Contempt and the Australian Constitution – Part I

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This two-part article considers possible reforms to the law of contempt in light of a recent controversy regarding the courts' power in this regard. It considers the interrelation between a court's power to punish for contempt, reform, and the Australian Constitution. Part I of the article places the discussion in the context of the recent controversy, and outlines the existing Australian law dealing with contempt. It specifically considers the compatibility of two forms of contempt, known as scandalising the court and sub judice contempt, with the implied freedom of political communication, and the kind of proportionality analysis applied to that freedom. It finds there are real constitutional concerns over courts' current power to punish for scandalising the court, on the basis that it substantially interferes with freedom of communication about "political matters", and may not be necessary, suitable or adequate in its balance. It is most unlikely that the reputation of courts relies or is dependent on such a power, and public confidence in the judiciary is considered to be generally very strong. Attempts to censor "scandalous" communication about courts are likely to be counterproductive and unnecessary.

INTRODUCTION

Recent events have shone a spotlight on the ancient power of courts to punish others for contempt. These events, while unfortunate, cause one to question and critique the current status of the principle of contempt. Other jurisdictions have substantially modified the law of contempt; however, Australian law in this area has not been substantially reformed. There are questions concerning the scope of the law of contempt, given the implied freedom of political communication, and its future as part of Australian law. At the time of writing, two federal cross-benchers, Nick Xenophon and Derryn Hinch, have called for a Senate Inquiry into possible reform. *The Australian* reported in July that Michael Chesterman, who has chaired two major Law Reform Commission reports into the law of contempt, still supports calls for reform.[1]

This article addresses these issues over two parts. The first part considers the possible application of the implied freedom to comments about members of the judiciary, and to public comment about matters currently before the courts. The second considers whether legislative reform to the law of contempt is necessary or desirable, as has occurred elsewhere, and whether there would be any constitutional impediments to the Commonwealth legislating to reform the existing law of contempt. The recent developments are used as a catalyst for a more general discussion about the place of contempt in Australian law, and in particular how the *Constitution* impacts or could impact on the law in this area. The article focuses on the area of contempt broadly, with which the recent controversy was clearly concerned, rather than solely on that particular incident.

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[1] N Berkovic, "Pressure Grows for Probe into Laws on Contempt", *The Australian*, 21 July 2017, 26. The article quotes three law academics – Jeremy Gans, Mark Pearson and Jason Bosland – to the effect that reform of the law of contempt is required. Professor Gans is quoted as saying the current law does not strike the right balance; Professor Pearson is quoted as saying that the scandalising the court variety of contempt was out of place in a 21st century western democracy; and Jason Bosland said there were other, better ways in which courts could "look after themselves". See Australian Law Reform Commission (ALRC), *Contempt*, Report No 35 (1987).

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Recent Controversy

Controversy arose recently in relation to the hearing of an appeal against the sentence imposed on a terrorist by the Victorian Supreme Court. During the hearing of that appeal, the Victorian Chief Justice noted apparent discrepancies between sentencing practices of Victorian courts regarding that kind of offence, and that of New South Wales courts. Weinberg JA also noted such discrepancies. At this stage, the Court's decision on the appeal was reserved.

On 13 June 2017, *The Australian* published an article entitled "Victorian Judiciary Light on Terrorism", written by Simon Benson. Mr Benson quoted three federal government Ministers on the question of the sentencing practices of Victorian courts with respect to terrorism offenders. Federal Health Minister Greg Hunt was quoted as follows:

> Comments by senior members of the Victorian courts endorsing and embracing shorter sentences for terrorism offences are deeply concerning – deeply concerning … The Andrews Government should immediately reject such statements and sentiments … The State courts should not be places for ideological experiments in the face of global and local threats from Islamic extremism that has led to such tragic losses.

Assistant to the Treasurer Michael Sukkar was quoted as follows:

> It's the attitude of judges like these which has eroded any trust that remained in our legal system … Labor's continued appointment of hard-left activist judges has come back to bite Victorians. Our judiciary should focus more on victims and the safety of our society, and less on the rights of terrorists who don't respect our society, its laws or our people. This government can put up the best laws in the world but our efforts are undermined unless the courts use them for the purposes [for which] they were designed – as a penalty for acts of terrorism and a deterrent for those that might be planning them.

Human Services Minister Alan Tudge was quoted as claiming that the pendulum had swung in favour of the rights of convicted terrorists rather than public safety:

> Some of these judges are divorced from reality. We have a crisis on our hands with people who want to kill indiscriminately and yet some judges seem more concerned about terrorists than the safety of the community.

A statement by the Victorian Court of Appeal on 16 June 2017 indicated that the Court had serious concerns with the attributed statements in terms of possible contempt:

> Given that the court's decisions in both cases were pending, the court is concerned that the attributed statements were impermissible at law and improperly made in an attempt to influence the court in its decision or decisions. Further, the court is concerned that some of the statements purported to scandalise the court. That is by being calculated to improperly undermine public confidence in the administration of justice in this state in respect of the [appeals currently being heard].

The statement indicated the Court's concern that the statements made prima facie failed to respect the principle of separation of powers, breached the sub judice principle, and reflected a lack of proper understanding of the importance of the independence of the judiciary. A letter sent by the Judicial Registrar of the Victorian Court of Appeal to the federal Attorney-General, the publisher and editor of *The Australian* and the journalist required the parties' appearances before the Victorian Court.

A subsequent statement by the Victorian Court of Appeal on 23 June 2017 summarises the events that followed. The statement notes that, initially, the position of the Ministers was that they did not intend to undermine public confidence in the judiciary, or suggest the Court would not apply the law in deciding the matters before it, or to influence the Court. The statement notes that the Ministers expressed regret that their language could have been taken that way. At that stage no apology or retraction was forthcoming. The Court of Appeal's statement notes that, at an advanced stage of proceedings, the Commonwealth Solicitor-General apparently received instructions to withdraw some of the content of the Ministers' statements. The statement notes that again at this stage there was no apology. It then records that on 20 June the Judicial Registrar of the Court of Appeal received a letter from the legal representative of the Minister offering an apology to the Court. At a subsequent hearing on 23 June,

the Commonwealth Solicitor-General appeared before the Victorian Court of Appeal and made a full apology for, and retraction of, the statements made.

The statement of the Victorian Court of Appeal noted that they had taken the view that the statements made involved a serious breach of the sub judice rule, and that while the Ministers had apologised this was at a late stage of proceedings, after the controversy had attracted significant media attention. The Court indicated that, had the apology and retraction not been made, it would have referred the matter for prosecution for contempt of court, but that in the circumstances the Ministers had "sufficiently purged their contempt" and no further action would be taken.

As indicated above, this article uses these recent events as a current contemporary example of possible action based on scandalising the court and sub judice. The article is intended to be based on the relevant principles, what they are and what they should be, and how the *Constitution* interacts with them. It is not designed to be a commentary on the specific recent events.

Different Kinds of Contempt

There are various different categories of contempt of court, including physical conduct in or around the court precinct and failure to respect and abide by court orders. Important as they are, these examples of contempt are not further examined here. This article focuses on the two types of contempt potentially relevant to the recent events – namely, breach of the sub judice rule, and what is typically called "scandalising the court". It is necessary to outline the current Australian case law in relation to each of these categories of contempt. As a criminal matter, allegations of contempt must be proven by the use of admissible evidence at the level of beyond reasonable doubt.[2]

Scandalising the Court

That species of contempt known as "scandalising the court" is of ancient vintage. In a 1344 decision, De Northampton was apparently found guilty of this offence for writing a letter criticising judges of the King's Bench.[3] The 1765 decision in *R v Almon* is often cited as a pivotal decision establishing the existence of the jurisdiction.[4] A recent example where a person was found to have scandalised the court is *Tate v Duncan-Strelec*.[5]

The allegation that someone who has made critical comments about the judiciary, or individual judges, has scandalised the court has often been made. In such cases, as shown below, the court has noted important but conflicting values in play. Specifically, it has identified the freedom of speech inherent in any free and democratic society. In *Ambard v Attorney General for Trinidad and Tobago* Lord Atkin noted:

> The path of 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 exercising a right of criticism, and are not acting in malice or attempting to impair the

[2] *Consolidated Press Ltd v McRae* (1955) 93 CLR 325, 333 (Dixon CJ, Kitto and Taylor JJ).

