Court held that, while there was certainly a legitimate public interest in coverage of the issues raised by Mr Gillies’s arrest, the debate should either have taken place without reference to the news event or been postponed until the trial had been completed.<sup>135</sup>
- 4.61 The problem, of course, is that media discussion of the country’s bail laws, for example, is far more likely to capture the public’s attention (and by extension the political radar) if the subject is raised in the context of an unfolding news event. Postponing the discussion for a year or more until the trial has been completed simply misconceives the function of the news media in a free and democratic society. However, it is precisely this “newsworthiness” that makes such coverage contentious from the court’s perspective because of its potential to inflame public opinion and distort the views of potential jurors.
- 4.62 In practice, the way the common law has evolved since *Gisborne Herald* suggests that there is now a much greater tolerance for robust discussion and debate at the time of the news event and during the course of any police investigation. The current position gives much more deference to freedom of expression. As noted by the Supreme Court, that value must as far as possible be accommodated. Debate or comment in the media that prejudges a case before the courts or discloses material that forms part of a pending case prior to trial should not of itself constitute contempt (unless disclosure of that material breaches a court order or is prohibited by a statutory provision).
- 4.63 We suggest that, for a publication to be contemptuous, it must do more than simply comment or prejudice; it must comment or prejudice in a way that poses a real risk of prejudice to the trial or some other harm to the administration of justice or people’s confidence in it.

## REFORMING THE LAW

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- 4.64 We have reached a preliminary view that some change is needed to the law of contempt as it relates to publications. There are significant conceptual and practical problems in applying the current real risk test and reasoning in the age of the Internet. The lack of clarity around the threshold for contempt is also problematic.
- 4.65 We suggest that it might be time to consider a different approach and focus more on preventing certain types of information that would normally give rise to a real risk of prejudice to a fair trial from being publicised rather than placing reliance on contempt to prevent that risk. One of the main difficulties with contempt currently is uncertainty over its ambit. Those publishing material need to essentially second guess where a court may ultimately place the line between contemporaneous discussion and prejudicial reporting.
- 4.66 Uncertainty over where the line is to be drawn can have a chilling effect if the media and others reporting or commenting on public events take too cautious an approach. On the other hand,

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134 *Siemer v Solicitor-General*, above n 69, at [158].

135 *Gisborne Herald Co Ltd v Solicitor-General*, above n 73, at 569.

uncertainty may mean too robust an approach is taken and anything goes, which jeopardises fair trial rights.

- 4.67 This is very much the concern expressed by the Supreme Court (majority judgment) in *Siemer v Solicitor-General*:<sup>136</sup>

A system which leaves publication decisions (particularly the assessment whether a publication will prejudice fair trial rights) entirely to third parties (who may be neither dispassionate nor fully informed) creates a risk that those third parties will get it wrong, resulting in prejudice to fair trial rights which cannot be remedied, after the fact, by prosecution for contempt of court.

- 4.68 The Court in that case was discussing the question of whether contempt of court (including the power to grant an injunction to restrain a threatened contempt), as well as other mechanisms short of suppression,<sup>137</sup> were adequate to protect fair trial rights and the administration of justice. The Court said that the New Zealand view has been that these do not adequately protect fair trial rights and the administration of justice. The Court considered this a well-founded view.<sup>138</sup>
- 4.69 We favour an approach that provides greater upfront clarity and precision for the reasons discussed. The rules to which both mainstream and new media are subject must be clear and readily ascertainable. We suggest that, rather than leaving publication decisions in relation to potentially prejudicial material in the hands of publishers, there should be an approach that prohibits for a limited period the publication of certain limited information.
- 4.70 We think that the constraints on freedom of expression during the course of a trial should be kept to the absolute minimum necessary to achieve the policy objective of a fair trial. We also suggest that the authority for these constraints should be derived from statute rather than the High Court's inherent common law jurisdiction.

### Proposed framework

- 4.71 We are proposing that common law publication contempt be replaced with the following:
- (a) A statutory provision that prohibits the publication or reporting of a defendant's previous convictions and any concurrent charges during a specified period leading up to the trial for an offence unless an order is made by the court permitting publication. (It would be a statutory offence to breach the provision.)
  - (b) A statutory provision under which a court may make an order forbidding publication of any report or account of any other information during the period leading up to a trial if satisfied that suppression of that information is necessary to protect a person's right to a fair trial. (It would be a statutory offence to breach a suppression order.)
  - (c) A statutory offence to replace the current common law publication contempt. It would cover any publication that (regardless of whether it also breached the provision in (a) or any suppression order made under (b)) created a real risk, as distinct from a remote possibility, of interference with the administration of justice by prejudicing a fair trial. (We have used the language of real risk to indicate that the test is the same as the current one, however, as discussed further below, we would favour a change to that terminology for the reasons already discussed in the Issues Paper.)

136 *Siemer v Solicitor-General*, above n 69, at [173].

137 In particular, judicial warnings about publication, hearing a case in camera or permitting witnesses to give evidence without disclosing their names or otherwise in circumstances that should protect their anonymity. There is also jurisdiction to grant an injunction to restrain a threatened contempt: *Siemer v Solicitor-General*, above n 69, at [172].

138 *Siemer v Solicitor-General*, above n 69, at [173].

4.72 The new statutory provisions would also include a system providing for take-down orders where a publication breached one of the provisions.

### **Statutory prohibition on publication of certain material**

4.73 As discussed earlier, publicly disclosing a defendant's previous convictions or concurrent charges before he or she has been tried will almost always constitute contempt at common law. As well as creating a real risk of undermining the accused's right to a fair trial, it also seriously interferes with the court's authority to decide what information will be admissible at trial according to the Evidence Act.

4.74 In our view, the potential harm arising from disclosing this information justifies a statutory provision prohibiting the reporting of this information. The provision would need to specify the time period during which the restriction applied. It could, for example, begin from the date on which the charges are filed and, subject to variation by the court, remain in place until after the verdict has been delivered. It might also be appropriate to provide some facility for the court to extend the prohibition on publishing the information beyond that time where circumstances, such as an appeal, require the order to remain in place longer.

#### *Exemptions should be available*

4.75 We suggest that the court should be able to make an order permitting publication of any of the details that would otherwise be prohibited. Because the statutory restriction represents a greater infringement of freedom of expression than the current post facto application for contempt or an injunction, we think it would be appropriate for any person to have standing to apply to the court for an order. The grounds for making such an order could be set out in the statute. These might include that:

- suppressing the information may endanger the safety of persons or the public at large;
- the information is already publicly available; or
- in the specific circumstances of the case, the publication of the information does not create a real risk of interference with the administration of justice by prejudicing a fair trial.

#### *Publication in breach an offence*

4.76 We propose that it would be an offence for any person to breach the statutory prohibition and disclose in any publicly accessible forum, whether directly or indirectly, any previous convictions of the defendant or any concurrent charges. Disclosing the fact that a defendant is facing other charges might also constitute a breach of the proposed new provision. However, publication of matters relating to bail and matters dealt with at any bail hearings are already covered by the restrictions on reporting contained in the Bail Act 2000.<sup>139</sup> That regime would continue to apply to matters covered there.

### **Suppression orders for other information**

4.77 We also propose a new provision under which the court could make a suppression order prohibiting the publication of other information during the period leading up to a trial if satisfied that suppression of that information is necessary to protect a person's right to a fair trial. At present, the High Court has an inherent power to make such suppression orders as are necessary for the administration of justice and the protection of fair trial rights.<sup>140</sup> We see

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139 Bail Act 2000, s 19.

140 *Siemer v Solicitor-General*, above n 69, at [174]–[175].

advantages in having the breadth of that power shaped by statute. We would anticipate that the power to suppress would be the minimum necessary to achieve the policy objective of a fair trial. We envisage that this provision would replace the use of the High Court's inherent jurisdiction to make general suppression orders against non-parties during the pretrial phase.

- 4.78 A breach of a suppression order made under the provision would be an offence.

### **Real risk to the administration of justice**

- 4.79 The question then remains what additional response, if any, is needed to deter the news media and also new media from publishing information that risks undermining the rights of the accused to a fair trial or otherwise interfering with the administration of justice. For example, how should the law respond to a social media campaign demanding preventive detention for an accused person before they have stood trial, or how should the law respond to a website that publishes damning witness statements or video clips pertaining to the trial that may or may not be admitted at trial?
- 4.80 If the courts are to retain their authority and the confidence of the community in this new communications era and if accused persons are to retain their right to a fair trial on the evidence adduced at court, it would seem necessary to have an offence to replace publication contempt. The new offence would cover publications that pose a real risk of interfering with the administration of justice by prejudicing a fair trial – regardless of whether they breach the statutory prohibition discussed earlier or any suppression order. This new offence would essentially be a statutory form of contempt replacing the common law.

### *Defining the boundaries of the offence*

- 4.81 A key question law reformers and drafters face when codifying contempt is whether to attempt to exhaustively define the range of conduct caught by the offence or whether to describe it more generally and allow the courts to develop and apply the test in the unique circumstances of each case. We suggest that the latter approach to codification is the most appropriate in this context. The advantage of this approach is that it retains the flexibility currently available in the common law. However, the disadvantage is that the approach may not provide as much clarity or precision as a more prescriptive approach.
- 4.82 The current test that a publication poses a real risk as opposed to a remote possibility of interfering with the administration of justice should probably form the basis of the offence. However, as we have discussed, there may be a case for reframing the test using different terminology to try and better encapsulate the essence of contempt. Reframing would also distinguish it more clearly from the test applying when a stay of prosecution is sought. There is not sufficient separation between these different tests at present because of the similar language. The test could be reframed to make it clear that the test sets a lower threshold than these others. The bar would be set at whether the publication creates more than a remote risk to the trial.
- 4.83 As we discussed earlier, many of the factors that the courts have weighed when determining under the common law test whether a particular publication created a real risk of prejudicing a trial, such as time and place of publication, have become problematic in an age when information is permanent. That said, the core propositions and principles to be weighed have not changed, and this would be reflected in the offence.

## QUESTIONS

- Q5 Do you think that the common law test of real risk has become problematic?
- Q6 Do you have any comments to make on the proposed statutory prohibition?
- Q7 Do you have any comments to make on the proposed suppression power? Should it replace the common law power of suppression?
- Q8 Do you agree that the common law offence of publication contempt should be replaced with a statutory offence as we have proposed? How should the test be framed?

# Chapter 5

## Jurors and contempt of court

### INTRODUCTION

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- 5.1 The Internet and advances in technology have changed the way ordinary people obtain, use and share information. As a result, it is now more difficult to shield jurors from exposure to extraneous information during a trial.
- 5.2 In this chapter, we examine the law of contempt as it applies to jurors and consider whether changes are needed to modernise the law in this area to better address the risks that jurors accessing material through the Internet or communicating through social media may pose to a defendant's right to be fairly tried only on the evidence admitted in the courtroom. Given the ready access everyone now has to the Internet, it is unrealistic to assume that jurors, who otherwise use the Internet every day, will not be tempted to check for information relating to aspects of the case they are charged with trying.
- 5.3 We also consider in this chapter issues around jurors who disclose jury deliberations during or after a trial.

### JURORS ACCESSING INFORMATION

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- 5.4 Jurors do sometimes actively seek out information. Examples from cases illustrate that jurors have sometimes undertaken their own investigations or searched for information on the defendant or other parties. Jurors have, in the past, visited the scene of the crime<sup>141</sup> and conducted experiments to determine how long a car engine takes to cool down<sup>142</sup> or how much cocaine could be secreted in shoes.<sup>143</sup> Jurors have also asked chemists questions about the availability and price of ephedrine.<sup>144</sup> More recently in one reported case, printouts containing definitions of "burden of proof" and "beyond a reasonable doubt" were found in the jury room. The material was from the United States and so did not accurately reflect New Zealand law.<sup>145</sup>
- 5.5 The Internet unquestioningly exacerbates the potential for jurors to undertake their own research. People can find relevant information far more readily than ever before. A juror no longer needs to visit a crime scene physically but can instead do that virtually through Google Earth without leaving home. There is now no need for a juror to go to a pharmacy to check the price of a drug, as this can be done on the Internet. The breadth of information that is available, and the ease with which it can be accessed, provides jurors with a tantalising array of material at their fingertips.
- 5.6 Even if jurors do not actively seek out news coverage or other information on the Internet, there is a reasonable likelihood that, in high-profile cases, some jurors will come to their task with

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141 *R v Gillespie* CA227/88, 7 February 1989.

142 *R v Taka* [1992] 2 NZLR 129 (CA).

143 *R v Sangraksa* CA503/96, 3 July 1997.

144 *R v Bates* [1985] 1 NZLR 326 (CA).

145 *R v Harris* CA121/06, 27 September 2006.



some previous knowledge of the case gleaned by exposure either through mainstream media or social media.

- 5.7 These problems are compounded when a juror who accesses extraneous material outside of the court then shares it with fellow jurors, contaminating them also.

## Current law and approach

### *Pretrial publicity, jury selection and questioning*

- 5.8 The potential effect of pretrial exposure to information is addressed during the jury selection process, and jurors are given an opportunity to disqualify themselves where they have prior knowledge of the case that may influence them. Directions are given to the jury panel that emphasise the importance of impartiality where there has been a lot of publicity relating to the case.
- 5.9 The trial judge will normally invite any person on the panel to seek to be excused if the person feels unable to discharge their obligation to try the case only on the evidence presented to them in the course of the trial. Jurors are normally asked to approach the judge if they know anyone connected with the case or feel unable to decide the case impartially between the parties.
- 5.10 In New Zealand, jurors can be challenged for cause, although this is rarely done in practice.<sup>146</sup> The courts only allow questioning of jurors to elicit information that may be used as a basis for a challenge for cause in exceptional cases.<sup>147</sup> The Court of Appeal in *Gisborne Herald Co Ltd v Solicitor-General* stated that enhanced control over the jury selection process and the cross-examination of prospective jurors about their views and beliefs is generally undesirable.<sup>148</sup>
- 5.11 However, more recently, where there has been significant pretrial publicity, the courts have adopted a more interventionist approach to jury empanelling. There seems to be something of a move towards more actively questioning jurors during empanelling. For example, the empanelling process for the Rūātoki raid case, *Iti v R*, was described by the Court of Appeal:<sup>149</sup>

Before the jury was empanelled, we understand they were told of the subject matter of the trial and directed to advise the Judge if as a result of what they had read or heard or opinions they had formed, they doubted their ability to try the case fairly on the evidence. We accept that not all potential jurors may have recognised what may well be unconscious prejudice. However, significant numbers did. We were told that about 60 persons sought to be, and were, excused. Even after the panel was selected and retired, we understand that at least one more came forward and withdrew.

Similar approaches have been taken in many other high-profile cases.

- 5.12 These cases indicate an increasing willingness to use the jury empanelling process to screen jurors to help mitigate the risk of predetermination arising from pretrial publicity.

### *Jurors undertaking research*

- 5.13 If jurors search for information on the Internet or otherwise research or investigate the case they are trying, they are potentially in contempt of court. The position is not entirely clear, but it is likely that research by a juror in breach of directions of the trial judge amounts to contempt of court under the common law. The issue has not been tested in New Zealand.

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146 *Gisborne Herald Co Ltd v Solicitor-General* [1995] 3 NZLR 563 (CA) at 574.

147 Bruce Robertson (ed) *Adams on Criminal Law – Procedure* (online looseleaf ed, Brookers) at [TP8.07]; *R v Sanders* [1995] 3 NZLR 545 (CA).

148 *Gisborne Herald Co Ltd v Solicitor-General*, above n 146, at 575.

149 *Iti v R* [2012] NZCA 492 at [55]. This was anticipated by Winkelmann J in a stay judgment on the same proceedings: *R v Bailey* HC Auckland CRI-2007-085-007842, 23 April 2010.



## United Kingdom – common law contempt

- 5.14 In the United Kingdom, there have been a number of cases where jurors have been prosecuted for contempt of court for searching for information on the Internet.<sup>150</sup> In *Attorney-General v Dallas (Dallas)*, the Lord Chief Justice explained why research by a juror is a contempt of court:<sup>151</sup>

[T]he defendant knew perfectly well: first, that the judge had directed her, and other members of the jury, in unequivocal terms, that they should not seek information about the case from the Internet; secondly, that the defendant appreciated that this was an order; and, thirdly, that the defendant deliberately disobeyed the order. By doing so, before she made any disclosure to her fellow jurors, she did not merely risk prejudice to the due administration of justice, but she caused prejudice to it. This was because she had sought to arm and had armed herself with information of possible relevance to the trial which, although not adduced in evidence, might have played its part in her verdict. The moment when she disclosed any of that information to her fellow jurors she further prejudiced the administration of justice.

He then concluded that: “[m]isuse of the Internet by a juror is always a more serious irregularity, and an effective custodial sentence is virtually inevitable”.<sup>152</sup> The juror was sentenced to six months’ imprisonment.

- 5.15 There may be some doubt as to whether misuse of the Internet for research by a juror is a contempt by its own nature or only because it is a breach of the direction not to do it that is given by the judge at the beginning of the trial.<sup>153</sup> The decision in *Dallas* suggests that the relevant conduct is treated as contempt because it is a breach of the order made by the judge at the start of the trial instructing jurors not to undertake research into the case that they are trying. However, a more recent United Kingdom decision in *Attorney-General v Davey* and *Attorney-General v Beard* arguably implies that such conduct is both a breach of the direction, and of itself common law contempt, because it is conduct that specifically interferes with the administration of justice.<sup>154</sup>

## Section 365 of the Criminal Procedure Act – statutory contempt

- 5.16 In situations where a trial judge gives jurors an express direction that they must not undertake their own research or seek out information about the case, section 365(1)(c) of the Criminal Procedure Act 2011 applies. It is contempt of court under section 365(1)(c) where any person, including a juror, “wilfully and without lawful excuse disobeys any order or direction of the court in the course of the hearing of any proceedings”. The maximum sentence under the provision is a fine of \$1,000 or three months’ imprisonment.
- 5.17 Juries are routinely directed that they must decide the case on the evidence presented to them in court. However, the content of such directions is a matter for the individual judge to determine. The Criminal Jury Trials Bench Book, which provides guidance to judges on such matters, refers to advising jurors that they are not to undertake their own inquiries or experiments. However, whether a trial judge expressly refers to researching or Googling on the Internet and how much emphasis he or she places on this issue is not prescribed. We understand that approaches vary somewhat between judges.

150 *Attorney-General v Frail* [2011] EWHC 1629 (Admin), [2011] 2 Cr App R 21. See generally Dominic Grieve, Attorney-General (United Kingdom) “Trial by Google? Juries, social media and the internet” (speech to the University of Kent, 6 February 2013).

151 *Attorney-General v Dallas* [2012] EWHC 156 (Admin), [2012] 1 Cr App R 32 at [38].

152 At [43].

153 Law Commission of England and Wales *Contempt of Court (1): Juror Misconduct and Internet Publications* (LC340, 2013) at [3.19].

154 *Attorney-General v Davey, Attorney-General v Beard* [2013] EWHC 2317 (Admin) at [2]–[4].

### *Juror preparation and instruction*

5.18 Jurors are given written information and other instructions by the Ministry of Justice before they are empanelled. Jury service information provided to potential jurors when summonsed states that jurors must not make their own enquiries about the case. It says that they may not use the Internet to search the names of people or locations involved in the case or visit the location where the offence occurred unless this is officially arranged by the court.<sup>155</sup> It also advises that they avoid listening to or reading news reports and media comments about the trial when they leave court.<sup>156</sup> A video presentation made to the jury panel prior to empanelling tells jurors that they must not make their own inquiries, such as researching information about the defendant or going to visit a crime scene.

### **What are the problems?**

5.19 The main problem is obviously the risk that jurors accessing and sharing extraneous material with other jurors pose to the defendant's right to a fair trial. A person should not be convicted on the basis of secret evidence that he or she knows nothing about. Independent access to extraneous information also raises problems in relation to the laws of evidence. There are some pieces of evidence that a judge may determine are so unfairly prejudicial that they should not be placed before a jury. A classic example of this is a defendant's prior convictions.<sup>157</sup> The rules of evidence are undermined if jurors access information that a court has ruled inadmissible.

5.20 Importantly, there is also a very real risk that jurors may make mistakes. It is not inconceivable that a juror looking up the name of a defendant, for example, "David Smith", could find criminal history information for another "David Smith" and not realise their mistake.<sup>158</sup> Also, whatever a juror reads or finds on the Internet may not be at all accurate. People are free to exercise their freedom of expression by publishing things that are "extreme, false, misleading and/or offensive" on the Internet.<sup>159</sup>

5.21 If jurors break the rules and look at extraneous material, the trial may also be put at risk, particularly where such material has been shared and has contaminated the entire jury. A judge may have no option but to discharge the jury and abort the trial.<sup>160</sup> There are significant resourcing implications for the state whenever a jury is discharged and a trial abandoned part-way through. A retrial is costly and time consuming. It also impacts upon victims and other witnesses who will have to give evidence and endure the stress and inconvenience of a trial all over again.

5.22 Where a verdict has been given and it subsequently becomes apparent that extraneous information was accessed by jurors, that may necessitate a retrial. Public confidence in the administration of justice and in the jury system and courts may be adversely affected in all such situations.

5.23 In addition to these problems, there is also a degree of uncertainty over what conduct by jurors in this context amounts to contempt of court. Whether section 365(1)(c) of the Criminal

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155 Ministry of Justice *Jury Service: Information about jury service and being a juror* (Ministry of Justice, Wellington, 2010) at 6. See also Ministry of Justice "Your role as a juror" (September 2010) Ministry of Justice < [www.justice.govt.nz/services/jury-service](http://www.justice.govt.nz/services/jury-service) > .

156 Ministry of Justice, above n 155, at 7.

157 Evidence Act 2006, s 34.

158 Marcy Zora "The Real Social Network: How Jurors' Use of Social Media and Smartphones Affects a Defendant's Sixth Amendment Rights" [2012] U Ill L Rev 577 at 584.

