Contempt and the media

A leading academic in English contempt law, Professor John Miller, advised media practitioners at two recent Communications Law Centre gatherings

Where do you draw the line when reporting cases before the courts? A swag of recent contempt judgments continues the traditionally strict approach, punishing the media for publishing prejudicial material even when the jury may not have heard it (e.g. *Laws/2UE*) or was not discharged *(Westfield).*

Since *Who Weekly* was fined for publishing photographs of a karaoke-ing Ivan Milat, there has been nervousness about media use of photographs of an accused. Variations in the recent coverage of the three men charged with politician John Newman's murder reflect conflicting views about what can and cannot be published.

At the lunch seminar, Professor John Miller, respected English academic and author of the text *Contempt of Court*, addressed media law specialists on vexing idiosyncrasies in Australian contempt law and comparative English law. At an evening seminar co-hosted by the CLC and Blake Dawson Waldron, he later delivered a paper on "Contempt of Court and the U.K. Human Rights Bill".

Contempt law follows a finely balanced line between allowing the media to freely inform the public what is going on in the court system, and protecting an accused person's right to a fair trial. The tendency of a publication to prejudice a fair trial can depend on the character of the material (e.g. a confession) and the circumstances of its publication (e.g. how long before a trial it is published).

Professor Miller explained how proposed U.K. legislation requires courts to take into account European Court of Human Rights judgements and Commission opinions. This was likely to tip the balance in favour of free expression.

This would be consistent with a recent English trend not to prosecute over prejudicial publicity, even where trials were aborted or stayed. In last year's *Attorney General v MGN*, the trial of the boyfriend of a soap star was stayed because of "unfair, outrageous and oppressive" media coverage, including mention of his previous convictions. In failing to find contempt, the court took into account that the man's colourful past was notorious, the publication was more than six months before trial and saturation media coverage made it hard to pin the additional risk to his fair trial on any single publication.

As few European Human Rights Convention countries have jury trials, the Convention position has not been fully explored, but Professor Miller thought that the right to a fair trial would prevail where there is *actual*, not just *potential* prejudice. This directly contrasts the Australian position: e.g. in the *Laws* case, no evidence was brought that the jury heard the offending broadcast, either first- or secondhand.

English and Convention positions on when journalists can be compelled to disclose sources were fairly similar.

While the effect of the European Convention on English contempt law was hard to predict, Professor Miller thought that freedom of expression would probably gain increasing emphasis. The price to pay for this might be an increasing reliance on U.S.-style techniques (such as jury sequestration) to ensure fair trials.

Audience discussion touched on a number of vexed questions.

A major problem for the media is the lack of channels for communication between the media and the justice system. Pre-publication decisions were made without full knowledge of issues in upcoming cases or the attitude which would be taken to publishing particular material.

On the other hand, prosecuting authorities perceived that the media were trying to push back boundaries to compete for stories. A suggestion that many contempts were reported to the authorities by other members of the media was explained by one practitioner as more a sign of frustration than an illustration of competitive behaviour.

Another issue was why judges don't more often direct juries to ignore a problematic news story, rather than aborting the trial. Restrictions on juror disclosure mean little is known about how juries reach their decisions. Professor Miller considered that juries should only be discharged in exceptional circumstances and it should be left to the appeal courts to determine if a verdict should be overturned.

There was discussion about identifying photographs, strict liability for contempt despite lack of intent, and the impact of the Internet as it becomes a more widely used news medium.

Many of these issues were aired more than 10 years ago in the Australian Law Reform Commission's report on contempt. There has been little contempt reform since, apart from the *Costs in Criminal Cases Bill* currently before NSW parliament. That legislation seeks to charge the media (but not others) for costs of trials aborted as a result of media contempt and has justifiably received strong criticism. The proposed legislation confines itself to further punishing the media and does nothing to clarify the difficulty and uncertainty in reporting crimes and justice.

Julie Eisenberg