[3] D Norris, "Scandalising the Court" (2001) 5 *The Judicial Review* 67, 67; P Londono, ATH Smith and Hon Justice Eady, *Arlidge, Eady and Smith on Contempt* (Thomson Reuters, 5th ed, 2017) 1–5.

[4] *R v Almon* (1765) 97 ER 94 (Wilmot J): "[I]t is an impeachment of [the monarch's] wisdom and goodness in the choice of his judges, and excites in the minds of the people a general dissatisfaction with all judicial determinations, and indisposes their minds to obey them; and whenever men's allegiance to the laws is so fundamentally shaken, it is the most fatal and most dangerous obstruction of justice." For some of the history around this case, see D Hay, "Contempt by Scandalising the Court: A Political History of the First Hundred Years" (1987) 25 *Osgoode Hall Law Journal* 431. The case was placed in its historical context, and its ongoing correctness doubted, in Londono, Smith and Eady, n 3, 5–233: "[T]his passage has been quoted frequently, but its reasoning derives from an age when judges were much less used to vigorous public debate. In the eighteenth century, the judiciary were much exercised by the proper controls that should be set upon the newly established press, and the tradition of the virulent seventeenth century pamphleteers was by no means dead. It is noteworthy that since Wilmot J's judgment was written there are relatively few examples of such proceedings." That species of contempt commonly known as scandalising the court, which would include the *Almon* case, was abolished by statute in the UK in 2013.

[5] *Tate v Duncan-Strelec* [2014] NSWSC 1125.

> 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]

Notably, the cases in which Australian courts have identified the importance of freedom of speech have largely predated the early 1990s, when the High Court accorded the principle of free speech – or more accurately the implied freedom of political communication – constitutional status. As a result, it is expected that, if anything, the protection that the Court would today accord freedom of communication would be even stronger than is evident in the cases to be reported presently. The Court has candidly noted the sometimes difficult balance between, on the one hand, the importance of freedom of speech in a democracy and, on the other, public confidence in the judiciary and legal system. Clearly both principles are of fundamental importance, and great difficulty arises where they clash. The High Court has been required to adjudicate on this in a number of cases.

Allegations that public comment on a member of the judiciary amounted to unlawfully "scandalising the court" arose early in the life of the High Court. In *The King v Nicholls*[7] the Court considered a newspaper article involving Higgins J. The article was entitled "A Modest Judge" and stated: "Mr Justice Higgins is, we believe, what is called a political judge, that is, he was appointed because he had well served a political party."

Griffith CJ for the Court found that, in cases involving allegedly scandalising the court, the test was whether the statements made were calculated to obstruct or interfere with the court of justice in the High Court or the due administration of the law by the Court.[8] Griffith CJ expressly disagreed with assertions that an imputation that a judge was not impartial was necessarily a contempt of court. He alluded to the public benefits that could accrue from public statements that a judge was not impartial, at least if it were true or reasonably arguable.[9]

The case of *Bell v Stewart*[10] concerned both of the kinds of contempt considered in this article, whereby a newspaper article commented adversely on a judge and their attitude towards continuing proceedings. The context was a suggestion in an industrial relations case that employees were deliberately "slowing down" at work. The article stated:

> Mr Justice Higgins is not satisfied that slowing down is practised in industry. (It referred to the fact that employers believed it was being practised, as did some unionists) … the lack of judicial knowledge of facts well known to the parties is not unknown in cases outside industrial matters, and although that court can take no cognisance of notorious facts, there is nothing in the law to forbid the public from feeling amused at this display of ignorance from the Bench … this detachment of the Arbitration Court from the facts of industrial life explains, in some measure, why industrial life is rapidly detaching itself from the Court.

The Court rejected an argument that this amounted to scandalising the court. Nothing resembling "false play" or injustice was being alleged. The comments were unlikely to sap or undermine the authority of the Court.[11] They would not forfeit the respect of the community.[12]

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[6] *Ambard v Attorney General for Trinidad and Tobago* [1936] AC 322, 335. See to like effect *R v Gray* [1900] 2 QB 36, 40 (Lord Russell CJ): "[J]udges and courts are alike open to criticism and if reasonable argument or expostulation is offered against any judicial act as contrary to law or the public good, no court could or would treat that as contempt of court." Also *R v Commissioner of Police; Ex p Blackburn (No 2)* [1968] 2 QB 150, 155: "it is the right of every man … in the press or over the broadcast, to make fair comment … on matters of public interest. Those who comment can deal faithfully with all that is done in a court of justice. They can say we are mistaken, and our decisions erroneous" (Lord Denning MR); "it is the inalienable right of everyone to comment fairly upon any matter of public importance. This right is one the pillars of individual liberty … which our courts have always unfailingly upheld" (Salmon LJ).

[7] *The King v Nicholls* (1911) 12 CLR 280.

[8] *The King v Nicholls* (1911) 12 CLR 280, 285–286.

[9] *The King v Nicholls* (1911) 12 CLR 280, 286.

[10] *Bell v Stewart* (1920) 28 CLR 419.

[11] *Bell v Stewart* (1920) 28 CLR 419, 425–426 (Knox CJ, Gavan Duffy and Starke JJ).

[12] *Bell v Stewart* (1920) 28 CLR 419, 426 (Isaacs and Rich JJ).

One of the few occasions where the Court found that contempt through scandalisation of the court had occurred was in *The King v Dunbabin*.[13] There a newspaper article stated:

> Some time ago the Assistant Treasurer complained of the manner in which the High Court knocked holes in the Federal laws. Those laws have certainly been perforated by the keen legal intelligences of the High Court Bench. One of the results of this game [a very expensive game for the taxpayers] is that the law which was relied upon to keep Australia white is in a state of suspended animation. A noted Czechoslovakian author … arrived in Australia recently, very much against the will of the Government, which considered that his literary excellence … did not entitle him to [come to Australia] … he was promptly put in gaol [upon arrival] under the Act, which gave the Government the right to keep undesirables out. Friends of the humble and oppressed tested the law, and to the horror of everybody except the Little Brothers of the Soviet and kindred intelligentsia, the High Court declared that Mr Kisch must be given his freedom.

The article stated that Parliament would now need to amend the law, but time would tell whether "the new Act pleases the High Court any better than the old, or whether the ingenuity of the five bewigged heads cannot discover another flaw". The article commented on a sales tax decision of the High Court, dismissing it as an example of "the High Court, with that keen, microscopic vision for splits in hairs which is the admiration of all laymen, discovered that [items were not taxable]". The article lamented that "if the High Court were given some real work to do, the Bench would not have time to argue for days on the exact length of the split in the hair, and the precise difference between Tweedledum and Tweedledee", before speculating that in future Parliament might wish to send its draft legislation over to the Court for an advisory opinion about the validity of proposed measures (which would be unconstitutional because the High Court does not render advisory opinions). The article stated that, as matters currently stood, the only way to determine whether a law was constitutionally valid was to "have a squad of King's Counsel arguing about it for a few weeks".

Rich J, with whom Dixon, Evatt and McTiernan JJ agreed, stated publications that tended to detract from the authority and influence of judicial determinations, or which were calculated to impair the people's confidence in court decisions by lowering the authority of the court or its judges, and which "excited misgivings as to the integrity, propriety and impartiality" brought to judicial office, could be treated as contempt.[14] This should be contrasted with "honest criticism based on rational grounds", which was permissible.[15] Here the article was a contempt, tending and intending to disparage the Court's authority and undermine public confidence in it. It made out the Court was an obstacle that might be removed. As Dixon J put it, the article charged the Court with a "wanton destruction of legislation" by use of "excessive legal ingenuity". Although judges would not likely be swayed by the content of the article, would-be litigants could have less confidence in the Court as a result.