159 This is subject to the basic legal constraints protecting citizens' interests in reputation, privacy, personal safety and right to a fair trial. See Law Commission *The News Media Meets 'New Media': Rights Responsibility and Regulation in the Digital Age* (NZLC R128, 2013) at 23.

160 For example, in the United Kingdom case of *Attorney-General v Dallas*, above n 151, the judge discharged the jury and the trial was aborted after he was made aware that one juror had obtained information concerning the defendant off the Internet and shared that information with her fellow jurors.

Procedure Act applies or not depends on the clarity of the directions given by the judge at trial. There is not currently consistency in terms of the warning given to jurors at the start of the trial. If jurors are at risk of being held in contempt of court and potentially punished, that should be made clear to them at the outset, and they should be given clear instructions on what is not permitted.

### How prevalent are the problems likely to become?

- 5.24 The extent to which extraneous material is being considered and discussed covertly by jurors and the influence it may be having is unlikely to ever be fully known. For the important public policy reasons discussed later in the chapter, jury deliberations are kept secret.
- 5.25 We do not have a very clear picture as to how prevalent the problem of jurors accessing extraneous material really is at present in New Zealand. Some empirical research has been undertaken in New Zealand in the past and in other common law jurisdictions. The most recent research from the United Kingdom indicates there is a growing problem. Currently, other common law jurisdictions are also grappling with the impact the Internet is having in this area.

#### *Empirical studies*

- 5.26 In 1998, research was undertaken by Warren Young, Neil Cameron and Yvette Tinsley from Victoria University for the Law Commission project *Juries in Criminal Trials*.<sup>161</sup> The researchers interviewed 312 jurors from 48 trials and found that, in five of the trials, jurors had made external inquiries such as visiting the crime scene or bringing explanatory brochures into the jury room. In addition to this, the summary of research findings noted:<sup>162</sup>

[J]urors not infrequently attempted to obtain additional information on the law, particularly during the trial itself – for example, by looking up definitions of key terminology in the dictionary or taking a legal textbook ... into the jury room.

These 1998 findings probably under-represent the extent to which jurors in New Zealand now turn to the Internet to find information during a trial. The interviews are over 15 years old, and the use of the Internet is far more entrenched and prevalent today.<sup>163</sup>

- 5.27 In a 2010 United Kingdom study undertaken by Cheryl Thomas, 668 jurors were interviewed from 62 cases.<sup>164</sup> Five per cent of the jurors said they looked for information on the Internet, and 13 per cent claimed to have seen reports on the Internet during the trial. When high-profile cases were isolated, the numbers rose to 12 per cent and 26 per cent respectively.<sup>165</sup> Thomas noted that:<sup>166</sup>

[I]t should be borne in mind that [the jurors] were being asked to admit to doing something they may have remembered being told not to do by the judge. As a result the figures may reflect the minimum numbers of jurors who looked for information on the Internet during cases.

In follow-up work in 2013, Thomas found that 23 per cent of jurors questioned were “confused about the rule on Internet use”. Seven per cent of jurors admitted looking for information about

161 Law Commission *Juries in Criminal Trials – Part Two: A summary of the research findings* (NZLC PP37, 1999).

162 *Juries in Criminal Trials – Part Two: A summary of the research findings*, above n 162, at [7.44].

163 For example, Wikipedia was launched in 2001, Facebook in 2004 and Twitter in 2006. The availability and use of smartphones is also a subsequent development.

164 Cheryl Thomas *Are Juries Fair?* (Ministry of Justice (UK), Research Series 1/10, February 2010).

165 High-profile cases were “those lasting two weeks or more with substantial pretrial and in-trial media coverage”: see Thomas, above n 164, at 40–41.

166 Thomas, above n 164, at 43–44.

the legal teams involved in their trial, and six per cent admitted to looking for definitions of legal terms.<sup>167</sup>

#### Pretrial publicity

- 5.28 The effect of pretrial publicity on jurors was considered by Young, Cameron and Tinsley in 1998. They found the following:<sup>168</sup>
- Very few of the jurors who were aware of the pretrial publicity had more than a hazy recollection of the bare essentials of the incident.
  - Very few jurors described what they knew of the case from pretrial publicity in terms that indicated an element of prejudgment.
  - Even if an individual juror referred to pretrial, this did not necessarily impact on the eventual verdict. For instance, in one case, a juror referred to extraneous material but was “told by other jurors that they did not want to know about that”.
- 5.29 Thomas, in the United Kingdom, also looked into the question of juries recalling media coverage. Generally, she concluded that, in high-profile cases, juries were more likely to recall media coverage and that most jurors encountered some coverage during the trial.<sup>169</sup> Thomas suggests that pretrial publicity may well have more influence than was previously thought.<sup>170</sup> The research found that, in cases that were categorised as high profile, 20 per cent of the jurors who recalled media reports of their cases “said they found it difficult to put these reports out of their mind while serving as a juror”. The report also notes, however, that less than half those jurors (43 per cent) could identify a particular emphasis in the media reports. Of those that did remember an emphasis, almost all (89 per cent) remembered the coverage as suggesting the defendant was guilty.<sup>171</sup>

#### Judges' survey

- 5.30 Because there appeared to be little up-to-date information on possible use of the Internet by jurors and its consequences in New Zealand, we undertook a survey of jury warranted judges sitting in the District Court who regularly undertake jury trials. Of the 59 of the 94 judges with warrants who participated in this survey, 58 per cent said they had never had reason to believe that jurors had used the Internet for information sources, and just over 29 per cent thought that it had happened once or twice. Just over 10 per cent considered they had reason to believe or had suspected that a juror may have used the Internet in some cases. Only one respondent thought it happened in the majority of cases.
- 5.31 In cases where use had been detected, the most prevalent reasons for that coming to notice were either from material left in the jury room or another juror notifying the court staff. Where such instances occurred, the judges who answered this question preferred to interview the juror involved to determine what had happened and why and then to discuss the matter with counsel before determining how to proceed. In those cases where Internet use was detected, judges often considered that the issue could be dealt with by a direction to the jury rather than by discharging the juror or abandoning the trial. However, sometimes a juror was dismissed by the judge or the trial was abandoned as a result of juror research.

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167 Cheryl Thomas “Avoiding the Perfect Storm of Juror Contempt” [2013] Crim LR 483 at 491.

168 *Juries in Criminal Trials – Part Two: A summary of the research findings*, above n 161, at [7.51]–[7.53].

169 Thomas, above n 164.

170 Thomas, above n 164.

171 Thomas, above n 164, at 42.

5.32 The survey indicates to us that the issue is not unduly problematic at this stage.

### What are the options for addressing the problems?

5.33 It is unrealistic to expect to hold back the tide of information and completely shield the jury from external information. Short of physically sequestering jurors in a technology-free bubble for the duration of a trial, this is simply not possible. The traditional conception of a “pure” jury, where jurors have heard nothing about the case except the evidence presented in the courtroom, is increasingly becoming a fiction in the digital age. However, there are a number of measures that might appropriately be adopted to reduce the risk that jurors will access and share external material.

#### *More interactive approach to empanelling jurors*

5.34 To address the problem that potential jurors may have been exposed to pretrial publicity, the degree of enquiry when empanelling jurors could be enhanced. As discussed already, this has begun to occur in high-profile cases. In one of the Rūātoki raids cases, *R v Bailey*, Winkelmann J said that, for a fair trial, the judge would tell the jury panel the subject matter of the trial and direct them to advise him or her if they were unsure if they could try the case fairly on the evidence.<sup>172</sup> The type of *voir dire* process involving cross-examination of jurors, such as is used in the United States and Canada when empanelling jurors, is unlikely to ever find favour in New Zealand.<sup>173</sup> However, the option of expressly addressing pretrial exposure by the trial judge routinely asking potential jurors to individually confirm their ability to try the case fairly on the evidence may be appropriate.

#### *Systematic approach to comprehensive judicial directions*

5.35 One option for proactively addressing the risk of jurors researching would be to ensure that clear, consistent and comprehensive “do not research” instructions are given in all jury trials.<sup>174</sup> Juries are already routinely directed to decide the case on the evidence put before them in court and to not discuss the case outside of the courtroom or seek out information on the case. As discussed earlier, the Criminal Jury Trials Bench Book has guidelines for trial judges. The form that instructions may take, however, falls to the discretion of the trial judge, so there is not necessarily a consistent approach.

5.36 There are differences of opinion on whether juries obey judicial directions. Reliance on directions assumes that jurors are prepared to accept what they are told and disregard extraneous material. It also assumes that jurors are conscious of how extraneous information has influenced them.<sup>175</sup> Critics have labelled judiciaries’ reliance on instructions as “one of the great legal fictions”.<sup>176</sup> Some have even suggested that jurors will almost certainly use any information they perceive to be relevant and useful.<sup>177</sup> Some research indicates that jurors may be unwilling or even unable to set aside information that they regard to be relevant, irrespective of a judicial direction to the contrary, and that rules that eliminate the freedom of jurors to decide matters on their own common-sense view of justice may consequently be resisted.<sup>178</sup>

172 *R v Bailey*, above n 149, at [72].

173 See *R v Sanders*, above n 147.

174 Jacqueline Horan *Juries in the 21st Century* (Federation Press, Melbourne, 2012) at 170–171.

175 Horan, above n 174, at 166–167.

176 Horan cites a number of critics: Horan, above n 174, at 167.

177 Jane Johnston and others *Juries and Social Media: A report prepared for the Victoria Department of Justice* (2013) at 15.

178 Johnston and others, above n 177, at 15–16 citing the theory of psychological reactance.



- 5.37 While some studies confirm that jurors do listen to the judge's instructions, they also suggest that jurors will defy instructions and do their own research if they feel it will assist them in coming to the right verdict. It was observed in the research undertaken by Young, Cameron and Tinsley for the Law Commission in 1998 that the jurors in the study "did not seem to appreciate the importance, or did not understand the logic, of restricting themselves to the information presented by the parties and the judge".<sup>179</sup> The study found no apparent link between "don't research" instructions and those jurors who did their own research. Thomas's recent United Kingdom study has also raised questions as to whether directions really address the impact of prejudicial publicity on jurors.<sup>180</sup>
- 5.38 Taking all of this into account, we think it is important not to place too much reliance on "do not research" directions. Judicial directions must be approached as one of a range of measures. Further, the effectiveness of judicial directions depends on their form, content and timing. Directions need to present the rules as reasonable logical restrictions and provide jurors with a clear explanation of why their decision must be based only on the evidence presented in court. Some trial judges we spoke to have developed their own tailored directions to jurors not to conduct their own research, explaining fully the reasons why they must not do this.
- 5.39 It is also important to consider when and how directions should be conveyed to jurors.<sup>181</sup> The majority of jury instructions are provided at the beginning of the trial, yet this is the time when jurors are most distracted and are settling in and adjusting to the fact they are on the jury and the disruption this may cause them. Jurors may be least likely to fully take on board important rules and information at this stage. While jurors do need to be given the information at the start, later reinforcement is also needed.
- 5.40 Written instructions that jurors may keep and refer to may be more effective.<sup>182</sup> One important point that must be covered is just what is meant by "research". This must be thoroughly explained so that it is clear that it covers all experiments, investigations and Internet searches, expert evidence, Google Earth and maps. Jurors should also be told clearly that acting contrary to the judge's direction could be punished as contempt of court. This would help alert jurors to the importance of the direction and perhaps ensure a higher degree of compliance.

#### *Juror service educational information*

- 5.41 Another possible reform would be to provide more explicit and clear information about the issue of juror research in the material given to those called for jury service and that provided to the panel from which the jury is selected. Material must explain clearly why jurors should not do research and provide examples of what research covers. We suggest that the message should be given as early as possible.

#### *Juror oath and express acknowledgement*

- 5.42 Jurors also take an oath or affirmation to give their verdict on the evidence.<sup>183</sup> It may not be clear to them what that specifically entails. Implicit in that oath is a promise not to obtain or use extraneous material privately at any stage before or during the trial. Where a juror reaches a verdict that is not in accordance with his or her conscientious assessment of the evidence

179 *Juries in Criminal Trials – Part Two: A summary of the research findings*, above n 162, at [7.44]–[7.45].

180 Thomas, above n 164.

181 Horan, above n 174, at 169.

182 Horan, above n 174, at 170.

183 At present the oath that must be taken in open court is:

Do each of you swear by Almighty God (or solemnly, sincerely and truly declare and affirm) that you will try the case before you to the best of your ability and give your verdict according to the evidence?

called at trial, the juror breaches his or her oath.<sup>184</sup> Another option might be to amend the oath that jurors take so that it is very transparent that jurors must not read or research for any material not presented in the court. The Law Commission for England and Wales has recently recommended amending the wording of the juror oath to include a promise to base the verdict on the evidence presented in court and not to seek or disclose information on the case.<sup>185</sup> They also recommend that jurors be asked to sign a written declaration on their first day of jury service acknowledging they have been warned not to research.<sup>186</sup> We think these are useful options for New Zealand to also consider.

### *Juror questions*

- 5.43 Although not prohibited in New Zealand, jurors do not seem to be encouraged to ask questions at present. There may be more scope for jurors to be given clear advice about their ability to ask questions. More active engagement in the courtroom may make jurors less susceptible to conducting their own enquiries. Also, if jurors ask questions, this is likely to alert counsel and the judge to any issues that may be concerning or distracting the jurors. It is preferable that the jury raise their concerns with the judge as this could avoid the risk that they will do their own research to check points they do not understand. Making it easier for jurors to ask questions and have the judge explain legal and technical matters may help, although obviously a balance needs to be struck, as such questions can interrupt the presentation of evidence.

### *Presentation of evidence*

- 5.44 Greater deployment of information technology in the courtroom may also be of some assistance as it could meet some of the interactive need and address juror expectations. It has been suggested that, if the courts want to curb access to information outside the courtroom, a better information flow and more engagement within the courtroom is needed.<sup>187</sup> One Australian trial judge made the telling comment that:<sup>188</sup>

There is something faintly ridiculous about criticising lay people who go to a standard reference source for assistance on a question of fact such as the meaning of an ordinary English word when that is exactly what any reasonable person would expect them to do.

Judges and lawyers need to be aware that placing information before jurors in an incomplete, confusing or haphazard manner tempts even conscientious jurors to seek outside information to complete the picture.<sup>189</sup>

### *Return to routine sequestering?*

- 5.45 Another option, which we do not support, would be to take a completely different type of approach to the problem and begin routinely sequestering juries to ensure that they are unable to access extraneous material. We do not favour this approach because it runs counter to the modern trend away from sequestering. Reforms introduced in 2008 ended routine sequestering. In the past, it was commonplace for juries to be sequestered for the entire trial until they had given their verdict. The Juries Act 1981 now precludes sequestering unless the judge considers that the interests of justice require the jury to be sequestered.<sup>190</sup> Given the hardship caused to jurors by sequestration, this is a rarely used measure.

184 *Attorney-General v Frail*, above n 150, at [27].

185 Law Commission of England and Wales, above n 153, at [5.35].

186 At [5.40]–[5.41].

187 Horan, above n 174, at 198–200.

188 *Bongiorno J in R v Benbrika (Ruling Nos 35.01–35.11)* [2009] VSC 142 at [114].

189 Horan, above n 174, at 201–202.

190 Juries Act 1981 s 29A.



5.46 Our preliminary view is that sequestering is not a viable option for a number of reasons. In addition to being prohibitively expensive, sequestering makes jury service, especially in a longer trial, an unacceptable civic burden for those selected. We think people would be more likely to need to defer or avoid jury service on a range of grounds relating to consequences of full sequestering. Sitting jurors might need to be excused more often during a trial also.

#### *A statutory offence*

5.47 A further option that could be adopted in combination with some of the proactive upfront measures already outlined is to make it an offence for jurors to undertake their own research. It is probably contempt of court either at common law or under section 365 of the Criminal Procedure Act for a juror to undertake research. However, the position at common law is not completely clear. We generally favour replacing the common law of contempt with statutory offences, so it might therefore be appropriate to create an offence that covers jurors who deliberately conduct their own research even though they have been told clearly not to do this.

5.48 Some other common law jurisdictions have already responded to the problem by making it an offence for jurors to conduct their own research. In Australia, it is now an offence in three states for jurors to conduct their own investigations.<sup>191</sup> The Law Commission for England and Wales recommended last year that research by jurors be made a statutory criminal offence also.<sup>192</sup> The Commission's recommendation has been adopted and included, together with other new offences relating to juror conduct, in a Bill currently before the House of Commons.<sup>193</sup> Once the Bill is enacted, any juror found guilty would face a maximum penalty of two years' imprisonment.<sup>194</sup>

5.49 However, we need to be careful about creating new offences. Punishing a citizen when he or she is undertaking a civic duty would be harsh, particularly where the person has simply been overzealous about trying to do a good job. It is already a significant burden for a citizen to serve on a jury, and jury service should not be made more onerous than it already is. There would also likely be some reluctance by judges to refer cases for prosecution if a punitive approach were taken in New Zealand. Also, a heavy-handed approach to juror misbehaviour may simply push it underground and reduce the chance of it being detected and corrected.

5.50 On balance, a statutory offence is probably necessary to bring more clarity to the law in this area. It would send a clearer message that research is simply not permitted. To strike the right balance here, we suggest that the maximum penalty should probably be no more than three months' imprisonment, which is the current maximum for contempt in the face of the court. Importantly, we also consider that the threshold for the offence should be quite high so that only a juror who intentionally searches for information knowing or believing it will be relevant to the case would be caught. Whether or not the juror shared any information they found with other members of the jury could be a relevant factor when sentencing the juror.

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191 Under s 68C of the Juries Act 1977 (NSW), it an offence for jurors to conduct their own investigations. Section 69A of the Juries Act 1995 (Qld) prohibits jurors from making inquiries and s 78A of the Juries Act 2000 (Vic) prohibits the making of inquiries. All of these provisions are considered broad enough to cover jurors undertaking research. In New South Wales, recent legislation has also prohibited the use of personal digital assistants during and after proceedings in court: see Court Security Act 2005 (NSW) amended by the Courts and Other Legislation Further Amendment Act 2013 (NSW). This new provision would seem to prohibit jurors using social media during trial.

192 Law Commission of England and Wales, above n 153, at [1.21].

193 The Commission's recommended provision is cl 45 of the Criminal Justice and Courts Bill 2013–2014 (192 as amended in Public Bill Committee). It will insert a new s 20A "Offence: research by jurors" into the Juries Act 1974 (UK).

194 Criminal Justice and Courts Bill 2013–2014 (192), cl 45(8).

*Amending the criteria for a judge-alone trial*

- 5.51 A final option that should be put on the table for consideration is whether, where there is a significant risk that the prejudice of pretrial publicity cannot be overcome, there should be scope for having a judge-alone trial.
- 5.52 Most jurisdictions allow a trial judge to order trial by judge alone in some circumstances. In a few jurisdictions, this includes where there may be concerns that pretrial publicity cannot be satisfactorily overcome. In Queensland, for example, the danger of pretrial publicity that may affect jury deliberations is adverted to as a specific risk factor for the judge to consider.<sup>195</sup>
- 5.53 In New Zealand, for the most serious offences (category 4), trial is by jury, and there is no alternative. The very limited grounds on which a trial judge may determine that there should be a trial before a judge alone currently do not include risks posed to a fair trial by extensive pretrial publicity. Under the Criminal Procedure Act, trial before a judge alone may only be ordered either where the case is long and complex<sup>196</sup> or there has been intimidation of jurors.<sup>197</sup> For category 3 offences, the defendant may elect to be tried by a judge alone. Pretrial publicity may be a factor a defendant or his or her counsel consider in determining whether or not to elect a jury trial.
- 5.54 One option that might therefore be considered is some broadening of the grounds to also cover the risk of significant prejudicial pretrial publicity preventing a fair trial before a jury. However, a judge-alone trial would only be appropriate where that was the only effective way to overcome the problem.

**Our suggested approach**

- 5.55 Having considered and discussed the range of possible options for reform, we now seek feedback from submitters on what type of approach they think might work. Our preliminary assessment is that an approach that proactively manages the risk that jurors will see or look for extraneous material is likely to be the best approach. We therefore suggest a combination of the preventative measures discussed in paragraphs [5.34] to [5.44] above. In summary we favour:
- an interactive approach to empanelling jurors covering prior exposure to the case [5.34];
  - guidance for comprehensive judicial directions that deal with the risks of jurors searching out material and a systematic approach to presenting this (including in written form) [5.35] and [5.40];
  - juror service educational information that includes the same or similar material [5.41];
  - amendment to the wording of the oath taken by jurors so it includes agreeing to base the verdict only on the evidence presented in court [5.42];
  - making it easier for jurors to ask questions, particularly about legal or technical matters [5.43]; and
  - greater deployment of information technology in the courtroom [5.44].
- 5.56 In addition, we consider that a statutory offence [5.50] to replace common law contempt as it applies to jurors is probably also desirable to better address situations where a juror, notwithstanding clear unequivocal instruction, intentionally searches for extraneous information knowing or believing it will be relevant to the case.

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195 Criminal Code Act 1899 (Qld), ss 615(4)(c).

196 Criminal Procedure Act 2011, s 102.

197 Criminal Procedure Act 2011, s 103.

## DISCLOSURE OF INFORMATION BY JURORS

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- 5.57 The deliberations of juries are confidential, and jurors are not supposed to answer questions or give out information to anyone during or after a trial. On occasion, however, the confidentiality of jury deliberations has not been respected, and jurors have given information to others outside the jury room. The advent of the Internet and social media now allows jurors to communicate or publish their views much more easily. There is now the potential for jurors to use social media at any stage during a trial to share information about the trial.<sup>198</sup>

### Current law on disclosure of jury deliberations

#### *Breach of direction – section 365(1)(c)*

- 5.58 Where a juror discusses the case in breach of a direction not to do so, the juror may be in contempt of court under section 365(1)(c) of the Criminal Procedure Act. As discussed earlier in the chapter, section 365(1)(c) comes into play whenever a juror deliberately disobeys without lawful excuse an order or direction of the court.<sup>199</sup> Jurors are normally told that all members of the jury must be together whenever the case is being discussed and that jurors must not discuss the case with anyone else outside of the jury room. Section 365(1)(c) is therefore relevant, although it seems unlikely that it would continue to apply after the trial is completed and the jury released.