The leading current decision in terms of contempt known as scandalising the court is *Gallagher v Durack*.[16] There the secretary of a trade union had been convicted and sentenced for contempt. The Full Federal Court had allowed his appeal against conviction. When asked by the media to comment on the Full Federal Court decision in his favour, Gallagher commented that he was pleased, and that he believed the actions of ordinary union members in walking off jobs and demonstrating was the main reason for the Court "changing its mind". The Federal Court then held him in contempt of court, and sentenced him to three months' imprisonment. A majority of the High Court (Gibbs CJ, Mason, Wilson and Brennan JJ; Murphy J dissenting) upheld his conviction.

The joint reasons noted the balancing of two important interests in such cases: freedom of speech; and public confidence in the administration of justice. Public confidence in the judiciary must not be

[13] *The King v Dunbabin* (1935) 53 CLR 434.

[14] *The King v Dunbabin* (1935) 53 CLR 434, 442.

[15] *The King v Dunbabin* (1935) 53 CLR 434, 442; Dixon J (at 448) agreed that criticism that was "fair and honest and … not directed at lowering the authority of the Court" was permissible. In *The King v Fletcher; Ex p Kisch* (1935) 52 CLR 248, 257, Evatt J said that attacks against judges or courts were considered to be punishable contempt only where the attacks were "unwarrantable" or calculated to interfere with the administration of justice.

[16] *Gallagher v Durack* (1983) 152 CLR 238.

shaken by baseless attacks on the integrity or impartiality of courts or judges. Usually the community's good sense was a sufficient safeguard against "scandalous disparagement" of a court or judge, but in rare cases, where the court was satisfied that in the interests of the "ordered and fearless administration of justice and where the attacks were unwarrantable", contempt charges were appropriate.[17] Gallagher had made an unwarranted and unsubstantiated allegation that the Court had been influenced by union activity. It was relevant that Gallagher was a high profile public figure holding an important trade union office.

Murphy J (dissenting) attacked the *Dunbabin* decision, stating it severely crimped the freedom of an individual to criticise or comment on the courts. Criticisms would have to be honest, based on rational grounds, fairly conducted and honestly directed to a legitimate public purpose.[18] They were liable to be held to be in contempt, although what they said had not been shown to have interfered with the due administration of justice. It had chilled public criticism of courts, and "the chill persisted for about four decades". Murphy J said that law regarding scandalising courts was too vague and general, and imposed "oppressive censorship". He said that robust public criticism of the courts was healthy for both the courts and the people. Murphy J concluded that the courts' ability to punish as contempt so-called scandalisation of the court was "very dangerous" and should be strictly confined.[19]

Finally, the High Court decision in *Nationwide News v Wills* should be noted.[20] The case is known as a constitutional law decision. It and its sister case, *Australian Capital Television Pty Ltd v State of New South Wales*,[21] are rightly regarded as landmark constitutional law cases, recognising for the first time an implied freedom of political communication, derived from the system of representative government established by the Australian *Constitution*, and in particular ss 7 and 24. The relevant question in *Nationwide News* was over the constitutionality of a statutory provision making it an offence, by writing or in speech, to use words calculated to bring a member of the Industrial Relations Commission into disrepute. It concerned an article referring to the

> corrupt and compliant 'judiciary' in the official Soviet-style Arbitration Commission. Local trade union soviets, with the benefit of monopoly powers conferred on them by the State and enforced by the corrupt labour 'judges' in many industries regulate the employment of each individual … so in Australia, as in Eastern Europe or [Russia] the ministry of labour controls on workers' right to work, enforced by pliant 'judges'.[22]

The case was decided by some justices on the basis of the implied freedom of political communication, and by other judges on the basis that the Commonwealth lacked a head of power to support the law. For these latter judges, in deciding whether or not the suggested head of power supported the law, it was relevant that the law trampled upon a fundamental freedom – namely, freedom of speech.

The Court in *Nationwide News* did not consider extensively the possible implications for that kind of contempt known as scandalising the court of the implied freedom of political communication. It can be forgiven for not doing so, given it was the first decision that heralded recognition of the freedom. The Court could not reasonably be expected to be aware of, and to explicate, all of the likely consequences of its decision, including (most relevantly here) for the law of contempt.

Notwithstanding this, some judges made comments of some relevance to current discussion. Mason CJ said that "scandalizing the court was a well-recognised form of criminal contempt" comprising acts or writing calculated to bring a court or judge into disrepute.[23] However, good faith criticism of

[17] *Gallagher v Durack* (1983) 152 CLR 238, 243.

[18] *Gallagher v Durack* (1983) 152 CLR 238, 248.

[19] *Gallagher v Durack* (1983) 152 CLR 238, 249.

[20] *Nationwide News v Wills* (1992) 177 CLR 1.

[21] *Australian Capital Television Pty Ltd v State of New South Wales* (1992) 177 CLR 106.

[22] *Nationwide News v Wills* (1992) 177 CLR 1, 96 (noted in the judgment of McHugh J).

[23] *Nationwide News v Wills* (1992) 177 CLR 1, 31–32.

courts or judges was not contempt.[24] A person acting without malice and not attempting to impair the administration of justice was immune from prosecution for contempt.[25] Again, the good sense of the community was normally an effective safeguard against scandalous disparagement of a court or judge.[26] Brennan J noted that fair criticism did not amount to contempt.[27] Four justices – Brennan, Deane, Toohey and Gaudron JJ – found that this provision forbidding statements that were calculated to bring a member of the Industrial Relations Commission into disrepute was invalid due to the implied freedom of political communication.[28] As indicated, other justices used the fact of the legislation's impact on freedom of speech in concluding it was not supported by a head of power.[29] The case involved criticism of a member of the Industrial Relations Commission, not a court, but some justices observed "obvious similarities" between the functions and qualifications of members of the Commission and judges. Members of the Commission were required to act judicially.[30] Deane and Toohey JJ reflected on the importance and value of well-founded and relevant criticism of public figures, in relation to the implied freedom of political communication.[31] (The interplay between the implied freedom of political communication and the law of contempt is considered further below.)

It should finally be noted that highly intemperate remarks were made about the High Court in the aftermath of its decision in *Wik Peoples v State of Queensland*.[32] The then Deputy Prime Minister accused the majority of the Court of unacceptable judicial activism, and called for the appointment of a "capital C" conservative to be appointed to the Court. Nationals Senate Leader Ron Boswell claimed the High Court had "plunged Australia into the abyss". Queensland Premier called defences of the High Court "pathetic and lamentable … what we've got are self-appointed kings and queens … the current High Court, across large parts of Australia, is increasingly being held in absolute and utter contempt". The Queensland Premier called the High Court collectively "a pack of historical dills", said the *Wik* decision was lunacy, and that Kirby J's "ranting and ravings" were an assault on the democratic process.[33] The Honourable Anthony Whealy noted that no contempt proceedings were brought in respect of these comments.[34]

Sub Judice Contempt

More common have been suggestions of sub judice contempt, where newspaper proprietors, television stations or other media outlets discuss a particular legal matter, often in criminal matters after the relevant person has been charged but prior to their trial.

The High Court has referred to the power of any superior court to "protect itself from any action tending to impair its capacity to administer impartial justice". It has been at pains to point out that the jurisdiction exists not to protect the reputation or standing of individual justices, but to preserve the right of an accused to a fair trial[35] and, more broadly, public confidence in the independence and impartiality

[24] *Nationwide News v Wills* (1992) 177 CLR 1, 32.

[25] *Nationwide News v Wills* (1992) 177 CLR 1, 32.

[26] *Nationwide News v Wills* (1992) 177 CLR 1, 33.

[27] *Nationwide News v Wills* (1992) 177 CLR 1, 39.

[28] *Nationwide News v Wills* (1992) 177 CLR 1, 53 (Brennan J), 78–80 (Deane and Toohey JJ), 95 (Gaudron J).

[29] *Nationwide News v Wills* (1992) 177 CLR 1, 34 (Mason CJ), 103 (McHugh J).

[30] *Nationwide News v Wills* (1992) 177 CLR 1, 78 (Deane and Gaudron JJ).

[31] *Nationwide News v Wills* (1992) 177 CLR 1, 78–79.

[32] *Wik Peoples v State of Queensland* (1996) 187 CLR 1.

[33] These various quotes appear in a learned article by former Justice of the Supreme Court of New South Wales and former Member of the New South Wales Court of Appeal: A Whealy, "Contempt: Some Contemporary Thoughts" (2008) 8 *The Judicial Review* 441, 464–466.

[34] Whealy, n 33, 467.

[35] *Packer v Peacock* (1912) 13 CLR 577, 581 (Griffith CJ, for the Court); *Bell v Stewart* (1920) 28 CLR 419, 425 (Knox CJ, Gavan, Duffy and Starke JJ), 428 (Isaacs and Rich JJ).

of Australia's legal system.[36] In *Packer v Peacock*,[37] the Court distinguished between "bare facts" and "alleged facts" or matters that related to testimony and/or those that are in dispute. The media would have greater latitude to report on the former than the latter.

The Court has said that it is not the theoretical possibility but the practical likelihood that publication of the material before proceedings will influence the Court's processes.[38] This could be through influencing jurors[39] or witnesses. It is possible,[40] though unlikely,[41] that it might influence judges. The intention of the person making the publication is not decisive; a person can be in contempt under the sub judice rule because of the tendency of what they did to compromise the course of justice, though they did not intend to do so.[42] In this sense, criminal contempt is unusual, contemplating a criminal act punishable by jail time, in the absence of proof of intent.[43] However, evidence of intent or otherwise may be relevant in the Court's assessment of whether there is a punishable contempt and, if so, whether a jail term is appropriate.[44]

The leading sub judice case of *Hinch v Attorney-General (Vic)*[45] involved the highly charged area of child sexual abuse. The day after a Catholic priest had been charged with numerous sexual offences against children, Derryn Hinch broadcasted that the accused had been charged with numerous sexual offences against children, and been convicted of some of them. He noted the priest had been director of a youth foundation providing camps for children, and asked how it was that a convicted sex offender could be placed in such a position. Mr Hinch and the radio station that broadcasted his statements were charged with contempt. Mr Hinch was jailed and both he and the radio station fined. Their appeal to the High Court failed.

Mason CJ noted that, while Mr Hinch spoke of matters of great importance and may have raised legitimate concerns regarding the employment of the accused in such a position, it did not override the fundamental right of any accused to a fair trial. Mason CJ noted that in assessing whether pre-trial publicity amounted to contempt, the question of whether it was central, or merely peripheral, to the matters in dispute was important. Here, the matters went directly to the question of guilt or innocence. The Court had generally taken a very dim view of the publication by broadcasters of an accused's past criminal record. It was not generally admissible evidence, because of its possibly highly prejudicial impact on the trial. This reasoning was equally applicable to questions of contempt by broadcasters in relation to publication of such material.[46]

The court noted that in assessing whether pre-trial publicity is likely to impact on the administration of justice and the accused's right to a fair trial, the time gap between that publicity and the actual trial

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[36] *Victoria v Australian Building Construction Employees and Builders Labourers' Federation* (1982) 152 CLR 25, 136 (Wilson J), 167 (Brennan J).

[37] *Packer v Peacock* (1912) 13 CLR 577.

[38] *John Fairfax and Sons Pty Ltd v McRae* (1955) 93 CLR 351, 370 (Dixon CJ, Fullagar, Kitto and Taylor JJ).

[39] In *Victoria v Australian Building Construction Employees' and Builders Labourers' Federation* (1982) 152 CLR 25, Mason J said a relevant factor was whether the matter was to be heard by a jury (in which case, the risk of a contempt finding is greater) or a judge or judges; see to like effect *Attorney-General v Times Newspapers Ltd* [1974] AC 273, 310 (Lord Diplock).

[40] *Bell v Stewart* (1920) 28 CLR 419, 433 (Isaacs and Rich JJ): "[A] judge is only human, and may, particularly in the position of an arbitration judge, even unconsciously, be affected by public statements as to alleged 'notorious facts'."

[41] *Victoria v Australian Building Construction Employees' and Builders Labourers' Federation* (1982) 152 CLR 25, 58 (Gibbs CJ), 101 (Mason J).

[42] *Consolidated Press Ltd v McRae* (1955) 93 CLR 325, 341 (McTiernan J); *Victoria v Australian Building Construction Employees' and Builders Labourers' Federation* (1982) 152 CLR 25, 56 (Gibbs CJ).

[43] "Proceedings for contempt of court are proceedings for a criminal offence. It might be thought therefore that such proceedings cannot succeed unless they establish an intention on the part of the person charged to interfere in the administration of justice. But the weight of authority is now firmly against that view": *Hinch v Attorney-General (Vic)* (1987) 164 CLR 15, 69 (Toohey J).

[44] *John Fairfax and Sons Pty Ltd v McRae* (1955) 93 CLR 351, 371 (Dixon CJ, Fullagar, Kitto and Taylor JJ).

[45] *Hinch v Attorney-General (Vic)* (1987) 164 CLR 1.

[46] *Hinch v Attorney-General (Vic)* (1987) 164 CLR 1, 28; similarly Wilson J (at 37).

was relevant.[47] Specifically, the longer the gap between the two, the less likely that the publication will amount to a contempt.

The nature of the proceedings is also relevant. Deane J found that in the criminal law sphere it was more likely that pre-proceeding publication would be found to be a contempt. This was because in non-criminal cases the public interest in the free discussion of current affairs was likely to be weighted more heavily than in the criminal context. It was much more difficult to justify such disclosure in the criminal context. He noted that "criminal guilt or innocence should not turn upon an essentially discretionary judgment of the comparative claims of competing public interests".[48]

> The right to a fair and unprejudiced trial is an essential safeguard of the liberty of the individual under the law. The ability of a society to provide a fair and unprejudiced trial is an indispensable basis of any acceptable justification of the restraints and penalties of the criminal law. Indeed, it is a touchstone of the existence of the rule of law. It is difficult, if not impossible, to envisage any situation in which countervailing public interest considerations could outweigh the detriment to the due administration of justice involved in public prejudgment by the mass media of the guilt of a person awaiting trial.[49]

Having summarised the existing Australian law regarding two main forms of contempt, both of which were arguably raised in the recent controversy, the article now turns to a consideration of what, if any, influence the Australian *Constitution* might have in assessing the true contours of a court's ability to punish for contempt.

The Implied Freedom of Political Communication

Commencing in the early 1990s, the High Court in a series of decisions discerned that the Australian *Constitution* contemplates a system of representative government. This is particularly sourced in ss 7 and 24 of the *Constitution*. The High Court found that essential to the proper workings of the system of representative government, or representative democracy, which the *Constitution* contemplates, is the freedom to communicate about political matters.[50] Obviously, the value and importance of free speech has been recognised for a long time, with the likes of John Stuart Mill providing the classic philosophical foundation.[51] The High Court found that this was a two-way freedom – citizens having a right to access, and to contribute to, political debate and discussion of political matters. The freedom was negative in nature, providing a defence to a law impinging upon the freedom, rather than a source of positive rights. The freedom includes verbal and non-verbal communication.[52] It has been expanded to discussion of State political matters, as well as federal political matters, to the extent there is a clear difference.[53]

The law to which it applies has usually been statutory in nature; however, it has also been applied to the common law. Where the constitutional freedom is inconsistent with the common law, the common law must yield to and be moulded by the constitutional freedom.[54] This is of importance here, given that the law of contempt is part of the common law.[55] Specifically in *Lange v Australian Broadcasting Corporation*,[56] the Court considered that aspects of the common law of defamation were at odds with the constitutional implied freedom of political communication. A unanimous Court found:

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[47] *Hinch v Attorney-General (Vic)* (1987) 164 CLR 1, 44 (Wilson J), 71–72 (Toohey J).