#### *Common law contempt*

- 5.59 Disclosure or publication of jury deliberations may amount to contempt of court under common law. With few cases, the scope of this form of contempt remains quite unclear.<sup>200</sup>
- 5.60 In *Solicitor-General v Radio New Zealand Ltd*, a journalist approached some of the people who had been jurors in the trial of David Tamihere for the murder of two Swedish tourists for comment when new evidence was discovered some years later. Radio New Zealand broadcasted the comments of one of the jurors who spoke at length to the reporter. Radio New Zealand was found to be guilty of contempt and was fined \$30,000.<sup>201</sup> The Court considered that:<sup>202</sup>

While the correctness of the convictions and the impact of the [new evidence] were matters that could properly be discussed, disclosure of jury deliberations or the reactions of individual jurors did not raise any legitimate matter of public concern, or otherwise advance the public good or the cause of justice. They achieved no more than the titillation of the listening public.

- 5.61 Applying *Solicitor-General v Radio New Zealand Ltd*, it seems that both a journalist who approaches jurors for information and the person who publishes such information are likely to be in contempt. The authors of *Media Law in New Zealand* say the decision is best interpreted as rendering it quite unsafe either: (i) to approach a juror in an attempt to elicit comment about a decision; or (ii) to publish information about a jury's deliberations elicited from an interview with a juror.<sup>203</sup>

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198 See generally Johnston and others, above n 177, for a useful summary about the general issues raised by social media and juries.

199 *McAllister v Solicitor-General* [2013] NZHC 2217, [2013] 3 NZLR 708 at [30].

200 Jennifer Tunna “Contempt of Court: Divulging the Confidences of the Jury Room” (2003) 9 *Canta LR* 79 at 83.

201 *Solicitor-General v Radio New Zealand Ltd* [1994] 1 NZLR 48 (HC).

202 At 58.

203 John Burrows and Ursula Cheer *Media Law in New Zealand* (6th ed, LexisNexis, Wellington, 2010) at 580. In an earlier edition, the authors also suggested that it would still be contempt to publish the results of an interview even if the juror had approached the media voluntarily instead of the other way round.

- 5.62 The question of whether jurors themselves could be in contempt if they approach the media has not been addressed by the courts in New Zealand.<sup>204</sup> The position at common law is probably that a juror who discloses information or communicates with external parties (including the media) after being directed not to do this may be in contempt at common law.
- 5.63 An important issue that has not been addressed is the question of whether it would still be contempt if the disclosure is made in the belief that there has been a miscarriage of justice. It is arguable that, in such circumstances, the disclosure or publication of jury deliberations is in the public interest and is not contempt. In such circumstances, there may be a public interest defence available.

#### *Why jury deliberations are confidential*

- 5.64 The Court in *Solicitor-General v Radio New Zealand Ltd* identified three reasons for the confidentiality of jury deliberations.<sup>205</sup>

#### Free and frank discussion

- 5.65 Confidentiality promotes free and frank discussion between jurors. Jurors may feel inhibited if their words could later be aired publicly and subjected to public scrutiny and attack. Jurors should be able to express their views without being afraid that it will subsequently be exposed in public. This is perhaps the strongest reason for protecting against the disclosure of jury deliberations.

#### Finality of verdicts

- 5.66 Confidentiality also protects the finality of verdicts. Exposing the jury deliberations may wrongly open verdicts up to public challenge. There may also be public disagreement among jurors as to what occurred in the jury room.<sup>206</sup> The Court of Appeal has commented that “[t]he prospect of one or more jurors being cross-examined on their affidavits and possibly being the subject of evidence in rebuttal is extremely unattractive [and] would, potentially at least, have a very detrimental effect on the jury system”.<sup>207</sup> Likewise, one talking juror may compel other jurors, who may have wished to preserve their traditional silence, into speaking to explain their side or clarify what happened in the jury room.<sup>208</sup>
- 5.67 A verdict does not get its legitimacy from the reasoning or deliberation process taken by individual jurors. Rather, it is the fact that the verdict is unanimous or supported by a substantial majority of the jurors, irrespective of the different routes by which individual jurors came to agree on that verdict that gives it validity. In exceptional circumstances, the courts may need to look behind and inquire into the decision-making process. Section 76 of the Evidence Act allows a court to accept evidence relating to jury deliberations in exceptional circumstances.

#### Privacy of jurors

- 5.68 The confidentiality of deliberations protects the privacy of jurors. This is an important consideration. In *Solicitor-General v Radio New Zealand Ltd*, the Court said:<sup>209</sup>

204 Tunna, above n 200, at 103.

205 *Solicitor-General v Radio New Zealand Ltd*, above n 201.

206 Tunna, above n 200, at 89.

207 *Tuia v R* [1994] 3 NZLR 553 (CA) at 557.

208 Murray Gleeson “The Secrecy of Jury Deliberations” (1995–1996) 1 Newcastle L Rev 1 at 12.

209 *Solicitor-General v Radio New Zealand Ltd*, above n 201, at 55.

[J]urors serve in the impression that their privacy will be respected and their identity remain undisclosed; that they will not be interviewed about their deliberations nor called upon to explain or justify their verdict.

Other measures are also in place that directly protect the identity of jurors.<sup>210</sup>

### How significant are the problems?

5.69 There have been a few cases in New Zealand where the mainstream media have published or broadcast interviews with jurors, the most significant being *Solicitor-General v Radio New Zealand Ltd*, which has already been discussed.

5.70 There have been a few instances where jurors voluntarily approached the media. For example, following the retrial of David Bain, there were a number of interviews with jurors.<sup>211</sup> There have also been a handful of other instances of articles in the media containing juror comment in recent years.<sup>212</sup> To date, contempt proceedings have not been taken against jurors for disclosure.

### Social media and Internet blogs

5.71 The use of social media by jurors and the ability to self-publish blogs on the Internet have been identified internationally as the area where there is the most potential for disclosure by jurors.<sup>213</sup>

5.72 There has been a handful of cases in the United Kingdom. The case of *Attorney-General v Fraill* involved the use of Facebook in a very objectionable way. The juror contacted a defendant and discussed the case with her before deliberations had been completed.<sup>214</sup> Also, a juror in Lancaster was dismissed from the jury after she asked her Facebook friends to help her decide: “I don’t know which way to go, so I’m holding a poll”.<sup>215</sup> More recently in *Attorney-General v Pardon*, a juror in a multi-defendant trial contacted one defendant to apologise for a guilty verdict returned on one of the counts and disclosed information about the jury deliberations.<sup>216</sup> A significant number of instances have also been reported in the United States involving jurors sharing information.<sup>217</sup>

5.73 No such egregious instances of the use of social media have been uncovered in New Zealand. However, we should not be unduly complacent, as overseas experience suggests that may be happening to some extent.

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210 In particular, there are a number of protections for the jury list included in the Juries Act 1981 that have recently been strengthened. See the Juries (Jury Service and Protection of Particulars of Jury List Information) Amendment Act 2012, which brought the changes into force on 29 April 2013.

211 For example, in an article in *The New Zealand Herald*, one juror shared her experience of serving on the jury and the trauma she suffered as a result: see David Fisher “Bain juror: we were hounded” *Herald on Sunday* (online ed, Auckland, 7 June 2009). While the article did not touch on the deliberations of the jurors, it probably disclosed more information than has ever been published previously: Burrows and Cheer, above n 203, at 581.

212 For example, Sarah Harvey “Jurors stand by their disputed cruelty verdict” *Stuff.co.nz* (online ed, New Zealand, 27 March 2011).

213 In recent Australian research, 62 Australian judges, magistrates, court administrators and other stakeholders identified the potential for juries to misuse social media during trials as the most significant challenge that social media poses to the courts: see Johnston and others, above n 177.

214 *Attorney-General v Fraill*, above n 150.

215 Urmee Khan “Juror dismissed from a trial after using Facebook to help make a decision” *The Telegraph* (online ed, United Kingdom, 24 November 2008).

216 *Attorney-General v Pardon* [2012] EWHC 3402 (Admin).

217 A review of the literature and media reveals jurors doing things such as blogging about a trial or tweeting “oh and nobody buy [a building product]. Its bad mojo and they’ll probably cease to Exist, now that their wallet is 12m lighter”. See John Schwartz “As Jurors Turn to Web, Mistrials Are Popping Up” *The New York Times* (online ed, New York, 18 March 2009).



## Approach in overseas jurisdictions

### United Kingdom

5.74 Confidentiality of jury deliberations is protected by section 8 of the Contempt of Court Act 1981 (UK). Section 8 provides:

#### **8 Confidentiality of jury's deliberations.**

- (1) Subject to subsection (2) below, it is a contempt of court to obtain, disclose or solicit any particulars of statements made, opinions expressed, arguments advanced or votes cast by members of a jury in the course of their deliberations in any legal proceedings.
- (2) This section does not apply to any disclosure of any particulars—
  - (a) in the proceedings in question for the purpose of enabling the jury to arrive at their verdict, or in connection with the delivery of that verdict, or
  - (b) in evidence in any subsequent proceedings for an offence alleged to have been committed in relation to the jury in the first mentioned proceedings,
 or to the publication of any particulars so disclosed.

5.75 The provision contains two exceptions: (a) deliberations can be disclosed to the court in which the jury is sitting; and (b) evidence of the jury's deliberations may be used in subsequent proceedings for an offence alleged to have been committed in relation to the jury. The maximum penalty for a breach of section 8 is an unlimited fine and/or imprisonment for up to two years.<sup>218</sup>

5.76 The “strict liability rule” in section 8 has been criticised for a number of reasons.<sup>219</sup> There is no exception for a juror who has an honest and possibly well-founded concern that the manner of jury deliberation has resulted in a miscarriage of justice. If the juror expresses those concerns to someone other than the court, such as, for example, a solicitor, the juror will expose him or herself to a criminal penalty. The provision also does not contain an exception for academic research into how juries perform their role.<sup>220</sup> Thomas considers that the prohibition has “created confusion about what jury research can and cannot be conducted and has contributed to an information vacuum about juries” in the United Kingdom.<sup>221</sup>

### Australia

5.77 A number of states in Australia have created statutory offences for the disclosure of deliberations. The scope of the offence varies between the states.<sup>222</sup> However, one common element is that, in each state, it is an offence for a person to solicit information as to statements made by jurors and votes cast in the course of jury deliberations. Each state also makes it an offence for a juror to disclose such information if it is likely to be or will be published to the public. The Australian legislation also contains a number of defences. These vary among states. Some examples are disclosure to a court, to a board or commission, to a prosecuting officer for the purpose of a contempt allegation or with authorisation by a relevant minister for research purposes.

218 Contempt of Court Act 1981 (UK), s 14.

219 See generally Enid Campbell “Jury Secrecy and Contempt of Court” (1985) 11 Mon LR 169.

220 Law Commission of England and Wales *Contempt of Court: A Consultation Paper* (LCCP 209, 2012) at 81–84.

221 Thomas, above n 164, at 1.

222 Juries Act 1967 (ACT), s 42C; Juries Act 1977 (NSW), ss 68A–68B; Juries Act 2000 (Vic), s 78; Juries Act 1995 (Qld), s 78; Juries Act (NT), s 49A; Juries Act 2003 (Tas), s 58; Juries Act 1957 (WA), pt IXA.



## Canada

- 5.78 Canada also addressed the situation in legislation. There is a statutory offence for disclosure of information in the Criminal Code:<sup>223</sup>

649. Every member of a jury, and every person providing technical, personal, interpretative or other support services to a juror with a physical disability, who, except for the purposes of

- (a) an investigation of an alleged offence under subsection 139(2)<sup>224</sup> in relation to a juror, or
- (b) giving evidence in criminal proceedings in relation to such an offence,

discloses any information relating to the proceedings of the jury when it was absent from the courtroom that was not subsequently disclosed in open court is guilty of an offence punishable on summary conviction.

## Proposals for reform

- 5.79 We consider that legislation would usefully clarify the law concerning disclosure of jury deliberations. Legislation has the distinct advantage of making the rules clear. Everyone would know in advance exactly what is and is not permitted. This would provide guidance to jurors, media, practitioners and the judiciary.

### *A statutory offence*

- 5.80 A statutory offence could clarify the law in this area. It could clearly provide that it is an offence for anyone, including a person who is or has served on a jury, to disclose or publish details of a jury's deliberations or for anyone to solicit such information. This approach would be consistent with that taken in the United Kingdom, Canada and Australia.
- 5.81 As discussed earlier, the United Kingdom provision has been criticised for its strict liability rule. In its report last year, the Law Commission for England and Wales recommended reforming section 8 to address this issue.<sup>225</sup> The Commission recommended that a specific defence be provided to cover jurors disclosing deliberations to certain officials in the genuine belief that such disclosure is necessary to uncover a miscarriage of justice.<sup>226</sup> The Commission also recommended inclusion of an exception for authorised academic research into jury deliberations.<sup>227</sup>
- 5.82 A Bill is currently before the House of Commons that will, when enacted, give effect to the Commission's recommendations in terms of a public interest defence.<sup>228</sup> The Bill repeals section 8 of the Contempt of Court Act 1981 (UK) in so far as it applies to England and Wales and replaces it with new offence provisions on the Juries Act 1974 (UK). These provisions include exceptions to cover occasions where disclosure may be in the interests of justice because there has been an irregularity such as juror misconduct during deliberations. A juror with real concerns about the fairness of the deliberation process may make a disclosure to a number of specified people during or after the trial. These include the trial judge, a judge of the Court of Appeal, the Registrar of Criminal Appeals, the Crown Prosecution Service and the Criminal Cases Review Commission, as well as the Police and the Attorney-General.<sup>229</sup>

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223 Criminal Code RSC 1985 c C-46, s 649.

224 Subsection 139(2) relates to the offence of obstructing, perverting or defeating the course of justice.

225 Law Commission of England and Wales, above n 153, at [1.23] and ch 4.

226 At [4.15].

227 At [4.27] and [4.49].

228 The Commission's recommended provision is cl 48 of the Criminal Justice and Courts Bill 2013–2014 (192 as amended in Public Bill Committee). It will insert a new s 20A "Offence: research by jurors" into the Juries Act (UK) 1974. If the Bill is enacted in its present form, it will insert new ss 20D–20G into the Juries Act 1974 (UK).

229 New ss 20D–20F provide for disclosure to various persons depending on the stage of the trial.

- 5.83 If New Zealand moves to clarify the law concerning disclosure of jury deliberations and makes the disclosure of deliberations by a juror an offence, we would also need to specify what defences and exceptions would be appropriate. There would certainly need to be an exception or defence covering disclosure in the interests of justice where there has been some irregularity, such as juror misconduct during deliberations, to avoid what is potentially a miscarriage of justice. The two options that might be considered here are either to:
- follow the United Kingdom approach and provide a specific and relatively narrow avenue of complaint for a juror; or
  - take a broader approach and provide a general public interest defence. This option might be preferred on the basis that a complaint to an official body will not always be enough and that public and media scrutiny may be required if there is genuine concern about the safety of a conviction.
- 5.84 Whether an exception is needed in relation to research is an issue that also needs to be considered in New Zealand. The current Bill in the United Kingdom does not include that particular Law Commission recommendation.

*Proactive management options*

- 5.85 We consider that the types of proactive management options we discussed in relation to jurors undertaking research could also be taken to reduce the risk that jurors will disclose details of deliberations or disclose information.
- 5.86 Jurors could be given more explicit directions before and during the trial that they must not disclose information or use social media to discuss the case. They could also be clearly directed on the reasons for this. The information provided to those called for jury service and the information given to jurors before the trial should also clearly state the position and the reasons for it. Earlier, we suggested that the direction on how jurors must conduct themselves might be provided in written form. The juror oath could also be amended to include a juror promise not to disclose information about jury deliberations.

## QUESTIONS

- Q9 Do you agree with our suggested approach to pretrial publicity and research by jurors?
- Q10 Do you have any comments on the different options for dealing with pretrial publicity and research by jurors? Are there other options we should consider?
- Q11 Do you agree that there should be a statutory offence to replace common law contempt as it applies to jurors who, notwithstanding clear unequivocal instruction, intentionally search for extraneous information?
- Q12 Do you agree that the law on the disclosure of jury deliberations should be clarified and that it should be a statutory offence for anyone, including a person who is or has served on a jury, to disclose or publish details of a jury's deliberations or for anyone to solicit such information?
- Q13 What exceptions or defences should be available to allow disclosure where it is in the interests of justice because there has been some irregularity during deliberations, such as juror misconduct?
- Q14 Should there be an exception to allow for academic research into juries?
- Q15 Do you have any comment on the proactive management options as they relate to disclosure of information? Are there any other options we should consider?

# Chapter 6

## Scandalising the court

### INTRODUCTION

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- 6.1 This chapter deals with the contempt of undermining confidence in the court itself, as a continuing process, which is known as “scandalising” a court or judge.
- 6.2 The contempt is generally committed by way of written publication, but it may include statements published by other means, such as orally, by placard<sup>230</sup> or letters to a judge.<sup>231</sup> These days, the contempt may be committed through publication of comments about judges and courts on the Internet or via social media.

### WHAT IS “SCANDALISING”?

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- 6.3 The first real articulation of the contempt appears in the judgment of Wilmot J in the English case of *R v Almon*, where the contempt of scandalising was described as:<sup>232</sup>

An impeachment of the [King’s] wisdom and goodness in the choice of his judges, [and which] excites in the minds of his people a general dissatisfaction with all judicial examinations, and indisposes their minds to obey them ...

- 6.4 Interestingly, Wilmot J’s judgment was never actually delivered, so the contempt somewhat controversially originated in a draft judgment that was subsequently cited as authority by the courts.

- 6.5 The classical description of the contempt, which is still referred to today, is that of Lord Russell of Killowen CJ in *R v Gray*:<sup>233</sup>

Any act done or writing published calculated to bring a Court or a judge of the Court into contempt, or to lower his authority.

In *R v Gray*, the offending article published at the end of a trial referred to the judge as “an impudent little man in horse hair, a microcosm of conceit and empty-headedness”.<sup>234</sup> The editor of the paper, Gray, apologised and was fined £1000 for “personal scurrilous abuse of a judge as a judge”. Were it not for his apology, the Lord Chief Justice said Gray would have been sent to prison “for a not inconsiderable period of time”.<sup>235</sup>

- 6.6 Essentially, the contempt comprises “scurrilous abuse” of a judge as a judge or of a court or attacks upon the integrity and impartiality of a judge or court. The word “scurrilous” is

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230 *R v Vidal*, *The Times*, 14 October 1922.

231 *R v Freeman*, *The Times*, 18 November 1925.

232 *R v Almon* (1765) *Wilm* 243, 97 *ER* 94 as cited in Julie Maxton “Contempt of Court in New Zealand” (PhD Thesis, University of Auckland, 1990) at 361.

233 *R v Gray* [1900] 2 *QB* 36.

234 See Julie Maxton “Contempt of Court in New Zealand” (PhD Thesis, University of Auckland, 1990) at 368. The offending words were deliberately omitted from the judgment; see *R v Gray* [1900] 2 *QB* 36 at 37.

235 At 40–41.

no longer in common usage but is defined in the Concise Oxford Dictionary as “grossly or indecently abusive”.<sup>236</sup>

6.7 The courts frequently note that the offence of scandalising exists to protect the proper functioning of the court, not the dignity or hurt feelings of individual judges.<sup>237</sup>

6.8 Not every criticism of a judge amounts to a contempt. Lord Atkin set out the parameters of the contempt in *Ambard v Governor-General for Trinidad and Tobago (Ambard)* by saying that:<sup>238</sup>

[N]o wrong is committed by any member of the public who exercises the ordinary right of criticising, in good faith, in private or public, the public act done in the seat of justice. The path to criticism is a public way: the wrong headed are permitted to err therein: provided that members of the public abstain from imputing improper motives to those taking part in the administration of justice, and are genuinely expressing a right of criticism, and not acting in malice or attempting to impair the administration of justice, they are immune. Justice is not a cloistered virtue: she must be allowed to suffer the scrutiny and respectful, even though outspoken, comments of ordinary men.

6.9 In *Ambard*, the Privy Council found that an article criticising apparently discrepant sentences was not a contempt, despite containing strong criticism of the judge.

### New Zealand authorities

6.10 In *Attorney-General v Blomfield (Blomfield)*,<sup>239</sup> the existence of the scandalising jurisdiction in New Zealand was questioned by some of the judges in light of an earlier statement by Lord Morris in the Privy Council decision of *McLeod v St Aubyn* that committals for contempt of court by scandalising the court had become obsolete.<sup>240</sup> Denniston J in *Blomfield* described the offence of scandalising as being “wholly inconsistent with the trend of modern ideas”.<sup>241</sup> However, the majority of the Court held, and subsequent decisions have confirmed, the contempt is indeed part of New Zealand law, and the High Court has inherent jurisdiction to commit and punish a person for the contempt of scandalising the Court.<sup>242</sup>

6.11 In the 1953 decision of *Attorney-General v Butler (Butler)*, Fair J, in what was then the Supreme Court, described the essence of the offence of scandalising and its rationale as follows:<sup>243</sup>

It has long been recognized that the Courts of Justice should be subject to the freedom of criticism which is a necessary accompaniment of the freedom of speech which is the right of all free men. The public interest requires that the right of free speech should not be restricted except where circumstances necessitate it. But there must be some limitation: ... So far as the Courts are concerned, any publications which are calculated, or have a tendency, to impair confidence in the rule of law, and the Courts charged with their administration, constitute contempt of Court unless they are made in temperate and reasonable language appropriate to a proper respect for Courts as institutions established to administer the law in the interests of order, and the good government of the country. Extravagant and inflammatory language, calculated not only to incite disapproval of particular decisions, but also to shake confidence in the Courts themselves, and provoke discontent and ill-feeling, is considered so plainly contrary to the public interest as to constitute an offence calling, in proper cases, for the application of the summary power of punishing for contempt, which ... is to be used sparingly

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236 Concise Oxford Dictionary of Current English (8th ed) (Clarendon Press, Oxford 1990).