[48] *Hinch v Attorney-General (Vic)* (1987) 164 CLR 1, 52.

[49] *Hinch v Attorney-General (Vic)* (1987) 164 CLR 1, 58–59.

[50] *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106.

[51] JS Mill, *Utilitarianism, On Liberty, Considerations on Representative Government* (Everyman Publishing, 1910).

[52] *Levy v State of Victoria* (1997) 189 CLR 579.

[53] *Unions NSW v New South Wales* (2013) 252 CLR 530.

[54] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

[55] E Campbell, "Contempt of Parliament and the Implied Freedom of Political Communication" (1999) 10 PLR 196, 208: "[T]he law relating to contempt of court is still largely law developed by the courts themselves but, like the common law of defamation, it must now conform with the Federal *Constitution*."

[56] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

> In Australia the common law rule of defamation must conform to the requirements of the *Constitution* … at least by 1992 the constitutional implication precluded an unqualified application in Australia of the English common law of defamation in so far as it continued to provide no defence for the mistaken publication of defamatory matter concerning government and political matters to a wide audience.[57]

Like most freedoms, the implied freedom of political communication is not absolute in nature. It is fair to say that the High Court's approach to the implied freedom has been adapted over the years since it was first recognised. Until recently, the test was taken from the High Court decision in *Lange*, as slightly modified by the Court in *Coleman v Power*. The test comprised two limbs:

1. Whether the law effectively burdened freedom of communication about government or political matters in its terms, operation or effect.
2. If so, whether the law was reasonably appropriate and adapted to serve a legitimate end in a manner compatible with the maintenance of the constitutionally prescribed system of representative and responsible government.[58]

If the answer to the first question was "yes" and the answer to the second was "no, the law was invalid.

It should be acknowledged that some applications of the freedom have included quite intemperate language. As Kirby J famously noted in the *Coleman* case, the implied freedom

> does not protect only the whispered civilities of intellectual discourse … one might wish for more rationality, less superficiality, diminished invective and increased logic and persuasion in political discourse. But those of that view must find another homeland … Australian politics has regularly included insult and emotion, calumny and invective, in its armoury of persuasion. They are part and parcel of the struggle of ideas.[59]

Further, while the precise meaning of "political" in terms of "political communication" remains open to conjecture, the general sense is of its use in a broad sense. It could, for example, include comments on alleged corruption of police, as members of the executive branch of government.[60] The High Court found in *Hogan v Hinch* that a provision that authorised a court to order the suppression of details of a person who had given evidence was a law that burdened, or at least could burden, the freedom of political communication.[61]

Most recently in *McCloy v New South Wales*, four members of the Court adopted a three-stage test:[62]

1. whether the law effectively burdens freedom of communication about government or political matters in terms, operation or effect;
2. whether the purpose of the law and the means adopted to achieve it are legitimate, being compatible with the maintenance of the constitutionally prescribed system of representative government (known as compatibility testing); and

[57] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 556 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).

[58] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 567–568 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ), as slightly modified in *Coleman v Power* (2004) 220 CLR 1, 50 (McHugh J; with whom Gummow and Hayne JJ (at 77–78) and Kirby J (at 82) agreed).

[59] *Coleman v Power* (2004) 220 CLR 1, 91; see similarly French CJ in *Monis v The Queen* (2013) 249 CLR 92, 131: "reasonable persons would accept that unreasonable, strident, hurtful and highly offensive communications fall within the range of what occurs in what is sometimes termed 'robust' debate", before concluding that communication to the families of dead soldiers about the futility of war was a political communication.

[60] *Coleman v Power* (2004) 220 CLR 1.

[61] *Hogan v Hinch* (2011) 243 CLR 506, 544 (French CJ), 555 (Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ).

[62] *McCloy v New South Wales* (2015) 89 ALJR 857, 862 (French CJ, Kiefel, Bell and Keane JJ); note that the three other justices in this case (Gageler, Nettle and Gordon JJ) continued to apply the two-limbed *Lange* test. French CJ has since left the court; it is not known at present which of the approaches to the implied freedom is favoured by Edelman J.

3. whether the law is reasonably appropriate and adapted to achieve that legitimate objective (proportionality testing).

The proportionality test considers aspects such as suitability, necessity and adequacy of balance. A law will be suitable where it has a rational connection to its purpose. It will be necessary if there is no obvious and compelling alternative, reasonably practical method of achieving the same purpose with a less restrictive effect on the freedom. It may be adequate in its balance upon consideration of the importance of the objective furthered by the restrictive measure, and the extent to which it impinges upon the freedom. If the answer to the first question is yes, and the answer to either the second or third is "no", the law is constitutionally invalid.

The *Nationwide News* case,[63] noted above, was the first case in which the implied freedom of political communication was discerned by the High Court. Coincidentally, the case involved a statute making it unlawful for a person to use words or writings in a manner calculated to bring a member of the Industrial Relations Commission (equated by the High Court to a court) into disrepute. All members of the High Court found that the legislation was invalid.[64] As indicated above, four justices did so based on the implied freedom of political communication. In conducting the balancing exercise, which the test at the time required and is still required under the *McCloy* approach, Brennan J found the provision went much further than was necessary to protect the legitimate interest underlying the regulation (proper protection of reputation). It went too far because it made no exception for criticism that was fair and reasonable. It was a simple blanket ban on discussion of an important agency of social regulation. It stifled discussion about an institution that was essential to expose defects in, and maintain the integrity of, an institution with significant power to affect the lives of Australians.[65] Deane and Toohey JJ found that suppression of "well-founded and relevant" criticism of legislative, executive or judicial arms of government or of the official conduct or fitness for office of any who comprise them could never be in the public interest. An essential constraint on the abuse of government power was the ability of individuals to criticise the arms of government and those who staff them.[66] For similar reasons, Gaudron J found that the law was offensive to the implied freedom.

The High Court has generally been reluctant to precisely define what is "political" in terms of the communication protected by the constitutional freedom. However, French CJ for instance has indicated that the concept is a broad one. In *Hogan*,[67] French CJ said that the concept was not limited to matters concerning the current functioning of government; it arguably included "social and economic features of Australian society" because they were potentially within the purview of government.[68] Discussion of religion is a political communication,[69] as is discussion of possible police corruption,[70] a protest against existing government legislation[71] and criticism of politicians.[72]

The extent to which current Australian contempt law is compatible with the implied freedom of political communication is now considered.

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[63] *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1.

[64] Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ.

[65] *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 53.

[66] *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 79.

[67] *Hogan v Hinch* (2011) 243 CLR 506.

[68] *Hogan v Hinch* (2011) 243 CLR 506, 544.

[69] *Attorney-General (SA) v Adelaide City Corporation* (2013) 249 CLR 1.

[70] *Coleman v Power* (2004) 220 CLR 1.

[71] *Levy v Victoria* (1997) 189 CLR 579.

[72] *Theophanous v Herald and Weekly Times Ltd* (1994) 182 CLR 104; *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211.

Scandalising the Court

Inevitably, questions will arise as to the continuing applicability of the existing common law permitting judges to punish as contempt what is said to amount to "scandalising the court", given that a majority of the Court in the *Nationwide News* decision invalidated a statutory equivalent as being inconsistent with the implied freedom. Clearly, that decision related to members of the Industrial Relations Commission rather than "courts" per se;[73] however, members of the High Court in that case equated the Commission with a court. Though the question of the application of the implied freedom to judicial power to try and punish for contempt remains technically moot, *Nationwide News* suggests that the freedom would be applicable to the exercise of such powers. This is the conclusion reached by Campbell,[74] and by Campbell and Lee.[75] Further, it is known that the common law must be moulded to satisfy the requirements of the *Constitution*.

There can be little doubt that in relation to the common law that permits judges to punish for contempt those the court concludes have "scandalised the court", the law burdens the freedom of communication about government or political matters in terms, operation or effect. Many of the cases have involved criticism of judges or the court more generally. Whatever may be said about the contents of that communication, it was clearly a communication about a "government or political matter". It is so, because governments appoint the judiciary, so comments about members of the judiciary must by definition be communication about a government matter. In effect, it is a communication concerning the government decision to appoint particular individuals to the court. Another way in which the requirement of "government or political matter" may be complied with is that, again, the criticisms are often about judicial decisions. These decisions will often involve political questions. The High Court is often in the thick of Australian politics and political questions. Books have been devoted to the topic.[76] Campbell noted that "criticisms of courts, or individual judges may … be highly political".[77] In another context, Lord Simon referred to the public having a "permanent interest in the general administration of justice", and a "paramount interest … in hearing unhampered debate on whether the law, procedure and institutions which it had [sic] ordained have operated satisfactorily or call for modification".[78]

Further, where the case involves interpretation of statute law, that statute has obviously been passed by Parliament, so discussion about a decision concerning the statute is really a discussion about a political matter. The prime objective of Parliament is to pass statutes. Even when the case concerns purely the common law, the common law is a creature of judges, who are appointed by governments. And Parliament can alter the common law if it is working in an unsatisfactory way, apart from questions of constitutional interpretation. In sum, regardless of whether the discussion concerns criticism of particular judges or the judiciary collectively, or criticises a decision they have made, it is submitted that the discussion is political in nature. And it would logically follow that the law of contempt that permits a court to punish someone who is said to have "scandalised the court" is a burden on that freedom.

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[73] Campbell, n 55, 208: "[T]o date the court has not had occasion to consider whether judicial powers are inhibited by the protected freedom. Those powers include the power to try and punish for contempt of court."

[74] Campbell, n 55, 208: "[T]he laws under which publishers of such commentaries and criticisms [of courts, judges or decisions] may be punished for contempt of court may well have to be revised in the light of the constitutionally protected freedom [of political communication]." Compare O Litaba, "Does the Offence of Contempt by Scandalising the Court have a Valid Place in the Law of Modern Day Australia?" (2003) 8 *Deakin Law Review* 113, 144: "[T]he High Court might also take the view that, the contempt power being sui generis, and based on inherent powers under Chapter III, it is not appropriate to constrain such power by implications drawn from other parts of the *Constitution.*"

[75] "[T]he freedom of political communication which the High Court of Australia has found to be implied in the federal Constitution, not only inhibits the legislative power to restrict freedom of expression, but it also constrains the power of the courts in relation to what they may legitimately regard as contemptuous criticism of their activities": E Campbell and HP Lee, *The Australian Judiciary* (Cambridge University Press, 2001) 183.

[76] R Dixon and G Williams (eds), *The High Court, the Constitution and Australian Politics* (Cambridge University Press, 2015).

[77] Campbell, n 55, 208.

[78] *Attorney-General v Times Newspapers Ltd* [1974] AC 303, 320.

The next question would be whether the laws are targeted to achieve a legitimate end, compatible with representative and responsible government. Both the *Lange* test and the *McCloy* test ask this question.

Clearly the laws are aimed at a legitimate end. Public confidence in the judiciary and the due administration of justice is imperative. Actions that would undermine the authority of the court must be carefully scrutinised.

On the other hand, it is harder to argue the measures are compatible with representative government. The High Court itself said in *Nationwide News* and *Australian Capital Television Pty Ltd v Commonwealth*[79] that representative government required the free flow of information and ideas; that people had a right to receive views and opinions of others, and the right to express their own views; and that this was essential to the kind of representative government and/or representative democracy envisaged by the founding fathers. The High Court in this conversation distinguished between laws that impact political communication directly, and those that do so indirectly.[80] A law that prohibits an individual from expressing opinions that are said to scandalise the court is an example of the former variety. The High Court has said that laws of the former variety are more difficult to justify than laws of the latter variety. Mason CJ said there would have to be "compelling justification" for them. Important as public confidence in the judiciary is, it is difficult to argue that it is a "compelling justification" for preventing an individual or organisation from expressing their or its view on particular judges, courts or decisions.

One might hope that individuals or organisations might show more respect for the court, or express themselves in more measured tones, as such comments may well be personally offensive and/or hurtful. However, this is arguably the price we pay for democracy. Sometimes people will say things we do not agree with. They may be ignorant. They may be hurtful. However, we pay this price because we know that the alternative – ie government censorship of what can or cannot be said (through the legislature, executive or judiciary) – is worse. It is submitted that the comments in any of the cases discussed above were unlikely to cause general distrust in the judiciary, or to undermine public confidence in the long term. As the sources of media have exponentially grown over the years, most pointedly the growth of the internet as a source of information, and the role of newspapers and even television minimised, if anything it has become harder and harder to say that a particular newspaper column or editorial, or particular television program, has undermined, or has a real, practical tendency to undermine, public confidence in the judiciary. The source of news has become so widely dispersed. This, in itself, might be said to undermine the rationale for the scandalising the court doctrine.[81] Newspapers and television stations do not enjoy the readership and viewership, and hence power, that they once did. And, as Whealy notes, "perhaps we have reached the point in our society where the authority of the courts is so firmly established that most criticism, however strident, is not likely to adversely affect the administration of justice".[82] It may also be said that any court that requires court orders to maintain public confidence is already in peril of losing it. However, there is no suggestion Australian courts are in this situation.

In sum, there are real doubts as to whether the common law offence of scandalising the court would survive this kind of "compatibility testing" in the second limb of the *Lange* test and second limb of *McCloy*.

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[79] *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106.

[80] *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 143 (Mason CJ), 234–235 (McHugh J).

[81] Contrary to the author's view, Bergin CJ in Eq in *Tate v Duncan-Strelec* [2014] NSWSC 1125, [198] claimed the growth of the internet as a source of information "does not mean that the court should be less vigilant" in protecting its reputation.

[82] Whealy, n 33, 467; See *R v Commissioner of Police of the Metropolis; Ex p Blackburn (No 2)* [1968] 2 QB 150, 155 (Salmon LJ): "[T]he authority and reputation of our courts are not so frail that their judgments need to be shielded from criticism." Also *R v Kopyto* (1987) 62 OR (2d) 449: "the courts are not fragile flowers that will wither in the hot heat of controversy ... (courts) are well regarded in the community because they merit respect. They need not fear criticism" (Cory J); "courts and judges should be subject to criticism, no matter how extreme; they will function better as a result of it" (Houlden JA); and "our judiciary and courts are strong enough to withstand criticism after a case has been decided no matter how outrageous or scurrilous that criticism may be" (Goodman JA).

On the assumption that the *McCloy* approach will continue to be applied in future, a further question in applying the implied freedom of political communication involves "proportionality testing". In other words, it asks whether the challenged law is reasonably appropriate and adapted to achieving the legitimate end. It must be suitable, necessary and adequate in its balance. Certainly, a law punishing an offence of scandalising the court is suitable to the purpose of preserving courts' reputation and confidence.

However, a more difficult consideration arises when it is asked whether the law is necessary or, in other words, whether there is any obvious and compelling alternative, practical means of achieving the same purpose with a less restrictive effect on the freedom. Of course, there are many ways in which public confidence in the judiciary might be achieved. Many of them do not involve punishing criticism of a judge, a court or a decision. Some would even argue that robust public discussion of judgments actually increases public confidence in the judiciary. The High Court has noted that the good sense of the community is usually a sufficient safeguard against extreme comments about judges, courts or decisions. It is considered unlikely that a court would be swayed in future action by public criticism of past decisions.[83] In sum, it is doubtful that a law punishing contempt for scandalising the court is "necessary".