237 See for example *Ahnee v Director of Public Prosecutions* [1999] 2 AC 294 (PC) at 307.

238 *Ambard v Governor-General for Trinidad and Tobago* [1936] AC 322 (PC) at 335.

239 *Attorney-General v Blomfield* (1913) 33 NZLR 545 (SC).

240 *McLeod v St Aubyn* [1899] AC 549.

241 *Attorney-General v Blomfield*, above n 239, at 574.

242 *Re Wiseman* [1969] NZLR 55 (CA); *Solicitor-General v Radio Avon Ltd* [1978] 1 NZLR 225 (CA).

243 *Attorney-General v Butler* [1953] NZLR 944 (SC) at 946.

and only in serious cases. Criticism may be strong and forceful, but it is not to be couched in the language of abuse and invective.

- 6.12 In *Butler*, the defendant had published a circular letter to branches of the Union of Workers, the Court, several ministers and the Secretary for Labour and Employment, following the making of a new award by the Court of Arbitration. The letter said:<sup>244</sup>

[T]his is a travesty of justice and will naturally cause resentment against the manner in which the Court of Arbitration applies the principles of the Arbitration Act. ... Recent decisions of the Court ... of which the present is typical, ruthlessly disregard the rights of employees to a fair standard of living and are important factors in creating in the minds of the workers a sceptical disregard of justice as administered by the Court.

The Court found that the letter was a contempt; however, no penalty was ordered.<sup>245</sup>

- 6.13 In *Solicitor-General v Radio Avon Ltd*,<sup>246</sup> the Court of Appeal held that a scandalising contempt could not be proved unless the facts of the case establish beyond reasonable doubt that there is a real risk, as opposed to a remote possibility, that the objectionable conduct would undermine public confidence in the administration of justice.
- 6.14 There is no requirement that, as a result of the statements, the administration was in fact undermined or discredited, and it is difficult to conceive how empirical proof of this could be obtained. The size of the audience and the likely nature, impact and duration of the influence of the statements will be relevant to the assessment of whether there is a risk of undermining public confidence. The identity of the person making the statement will also be relevant.
- 6.15 With regard to the mental element of the offence, it seems there must be a voluntary publication, and the publisher must know that the publication contained the allegations in question and that the allegations reflect on the court.<sup>247</sup>
- 6.16 In a recent case dealing with the offence of scandalising, the defendant had described Penlington J in an application for leave to appeal to the Court of Appeal as “prejudiced, biased, one-sided, even criminal”.<sup>248</sup> He said further that the Judge had “turned the Hamilton High Court into a public toilet, defecating on the principles of justice and the laws of God”.<sup>249</sup> The defendant had a history of being abusive towards his counsel, other judges and court staff. He also made abusive comments in subsequent correspondence to both Penlington and Hammond JJ.
- 6.17 In an oral judgment, Hammond J held that, in the context of the case, the general law of contempt was of sufficient importance to justify a limit on the defendant’s rights of freedom of expression. The Judge noted that fair criticism of courts and judges has always been permitted and even encouraged. That said, he found that the leave application and subsequent correspondence were a direct attack on the integrity, propriety and impartiality of Penlington J.<sup>250</sup>

In short, what was being exercised by [the defendant] was not a genuine right of criticism but the improper imputation of the basest of motives.

244 At 946.

245 This was because the defendant had limited his comments to recent decisions and had indicated his confidence in methods of arbitration, and he would have been within his rights had his comments been expressed in moderate language.

246 *Solicitor-General v Radio Avon Ltd*, above n 242.

247 *ATH Smith Reforming the New Zealand Law of Contempt: An Issues/Discussion Paper* (Crown Law Office, April 2011) at [3.46].

248 *Solicitor-General v Van der Kaap* HC Hamilton M155/97, 30 May 1997 at 2.

249 At 2.

250 At 5.



The Judge concluded that these attacks were designed to lower the authority of the judges of the Court and to detract from the authority of the decisions of the Court. The statements were held to reflect directly on the integrity and impartiality of the Judges. The Judge characterised the defendant's behaviour as "a form of aggressive bullying ... designed to distract the Judges from arriving at proper decisions".<sup>251</sup> The defendant was sentenced to six weeks' imprisonment and fined \$1,000.

- 6.18 The most recent case in New Zealand involving scandalising was *Solicitor-General v Smith (Smith)*.<sup>252</sup> The Hon Dr Nick Smith MP had become involved in a custody dispute involving constituents in his electorate. He twice spoke to the litigant caregiver who was seeking custody of a child in proceedings against the child's biological parents, asking her how she felt about "stealing" her sister's child and telling her that Parliament was "the highest Court in the land".<sup>253</sup> In a media statement relating to the Family Court custody proceeding, Dr Smith said: "This case almost amounts to state sanctioned child stealing." He made similar statements in a TV3 interview and on National Radio. He also described what had occurred in court as "obscene", "a fiasco", "blatantly wrong" and "an indefensible situation". He referred to a court warrant for custody of the child as a warrant for the child to be "ripped out of his family's arms".<sup>254</sup>
- 6.19 The Crown brought contempt proceedings on multiple bases, including that Dr Smith's comments carried a real risk of placing pressure on the Court in terms of its final decision and was likely to lower the standing of the Court generally and to undermine public confidence in its ultimate decision in the case.
- 6.20 The Court held that the tone and fairness of comments are relevant to their tendency to interfere with the administration of justice. The Court agreed with the Crown's characterisation of Dr Smith's public statements as "one-sided, emotive and extreme in terms of their language, and inflammatory and intimidatory ... in their effect".<sup>255</sup> The Court found Dr Smith made his media releases and gave the interviews on television and radio with the intention of persuading the litigant to give up on her custody case. Alternatively, it said it considered there was a real likelihood that Dr Smith's comments would inhibit a litigant of average robustness from availing herself of her right to have the case determined by the Family Court. Dr Smith had deliberately chosen to publish his views on the case to as wide an audience as possible.
- 6.21 The Court accepted that the offence of scandalising the court could be justified as a reasonable limitation upon freedom of expression. The Court reasoned that the limitation was justified as it was necessary to preserve the impartial and effective system of justice upon which any freedom of expression was dependent. Hence.<sup>256</sup>

The rights guaranteed by the BORA depend upon the rule of law, the upholding of which is the function of Courts. Courts can only effectively discharge that function if they command the authority and respect of the public. A limit upon conduct which undermines that authority and respect is thus not only commensurate with the rights and freedoms contained in the BORA, but is ultimately necessary to ensure that they are upheld.

This reasoning led the Court to conclude that the offence was a reasonable limit justified under section 5 of the New Zealand Bill of Rights Act 1990 (Bill of Rights).

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251 At 5.

252 *Solicitor-General v Smith* [2004] 2 NZLR 540 (HC).

253 At [49].

254 At [58].

255 At [58].

256 At [133].

- 6.22 The Court found that the course of Dr Smith's conduct as a whole amounted to contempt. Although the case is cited as an example of the New Zealand courts being more willing to find contempt by scandalising than courts in the United Kingdom,<sup>257</sup> the scandalising conduct was not separate from the conduct that amounted to other forms of contempt.
- 6.23 Professor ATH Smith has noted it is arguable that each of the incidents involving Dr Smith could also have been treated as a conspiracy to interfere with the course of justice under section 116 of the Crimes Act 1961 or a specific offence under section 117(e) of that Act, which penalises everyone who "wilfully attempts ... to obstruct prevent, pervert or defeat the course of justice".<sup>258</sup>
- 6.24 Both *Solicitor-General v Van der Kaap* and *Smith* indicate that the senior courts have, in the past, been inclined to regard the need for maintaining confidence in the courts as a justified limitation on freedom of expression in appropriate cases, but this will depend on the facts of the particular case.
- 6.25 A recent website on judging judges did not meet the threshold for prosecution.<sup>259</sup> One can infer from this that the bar for prosecution of contempt by scandalising the court in modern New Zealand is very high. This reflects that there appears to be a high level of confidence in the New Zealand justice system and that it would take comments of an extraordinarily corrosive nature to erode that confidence.
- 6.26 The New Zealand Law Society recently criticised the decision of a Fijian court, which had held a report by the Citizens Constitutional Forum that was critical of the state of the rule of law and independence of the Fijian judiciary was contempt by scandalising.
- 6.27 Austin Forbes QC said:<sup>260</sup>
- In a free and democratic society that adheres to the rule of law, prosecutions for contempt scandalising the court would not be expected to be brought other than in rare cases.

## SCANDALISING ISSUES

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- 6.28 There are a number of problems with the common law contempt of scandalising the court.
- 6.29 The term "scandalising" is itself problematic, as it harks back to a bygone era and no longer reflects the nature of the harm caused by the offence or what the punishment is meant to achieve. If an offence of a similar nature is to be retained, the Law Commission considers it should not refer to "scandalising".
- 6.30 More so than with other forms of contempt, the scope of the scandalising contempt is unclear.
- 6.31 The requisite mens rea for committal of the contempt and whether truth or justification is a defence are also unresolved issues.
- 6.32 As scandalising does not protect a particular trial, it is doubtful whether use of the summary procedure is justified in a proceeding dealing with a scandalising matter. In practice, the courts are unlikely to proceed without giving the accused some opportunity to be heard and considering whether the matter should be heard by another judge, but there does not seem to be an agreed uniform procedure for judges to follow.

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257 See for example Ian Cram *Borrie & Lowe: The Law of Contempt* (4th ed, LexisNexis, London, 2010) at 406.

258 Smith, above n 247, at [3.39].

259 Gerard Counsell "Judge the Judges' website concerns Government" (6 May 2013) TVNZ < [www.tvnz.co.nz](http://www.tvnz.co.nz) > .

260 Austin Forbes QC "Fiji Sentences Condemned: Austin Forbes QC, chair of NZLS Rule of Law Committee Responds" (2011) 829 *Lawtalk* at 31.

- 6.33 Clearly, criticism and critical debate about the judicial system are not wholly off limits, but where is the line to be drawn? At what point does criticism go too far? Would the administration of justice really be undermined if people were free to say what they wished about judges and the courts? There is plenty of existing criticism on New Zealand blog sites and social media that does not seem to have had an appreciable negative effect on confidence in the New Zealand justice system. It might also be thought convictions later found to be wrongful are likely to be far more damaging.
- 6.34 Does the fact that there have been no scandalising prosecutions for several years suggest that it is no longer of any relevance? If asked, most people would almost certainly say that they did not know they could be imprisoned for abusing a judge in such a way as to undermine the administration of justice. Media companies are aware of it, however.
- 6.35 In tracing the history of the contempt, it is easy to see that comments that may have constituted commission of the contempt in days gone by would certainly not meet the threshold for prosecution today.
- 6.36 The infrequency of proceedings for scandalising, particularly after the enactment of the Bill of Rights Act, means it is difficult to ascertain where the courts will draw the line in future cases.
- 6.37 Another issue with the scandalising contempt is that the effect of statutory “contempt in the face of the court” provisions means that insulting a judge in court can only attract the statutory penalties, whereas insults made out of court may be subject to limitless penalty (although *Siemer v Solicitor-General (Siemer)* determined that the Bill of Rights Act would restrict a judge’s summary jurisdiction to imprison a person to a maximum of two years).<sup>261</sup>

## INTERNATIONAL APPROACHES TO THE CONTEMPT OF SCANDALISING

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### Developments in England and Wales

- 6.38 The last successful prosecution for scandalising in England and Wales was in 1931.<sup>262</sup>
- 6.39 In 1974, the Phillimore Committee recommended that “scandalising the court” should cease to be part of the law of contempt.<sup>263</sup> Instead, the Committee said it should be made an indictable offence to defame a judge in such a way as to bring the administration of justice into disrepute. The Committee recommended further that proof that the allegations in question were true and that publication was for the public benefit should be a defence.<sup>264</sup>
- 6.40 Such a provision was not included in the Contempt of Court Act 1981 (UK), which focuses on publication contempts affecting a particular trial and the test for when a matter is sub judice.
- 6.41 Following the Spycatcher litigation, in which the House of Lords upheld an injunction preventing the publication of the memoirs of a former MI5 agent in England when the material had been published in other countries,<sup>265</sup> the *Daily Mirror* published upside-down photographs of the Law Lords who had allowed the Spycatcher injunction to continue under the banner headline “You Fools”. Contempt proceedings were not initiated,<sup>266</sup> which illustrates there was a high threshold for prosecution of a scandalising offence in the United Kingdom at the time.

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261 *Siemer v Solicitor-General* [2010] NZSC 54, [2010] 3 NZLR 767 at [66]–[68].

262 *R v Colsey*, *The Times*, 9 May 1931.

263 Henry Phillimore *Report of the Committee on Contempt of Court* (House of Commons, Cmd 5794, 1974) at 94.

264 At 94.

265 *Attorney-General v Observer Ltd* [1988] 1 AC 109 (HL).

266 Geoffrey Robertson and Andrew Nichol *Media Law* (4th ed, Penguin Books, London, 2002).

- 6.42 The offence of scandalising made headlines in the United Kingdom again in March 2012, when the Attorney-General for Northern Ireland obtained leave to prosecute Peter Hain MP for comments he had made in his published memoirs, *Outside In*, criticising a Judge's handling of a judicial review application<sup>267</sup> and saying the Judge was "off his rocker".<sup>268</sup>
- 6.43 The action was discontinued following a statement issued by Mr Hain clarifying the intention behind his remarks, but it led to Lords Lester and Pannick calling for the abolition of the offence of scandalising the court.<sup>269</sup>
- 6.44 In response, the Law Commission for England and Wales expedited its work on scandalising in its own review of contempt of court and concluded that the contempt of scandalising should be completely abolished.<sup>270</sup>
- 6.45 The Commission said the common law offence arguably infringes the European Charter of Human Rights and is unnecessary, given that the more serious scandalising conduct will generally fall within the scope of other offences, such as offences under sections 4A and 5 of the Public Order Act 1986 (UK) (threatening, abusive or insulting words or behaviour), section 1 of the Communications Act 1988 (UK) (sending offensive or false communications), the Protection from Harassment Act 1997 (UK) or assisting and encouraging an offence under the Offences Against the Person Act 1861 (UK).
- 6.46 The Commission said it considered the retention of the contempt would serve no practical purpose and would be counter-productive in that prosecutions for scandalising are likely to attract more publicity than the original publication, which would otherwise have begun to fade from public memory.
- 6.47 The Commission found that the offence of scandalising is clearly not an effective deterrent, as there is a large volume of online material containing abuse of judges.
- 6.48 It also said it did not believe the existence of the offence or prosecutions for it would increase public respect for judges. In fact, it considered quite the opposite to be the case.
- 6.49 Further, the Commission considered that the offence is not well-known enough to have symbolic value.
- 6.50 Subsequent to the Commission's Report on the scandalising contempt, the contempt was abolished in England and Wales by the Crime and Courts Act 2013 (UK). Section 33 of that Act provides:
- (1) Scandalising the judiciary (also referred to as scandalising the court or scandalising judges) is abolished as a form of contempt under the common law of England and Wales.
  - (2) That abolition does not prevent proceedings for contempt of court being brought against a person for conduct that immediately before that abolition would have constituted both scandalising the judiciary and some other form of contempt of court.

## Australia

- 6.51 The contempt of scandalising remains a common law offence in Australia along similar lines to that which exists in New Zealand.

267 See for example Clare Dyer "Archaic law used against critic of 'legal mafia'" *The Guardian* (online ed, United Kingdom, 1 October 1999).

268 Peter Hain *Outside In* (Biteback Publishing, London, 2011) at 332.

269 D Pannick "Judges must be open to criticism to help expose injustice" *The Times* (online ed, United Kingdom, 24 May 2012).

270 Law Commission of England and Wales *Contempt of Court: Scandalising the Court* (LawCom No 335, 2012).

- 6.52 In *Gallagher v Durack*, the High Court of Australia justified the existence of the contempt by saying:<sup>271</sup>

The authority of the law rests on public confidence, and it is important to the stability of society that the confidence of the public should not be shaken by baseless attacks on the integrity or impartiality of courts or judges.

### United States

- 6.53 In contrast to the Commonwealth countries, scandalising was long ago found to violate the United States First Amendment constitutional rights of freedom of speech and of the press and was dismissed as “English foolishness”.<sup>272</sup>

### Canada

- 6.54 In Canada, the most influential decision on the offence of scandalising the court remains that of the Ontario Court of Appeal in *R v Kopyto*.<sup>273</sup> In that case, Mr Kopyto issued the following statement to a newspaper in response to a decision of the Toronto Small Claims Court:<sup>274</sup>

This decision is a mockery of justice. It stinks to high hell.

It says it is okay to break the law and you are immune so long as someone above you said to do it. Mr Dowson and I have lost faith in the judicial system to render justice.

We’re wondering what is the point of appealing and continuing this charade of the courts in this country which are warped in favour of protecting the police. The courts and the RCMP are sticking so close together you’d think they were put together with Krazy Glue.

- 6.55 Each of the majority opinions make clear that the Canadian offence of scandalising the court had been adopted from the English case of *R v Gray*.<sup>275</sup> The offence was committed by someone whose “acts or words published were calculated to bring the administration of justice into disrepute”.<sup>276</sup> There is no requirement to prove the administration of justice had in fact been brought into disrepute.<sup>277</sup> The majority accepted that, at least prior to the Canadian Charter or Rights and Freedoms 1982 (Charter), the statement made by Mr Kopyto would have satisfied this test, but the majority said that the offence, as currently articulated in the common law, constituted an impermissible limitation on freedom of expression.<sup>278</sup>
- 6.56 The dissenting opinion of Dubin and Brooke JJA adopted a different definition of the essential elements of the offence. The actus reus, in their opinion, was that there is a serious risk that the administration of justice would be interfered with. The risk of prejudice needed to be serious, real or substantial.<sup>279</sup> The mens rea of this offence is intention to bring the administration of justice into disrepute.<sup>280</sup> The dissent found the requisite mens rea but not the actus reus. They found there was no substantial risk because the suggestions made were “so preposterous that no right thinking member of society would take them seriously”.<sup>281</sup>

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271 *Gallagher v Durack* (1983)152 CLR 238 (HCA) at 243.

272 *Bridges v California* 314 US 252 (1941) at 287.

273 *R v Kopyto* (1987) 62 OR (2d) 449 (ONCA); 47 DLR (4th) 213 (ONCA).

274 At [168].

275 At [178]–[179] per Cory JA; at [135]–[137] per Goodman JA; and [107] per Houlden JA.

276 At [136]–[137] per Goodman JA; see also Cory JA at [177].

277 At [134]–[136] per Goodman JA.

278 At [184] per Cory JA; [108] per Houlden JA; and [136] and [144] per Goodman JA.

279 At [38]–[39] per Dubin and Brooke JA (dissenting).

280 At [44] per Dubin and Brooke JA (dissenting).

281 At [83]–[84] per Dubin and Brooke JA (dissenting).



6.57 Back in 1982, the Law Reform Commission of Canada had recommended that an offence of affront to judicial authority be included in the Canadian Criminal Code.<sup>282</sup> It also recommended that statutory recognition be given to the practice whereby the offence is tried by a judge other than the judge who was the subject of the affront. Although a Bill to effect this was drafted, it was never enacted. Nevertheless, the Charter means a prosecution for the offence of scandalising is unlikely to ever succeed in Canada.

## WHERE TO NOW FOR THE CONTEMPT OF SCANDALISING?

6.58 In researching the scandalising contempt, the Commission has become aware of a number of unsavoury websites containing offensive material about judges. In many cases, these can be written off as emotional outbursts from unsuccessful litigants or ignorance. However, some sites take on a more menacing tone by appearing to be official or including photographs and personal details of judges, their children and grandchildren. On one site, there is even a photograph of the gravestone of a particular Judge's parents.

6.59 In *Ahnee v Director of Public Prosecutions*, Lord Steyn observed that scandalising proceedings were rare in England but that "it is permissible to take into account that on a small island such as Mauritius the administration of justice is more vulnerable than in the United Kingdom. The need for an offence of scandalising the court on a small island is greater."<sup>283</sup>

6.60 The Commission does not think that comment is applicable to New Zealand in 2014, which is one of the most stable democracies in the world and appears to have a justice system that is, by and large, respected by the population.

6.61 Writing in 1990, Julie Maxton opined that:<sup>284</sup>

The scandalising jurisdiction seems a relic of an age where kingly rule dictated some forms of offence: it is outdated in an era when the only type of sovereignty which informs the content of laws is the democratic sovereignty of the populace.

6.62 The Commission's preliminary view is that retention of the common law offence of scandalising is untenable in light of the freedom of expression issues outlined in Chapter 2, the rule of law concerns also discussed in that chapter and the views of modern New Zealand society. The question then becomes whether the contempt should be replaced with a statutory offence of some kind, for example, an offence of publication of material imputing improper or corrupt judicial conduct, which, having regard to the nature of the statement, the status of the person making the statement and the likely audience, creates a real risk of impairing confidence in the administration of justice. There could be a defence to such an offence if the allegations were true or publication was for the public benefit. The defence might ensure the offence was compliant with the Bill of Rights Act. One problem, however, with enacting an offence with a defence of truth and public interest is that it would effectively put the judge on trial and subject the judge's conduct to scrutiny outside the statutory process for dealing with complaints about the judiciary. On the other hand, how could truth not be a defence? We discuss our general approach to offences in Chapter 8.