Further difficulties arise with the question of whether the law is "adequate in its balance" having regard to the importance of the purpose of the restrictive measure and the extent of restriction it imposes on the freedom. Again, preserving public confidence in the judiciary is important, but a restriction on the ability of individuals or organisations to criticise judges, courts or decisions is a severe restriction on the freedom to discuss the judicial system. When the extent to which the power to punish as contempt scandalising the court will actually do much to further public confidence in the judiciary is open to serious question, the impact on freedom of speech seems more stark. As noted above, Whealy indicated that public confidence in the judiciary is not likely to be shaken by strident criticism. Again, the fact that the good sense of the community is usually sufficient "antidote" to extreme comments about judges, courts or decisions is noted. And again, it is concluded that the law permitting courts to punish as contempt what it considers to be "scandalising the court" is not adequate in its balance, given the small contribution it would make to retaining public confidence in the judiciary, and the significant intrusion it makes on freedom of speech.

It is also relevant to note that the proceedings for contempt are unusual, in that the judges actually bring on the hearing rather than an independent prosecutor. The court is apparently not limited in the penalties it may impose for breach. This tends to reinforce the argument that the law of contempt, in terms of scandalising the court, is not adequate in its balance, with potentially extremely harsh penalties after an unorthodox hearing process, given the benefit (if any) of having such a law.

The author therefore concludes that the common law offence of contempt, based on scandalising the court, is no longer good law in Australia, because it is incompatible with the implied freedom of political communication.

Having reached this conclusion, the author was somewhat fortified by reading the decision of the Ontario Court of Appeal in *R v Kopyto*.[84] Canada is a useful comparison jurisdiction here. Its Charter contains protection of freedom of expression, but this freedom is not absolute as it is subject to limits as can be supported by the government where the means chosen are reasonable and demonstrably justified. The Canadians have adopted proportionality analysis here. Specifically, measures adopted must be carefully designed to achieve the legitimate objective, must be minimally invasive on the freedom, and there must be proportionality between the measures chosen and their objective. The analogies with the High Court's proportionality analysis approach to the implied freedom of political communication are obvious, making the Canadian decision in *Kopyto* of particular interest.

The case concerned ill-considered remarks of a legal practitioner after he had lost a court case. He claimed the decision made a mockery of justice, that he had lost faith in the legal system, that courts were

[83] *Attorney-General v BBC* [1981] AC 303, 343 (Lord Salmon): "I have always been satisfied that no judge would be influenced in [their] judgment by what may be said by the media. If [they] were, [they] would not be fit to be a judge."

[84] *R v Kopyto*, 62 OR (2d) 449 (1987).

"warped in favour of protecting the police" and that they were too close to the police. He was charged with criminal contempt and was convicted at trial.

A majority of the Ontario Court of Appeal overturned his conviction. Cory J (then of the Ontario Court of Appeal, subsequently appointed to the Canadian Supreme Court) found that the common law offence of scandalising the court, at least as drawn at that time, was inconsistent with the Canadian Charter provision preserving freedom of expression. He indicated the only way in which an offence of scandalising the court could be compatible with the freedom of expression was if it were crafted much more narrowly, confined to cases where the speaker/writer intended or was reckless as to whether the statement would likely cause disrepute to the administration of justice, that the consequences flowing were extremely serious, and that they were imminent. Houlden J in the majority found no construction of a criminal contempt provision regarding scandalising the court could be consistent with freedom of expression. Goodman J found only conduct that presented a "real, significant, and imminent or present danger to the fair and effective administration of justice" could possibly form the basis of a successful criminal contempt prosecution, and the situation would have to reflect an "extreme combination of unusual circumstances".

Should the common law offence of contempt, based on scandalising the court, be retained in respect of comments that are "dishonest", "irrational", "unjustified" or not "in the public interest"? Scattered through the High Court judgments on scandalising the court, where in only a small number of cases was contempt found, are comments indicating a limit to the Court's tolerance of comments and criticism of judges, courts, or decisions. The actual words used vary, but they convey a common impression – that the words used have some "justification" and/or are "fair", "reasonable" etc. As indicated, most of these decisions were rendered at a time when the implied freedom of political communication in the Australian *Constitution* was not recognised as part of the law.

Now, it may be that the Court used concepts referred to above in these cases because it was analogising to some extent with the law of defamation, which tends to include concepts like "fair comment on a matter of public interest", "justification" etc. If this is in fact the case, the reasoning is problematic because the High Court has repeatedly emphasised that the jurisdiction does not exist to preserve individual reputations of judges, but to preserve public confidence in the due administration of justice. As a result, any analogies with defamation law and concepts, explicitly or implicitly, are inapt.

On a practical point, how can a court determine whether criticism of a judge or a court is "fair", "justified" or "reasonable"? This becomes very difficult. The author cannot but agree with the observation of Kirby J in *Coleman* that one might wish for increased civility in public discourse but must accept the reality that democracy can involve "insult and emotion, calumny and invective". These are "part and parcel of the struggle of ideas". The author also agrees with Goodman JA in *Kopyto* that lawful expression of opinion does not cease to have that character merely because it is expressed in terms that are crude, rude, or acerbic.[85] Now courts, as the third arm of government, are not, and should not, be immune. Often with criticism, this is the realm of opinion. How can a court practically determine whether an opinion is fair or reasonable, most especially when it is about itself, or at least another judge? Goodman JA in *Kopyto* rightly rejected any test based on the reasonableness of the statement made. The communication in dispute in *Nationwide News* referred to "a corrupt and compliant judiciary in the official Soviet-style Arbitration Commission".

As indicated, all members of the High Court declared the law purporting to make such communication illegal invalid. Four of them found it infringed the implied freedom of political communication. None of the judges discussed whether the comments were "fair", "rational" or "justified". They were correct not to do so, with respect, because of the insuperable difficulties in doing so. There is certainly the possibility that if a court were called upon to judge whether comments made about it, or one of its members, amounted to contempt, the general public would view this with suspicion. A perception of a conflict of

[85] See also Londono, Smith and Eady, n 3, 5–249: "The English courts came to recognise the difficulty in justifying the notion that the maintenance of public confidence in the administration of justice should depend on whether criticism is expressed in courteous and respectful terms."

interest could arise, or "Caesar judging Caesar". Some might think that judges were being "precious", and that no-one was or should be above criticism.[86] Ironically, in purporting to exercise a jurisdiction said to exist to preserve public confidence in the judiciary, the judiciary risks undermining public confidence in itself, by arguably exercising a jurisdiction likely to raise more concerns about the judiciary than it solves.[87] Black J of the US Supreme Court expressed this point with characteristic eloquence:

> The assumption that respect for the judiciary can be won by shielding judges from published criticism wrongly appraises the character of American public opinion. For it is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions. And an enforced silence, however limited, solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion and contempt, much more than it would enhance respect.[88]

Of course, a judge who believed they had been personally defamed would have the right to seek legal redress for that.[89] However, that is a separate question from the question of contempt for scandalising the court.

It should be noted for the sake of completeness that, in comparable overseas jurisdictions, the court's power to punish as contempt what is seen as "scandalising the court" has been abolished[90] or severely circumscribed.[91] There have been academic and practitioner calls for its abolition or strict confinement.[92] As discussed above, in *Kopyto* the Ontario Court of Appeal found the criminal law of contempt associated with scandalising the court, either in the form in which it was at that time or regardless of form, did not pass a proportionality analysis, in terms of its interference with freedom of expression. This case is considered highly relevant to the Australian position.

The American position is also worthy of some reflection. Critics will be quick to point out that the First Amendment is broader than the interpretation given to the implied freedom of political communication, at least to date. So much may be conceded. However, perhaps of most relevance has been the impact, if any, on public confidence in the judiciary of the virtual carte-blanche given to individuals to discuss judges, courts and court decisions. What impact has it had on public confidence in the judiciary? This is surely relevant to the kind of proportionality analysis Australia's High Court would take when/if the question arises.