282 Law Reform Commission of Canada *Contempt of Court* (LRCC Report 17, 1982).

283 *Ahnee v DPP (PC)* [1999] 2 AC.

284 Maxton, above n 232, at 392.



## Other avenues for sanctions and redress

- 6.63 It is important to consider what remedies would be available in situations where judges are unfairly subjected to vitriolic criticism or threatening behaviour if the common law offence of scandalising were abolished.
- 6.64 First, what other criminal offences might apply? It should not be forgotten that there already exist a number of relevant statutory offences, particularly in respect of acts at the most serious end of the contempt spectrum. Examples of relevant offences include:
- section 306 of the Crimes Act 1961 (threatening to kill or do grievous bodily harm);
  - section 307 of the Crimes Act (threatening to destroy property);
  - section 307A of the Crimes Act (threats of harm to people or property);
  - section 308 of the Crimes Act (threatening acts);
  - section 116 of the Crimes Act (conspiring to defeat justice);
  - section 117 of the Crimes Act (corrupting juries and witnesses);
  - section 4 of the Summary Offences Act 1981 (offensive behaviour);
  - section 112 of the Telecommunications Act 2001 (misuse of telephone device); and
  - section 8 of the Harassment Act 1997 (criminal harassment).
- 6.65 A civil defamation action is another obvious remedy, but this would involve judges leading evidence and being cross-examined. If successful, a defamation claim would only compensate for the damage done to the judge's personal reputation. It would not address the damage to the reputation of the administration of justice. Defamation actions are expensive, and it is necessary to consider whether such an action should be financed by the public purse if the relevant damage is to the public's confidence in the judicial system.
- 6.66 An action under the Harassment Act may also be possible, depending on the nature of the abuse, but this, too, would not address the potential damage to the justice system itself.
- 6.67 A frequently cited argument in favour of retaining the offence of scandalising in some form is that judges, by the nature of their position, have fewer options to deal with the abuse they are subject to than other holders of public office or members of the public.
- 6.68 By convention, judges are unable to speak out in public to defend themselves or their judgments. A judgment must speak for itself. Further, a judge's position makes an impartial trial of a defamation or harassment claim difficult.
- 6.69 The Cabinet Manual states that the Attorney-General is the link between the judiciary and executive government, who:<sup>285</sup>
- [R]ecommends the appointment of judges and **has an important role in defending the judiciary by answering improper and unfair public criticism**, and discouraging ministerial colleagues from criticising judges and their decisions.
- 6.70 However, the Attorney-General is also a member of the executive, so it may be more appropriate for the relevant Head of Bench to provide comment and support in situations where judges have been defamed.

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285 Cabinet Office *Cabinet Manual 2008* at [4.8] [emphasis added].

6.71 The Commission is inclined to agree with the authors of *Media Law in New Zealand*, who have observed:<sup>286</sup>

The relative infrequency of recent authorities on “scandalising” in this country not only renders precise elaboration of the law in modern times difficult, but it might also suggest that sometimes the best way to deal with extravagant criticism is to ignore it.

6.72 Unless one of the offences discussed applied, abolition of the scandalising offence would currently leave only civil defamation or harassment proceedings available to a judge who has been the subject of abuse. This is going to change, however.

### Harmful Digital Communications Bill

6.73 In response to the Commission’s Ministerial Briefing on harmful digital communications,<sup>287</sup> the Government introduced the Harmful Digital Communications Bill to the House in November 2013. That Bill had its first reading and was referred to the Justice and Electoral Committee in December 2013. The Committee is due to report to the House on 3 June 2014. The explanatory note states the purpose of the Bill is to “mitigate the harm caused to individuals by digital communications and to provide victims of harmful digital communications with a quick and efficient means of redress”.<sup>288</sup>

6.74 The Bill defines “digital communication” as “any form of electronic communication [including] any text message, writing, photograph, picture, recording, or other matter that is communicated electronically”.<sup>289</sup> It creates a new civil enforcement regime that enables initial complaints about harmful digital communications to be made to an “Approved Agency”, which may investigate a complaint and attempt to resolve it by negotiation, mediation and persuasion.<sup>290</sup> An Approved Agency is to be appointed by Order in Council on the recommendation of the responsible Minister. The Approved Agency may be an individual or an organisation.<sup>291</sup>

6.75 Where the Approved Agency cannot resolve a complaint, a person may apply to the District Court for a number of civil orders, including requiring harmful digital communications to be taken down, requiring the defendant to cease the harmful conduct and requiring the identity of the author of an anonymous communication be released.<sup>292</sup> The court may also make a declaration that a communication breaches a communication principle. There are 10 such principles derived from the law and reduced to an accessible form (to serve an educational and deterrent function as well as establishing the basis for a complaint). These provide that a digital communication should not:<sup>293</sup>

- disclose sensitive personal facts about an individual;
- be threatening, intimidating or menacing;
- be grossly offensive to a reasonable person in the complainant’s position;
- be indecent or obscene;
- be part of a pattern of behaviour that constitutes harassment;

286 John Burrows and Ursula Cheer *Media Law in New Zealand* (6th ed, LexisNexis, Wellington 2010) at 525.

287 Law Commission *The News Media Meets ‘New Media’: Rights, Responsibilities and Regulation in the Digital Age* (NZLC R128, 2013); Law Commission *Harmful Digital Communications: The Adequacy of current sanctions and remedies* (NZLC Ministerial Briefing, 2012).

288 Harmful Digital Communications Bill 2013 (168-1) (explanatory note) at 2.

289 Clause 4.

290 Clause 8.

291 Clause 7.

292 Clause 17.

293 Clause 6.

- make a false allegation;
  - contain a matter that is published in breach of confidence;
  - incite or encourage anyone to send a message to a person with the intention of causing harm to that person;
  - incite or encourage another person to commit suicide; or
  - denigrate a person by reason of his or her colour, race, ethnic or national origins, religion, gender, sexual orientation or disability.
- 6.76 In performing functions under the Act, the Approved Agency and the courts must take these principles into account and act consistently with the Bill of Rights Act.
- 6.77 Failure to comply with an order of the court is an offence punishable by a fine not exceeding \$5,000 in the case of a natural person or \$20,000 for a body corporate.<sup>294</sup>
- 6.78 The Harassment Act 1997 will also be amended to provide that giving offensive material to a person by placing the material in any electronic media where it is likely it will be viewed by or brought to the attention of that person is a specified act of harassment in section 4 of that Act.
- 6.79 The Commission considers the new regime for dealing with harmful digital communications through take-down orders and an offence of failing to comply with a take-down order together with the current criminal offences for extreme behaviour could provide sufficient protections for the judiciary, although this would not address any harm to the justice system itself. That harm would be extremely difficult to gauge, however. In the case of judges, the Commission considers a Crown solicitor, in the name of the Solicitor-General, should be able to make the complaint and act on behalf of a judge.
- 6.80 The Bill does not indicate whether there is to be one Approved Agency or several. If there is to be more than one, for situations involving judges, the Commission is of the preliminary view that one Approved Agency could be the Judicial Conduct Commissioner. However, that office would need additional funding to undertake this extra role.
- 6.81 The Judicial Conduct Commissioner is well placed to carry out the functions of an Approved Agency in respect of complaints by judges about digital communications affecting them, as it already investigates complaints about judges, and any serious complaint about a judge will likely ultimately end up being considered by that office. Acting as an Approved Agency would therefore complement the role of the Judicial Conduct Commissioner.
- 6.82 The statutory judicial complaints process is an important element in maintaining the public confidence in the judiciary, which is also the purpose of the scandalising offence. As the authority of the law relies on that public confidence, it is important to maintain it. However, as Denniston J recognised, one “cannot compel public respect for the administration of justice”.<sup>295</sup> Judges must maintain public confidence by giving litigants an opportunity to be heard and delivering fair and impartial judgments.

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294 Clause 18.

295 *Attorney-General v Blomfield*, above n 239, at 574.

## QUESTIONS

- Q16 Do you agree the common law contempt of scandalising should be abolished by statute?
- Q17 Do you agree that, when passed, the Harmful Digital Communications Bill together with other existing remedies will provide sufficient protection for the judiciary?
- Q18 If the common law offence of scandalising were abolished, should a new statutory offence replace it? If so, what should be the nature of that offence?

# Chapter 7

## The future of civil contempt

### INTRODUCTION

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- 7.1 Contempt of court was traditionally classified as either criminal or civil in nature. Under the traditional dichotomy, criminal contempt is viewed as punitive because it is concerned with actions or words that obstruct or interfere with the public interest in the administration of justice, while civil contempt is seen as primarily remedial in nature and concerned with compelling compliance with a court's order through the threat of punitive sanctions.
- 7.2 Civil contempt has become a complex hybrid combining a civil application procedure, the criminal standard of proof and the threat, and occasionally the imposition, of punitive sanctions. In civil contempt proceedings, the dual purposes of coercing compliance for the benefit of a private party and the public interest in maintaining and upholding judicial authority are “inextricably intermixed”.<sup>296</sup>
- 7.3 The Supreme Court's 2010 decision in *Siemer v Solicitor-General (Siemer)* raises questions over the validity of continuing to distinguish civil from criminal contempt simply because the threat of imprisonment in civil contempt is primarily intended to coerce compliance with a court order rather than to punish.<sup>297</sup> The Supreme Court said, where a person is found to be in contempt of court, whether the contempt is one categorised as criminal or civil, that determination stigmatises the person, and the effect of a finding of contempt is equivalent to that resulting from conviction on a charge of committing a statutory crime.<sup>298</sup> The Court held that all the criminal law protections of the New Zealand Bill of Rights Act 1990 (Bill of Rights) will apply where any person is facing the risk of imprisonment for civil, as well as criminal, contempt.
- 7.4 There is little now to separate civil from criminal contempt in New Zealand law. In this chapter, we examine the development of civil contempt and consider the implications of the Supreme Court's decision in *Siemer*. It may be time for New Zealand to abolish civil contempt altogether and make all contempt of court criminal.

### WHAT IS CIVIL CONTEMPT?

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#### Disobeying a court order or judgment

- 7.5 It is a civil contempt of court for anyone to refuse or neglect to do an act required by a judgment or order of the court (other than the payment of money to the other party) within the time specified in the judgment or order. It is similarly contempt to disobey a judgment or order requiring a person to desist or abstain from doing something.<sup>299</sup> Civil contempt is not available to enforce monetary awards and the non-payment of money in breach of a judgment. Acting in breach of an undertaking given to the court is also contempt of court.<sup>300</sup>

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296 Lord Justice Salmon first used this description in *Jennison v Barker* [1972] 2 QB 52.

297 *Siemer v Solicitor-General* [2010] NZSC 54, [2010] 3 NZLR 767 at [57].

298 *Siemer v Solicitor-General*, above n 297, at [15].

299 *Laws of New Zealand Contempt of Court* (online ed) at [54].

300 *Laws of New Zealand*, above n 299, at [54] state that the breach must be of an undertaking given to the court by a person on the faith of which the court has sanctioned a particular course of action or inaction.

## Nature of civil contempt

- 7.6 Civil contempt has its origins in the Court of Chancery. Originally, the court treated any disobedience of an order sealed by the Lord Chancellor as an affront to or contempt of the monarch.<sup>301</sup> Later, by the 19th century, civil contempt had become simply a method for executing the judgments of the court in favour of a successful party. Imprisonment for contempt or the threat of it was used as an effective process to compel or coerce performance.<sup>302</sup>
- 7.7 The unique feature of civil contempt is that wrongs of a private nature can be remedied by imprisonment because those wrongs also interfere with the due process of justice.<sup>303</sup> However, as has been noted by the courts on numerous occasions in recent times, the validity of the traditional distinction between civil and criminal contempt is highly questionable. Earlier this year, in *Solicitor-General v Krieger*, Panckhurst J summarised the illusory nature of the traditional distinction:<sup>304</sup>
- [T]he validity of this distinction has been doubted in many jurisdictions. A true dichotomy does not exist. Civil contempt, in common with criminal contempt, is similarly focused upon the due administration of justice. The remedial punishment for a civil contempt will benefit a litigant, but the Court intervenes in direct response to the disobedience of its order. Hence, civil contempt vindicates both the right of the successful litigant and equally the authority of the Court. As Salmon LJ put it, the two objects are inextricably intermixed.
- 7.8 The traditional distinction between civil and criminal contempt overlooks the underlying rationale behind every exercise of the contempt power, namely that of upholding and protecting the administration of justice. Even if civil contempt does have a coercive element, it is also punitive and thus shares the attributes normally associated with criminal contempt.<sup>305</sup> It is only because the disobedience of the courts' order interferes with the fair administration of justice that it is contempt and punishable by imprisonment in the same way as criminal contempt.<sup>306</sup> McGrath J said in *Siemer*:<sup>307</sup>

Effective administration of justice under our constitution requires that the orders of the courts are obeyed unless properly challenged or set aside. Public confidence in the administration of the law, also necessary for its effective administration, requires that there is a strong expectation that those who ignore court orders are quickly brought to account.

## Sources of jurisdiction

- 7.9 Civil contempt comes within the High Court's inherent common law jurisdiction. However, the practice and procedure for issuing a writ of arrest, committing a person for contempt of court or sequestering property is now prescribed in the High Court Rules.<sup>308</sup> To the extent that these matters are regulated by the Rules, the court will not exercise its inherent jurisdiction in a manner that is contrary to the relevant Rules.<sup>309</sup>

301 Julie Maxton "Contempt of Court in New Zealand" (PhD Thesis, University of Auckland, 1990) at 434.

302 At 434.

303 At 435.

304 *Solicitor-General v Krieger* [2014] NZHC 172 at [23]. See *Jennison v Barker*, above n 296, for Salmon LJ's decision.

305 Julie Maxton "Contempt of Court in New Zealand" (PhD Thesis, University of Auckland, 1990) at 437.

306 *Laws of New Zealand*, above n 299, at [2].

307 *Siemer v Solicitor-General*, above n 297, at [26].

308 The rules are made under s 51 of the Judicature Act 1908. The relevant rules are in pt 17, subpt 7 of the High Court Rules – "Arrest orders and sequestration orders", r 7.48, dealing with the enforcement of interlocutory order by committal, and r 17.6, dealing with enforcement against non-parties.

309 *McGechan on Procedure* says that, where a matter before the court is already the subject of precise legislation, the court will rarely choose to exercise any inherent powers. The inherent jurisdiction should be developed and exercised in harmony with the relevant legislation. See *McGechan on Procedure* (online looseleaf ed, Brookers) at [J16.06] citing *R v Moke and Lawrence* [1996] 1 NZLR 263 (CA) as authority.



## High Court Rules

- 7.10 The High Court Rules, made under section 51 of the Judicature Act 1908, regulate the practice and procedure of all civil litigation in the High Court.
- 7.11 Briefly, in the area of civil contempt, the High Court Rules provide that the court may issue a writ of arrest<sup>310</sup> and make an order committing a person to prison for contempt of court<sup>311</sup> where a court order (excluding an order requiring the payment of money) has been breached or where an undertaking has been breached.<sup>312</sup> The rules provide that the term of imprisonment is for such period as the court thinks necessary and is allowed by law.<sup>313</sup> The court may alternatively impose a fine for contempt.
- 7.12 Rule 17.84(1) expressly excludes an order to pay a sum of money. No writ of arrest may be issued in respect of non-compliance with an order that amounts in substance to the payment of a sum of money such as a decree for specific performance of a contract where performance involves payment of money.<sup>314</sup> An order to pay money into court rather than to a party can probably also be enforced by way of a writ of arrest because it is arguably injunctive in nature and prevents the party disposing of funds in dispute.
- 7.13 A sequestration order may be issued against the property of a person who is in contempt of court by refusing or neglecting to obey a judgment or order of the court.<sup>315</sup> A sequestration order authorises and requires a person appointed by the court as the sequestrator to take possession of all the real and personal property of the party against whom it is directed.<sup>316</sup>
- 7.14 The rules also provide a power for the court to commit a party to prison for wilfully failing to comply with an interlocutory order<sup>317</sup> or for wilfully failing to comply with an order for discovery or for the production or inspection of documents.<sup>318</sup> The rules also address some circumstances in which a person who is not a party to the proceedings may be committed for contempt of court for wilfully failing to comply with an order for discovery.<sup>319</sup>

## Inherent common law jurisdiction

- 7.15 The court's powers arising out of inherent jurisdiction are wider than those contained in the High Court Rules. *McGechan on Procedure* says that “[t]he inherent jurisdiction permeates all proceedings and is able to fill any gaps left by the rules”.<sup>320</sup> The inherent jurisdiction can be invoked, for example, in response to the actions of persons who are not themselves actual litigants in the matter before the court.<sup>321</sup> Possible sanctions at common law include

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310 Rule 17.84.

311 Rule 17.85.

312 The rules are made under s 51 of the Judicature Act 1908. The relevant rules are in pt 17, subpt 7 of the High Court Rules – “Arrest orders and sequestration orders”, r 7.48, dealing with the enforcement of interlocutory order by committal, and r 17.6, dealing with enforcement against non-parties.

313 The Supreme Court has determined that the court could imprison a person for contempt for no more than three months and/or fine them: *Siemer v Solicitor-General*, above n 297, at [66]–[68].

314 *Summer & Winter Fuels Ltd v Pickens* (1990) 4 PRNZ 621 at 623.

315 Rule 17.87, which replaced r 610 (as from 1 February 2009).

316 Rule 17.86.

317 Rule 7.48, which provides that, if a party fails to comply with an interlocutory order, a judge can, subject to any express provision in the rules, make any order thought just, including an order that the party be committed. The rule provides that an order may not be enforced by committing the person in default to prison unless he or she has been served personally or he or she had knowledge or notice of the order and sufficient time to comply with it.

318 Rule 8.33.

319 See rr 8.21 and 8.33.

320 *McGechan on Procedure*, above n 309, at [J16.06].

321 *McGechan on Procedure*, above n 309, at [J16.06].

imprisonment, fines or sequestration of property. The court may also impose costs or strike out proceedings for contempt.

### *District Courts Act – civil contempt*

7.16 The jurisdiction of the District Courts is limited to that conferred on them by legislation. District Courts and other courts created by statute do not have inherent jurisdiction. The District Courts Act 1947 conferred on District Courts and on Family Courts and Environment Courts, which also partly source their jurisdiction from that Act, jurisdiction to enforce some orders by committal for contempt.<sup>322</sup> District Courts do not have jurisdiction to issue sequestration orders.

7.17 Section 79(2) of the District Courts Act provides that:

Any judgment or order in the nature of an injunction, and any judgment or order within the competence of a District Court which, if it were given or made in the High Court, could in that court be enforced by writ of arrest, may be enforced, by order or warrant of a District Court Judge, by committal for a term not exceeding 3 months:

provided that an order for the recovery of land shall not be enforceable by committal.

### **Proving the elements of civil contempt**

7.18 There are essentially four elements that must be proved to make the case for civil contempt. The applicant must prove, to the criminal standard of beyond reasonable doubt, that:<sup>323</sup>

- (a) the terms of the order (or injunction or undertaking) were clear and unambiguous and were binding on the defendant;
- (b) the defendant had knowledge of or proper notice of the terms of the order, normally as the result of personal service;
- (c) the defendant has acted in breach of the terms of the order; and
- (d) the defendant's conduct was deliberate.

### *Criminal standard of proof*

7.19 Although the proceedings are civil in nature, it is well established that an applicant must prove the elements beyond reasonable doubt. The fact that the liberty of the defendant could be affected means that the standard of proof is the criminal standard of beyond a reasonable doubt.<sup>324</sup> The applicant must prove all the elements to the higher standard of beyond reasonable doubt to establish contempt of court.<sup>325</sup>

### *Clear and unambiguous terms*

7.20 The terms of the order, injunction or undertaking must be clear and unambiguous and must be binding on the defendant. This may be relatively straightforward to determine in many situations. However, in some contexts, particularly in respect of undertakings, there may be more scope for uncertainty. The position is that an undertaking given to the court by a person

322 District Courts Act 1947, s 79. Section 97 of the Act also provides for the issue and execution of orders or warrants for committal. Section 79(2A) provides for the enforcement of any order for discovery (including one for particular disclosure of a document against a non-party) by order or warrant for committal for a term not exceeding three months or a fine exceeding \$1,000, and under s 79(4), a judgment or order for the delivery of specific chattels may also be enforced by a warrant for committal to prison.

323 These four elements are identified in the most recent cases. See for example *Shawyer v Thow HC Invercargill CIV-2010-425-116*, 20 October 2011 at [28]; and *Lockwood Group Ltd v Small HC Auckland CIV-2009-404-1019*, 21 April 2010 at [65]. In *Solicitor-General for New Zealand v Krieger [2014] NZHC 172* at [24]–[26], Panckhurst J combines the first two requirements so identifies only three elements that must be proved.

324 *Siemer v Stiassny [2007] NZCA 117*, [2008] 1 NZLR 150 at [11].

325 *Shawyer v Thow*, above n 323, at [28].

in pending proceedings, on the face of which the court sanctions a particular course of action, has the same force as an injunction, and a breach of it can therefore also be contempt of court.<sup>326</sup> The court, when considering what the terms of an undertaking are, must read them against the relevant background and give them their ordinary meaning.<sup>327</sup>

#### *Notice of the terms*

- 7.21 The applicant must have had notice of the terms of the order or injunction. As a general rule, an order in the nature of an injunction will not be enforced unless a copy of the order has been served personally on the defendant in question. Personal service may not be required where the party against whom the order is made is already aware of the order. In the case of an order requiring a person to do an act, the order must be served before the expiration of the time within which the act is required to be done.<sup>328</sup>
- 7.22 The courts will not hold a person in contempt unless satisfied that the order and notice were properly served.<sup>329</sup>

#### *Breach of the terms*

- 7.23 Whether or not the terms of an undertaking, injunction or other similar order were breached may be closely linked to how the terms of the order or undertaking are interpreted.<sup>330</sup>

#### *Mental element*

- 7.24 It is incumbent on the applicant to prove that the defendant's conduct was deliberate in the sense that he or she deliberately or wilfully acted in a manner that breached the order. There was historically some uncertainty as to whether the mental element required proving also that the person knew that their actions breached the order. The position was clarified by the Court of Appeal decision in *Siemer v Stiassny*. The Court held that, to prove contempt of court, it was not necessary to establish that a defendant knew he or she was breaching an injunction. It was, instead, sufficient to show that the relevant actions were deliberate.<sup>331</sup> The Court acknowledged that there was some authority that seemed to go the other way but that the weight of authority favoured the view they had taken.<sup>332</sup> The Court said that a bona fide breach of an order, which resulted from erroneous legal advice as to the scope of the order, is nonetheless a contempt of court. Deliberate disobedience of the court order is not necessary, and unintentional disobedience may still amount to contempt.

#### *Imposition of sanctions*

- 7.25 However, whenever contempt is established, whether it is criminal or civil, the imposition of any sanction is a matter within the discretion of the court. An important question for the court to consider is the extent of the contempt and the motive with which the defendant was acting. A further question is the degree of prejudice suffered by the innocent party.<sup>333</sup>

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326 *Malevez v Knox* [1977] 1 NZLR 463 at 467.

327 *Malevez v Knox*, above n 326, at 467.

328 *Laws of New Zealand*, above n 299, at [63].

329 In one case, the Judge declined to issue a committal warrant because the applicant had waited too long before seeking to enforce an order requiring the defendant to vacate premises. The order in question required the defendant to vacate by 31 December 1991, but the defendant was not served with the "Notice as to Consequences of Disobedience of Order of Court" until two months after the date, by which time, it was impossible for him to heed the warning and obey the order. See *Wellington City Council v Ivanoff* [1992] DCR 727.

330 For example *Bowie v Weyburne* [2013] NZHC 1728.

331 *Siemer v Stiassny*, above n 324, at [10].

332 At [10].

333 *Lockwood Group Ltd v Small*, above n 323, at [68].

- 7.26 The power to imprison for civil contempt is one to be exercised with great care.<sup>334</sup> The court will not order committal to prison where the contempt is of a minor or technical nature. An order committing a person to prison for contempt is to be adopted only as a last resort.<sup>335</sup> Accidental or unintentional disobedience of the court is not enough to justify either sequestration or imprisonment.<sup>336</sup>
- 7.27 So, although contempt may be committed in the absence of intentional disobedience of the court by the defendant, the punitive measures like imprisonment or sequestration will not be ordered unless the contempt involves a degree of fault or misconduct.<sup>337</sup>

#### Sequestration orders

- 7.28 The writ of sequestration has its origins in the Courts of Chancery and was introduced in the reign of Elizabeth I.<sup>338</sup> As Chitty J said in *Pratt v Inman*: “Sequestration unquestionably was and is a process of contempt”.<sup>339</sup> It is available only where the person against whom it is sought to be issued is in contempt of court through having wilfully disobeyed its order.<sup>340</sup> In England, the Committee on the Enforcement of Judgment Debts, reporting in 1969, characterised sequestration as more akin to punishment than to execution and concluded that the justification for the remedy lay in the need for coercive powers to deal with contempt of court.<sup>341</sup>
- 7.29 In *Morris v Douglas*, Paterson J explained the nature and effect of a sequestration order:<sup>342</sup>

It is generally considered to be a writ of last resort and it is coercive in its function rather than punitive. It is available only where the person against whom it is sought to be issued is in contempt of Court through having wilfully disobeyed its order. If the writ does issue, it temporarily places property of the contemnor into the hands of the sequestrators and denies him the right to enjoy or dispose of the property until a further order of the Court. If he purges his contempt, the sequestration order is lifted. Although it is said to be more coercive than punitive, it is more akin to a punishment than to execution. As the writ is very drastic in form, the Courts have generally been reluctant to allow the writ to issue except in the clearest cases and will not normally issue the writ unless the conduct has been intentional or reckless. The conduct must be shown to have been contumacious or wilful ...

#### Purging the contempt

- 7.30 Once a contempt has been purged, the order for committal or sequestration order can be discharged. In respect of the District Court, section 98 of the District Courts Act provides that, if at any time it appears to the satisfaction of a judge of the court that a person confined to prison under a warrant for committal ought to be discharged for any reason, the judge may order discharge upon such terms as he or she thinks fit. Rule 15.72 of the District Court Rules deals with the process for discharging a person who is in custody under a warrant.

#### Other remedies

- 7.31 The court may, in its own discretion, grant an injunction in lieu of committal or sequestration to restrain the commission or repetition of a civil contempt. The power to grant an injunction in

334 *Laws of New Zealand*, above n 299, at [61].

335 *Soljan v Spencer* [1984] 1 NZLR 618 (CA).

336 *Morris v Douglas* (1996) 10 PRNZ 363 (HC) at 366.

337 In a number of cases, the courts have determined that the elements of contempt are made out, but that sanctions, particularly committal or sequestration, are not appropriate. See for example *Lockwood Group Ltd v Small*, above n 323, at [68].

338 *Quality Pizzas Ltd v Canterbury Hotel Employees Industrial Union* [1983] NZLR 612 (CA) at 615.

339 *Pratt v Inman* (1889) 43 Ch D 175 at 179.

340 *Quality Pizzas Ltd v Canterbury Hotel Employees Industrial Union*, above n 338 at 615.

341 *RW Payne Report of the Committee on the Enforcement of Judgment Debts* (House of Commons, Cmnd 3909, February 1969) at [904].

342 *Morris v Douglas*, above n 336, at 366.

a case of civil contempt is exercisable by the court on its own initiative and not at the instance of the applicant, whose proper remedy is to move to commit or to apply for a sequestration order. The court may, in lieu of any other penalty, require the contemnor to pay the costs of the motion. As a general rule, the defendant can be ordered to pay costs only if found guilty of contempt. Sometimes, full solicitor-client costs are ordered.<sup>343</sup>

### *Collateral challenges to validity of original order*

7.32 It is not open to a defendant in a contempt proceeding to challenge the validity of the order said to have been breached. People are not free to ignore court orders simply because they believe they lack foundation and should not have been made. The citizens' safeguard is in seeking to have illegal orders set aside through the legal process, not in disobeying them.<sup>344</sup> It is no answer to an allegation of contempt of court involving breach of an injunction to assert that the injunction was wrongly granted. The injunction, while in force, must be complied with unless and until it is set aside. The position was confirmed last year by the Supreme Court in *Siemer*.<sup>345</sup> The majority held that, provided the court had power to make an order of its kind, a court order is binding and conclusive unless and until it is set aside on appeal or, for some other reason, lawfully quashed. Collateral attacks on such orders are not permitted.<sup>346</sup> The correct approach is for the party to apply to the court for relief from the order.

### *Privilege against self-incrimination*

7.33 In civil contempt proceedings, the civil rules of evidence apply,<sup>347</sup> although, as already discussed, the standard of proof is the criminal one. In addition, the defendant is also entitled to rely on the privilege against self-incrimination. The defendant is therefore not a compellable witness in proceedings against him or her for criminal or civil contempt, but a defendant who chooses to file an affidavit of evidence voluntarily cannot refuse, as of right, to be cross-examined on that evidence.<sup>348</sup>

## COMPARING CIVIL AND CRIMINAL CONTEMPT

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7.34 The essence of the conceptual distinction between civil and criminal contempt turns on whether the contempt involves an act that so threatens the administration of justice that it requires punishment from the public point of view. If it does, it is a criminal contempt,<sup>349</sup> even when the contempt itself takes the form of a breach of a court order made in civil proceedings. By contrast, disobedience of a court order or undertaking by a person involved in litigation is civil contempt where the purpose of imposing sanctions is primarily coercive or remedial.<sup>350</sup> McLachlin J in the Supreme Court of Canada explained the distinction, where the contempt involves a breach of a court order, in the following way:<sup>351</sup>

A person who simply breaches a court order, for example by failing to abide by visiting hours stipulated in a child custody order, is viewed as having committed civil contempt. However, when the element

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343 *Laws of New Zealand*, above n 299, at [56].

344 *Canada (Human Rights Commission) v Taylor* [1990] 3 SCR 892 per McLachlin J.

345 *Siemer v Stiassny*, above n 324, at [13].

346 At [191].

347 *Siemer v Stiassny*, above n 324, at [10].

348 *Siemer v Stiassny*, above n 324, at [11].

349 David Eady and ATH Smith (eds) *Arlidge, Eady and Smith on Contempt* (4th ed, Sweet & Maxwell, London, 2011) at [3.1]; and the discussion of the difference between civil and criminal contempt in the Supreme Court of Canada's decision in *Poje v British Columbia (Attorney-General)* [1953] 1 SCR 1065 at 522.

350 Eady and Smith, above n 349, at [3.1].

351 *United Nurses of Alberta v Alberta (Attorney-General)* [1992] 1 SCR 901 at 931.



of public defiance of the court's process in a way calculated to lesson societal respect for the courts is added to the breach, it becomes criminal.

- 7.35 This conceptual distinction between civil and criminal contempt has been much criticised. As discussed already, a true dichotomy does not exist because, although conceptualised as remedial, the courts intervene in civil contempt because disobedience of court orders challenges the authority of the courts.<sup>352</sup> The effective administration of justice requires that court orders are obeyed or properly challenged.<sup>353</sup>
- 7.36 There have been calls for the abolition of civil contempt in a number of jurisdictions.<sup>354</sup> In practical terms, the significance of the distinction has been diminishing over time anyway, as the courts have increasingly extended the rights and protections available to a defendant facing criminal contempt proceedings to defendants facing punitive sanctions in civil contempt cases.

### **Solicitor-General v Siemer**

- 7.37 The 2010 decision of the Supreme Court in *Siemer* has arguably moved civil and criminal contempt closer together in New Zealand. To understand the current position, it is helpful to examine that decision in some detail.

#### *Background*

- 7.38 The proceedings for contempt arose from a deliberate and ongoing breach over a number of years of an injunction issued by the High Court in private civil litigation in 2005.<sup>355</sup> The injunction required Mr Siemer not to publish, in any form, material containing allegations of criminal, unethical or other improper conduct by a chartered accountant and his firm in relation to their administration of the receivership of a company associated with Mr Siemer.
- 7.39 After Mr Siemer was held in contempt twice, following earlier applications by the chartered accountant, Mr Stiassny, and his firm,<sup>356</sup> the Solicitor-General brought an originating application in the High Court seeking to commit Mr Siemer to prison for contempt for an indefinite period until he complied with the injunction. The High Court found that the contempt was proved and that the prohibited allegations had been published on a website controlled by Mr Siemer. He was sentenced by the High Court to a finite term of imprisonment of six months.<sup>357</sup>

#### *Court of Appeal decision*

- 7.40 Mr Siemer then appealed to the Court of Appeal against the High Court decision.<sup>358</sup> The principle issue the Court of Appeal considered was whether Mr Siemer was entitled to elect trial by jury on an allegation of contempt of court. He argued that proceedings for contempt were in substance criminal proceedings and consequently triggered a right to elect trial by jury, provided for in section 24(e) of the Bill of Rights Act, which (prior to amendment last year) entitled anyone charged with an offence punishable by imprisonment for more than three months to elect a jury trial.<sup>359</sup>

352 *Solicitor-General for New Zealand v Krieger*, above n 323, at [23]. See *Jennison v Barker*, above n 296, for Salmon LJ's decision.

353 *Siemer v Solicitor-General*, above n 297, at [26].

354 For example, in the United Kingdom and Australia, reviews have concluded it should be abolished.

355 *Ferrier Hodgson v Siemer* HC Auckland CIV-2005-404-1808, 5 May 2005.

356 *Ferrier Hodgson v Siemer* HC Auckland CIV-2005-404-1808, 16 March 2006; and *Ferrier Hodgson v Siemer* HC Auckland CIV-2005-404-1808, 13 July 2007. In relation to these earlier breaches of the injunction: the first resulted in the imposition of a fine of \$15,000 on Mr Siemer and an order for payment by him of solicitor and client costs to the other parties; the second resulted in Mr Siemer being sentenced to six weeks' imprisonment, which he served.

357 *Solicitor-General v Siemer* HC Auckland CIV-2008-404-472, 8 July 2008 at [100].

358 *Solicitor-General v Siemer*, above n 357.

359 Section 24(e) was amended to increase the period from three months to two years on 1 July 2013 by s 4 of the New Zealand Bill of Rights Amendment Act 2011.



- 7.41 After canvassing the state of the law in New Zealand, as well as in similar jurisdictions, the Court of Appeal concluded that there is still a distinction in New Zealand law between criminal and civil contempt.<sup>360</sup> The Court said that the purpose of civil contempt is to coerce rather than punish. Where the disobeyed order remains current and able to be obeyed and the sanction is designed to ensure obedience and comes to an end when that objective is achieved (that is, the contemnor “carries the keys of the prison in his own pocket”), the sanction is properly classified as civil. That is so, notwithstanding the obvious fact that any imposition of a sanction such as imprisonment has a punitive or penal aspect to it.<sup>361</sup>
- 7.42 The Court held that, where a contempt was properly classified as civil rather than criminal, the right under section 24(e) of the Bill of Rights Act to trial by jury was not triggered.<sup>362</sup> In other words, an allegation of civil contempt could not amount to being “charged with an offence”.
- 7.43 In this case, the application by the Solicitor-General was properly classified as civil because it was designed to coerce compliance with the court order. However, the High Court had imposed a fixed term of imprisonment not contingent on continued defiance of the Court order. The High Court had incorrectly imposed a punitive criminal sanction rather than a civil sanction. The Court of Appeal quashed the High Court’s order and substituted an order under which the six-month term of imprisonment was a maximum and subject to Mr Siemer’s compliance with the injunction and his provision of an undertaking to the Court to comply, at which time, the term of imprisonment would come to an end.<sup>363</sup>

#### *Supreme Court decision*

- 7.44 Mr Siemer appealed to the Supreme Court. Unlike the Court of Appeal, the Supreme Court did not dwell on the distinction between civil and criminal contempt. Instead, the Court focused on the penal consequences, such as imprisonment, that could follow a finding of either.

#### *Bill of Rights protections apply*

- 7.45 The Supreme Court unanimously considered that the Bill of Rights Act required a generous reading and that the form of the proceedings could not be determinative of the rights afforded the defendant.<sup>364</sup> In the minority judgment, McGrath J said:<sup>365</sup>

When a court holds someone to be in contempt of court, whether the contempt is one categorised as criminal or civil, its determination stigmatises that person. The effect of the court’s finding is equivalent to that resulting from conviction on a charge of committing a statutory crime.

- 7.46 For the majority, Blanchard J similarly explained:<sup>366</sup>

Whenever someone faces a proceeding for contempt they face the possibility of a sentence of imprisonment for such length as the court may reasonably impose. It would be extraordinary if, as must be the case, someone charged with minor offending had the benefit of the ss 24 and 25 guarantees, insofar as they can apply in the circumstances, when, as a matter of law, that person may not actually be liable to imprisonment or where as a matter of practice imprisonment will never be imposed, and yet a person proceeded against for contempt and undoubtedly exposed to the possibility of imprisonment did not.

360 *Siemer v Solicitor-General* [2009] NZCA 62, [2009] 2 NZLR 556 at [57].

361 *Siemer v Solicitor-General*, above n 360, at [63].

362 *Siemer v Solicitor-General*, above n 360, at [57], [59], [61]–[63] and [65].

363 *Siemer v Solicitor-General*, above n 360, at [96].

364 *Siemer v Solicitor-General*, above n 297, at [56].

365 At [15].

366 At [56].

- 7.47 The Court considered that the purpose of the criminal process rights in the Bill of Rights Act is to accord the various protections to those who are the subject of an official accusation that they have breached the criminal law. The protections are there because of the nature of the consequences to an individual, including exposure to the punishment that will follow. Exactly the same consequences apply to adverse findings of contempt of court, whether criminal or civil, and the penal orders that may then be imposed. The purpose for which the Bill of Rights Act confers section 24 protections applies equally to the position of those against whom contempt proceedings are brought.<sup>367</sup>

#### Summary process

- 7.48 The Supreme Court also confirmed the position that the only way in which contempt of court (civil or criminal) could be dealt with was by summary process. Trial by jury was not available. In the majority judgment, Blanchard J made the following observation:<sup>368</sup>

[W]e do not believe that the jury trial procedure for contempt would ever be appropriate, even accepting that a means exists or could be devised for summoning a jury and putting a case for contempt before it. Such a procedure would be highly undesirable because it would undermine the authority of the court by interposing a body of lay persons between the court's order and its enforcement and giving to them the task of interpreting the order. That task should be for the court alone to undertake.

#### Application of section 5 – a justifiable limitation?

- 7.49 By majority decision (Blanchard, Wilson and Anderson JJ), the Court considered that the consequence of section 24(e) applying was that the power of a New Zealand court to impose a sentence of imprisonment for contempt was limited to imprisonment for no more than three months (and/or a fine).<sup>369</sup> A person would have a right to elect trial by jury if exposed to a longer maximum term of imprisonment. The majority said they reached that view “not without hesitation” because the three-month limit in section 24(e) does not appear to have given consideration to the effect on the punishment of contempts.<sup>370</sup> Section 24(e) of the Bill of Rights Act has subsequently been amended, and the right to elect trial by jury now only applies where the maximum penalty is imprisonment for two or more years. That change was made as a consequence of the adoption of the Criminal Procedure Act 2011.<sup>371</sup>
- 7.50 The minority judgment (Elias CJ and McGrath J) considered that the power of a court to impose a sentence of imprisonment for contempt was not limited to three months under section 24(e), because the summary procedure for all contempt of court proceedings was a justified limitation under section 5 of the Bill of Rights Act that created an exception to the right to a jury trial under section 24(e).<sup>372</sup>

#### Position post-*Siemer*

- 7.51 The Supreme Court decision in *Siemer* clarified that the Bill of Rights Act protections apply to all defendants facing allegations of contempt, whether civil or criminal. However, this has left uncertainty as to what now remains of the differences between civil and criminal contempt.<sup>373</sup> As was noted by McGrath J in the minority judgment, the right to trial by jury is just one of the

367 *Siemer v Solicitor-General*, above n 297, at [16] and [56]–[57].

368 At [65].

369 At [66]–[67].

370 At [67].

371 The two-year maximum came into force on 1 July 2013.

372 At [37].

373 In his paper, Professor Smith concluded following his analysis of the Supreme Court's decision that “[i]t is not entirely straightforward to say, after the decision in *Siemer*, what remains of the traditional distinction between civil and criminal contempts”: ATH Smith *Reforming the New Zealand Law of Contempt: An Issues/Discussion Paper* (Crown Law Office, April 2011) at [6.22].

rights in relation to the criminal law process under sections 24 and 25 of the Bill of Rights Act. The other process rights, which are collectively aimed at protecting the right to a fair trial, also apply to both civil and criminal contempt. These include rights to legal representation, the right against self-incrimination and the right to properly be heard.<sup>374</sup>

### *Common features of all contempts*

7.52 The Supreme Court did not directly address the Court of Appeal conclusion that there is still a distinction in New Zealand law between criminal and civil contempt. However, the consequence of the decision is that few of the historic differences between civil and criminal contempt remain. The traditional classification of contempt into civil or criminal no longer seems to be a helpful one given the number of features common to both:

- The criminal standard of proof applies in both civil and criminal proceedings.
- The right to be released on bail, on reasonable terms and conditions, applies in both civil and criminal contempt proceedings.
- The maximum sentence of imprisonment for either civil or criminal contempt is the same. Following the amendment of section 24(e) in 2013, it is now limited to two years.
- Rights to legal representation, including the right to receive legal assistance without cost if the interests of justice so require and the person does not have sufficient means under section 24(f), apply in both the civil and criminal context.
- Rights to natural justice and a fair trial apply in both civil and criminal contempt proceedings, including the right against self-incrimination and the right to properly be heard.
- In both civil and criminal contempt proceedings, the defendant must also be given proper and adequate notice of the particularity of the allegations.

### *Appeal rights*

7.53 The statutory basis for appeals differs, but appeal rights do not differ much in substance. Civil contempt rulings are subject to appeal to the Court of Appeal under section 66 of the Judicature Act 1908, while criminal contempt rulings are subject to appeal under part 6, subpart 5 of the Criminal Procedure Act 2011. However, section 25(h) of the Bill of Rights Act provides a right, if convicted of the offence, to appeal according to law to a higher court against the conviction or sentence or against both. It must therefore be the case that a defendant held to be in civil contempt has equivalent rights of appeal.

7.54 It seems that both section 66 of the Judicature Act and the relevant sections of the Criminal Procedure Act provide equivalent rights of appeal, although the latter does not use the language of rehearing. Under section 66, appeals are by way of rehearing, which in this context requires the appeal to be conducted on the record of the evidence given in the court below, subject to the power to admit further evidence under the rules of court. There is not, therefore, a complete rehearing in the sense of a new trial with the evidence recalled, but the court hearing the appeal considers and determines for itself the issues determined at the original hearing on the basis of the record of the proceedings. It then applies the law as it is when the appeal is heard and not as it was when the trial occurred.<sup>375</sup>

7.55 The Criminal Procedure Act provides a first right of appeal against a finding of contempt and/or any sentence imposed other than an order that a person be detained in custody until the

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<sup>374</sup> *Siemer v Solicitor-General*, above n 297, at [33].