The words of former Chief Justice of the Supreme Judicial Court of Massachusetts are considered pertinent. In an address in Australia, the former Chief Justice indicated:

> Even after six decades and more of very broad criticism of American judges and the administration of justice, the fact remains as Justice Stephen Breyer observed, that we live in an orderly society, in which

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[86] Whealy, n 33, 468: "[T]here is no doubt a genuine feeling throughout the community that judges and judicial decisions … are not above public scrutiny and public criticism. Judges have to accept, I think, that this is, generally speaking, a healthy sign in a democracy, even if some of the commentary is ill-informed."

[87] Litaba, n 74, 133: "[A]s in defamation cases, publicity may do more harm to reputation than the original statement and the defendant may use the proceedings as a public forum and focus for protest." *State v Mamabolo* [2001] (3) SA 409 (CC), [77] (Sachs J): "[T]he more the critics are suppressed, the greater the loss of prestige of the judiciary." M Marshall, "Dangerous Talk, Dangerous Silence: Free Speech, Judicial Independence and the Rule of Law" (2002) 24 *Sydney Law Review* 455.

[88] *Bridges v California*, 314 US 252, 270–271 (1941) (Black J, for Reed, Douglas, Murphy and Jackson JJ).

[89] K Gould, "When the Judiciary is Defamed: Restraint Policy Under Challenge" (2006) 80 ALJ 602.

[90] *Crimes and Courts Act 2013* (UK) s 33, following a recommendation to that effect by the Law Commission. It was described in 1899 in *McLeod v St Aubyn* [1899] AC 549, 561 as "practically obsolete" in England, noted by the High Court in *The King v Nicholls* (1911) 12 CLR 280, 285 (Griffiths CJ, for the Court).

[91] *R v Kopyto* (1987) 62 OR (2d) 449 (Ontario Court of Appeal) (only contempt where the speech posed a real danger to the administration of justice); *Bridges v California*, 314 US 252 (1941) (only contempt where the speech creates a "clear and present danger" to the administration of justice).

[92] J Ziegel, "Some Aspects of the Law of Contempt of Court in Canada, England and the United States" (1960) 6 *McGill Law Journal* 229, 262: "[T]he power to punish libels on the courts not connected with pending proceedings should be seriously reviewed and preferably abolished altogether, except perhaps in a very limited number of cases." G Schneebaum and S Lavi, "The Riddle of Sub Judice and the Modern Law of Contempt" (2015) 2(1) *Critical Analysis of Law* 173, 195: "[C]hallenging the court is perfectly legitimate once the legal process has been concluded."

> people follow the rulings of courts as a matter of course, and in which resistance to a valid court order is considered unacceptable behaviour which most people would not countenance … the American people trust that judges as a whole, and the judiciary as an institution, will perform their core constitutional role independently, with fairness and integrity. And paradoxical as it may seem … the American public's trust is the product of our citizens' nearly unbounded right to peer into every nook and cranny of the administration of justice, and to voice their opinions, if any timbre, about what they find.[93]

This seems to fortify the conclusion that the criminal contempt based on scandalising the court would not survive a proportionality analysis as part of the implied freedom of political communication. While the objective of maintaining public confidence in the judiciary and the due administration of justice is laudable, it is highly doubtful that the cost (limits on freedom of speech) is worth any payoff in terms of improved public confidence, in terms of balancing. Such a law is not necessary. In fact, it may even undermine public confidence in the judiciary.

Sub Judice Contempt

Again the common law of contempt, including the sub judice category, must be considered in terms of its consistency with the implied freedom of political communication. It is apparent that the law by which judges may punish an individual or organisation for sub judice contempt is, or will often be, a law that burdens communication about government or political matters. As noted above, legal disputes involve questions about interpretation of statutes (passed by legislatures) and common law (developed by judges, who are appointed by legislatures). The judiciary comprises the third arm of government. Discussion of pending case law is taken to involve discussion about political matters, such that a law prohibiting or regulating such discussion is a law that burdens communication about government or political matters.

In terms of the second limb of the *Lange* or the *McCloy* test, it must be asked whether the law exists for a legitimate purpose and uses means compatible with representative and responsible government. It has been shown above that the sub judice branch of contempt seeks to ensure that an individual has a fair trial, that their guilt or innocence is not pre-judged or they are judged by the court of public opinion. There can be fewer, if any, goals more laudable than that a legal system provide a fair trial for an individual. Material likely to be dealt with in terms of sub judice contempt is likely to be comment about a specific case that is currently before the courts. As such, though it may have some relation to representative government, in that it might touch upon existing legal principle, it is likely to make a much more marginal contribution to public debate, for example, as to the judiciary, the need for legal reform etc. As such, it is concluded that the sub judice rule exists for a legitimate purpose, and is compatible with representative and responsible government. In other words, under the *Lange* test the sub judice rule would survive as part of the law, not being incompatible with the implied freedom of political communication.

If the *McCloy* approach were taken, a proportionality analysis would be required, considering whether the sub judice rule were suitable, necessary and adequate in its balance. Clearly, the sub judice rule is suitable in terms of ensuring that an accused individual has a fair trial. In terms of necessity, and whether less restrictive means are available to achieve the same end and are compelling, of course there are other means to achieve a fair trial. However, it is well recognised that pre-trial publicity poses a serious threat to the ability of an individual to achieve a fair trial, and it is extremely difficult for courts to prevent a person from accessing media, given the range of outlets available (eg the internet etc). In terms of being "adequate in its balance", the right to a fair trial is central to the entire system of criminal justice.[94] Some judges have found that it has a constitutional basis.[95] A court asked to preside over a proceeding that is not fair may be acting contrary to the requirements of Ch III of the *Constitution*, because its institutional

[93] Marshall, n 87, 459–460.

[94] *Dietrich v The Queen* (1992) 177 CLR 292, 299 (Mason CJ, McHugh J).

[95] *Dietrich v The Queen* (1992) 177 CLR 292, 326 (Deane J), 362 (Gaudron J).

integrity would be impaired.[96] Public confidence in the judiciary would be compromised. In conclusion, if the *McCloy* test were applied, it is likely that the sub judice rule would be found valid, because it passes the compatibility and proportionality tests – it is aimed at a legitimate objective and compatible with representative government and democracy, and it is suitable, necessary and adequate in its balance.

Conclusion

Though the law of contempt is of long standing, it has been the subject of extensive reform elsewhere. Specifically, that species of contempt known as "scandalising the court" has been abolished in the UK, and severely curtailed in comparable jurisdictions. However, as recent cases demonstrate, this species remains alive and well in Australian law. The above discussion questioned the compatibility of this species of contempt with the now well-established implied freedom of political communication in the Australian *Constitution*. It found that scandalising the court is not compatible with that freedom, using either the *Lange* or the *McCloy* approaches to application of the freedom. It also found that that species of contempt known as sub judice contempt is more easily defensible as being suitable, necessary and adequate in its balance, and compatible with representative and responsible government, in that it seeks to uphold the fundamental principle of fair trial, something inherent in judicial processes, and on one view itself protected by the *Constitution*. The discussion in Part II considers specific proposals for statutory reform of the Australian law of contempt, and possible constitutional issues that might arise with respect to them.

[96] *South Australia v Totani* (2010) 243 CLR 1, 43 (French CJ); *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 252 CLR 38, 105 (Gageler J). Whether a court's inherent power over its own processes (likely including its contempt power with respect to sub judice comments) is constitutionally protected by Ch III is explored below. The novel question of a possible conflict between the implied freedom of political communication (perhaps permitting and protecting sub judice comment) and a court's inherent power over its own processes (including the power to punish for contempt), and how such conflict would or should be resolved, does not need to be answered here, because the sub judice rule would likely *not* be found incompatible with the implied freedom of political communication. Of course, if it was, or could be, incompatible with the implied freedom, the question of a conflict between the constitutional implied freedom and the constitutionally enshrined power of Ch III to preserve its own processes would have to be resolved here, which would be difficult.