<sup>375</sup> *McGechan on Procedure*, above n 309, at [CR47.01].

rising of the court.<sup>376</sup> An appeal against a finding of criminal contempt is heard and determined, with necessary modifications, as if the appeal was a finding against a conviction.<sup>377</sup> There is no longer any express reference to an appeal against conviction following a judge-alone trial, proceeded by way of a rehearing, as there was in earlier legislation.<sup>378</sup> However, *Adams on Criminal Law* says, arguably, nothing has been lost as a result of this omission, because the relevant replacement provision (section 232(2)(b)) requires the appeal court to give the judge's reasoning close scrutiny and come to its own decision on the facts, which is fundamentally what is involved in a rehearing.<sup>379</sup>

### *Remaining differences between civil and criminal*

7.56 The only difference marking off civil contempt proceedings is that they can be taken by and for the benefit of the party in whose favour the original order or injunction was made. The entitlement that parties to litigation currently have to initiate contempt proceedings reflects the historic origins of civil contempt as an enforcement mechanism to remedy private wrongs as well as affronts to the administration of justice. Any reform of civil contempt will need to preserve the ability of individual litigants to protect their private interests in securing compliance with court orders.

7.57 Related to the private interests of the successful litigant is the question of whether civil contempt can be waived by the person for whose benefit the order was made. Criminal contempt, involving the breach of a court order, cannot be waived. *Arlidge, Eady and Smith on Contempt* say that it seems to have been largely just assumed for a long time that civil contempt can be waived.<sup>380</sup> While the authors note some authority to support this, they say the position is not straightforward. In some cases, the public interest may come into play and require that the court's authority be vindicated irrespective of the wishes of the parties. They state that:<sup>381</sup>

There is little recent authority on the significance of waiver in the context of civil contempt. It would seem that it will not normally be possible to waive a civil contempt if the breach constitutes a deliberate defiance of the authority of the court (especially in cases of public defiance), or requires to be punished or otherwise pursued from the public point of view.

7.58 The Phillimore Committee, in its 1974 *Report on Contempt of Court*, makes the point that the position from earlier times, that if the aggrieved party waived the contempt that was usually the end of the matter, does not fully accord with the modern views of the court's role. The court in civil proceedings is not viewed any more as "a mere ringholder for the contest between the parties".<sup>382</sup>

### Sequestration orders

7.59 A final, and perhaps obvious, distinction between civil and criminal contempt is that sequestration orders are only available as a remedy in civil contempt.

376 Criminal Procedure Act 2011, s 260.

377 Criminal Procedure Act 2011, ss 261–263.

378 Summary Proceedings Act 1957, s 119(1), provided that an appeal against conviction following a judge-alone trial, as with all general appeals in the summary jurisdiction, proceeded by way of a rehearing. *Adams on Criminal Law* says that, as introduced in the Criminal Procedure (Reform and Modernisation) Bill 2010, s 232 reflected s 119(1). However, that reference was removed from the Bill by the Justice and Electoral Committee on the basis that it implied that appeals against conviction from jury trials did not proceed by way of rehearing: see Criminal Procedure (Reform and Modernisation) Bill 2010 (No 243-2) (commentary) at 9; *Adams on Criminal Law* (online looseleaf ed, Brookers) at [CPA 232.03].

379 Under s 232(2)(b) of the Criminal Procedure Act 2011, the relevant ground of appeal in the case of a judge-alone trial is that the judge erred in his or her assessment of the evidence to such an extent that a miscarriage of justice has occurred.

380 Eady and Smith, above n 349, at [3-162].

381 Eady and Smith, above n 349, at [3-163].

382 Lord Phillimore *Report of the Committee on Contempt of Court* (House of Commons, Cmnd 5794, December 1974) at [171].

## APPROACH IN OTHER JURISDICTIONS

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7.60 The problem of retaining a cogent distinction at law between criminal and civil contempt has been discussed in a number of other jurisdictions, and proposals for reform have been mooted. Although there has been much criticism and calls for reform in Australia and the United Kingdom, the distinction between civil or criminal contempt still remains in these jurisdictions.

### United Kingdom

7.61 In 1974, the Phillimore Committee concluded that the distinction was complex and artificial and recommended that all distinctions between civil and criminal contempt in England and Wales should be abolished.<sup>383</sup>

7.62 The Committee said that, in England and Wales, the traditional view was that disobedience to an order made in civil proceedings is primarily a civil, not a criminal, matter, and thus it is designated civil contempt. The main purpose of sanctions for disobedience is coercion not punishment. The Committee noted that, over time, the more important distinctions had been whittled away, and the line between the two has become blurred.<sup>384</sup> The view that contumacious or wilful disobedience to an order ought to be a criminal contempt rendered the distinction less important and more difficult to define. The Committee reported that the rights of appeal in respect of both classes of contempt were similar, and the criminal standard of proof was being applied in the courts because of the penal nature of the sanctions that could be imposed. The Committee recommended that the same strict standard as was required in a criminal matter should be applied.<sup>385</sup>

7.63 However, the recommendation of the Phillimore Committee that civil contempt be abolished was never adopted. In the United Kingdom, the distinction remains. *Arlidge, Eady and Smith on Contempt* note that:<sup>386</sup>

Although the distinction between civil and criminal contempt continues to be made, and has to be considered carefully, the two categories have rather more in common than their traditional separation would imply.

### Australia

7.64 The distinction has been strongly criticised and there have been calls for reform in Australia as well.

7.65 The Australian Law Reform Commission in its 1987 report recommended abolishing the common law of civil contempt and replacing it with statutory forms of proceedings for civil enforcement of court orders and a separate offence of a disobedience contempt that would cover defiant breaches of both civil and criminal court orders.<sup>387</sup>

7.66 The Australian Commission said that there should be two quite distinct forms of action to replace what is now dealt with as “civil” contempt. One, essentially still civil in character, should be a “proceeding for the enforcement of a court order” and would probably best be dealt with by avoiding the terminology of “contempt”. The other should be a separately instituted criminal proceeding whose purpose is clearly punitive at the outset, which should

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383 At 73.

384 At 72.

385 At 75.

386 *Eady and Smith*, above n 349, at [3.6].

387 Australian Law Reform Commission *Contempt* (ALRC Report 35, 1987) Summary of recommendations at [64] and Appendix A cl 46.



be surrounded with the safeguards appropriate to a situation where a person is at risk of imprisonment.<sup>388</sup>

- 7.67 Subsequently, the High Court of Australia has considered the distinction between civil and criminal contempt to be artificial and has suggested that all proceedings for contempt should realistically be seen as criminal.<sup>389</sup> In *Witham v Holloway*, the Court said that the distinction between proceedings that are coercive in the interests of the private individual (civil) and proceedings in the public interest to vindicate judicial authority or maintain integrity of the judicial process (criminal) is not a satisfactory basis for distinguishing civil and criminal contempt.<sup>390</sup> The Court said there is not a true dichotomy between proceedings in the public interest and proceedings in the interest of the individual, because even when proceedings are intended to secure the benefit of an order or undertaking that is not being complied with, there is also a public interest aspect in the sense that the proceedings vindicate the Court's authority.<sup>391</sup>
- 7.68 The Court identified a number of distinctions between civil and criminal contempt that no longer apply, including standing to bring an action, waiver, unlimited imprisonment, the power to fine and standard of proof. The tendency to break down distinctions reflects recognition of the public interest in having court orders obeyed. The distinctions that do remain include clarity as to the right to appeal and the right to administer interrogatories. The Court concluded that: "The differences upon which the distinction between civil and criminal contempt is based are, in significant respects, illusory."<sup>392</sup>
- 7.69 In a more recent 2003 report reviewing the law of contempt, the Law Reform Commission of Western Australia has concluded the civil contempt should be abolished and replaced by an offence.<sup>393</sup> The Commission said that, given the serious penalties available and the broader public interest in securing compliance, an offence, which would normally be prosecuted by public officials, was appropriate. Acknowledging the legitimate and particular interests of applicants as well as the very wide range of orders and undertakings to which contempt proceedings may be subject, they recommended that the proposed criminal offence for disobedience contempt should also be able to be prosecuted by the applicant with leave of the court in which the contempt occurred. However, where it is prosecuted by the applicant, imprisonment should not be available upon conviction.<sup>394</sup>

## REFORM OPTIONS

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- 7.70 In light of the Supreme Court's decision in *Siemer* and the calls for reform in our most closely allied common law jurisdictions, it seems timely to also ask whether any useful distinction remains between civil and criminal contempt in New Zealand law. It may be time to look at abolishing civil contempt altogether.

### Should civil contempt be abolished and all contempt be criminal?

- 7.71 The Supreme Court has said that Bill of Rights Act protections apply to all defendants facing allegations of contempt, whether civil or criminal.<sup>395</sup> This rightly acknowledges that the risk of

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388 At [65]–[68] and Appendix A cl 46.

389 *Witham v Holloway* (1995) 183 CLR 525.

390 At 532.

391 At 533.

392 At 534.

393 Law Reform Commission of Western Australia *Report on Review of the Law of Contempt* (LRWA, PN 93, 2003) at 92–95 and recommendation 46.

394 At 98 and recommendation 48.

395 *Siemer v Solicitor-General*, above n 297.



the loss of liberty is a serious matter. We suggest that it might now be time to bring an end to the use of civil contempt as an enforcement mechanism to remedy private wrongs. The sanction of imprisonment is inherently punitive in nature, even if it is being imposed in order to coerce compliance rather than to punish. We suggest that committing a person to prison is now out of place in a modern civil enforcement regime. As a matter of principle, the prerogative to seek this type of punitive sanction should rest with the state and not with private parties involved in litigation. The sanction of imprisonment should only be available under the criminal law and not as a civil enforcement tool.

- 7.72 One option for reform, therefore, would be to make all contempt criminal and completely separate civil enforcement from contempt. Under this option, contempt would be removed from the current arsenal of civil enforcement measures and would sit squarely within the ambit of criminal law. In summary, we are suggesting that a clear line be drawn between contempt and civil enforcement.

#### *Civil enforcement*

- 7.73 Civil enforcement would be the mechanism for enforcing the private interest of the party in an order. Civil enforcement would remain in the hands of litigants and be available to enforce court orders and protect litigants' private interests in judgments and court orders. However, the courts would not have jurisdiction to commit a person to prison or impose fines as part of that regime to enforce orders in civil proceedings. Arrest orders would still need to be available to deal with situations where a defendant needs to be arrested and brought before the court for the various purposes still remaining within civil enforcement. The current regime for the civil enforcement of court judgments and orders would otherwise be retained largely as it is. It would also be very helpful to rid civil enforcement mechanisms of the language of contempt.

#### *Sequestration orders*

- 7.74 At this preliminary stage, we favour abolishing the remedy of sequestration altogether. As discussed earlier, this is an ancient remedy originating in the Courts of Chancery in Elizabethan times. Sequestration is generally considered to be draconian in nature and available only as a last resort. We consider that there are now sufficient better modern alternatives available in the enforcement arsenal to dispense with sequestration altogether.

#### *Criminal offence would replace criminal contempt*

- 7.75 Under this option, contempt would be solely a matter for the criminal law. It would have the function of punishing breaches of court orders where they are of a nature that so threatens the administration of justice that punishment is required to protect the public interest in upholding the administration of justice. Contempt would be prosecuted by the state and not by the litigants.
- 7.76 We have proposed in earlier chapters of this Issues Paper options for replacing different forms of common law contempt with statutory offences. If we also take that approach in relation to breaches of court orders that amount to contempt, we would have a criminal offence to cover breaches of court orders that are of such a serious nature that they threaten the administration of justice. We are proposing a statutory offence that would be more akin to what is currently criminal contempt. In other words, the threshold for the offence should be set so that it would only catch serious breaches and not all deliberate breaches.
- 7.77 The offence would need to be carefully crafted. As well as there being a requirement to prove the existence of a clear and binding order that the defendant had knowledge of and that the defendant intentionally acted in breach of the terms of the order, there would also need to be

an element of public defiance of the court's process in a way calculated to lessen respect for the courts or some other way that the defendant's actions breaching the order were of a nature that eroded or undermined the administration of justice. Currently, the non-payment of money in breach of a court order or judgment cannot be enforced by contempt. We think this should similarly be excluded from any offence that replaces the more serious types of breach.

#### Preserving the interests of the parties under court orders

- 7.78 One issue that is raised by the proposal to create an offence is whether the litigant who has a beneficial interest in the court order should have any particular rights in relation to a prosecution under the proposed offence. Currently, the beneficiary of the original court order is able to bring an action for civil or criminal contempt. Under the approach we are suggesting, that ability will of course be removed. While that party will no longer be able to seek committal to prison, they will still have available to them all the other existing civil enforcement tools. Our criminal justice system permits private prosecutions, and there is probably no reason why that default position should not apply to this offence also. We are interested in feedback from submitters on whether they think that the approach we have outlined will be sufficient to protect the position of the successful litigant under the original order.
- 7.79 Another issue concerning the litigant entitled to the benefit under the court order is whether a portion of any fine imposed by the court for the offence should be made payable to that person as compensation. Section 32 of the Sentencing Act 2002 also provides for a sentence of reparation where a party has suffered loss or damage to property. We would again be interested in comments from submitters on whether a portion of the fine should be payable to a party entitled to the benefit under the order, as compensation, and whether a sentence of reparation should also be available.

#### Corporate defendants

- 7.80 Rather than simply have a higher level of fine for corporate defendants, we could consider whether liability should not also be imposed on the directors. Currently, where a judgment or order has been made against a corporate body, including those incorporated under the Companies Act 1955, it can be enforced by an order of committal for contempt against the directors or other officers of the corporation.<sup>396</sup> Would it perhaps be appropriate to reflect that position in the new offence provision?

#### Jurisdiction

- 7.81 Finally, an important issue to also consider is whether any new offence should simply be a category 2, non-electable offence, under the Criminal Procedure Act and consequently prosecuted and tried in the District Court or whether this offence should be a special case that could be tried summarily in the High Court. This issue is considered further in the next chapter.

#### Civil contempt codified?

- 7.82 An alternative option that might also be considered, particularly if it was felt that simply abolishing civil contempt will leave some litigants with insufficient civil remedies, is to provide, in statutory form, a power for the courts to imprison a litigant as a last resort civil enforcement remedy. A statutory provision that allowed for the coercive use of imprisonment in civil proceedings would effectively be a codification of civil contempt.
- 7.83 At this stage, we consider that there are probably adequate civil enforcement mechanisms, without such a power, to address almost all of the situations that may arise where court orders

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<sup>396</sup> *Laws of New Zealand*, above n 299, at [54].

are not complied with. However, there may occasionally be situations where there would not otherwise be an adequate alternative remedy. If such an option was favoured, we would want to see all the appropriate Bill of Rights Act protections applied.

- 7.84 We would also wish to see the bar for triggering the power set at a high level so the court would have to be satisfied that all other methods of enforcing the order have either been tried already or are inappropriate in the situation.

#### QUESTIONS

- Q19 Do you agree that all contempt should now be criminal and that civil contempt should be abolished?
- Q20 What comments do you have on the proposed option in relation to civil enforcement? Should sequestration orders be abolished altogether?
- Q21 What comments do you have on the proposed statutory offence?
- Q22 Is it necessary for the courts to retain a power to imprison a litigant as a last resort to coerce compliance with a court order? What restrictions should be placed on such a power?

# Chapter 8

## Replacing common law contempt with statutory offences

### INTRODUCTION

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- 8.1 In the previous chapters, we have discussed replacing particular forms of contempt with statutory offences:
- Chapter 3 explores whether changes are needed to the current statutory offences for contempt in the face of the court.
  - Chapter 4 discusses a possible statutory offence to replace publication contempt concerning particular proceedings.
  - Chapter 5 asks whether there should be new statutory offences for juror research and disclosure of jury deliberations.
  - Chapter 6 seeks views on whether there should be a statutory offence relating to publications that undermine confidence in the judiciary generally.
  - Chapter 7 proposes a new offence for serious breaches of court orders that undermine public confidence in the administration of justice.
- 8.2 In this chapter, we discuss the issue of whether *all* contempt offences should be codified and how the statutory offences might operate in practice.
- 8.3 Section 9 of the Crimes Act 1961 provides:
- 9 Offences not to be punishable except under New Zealand Acts**
- No one shall be convicted of any offence at common law, or of any offence against any Act of the Parliament of England or the Parliament of Great Britain or the Parliament of the United Kingdom: provided that—
- (a) nothing in this section shall limit or affect the power or authority of the House of Representatives or of any court to punish for contempt:
- 8.4 Contempt of court is specifically excluded from the general rule that offences are not punishable except under New Zealand legislation. The Law Commission wonders whether this is appropriate in modern New Zealand.

### STATUTORY OFFENCES THAT WERE FORMERLY COMMON LAW CRIMINAL CONTEMPTS

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- 8.5 Appendix C contains a list of statutory provisions in force in New Zealand dealing with matters that were previously considered to be common law contempt. Many of these are in the Crimes Act 1961 or the Criminal Procedure Act 2011, but relevant provisions are also included in other statutes, such as the Juries Act 1981 and the Evidence Act 2006. Further, the Judicature

Modernisation Bill contains new contempt in the face of the court provisions for several courts.<sup>397</sup>

## INTERNATIONAL APPROACHES TO CODIFICATION

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### United Kingdom

8.6 The Contempt of Court Act 1981 (UK) provides for strict liability contempt by publication. It is not a comprehensive code of contempt law, so the common law exists alongside the piecemeal forms of contempt that have been replaced by statute.

### Australia

8.7 In Australia, contempt of court still largely exists at common law. Although some provisions are found in statute, the common law remains critical to interpreting the statutory provisions, including the test for strict liability contempt. Also, there is variance in the way in which contempt of court fits into the framework of criminal law in the states and territories.<sup>398</sup> In New South Wales and Victoria, there has been partial codification of the criminal law, but both statutory and common law offences, including contempt of court, continue to exist outside those Acts. The other states have adopted comprehensive criminal codes. As an example of the interrelationship between statute and common law, section 8 of the Criminal Code Act 1899 (Queensland) provides that:

Nothing in this Act or in the Code shall affect the authority of courts of record to punish a person summarily for the offence commonly known as 'contempt of court', but so that a person can not be so punished and also punished under the provisions of the Code for the same act or omission.

8.8 In 1987, the Australian Law Reform Commission recommended the following:

- The common law principles of contempt should be abolished and replaced by statutory provisions that would govern all Federal Courts except the High Court.<sup>399</sup>
- Current forms of contempt should be replaced by criminal offences. To establish that a person is criminally liable, specific criteria should be met. These would clarify the law and limit liability to situations where the conduct is sufficiently severe.<sup>400</sup>
- With the exceptions of contempt in the face of the court and disobedience contempt, new contempt offences should be tried in the same way as normal criminal offences, rather than by summary procedure, to ensure the protection of an accused's rights.<sup>401</sup>
- Contempt in the face of the court should be treated as a criminal offence, and the matter should continue to be heard summarily. However, the accused person should be able to require the original judge not to be in charge of the trial.<sup>402</sup>
- 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.<sup>403</sup>

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397 Judicature Modernisation Bill 2013 (178-1), cl 161.

398 David Barker *Essential Australian Law* (2nd ed, Cavendish Publishing, Sydney, 2005). See Law Commission of England and Wales *Contempt of Court – A Consultation Paper* (LC, CP 209, 2012) Appendix C: Contempt in overseas jurisdictions.

399 Australian Law Reform Commission *Contempt* (ALRC Report 35, 1987) Summary of recommendations at [1].

400 At [1].

401 At [59]–[60].

402 At [3]–[16].

403 At [64]–[84].

- 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 Crimes Act 1914 (Cth) should be amended to remedy this situation.<sup>404</sup>
  - Specific recommendations for the reform of contempt in family law matters, including replacing the system of contempt and quasi-contempt in the Family Law Act 1975 (Cth) with a single procedure for the enforcement of orders.<sup>405</sup>
- 8.9 Although the Australian Law Reform Commission's report focused on contempt at a Commonwealth level, it stated that the majority of its recommendations were suitable for use by state and territory governments. In this regard, it appears there were attempts by the federal and state governments to agree on a uniform contempt law, but state and territory interest in the project lapsed, and it appears this is no longer being actively pursued.<sup>406</sup> There has been substantial implementation of the report's proposed reforms relating to family law, however.

### Canada

- 8.10 Canada has a Criminal Code.<sup>407</sup> Contempt of court is the only surviving common law offence. Criminal law is a federal responsibility.
- 8.11 The Law Reform Commission of Canada published a report on contempt of court in 1982,<sup>408</sup> which was followed by a Bill in 1984.<sup>409</sup> This proposed to abolish the common law of contempt and replace it with the following three new offences to be incorporated into the Criminal Code:
- Knowingly making a publication creating a substantial risk of seriously impeding or prejudicing pending proceedings.
  - Affront to judicial authority.
  - Disruption of judicial proceedings.
- 8.12 The Bill lapsed when the government at the time was not returned to office,<sup>410</sup> and it does not appear that any similar Bill has been introduced since. This is likely due to the adoption of the Canadian Charter of Rights and Freedoms 1982.

### CODIFICATION IN NEW ZEALAND?

- 8.13 The Commission's preliminary view is that all common law contempt offences should be extinguished and the various forms of contempt made statutory offences. This would complete the partial codification that currently exists and make the offences relating to the administration of justice clearer and more accessible to the New Zealand public.
- 8.14 Contempt is an ancient law that was made by judges and modified by judges over the years. That law would have greater legitimacy if it were made by Parliament.
- 8.15 Criminal offences are different to other laws because a person may be punished and have their personal liberties curtailed as a result of failure to comply with a law. Since ignorance of the law

404 At [17]–[28].

405 At [85]–[112].

406 Australian Law Reform Commission "Contempt" (12 July 2010) <www.alrc.gov.au >.

407 Criminal Code RSC 1985 c C-46.

408 Law Reform Commission of Canada *Contempt of Court* (LRCC Report 17, 1982).

409 The provisions were included in an omnibus Bill; Criminal Law Reform Act, 1984, Bill C-19, 32nd Parl., 2d sess., 1983–1984, (1st reading 7 Feb. 1984). See L Puerst "Contempt of Court" [1984] Ottawa L. Rev. 316; P Healy "Bill C-19: Reforming the Criminal Law" [1984] Ottawa L. Rev. 297.

410 Australian Law Reform Commission *Contempt* (ALRC R35, 1987) at [13] and [111].



is no defence in a criminal prosecution, it seems obvious that people must have an opportunity to know what the criminal law requires.

- 8.16 An important argument against complete abolition of common law contempt and codification of the law of contempt is the breadth of matters that may potentially qualify as an interference with the administration of justice. There is a risk that conduct could be missed in such a drafting exercise, leaving a gap in the law if the inherent jurisdiction did not exist alongside the statutory provisions. Would the offences discussed in the previous chapters, together with existing statutory offences, provide all the necessary protection for the courts? At this stage, the Commission is not convinced there should be criminal offences punishable through inherent jurisdiction in addition to statutory offences.
- 8.17 Concerns about gaps in the law could be overcome, however, either by keeping the highly problematic inherent jurisdiction<sup>411</sup> or by having statutory provisions covering particular forms of contempt and a “catch-all” statutory provision making it an offence to engage in any other conduct where there is a real risk that the conduct will interfere with the administration of justice. A statutory catch-all provision would not make the law completely clear but would at least make it more accessible and give it greater constitutional legitimacy. If behaviour is covered by a specific statutory offence, any prosecution should be based on that provision rather than the general catch-all provision.
- 8.18 Another issue for consideration is whether any new statutory offences should be included in existing legislation or a new Contempt of Court Act. A new Act to replace the common law for all contempt offences would make the contempt laws as accessible as possible. Alternatively, the offences could be inserted into Part 6 of the Crimes Act 1961.

## Procedure

- 8.19 Consideration also needs to be given to how any new statutory offences replacing contempt should be prosecuted. There are several possibilities. One option would be for new statutory offences to be prosecuted in the same way as other criminal offences, with the laying of a charge by the police. Criminal protections would apply, such as giving the accused proper details of the offence they are charged with and an opportunity to seek legal advice and be represented in court. Under this scenario, a conviction would result in a person having a charge on their criminal record.
- 8.20 Perhaps offences related to business in the senior courts could be prosecuted in the High Court by the Solicitor-General and all other offences be referred by the police to the District Court and included in the Protocol established by the Chief High Court Judge and the Chief District Court Judge identifying cases that must always be considered for transfer to the High Court in accordance with section 66 of the Criminal Procedure Act 2011? This would ensure only appropriate prosecutions are brought to the attention of the most appropriate court.
- 8.21 Sections 116 and 117 of the Crimes Act 1961 already enable wide powers to punish contempt-type behaviour under normal criminal processes; however, police priorities do not enable police prosecution of such offences on a routine basis. In order to be effective, if treated like other offences, former contempt offences would need to be given a greater priority than is currently given to offences in Part 6 of the Crimes Act.
- 8.22 Another option would be for the registrar of the court to which the alleged contempt relates to be able to file a charging document as well.

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411 See M R Ferrere “The Inherent Jurisdiction and its Limits” (2013) 13 Otago LR 107.

- 8.23 A further option would be for a special procedure to be developed for former contempt cases that enabled a judge-alone hearing brought by application by the Solicitor-General. It may also be appropriate for different processes to apply to different offences, depending on the particular offence and the risk to the administration of justice.

#### QUESTIONS

- Q23 Do you think common law contempt of court offences should be completely abolished and replaced by statutory offences?
- Q24 Should there be a new Contempt of Court Act?
- Q25 If contempts were replaced with statutory offences, how should those offences be prosecuted?

# Questions

## CHAPTER 3 – CONTEMPT IN THE FACE OF THE COURT

- Q1 Do you think that contempt in the face of the court provisions in courts legislation should separate the need to deal immediately with an in-court interruption from the process of punishing a person for that disruptive behaviour?
- Q2 If so, what should the procedure be?
- Q3 Do you agree that all courts should open and close with directions in both English and Māori?
- Q4 Do you think judges should be encouraged to allow a short introduction/mihi whakatau or prayer/karakia by the key participants in their courts?

## CHAPTER 4 – REFORMING PUBLICATION CONTEMPT

- Q5 Do you think that the common law test of real risk has become problematic?
- Q6 Do you have any comments to make on the proposed statutory prohibition?
- Q7 Do you have any comments to make on the proposed suppression power? Should it replace the common law power of suppression?
- Q8 Do you agree that the common law offence of publication contempt should be replaced with a statutory offence as we have proposed? How should the test be framed?

## CHAPTER 5 – JURORS AND CONTEMPT OF COURT

- Q9 Do you agree with our suggested approach to pretrial publicity and research by jurors?
- Q10 Do you have any comments on the different options for dealing with pretrial publicity and research by jurors? Are there other options we should consider?
- Q11 Do you agree that there should be a statutory offence to replace common law contempt as it applies to jurors who, notwithstanding clear unequivocal instruction, intentionally search for extraneous information?

- Q12 Do you agree that the law on the disclosure of jury deliberations should be clarified and that it should be a statutory offence for anyone, including a person who is or has served on a jury, to disclose or publish details of a jury's deliberations or for anyone to solicit such information?
- Q13 What exceptions or defences should be available to allow disclosure where it is in the interests of justice because there has been some irregularity during deliberations, such as juror misconduct?
- Q14 Should there be an exception to allow for academic research into juries?
- Q15 Do you have any comment on the proactive management options as they relate to disclosure of information? Are there any other options we should consider?

#### CHAPTER 6 – SCANDALISING THE COURT

- Q16 Do you agree the common law contempt of scandalising should be abolished by statute?
- Q17 Do you agree that, when passed, the Harmful Digital Communications Bill together with other existing remedies will provide sufficient protection for the judiciary?
- Q18 If the common law offence of scandalising were abolished, should a new statutory offence replace it? If so, what should be the nature of that offence?

#### CHAPTER 7 – THE FUTURE OF CIVIL CONTEMPT

- Q19 Do you agree that all contempt should now be criminal and that civil contempt should be abolished?
- Q20 What comments do you have on the proposed option in relation to civil enforcement? Should sequestration orders be abolished altogether?
- Q21 What comments do you have on the proposed statutory offence?
- Q22 Is it necessary for the courts to retain a power to imprison a litigant as a last resort to coerce compliance with a court order? What restrictions should be placed on such a power?

## CHAPTER 8 – REPLACING COMMON LAW CONTEMPT WITH STATUTORY OFFENCES

Q23 Do you think common law contempt of court offences should be completely abolished and replaced by statutory offences?

Q24 Should there be a new Contempt of Court Act?

Q25 If contempts were replaced with statutory offences, how should those offences be prosecuted?

# Appendix A

## TERMS OF REFERENCE

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The objective of the law of contempt of court is to protect the integrity of the justice system and a defendant's right to a fair trial. However, the law is vague in scope, uses outdated language and concepts and is inaccessible to the New Zealand public. It was developed prior to the Internet age and the enactment of the New Zealand Bill of Rights Act 1990.

Most of the law of contempt is common law (law made by the courts), but parts of it that deal with conduct in court and specific offences relating to the administration of justice, such as perjury, are contained in statutes.

In recent times, New Zealand's senior courts have commented on the difficulties of reconciling some aspects of the law of contempt with the Bill of Rights Act, suggesting that "consideration should be given to legislative reform in this area of the law as happened in the United Kingdom".<sup>412</sup>

The Law Commission will undertake a first principles review of the law of contempt of court and make recommendations to ensure the law is appropriate for modern New Zealand, taking into account:

- the rights and freedoms recognised in the New Zealand Bill of Rights Act 1990;
- the development of the Internet and new media; and
- the need for the laws of New Zealand to be as understandable and accessible to the public as possible.

The review will consider whether the common law of contempt should be further amended or replaced by statutory provisions. In particular, it will include an examination of:

- contempt by publication, including the dissemination of information by members of the public via social media;
- juror contempt (for example, jurors undertaking Google research or disclosing jury deliberations);
- the contempt known as "scandalising the court";
- civil contempt/enforcement of court orders; and
- other contempts relating to interference with the administration of justice.

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<sup>412</sup> For example, *Siemer v Solicitor-General* [2009] NZCA 62, [2009] 2 NZLR 556.



# Appendix B

**TABLE OUTLINING COURTS' CONTEMPT JURISDICTION**

COMPARATIVE JURISDICTION TO PUNISH FOR CONTEMPT					
The Courts	Contempt in the face of the court	Publication contempt	Scandalising the court	Civil contempt failure to comply with court orders	Juror contempt
HIGH COURT	Inherent (substantive common law) jurisdiction to punish this type of contempt. s 56C Judicature Act 1908 – covers civil proceedings. s 365 Criminal Proceedings Act 2011 – covers criminal.	Inherent (substantive common law) jurisdiction. s 86 Evidence Act 2006 – restricts publication of some questions and evidence in response.	Inherent (substantive common law) jurisdiction to punish this type of contempt.	Inherent (substantive common law) jurisdiction remains. Extends to actions of third parties. High Court Rules – orders of arrest and committal to prison and sequestration orders.	Inherent (substantive common law) jurisdiction. s 365 Criminal Proceedings Act 2011 – covers misbehaviour in face of court.
DISTRICT COURTS	s 112 District Courts Act 1947 (Civil) & s 365 Criminal Proceedings Act 2011. Inherent (ancillary) powers of all courts to control own process would allow the court to punish this if no statutory provision.	No inherent or statutory jurisdiction. s 86 Evidence Act 2006 – restricts publication of some questions and evidence.	No inherent or statutory jurisdiction.	s 79 District Courts Act & 2009 rules cover some orders. s 41 – ancillary jurisdiction may cover contempt for wilful breaches of court order. (See <i>P v F</i> (2009) 27 FRNZ 603 (HC).)	s 365 Criminal Proceedings Act 2011 (in court or breach of order or direction). Otherwise no jurisdiction.
FAMILY COURTS	s 112 District Courts Act 1947 applies. Inherent (ancillary) powers of all courts to control own process would allow the court to punish this if no statutory provision.	No jurisdiction. Various statutory provisions restrict publication. s 86 of the Evidence Act 2006 applies.	No jurisdiction.	s 79 District Courts Act & 2009 rules cover orders of arrest and committal. s 41 – ancillary jurisdiction may cover contempt for wilful breaches of court order.	N/A
ENVIRONMENT COURT	Statutory jurisdiction – s 282 Resource Management Act 1991. Inherent (ancillary) powers of all courts to control own process would allow the court to punish this if no statutory provision.	No jurisdiction to commit and punish this type of contempt. Section 86 of the Evidence Act 2006.	No jurisdiction.	Statutory jurisdiction – s 79 District Courts Act & 2009 rules are applied to the Environment Court by virtue of s 278 Resource Management Act, which gives jurisdiction to commit for contempt (wilful disobedience of injunctive court order). s 41 District Courts Act applies also.	N/A
EMPLOYMENT COURT	Statutory jurisdiction – s 196 Employment Relations Act 2000. Inherent powers of all courts to control own process would allow the court to punish this if no statutory provision.	No jurisdiction to commit and punish this type of contempt. Section 86 of the Evidence Act 2006 applies.	No jurisdiction.	Statutory enforcement provisions cover same ground – s140 Employment Relations Act 2000 Court can enforce compliance orders by fines, imprisonment and sequestration. Under s 141, orders may be filed and enforced through the District Court.	N/A

COMPARATIVE JURISDICTION TO PUNISH FOR CONTEMPT					
The Courts	Contempt in the face of the court	Publication contempt	Scandalising the court	Civil contempt failure to comply with court orders	Juror contempt
MĀORI LAW COURT & MĀORI APPELLATE COURT	s 90 Te Ture Whenua Māori Act 1993 to take into custody and detain until the rising of the Court. Inherent powers of all courts to regulate their own processes cover this also.	No jurisdiction. s 86 of the Evidence Act 2006.	No jurisdiction.	No jurisdiction. s 83 Te Ture Whenua Māori Act injunctions issued by the Māori Land Court or the Māori Appellate Court may be enforced by committal for contempt in the High Court.	N/A

APPELLATE COURTS: JURISDICTION TO PUNISH FOR CONTEMPT				
Courts	Contempt in the face of the court	Publication contempt	Scandalising the court	Civil contempt failure to comply with court orders
SUPREME COURT	s 35(1) of Supreme Court Act 2003 covers all proceedings. s 365 of the Criminal Proceedings Act (criminal appeals).	s 35(4) of Supreme Court Act 2003 – Supreme Court has the same power and authority as the High Court (including inherent substantive common law jurisdiction) to deal with any contempt.	s 35(4) of Supreme Court Act 2003 – gives the Supreme Court the same power and authority as the High Court (including inherent substantive common law jurisdiction) to deal with contempt.	s 32 of Supreme Court Act 2003 – empowers the High Court to enforce Supreme Court orders including by committal.
COURT OF APPEAL	s 365 of the Criminal Proceedings Act (criminal appeals). s 56C Judicature Act 1908 (Civil proceedings) – unclear whether applies. Inherent powers of all courts to control own process would otherwise apply.	Court has no inherent (substantive common law) jurisdiction and not covered by statute.	Court has no inherent (substantive common law) jurisdiction.	s 63 of the Judicature Act – all judgments, decrees and orders of the Court of Appeal may be enforced by the High Court as if given or made by that Court.

# Appendix C

## STATUTORY CONTEMPTS

CONTEMPT IN NEW ZEALAND		
Type of contempt	Provision	Description
<b>Crimes Act 1961 contempts</b>	Section 116 Conspiring to defeat justice	It is an offence to conspire to defeat the course of justice.
	Section 108 Perjury defined Section 109 Punishment of perjury	It is a crime for a witness to give a statement knowing that it is false and is given with the intention to mislead the court holding the proceeding.
	Section 110 False oaths	It is an offence for a person who is required by law to make a statement on oath to make a statement that would amount to perjury if made in a judicial proceeding.
	Section 111 False statements or declarations	It is an offence for a person who is required to make a statement or a declaration required by law to make a false statement or declaration.
	Section 113 Fabricating evidence	A person who fabricates evidence commits an offence.
	Section 114 Use of purported affidavit or declaration	It is an offence to sign or purport to use a document as an affidavit or declaration when it isn't.
	Section 115 Conspiring to bring false accusation	It is an offence to conspire to prosecute a person for an alleged offence knowing that the person is innocent.
	Section 116 Conspiring to defeat justice	It is an offence to conspire to obstruct, prevent, pervert or defeat the course of justice.
	Section 117 Corrupting juries and witnesses	It is a crime to influence, bribe or dissuade any person who is to be a witness or a juror in any proceedings.
	Section 256 Forgery	It is an offence to produce false documents with the intention of using them to obtain something of valuable consideration and to make a false document with the intent that it be used as genuine.
	Section 257 Using forged documents	It is an offence to use documents knowing they are forged to obtain something of value or to use such documents as if they were genuine.
	Section 264 Paper or implements for forgery	It is an offence for a person to have in his or her possession or control anything capable of being used to forge any document with the intent to use it for that purpose.
	<b>Criminal Procedure Act 2011 contempts</b>	Section 120 Non-attendance of defendant charged with offence in category 2, 3, or 4: before plea is entered
Section 121 Non-attendance of defendant charged with offence in category 2, 3, or 4: after plea is entered but before trial or sentencing		If the defendant does not appear for a category 2, 3 or 4 offence after the plea is entered, the court may either proceed in the absence of the defendant or issue a warrant to arrest the defendant.

CONTEMPT IN NEW ZEALAND		
Type of contempt	Provision	Description
	Section 122 Non-attendance of defendant at trial for offence in category 2, 3, or 4	If a defendant fails to appear at trial for a category 2, 3 or 4 offence without a reasonable excuse, the court can either proceed with the trial or issue a warrant to arrest the defendant.
<b>Witness contempt</b>	Criminal Procedure Act 2011, s 165 Witness refusing to give evidence may be imprisoned	If a witness does not give evidence when required or refuses to be sworn or, having been sworn, refuses to answer questions, the court may order that the witness be detained or issue a warrant for his or her arrest and detention.
	Criminal Procedure Act 2011, s 159 Issue of summons to witness	A person commits an offence if that person has been served with a summons requiring the person to appear as a witness and that person refuses or fails, without reasonable excuse, to appear or to produce any document or thing required by the summons to be produced.
	Criminal Procedure Act 2011, s 211 Offences and penalties	It is an offence to publish details in breach of a suppression order.
	Electoral Act 1993, s 247(2) Summons and examination of witnesses	The High Court may by order require any person who appears to the court to have been concerned in the election to attend as a witness, and every person who refuses to obey any such order shall be guilty of contempt of court.
	Judicature Act, s 56B Refusal of witness to give evidence	A witness may be detained for refusing without "any just excuse" to give evidence or refuse to produce a document.
	Te Ture Whenua Māori Act 1993, s 89 Failure to comply with summons, etc	After being summoned to attend to give evidence or produce certain documents, it is an offence for a person to fail to attend, to refuse to be sworn or refuse to answer any lawful question or to fail to produce those certain documents.
<b>Jury contempt</b>	Juries Act 1981, s 32 Failure to attend	A person may be fined if the person is summoned to attend and serve as a juror but fails without reasonable excuse to attend or wilfully refuses or neglects to serve when called upon.
<b>Contempt against court in other statutes</b>	Armed Forces Discipline Act 1971, s 150E Contempt of military tribunal or court of inquiry	A person not subject to this Act commits a contempt of military court or tribunal if he/she fails to attend as a witness, refuses to swear an oath or produce papers or answer a question, disobeys an order of the tribunal or court, wilfully publishes any statement in respect of the proceedings that is likely to interfere with the proper administration of justice, insults a member of the tribunal or court or interrupts the proceedings.
	Criminal Procedure Act 2011, s 365 Contempt of court	It is an offence for a person to wilfully insult a member of the court, to wilfully interrupt the proceedings or otherwise misbehave or to wilfully and without lawful excuse disobey any court order or direction in the course of a hearing.
	Disputes Tribunals Act 1988, s 56 Contempt of Tribunal	It is an offence to wilfully assault, insult or obstruct a member of the Tribunal, wilfully interrupt or otherwise misbehave at a sitting of a Tribunal or wilfully and without lawful excuse disobey an order of a Tribunal.
	District Courts Act 1947, s 112 Penalty for contempt of court	A person may be detained and sentenced if he or she wilfully insults a member of the court or a witness, wilfully interrupts the proceedings or otherwise misbehaves or wilfully and without lawful excuse disobeys a court order.
	Employment Relations Act 2000, s 196 Contempt of court or authority	A person may be detained and sentenced if he or she assaults, threatens, intimidates or wilfully insults a member of the court, wilfully interrupts or obstructs the proceedings or otherwise misbehaves or wilfully and without lawful excuse disobeys any order or direction of the Authority or court.
	Evidence Act 2006, s 179 Contempt of Australian court	It is an offence to assault, threaten, intimidate or wilfully insult certain members of the court, wilfully interrupt or obstruct the proceeding or wilfully and without lawful excuse disobey an order of the Australian court in the course of the proceeding at a place where evidence is being given in New Zealand in a proceeding before an Australian court.

CONTEMPT IN NEW ZEALAND		
Type of contempt	Provision	Description
	Habeas Corpus Act 2011, s 19 Contempt of court	It is contempt of court to wilfully hinder the prompt disposal of an application, to remove a person from the jurisdiction of the court, to fail to comply with a condition attached to an order to release a person from detention or to wilfully fail to comply with a writ of habeas corpus ordering the release from detention of a person.
	Judicature Act 1908, s 56C Contempt of court	A person may be detained if he or she assaults, threatens, intimidates or wilfully insults a member of the court during the sitting or in going to and from. In any such case, the Judge may sentence the offender.
	Judicature Act 1908, s 56O Contempt of Federal Court of Australia	At any sitting of the Federal Court of Australia in New Zealand, it is an offence for a person to assault, threaten, intimidate or wilfully insult certain members of the court, to wilfully interrupt or obstruct the proceedings or to wilfully and without lawful excuse disobey an order of the court.
	Supreme Court Act 2003, s 35 Contempt of court	It is an offence to assault, threaten, intimidate or wilfully insult a member of the court, to wilfully interrupt or obstruct the proceedings or otherwise misbehave or to wilfully and without lawful excuse disobey an order.
	Te Ture Whenua Māori Act 1993, s 90 Power to remove for contempt	A person may be detained if he or she wilfully insults a member of the court, wilfully interrupts the proceedings or otherwise misbehaves or wilfully and without lawful excuse disobeys an order or direction of the Judge in the proceedings.
	Te Ture Whenua Māori Act 1993, s 91 Obstructing officers of court	It is an offence to wilfully obstruct or interfere with certain members of the court in the execution of his or her powers or duties.
	Resource Management Act 1991, s 282 Power to commit for contempt	A person may be detained and imprisoned or fined for wilfully insulting, assaulting, threatening or intimidating a member of the court or wilfully interrupting the proceedings or otherwise misbehaving or wilfully and without lawful excuse disobeying an order of the court.
	Trans-Tasman Proceedings Act 2010, s 50 Contempt of Australian courts or tribunals	A person who is at a place in New Zealand from which they are appearing remotely to a proceeding before an Australian court/tribunal commits an offence if they assault certain members of the court/tribunal or if they threaten, intimidate or wilfully insult other certain members or if they wilfully interrupt or obstruct the proceedings or if they wilfully and without lawful excuse disobey any order or direction of the Australian court/tribunal during the proceeding.
<b>Contempt by counsel</b>	Armed Forces Discipline Act 1971, s 150G Contempt by counsel	Counsel appearing at a military court or tribunal will commit contempt if the same action would be contempt before the High Court. Counsel also commits a contempt if he or she perseveres in the disobedience.
	Lawyers and Conveyancers Act 2006, s 29 Contempt of court	A person who purports to provide legal services who is not a lawyer is guilty of an offence and a contempt of court.
<b>Publication contempt</b>	Evidence Act 2006, s 86 Restriction of publication	It is contempt of court to print or publish any question or evidence in response to the question that the Judge has disallowed without the express permission of the Judge. It is also contempt to print or publish any question or evidence in response to the question that the Judge has informed a witness he or she does not have to answer and has ordered must not be published.