The law and media contempt: what should it protect?

Professor Michael Chesterman, Australian Law Reform Commissioner,

examines the policy assumptions underlying the law of contempt and argues for reform based on a refocus of such policies.

The law of contempt has been with us for some 700 years. Being a creature of judge-made law it has never been prone to sudden and dramatic change. This will remain the case unless of course sudden and dramatic change occurs as a result of legislative action by one or more of the parliaments of Australia.

What is media contempt?

There is no precise definition of media contempt. But for the purposes of this paper, I will take it to mean conduct by a media corporation, or by some individual working in the media, which attracts criminal penalties because it falls within one or more of the following categories of contempt of court:

1. **Breach of the Sub Judice Doctrine** – publication of material which has a 'real and definite tendency', as a matter of 'practical reality', to 'prejudice or embarrass' current or forthcoming legal proceedings, whether by exerting influence on one or more of the participants in the proceedings (in particular, the jury or a witness) or merely be pre-judging the outcome of the proceedings without actually exerting any appreciable influence on a participant. Some important exceptions exist, notably for fair and accurate reports of legal or parliamentary proceedings and publications relating to general matters of "public interest". The most important sphere of operation of the sub judice doctrine is the criminal jury trial.
2. **Breach of Suppression Order or Injunction** – publishing material in breach of a court order prohibiting or restricting the reporting of proceedings (a "suppression order"), or in breach of an injunction which either specifically binds the person making the publication or has been granted to preserve the confidentiality of information.
3. **Scandalising the Court** – publishing material which tends to undermine public confidence in the administration of justice, because it unwarrantedly imputes bias or corrupt behaviour to a judge or a court, or suggests that a judge or court acts or has acted in deference to an outside pressure group or institution, or constitutes "scurrilous abuse" of a judge or court.
4. **Breaching Jury Secrecy** – publishing accounts of the deliberations of a jury in such a way as "to interfere with the administration of justice". In Victoria , this vague common law criterion as to whether or not the publication of jury deliberations constitutes contempt has been supplanted by legislation. Elsewhere it survives.
5. **Using Cameras or Sound Recording Equipment in Court** – unless the judge or magistrate orders otherwise, it is a contempt of court for a journalist or any other person to take films, photographs or video tapes of court proceedings, or to record any part of the proceedings on a tape recorder, even though there is no significant disruption of the proceedings.
6. **Refusal to Answer Questions** – any witness, including a journalist, who refuses to answer questions in the witness box for any reason and is not protected by privilege risks being punished by the court for contempt.

Impact on the freedom of the media

The combined impact of these various prohibitions and restrictions on freedom of expression is of course substantial. Not surprisingly, the laws of media contempt are routinely criticised by the media and others as being unacceptably vague and uncertain, unacceptably broad in their scope, grossly unsympathetic to the problems of the working journalist who must prepare copy for publication under considerable pressure from deadlines, unduly repressive and, overall, exerting a chilling effect on freedom of publication in Australia.

On the other hand, it is asserted by many judges, practising lawyers and others that the inroads made by contempt law upon freedom of the media are essential in our society to protect values that must rank higher than freedom of expression. Specifically, these are (1) the proper workings of the system of administration of justice by the courts, and (2) the rights and legitimate expectations of all those citizens who are involved in court proceedings, whether as prosecutors or defendants in criminal cases, litigants in civil proceedings or in other capacities.

It is the relative emphasis placed respectively on these two broad justifications for media contempt laws that I wish to address.

Orientation of contempt law

In order to understand media contempt properly, one must have some general familiarity with the broader concept of contempt in the law. Contempt of court is a broad-ranging doctrine of the common law, empowering judges to impose criminal penalties on any person whose conduct constitutes " interference with the administration of justice".

Three important categories of contempt of court which fall (generally speaking) outside the description " media contempt" are (1) disrupting court proceedings, by such conduct as casting insults or missiles at the presiding judge or magistrate or conducting political demonstrations in court ; (2) disobeying a court order (as is regrettably common in contested family law cases, in particular); and (3) secretly attempting to influence the outcome of a trial by such tactics as threats or offers of bribes directed at judges, jurors or witnesses.

This brief description of the general concept of contempt of court is enough to show that, at least in the rhetoric of contempt, it is the first of the two justifications for media contempt outlined earlier - protection of the administration of justice - that receives most emphasis. Except perhaps in the category of disobedience of court orders ("civil contempt"), the primary question asked by the courts when they are confronted with cases of alleged

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contempt is not " what individual or group of individuals might be prejudiced if we do not punish this conduct?" but rather " does this conduct constitute a threat to the administration of justice? Even in cases of disobedience of court orders - the latter question is never far from the judges ' lips. Disobedience of a court order, particularly when it is overt, defiant and calculated to attract publicity, is viewed as a wrong to the administration of justice and to the court which made the order, as well as a wrong to the individual in whose favour the order was made.

Reversing the order of priorities

So far as media contempt is concerned, any redraft of the laws of contempt in Australia should start on the basis that the order of importance of the two justifications which I have identified here. That is to say, the primary emphasis should be on the protection of the rights and legitimate expectations of defendants in criminal trials, other parties to legal proceedings, witnesses, jurors and indeed individual judges or magistrates, rather than protection of "the system".

There is no inevitable reason why the specific issues addressed by the laws of media contempt - influence on juries and other participants in trials, jury secrecy, protection of judicial reputation etc - should all be dealt with under special judge-made laws and procedures whose overriding concern is with "the system".

Media contempt and individual rights

What would happen to the prohibitions and restrictions imposed by the law of media contempt if this fundamental shift of emphasis in this branch of the law were to take place?

First, some important specific prohibitions would disappear, or at least would be in serious jeopardy. One is the "prejudgement principle", that is, the principle that it is a form of sub judice contempt to publish material which prejudices the outcome of current or forthcoming proceedings, even though there is no significant risk of influence upon any of the participants in those proceedings. The only argument in terms of individual rights which the House of Lords put forward in the **Sunday Times v United Kingdom** (1979) case to justify this principle was that prejudgement of the outcome of present proceedings might deter future would-be litigants from going to court. But no evidence was offered in support of this assertion, and frankly the argument that people who are prepared to invest the necessary money, time and nervous energy into litigating will, in any significant number of cases, be put off from going ahead with it solely because of the possibility of media prejudgement of the outcome is pretty unconvincing.

The primary ground of the decision in the Sunday Times case is in fact a form of judicial power-play against the media. It is an ideological pronouncement that the media must not be allowed to "usurp" the role of courts in society by purporting to reach decision on matters currently before the courts. It is precisely this type of argument that should in my view be usefully and properly rejected in favour of free speech considerations.

Another important branch of media contempt law which would at least be "at risk" is the law of scandalising. This is expressly designed to protect the system of administration of justice by punishing the public utterance of statements which might undermine public confidence in the way justice is administered.

If the primary role of media contempt were taken to be the protection of individual rights, there might still be a place for an offence akin to scandalising. This would be on the ground that judges have a legitimate interest in the protection of their individual reputations, rather than the imposition of criminal penalties under laws such as contempt or criminal libel.

The third aspect of media contempt which would be abolished or severely curtailed is the prohibition on using tape recorders in a courtroom. Modern recording equipment is so quiet and unobtrusive that this activity causes no real disruption of court proceedings. There seems little doubt that the continuing judicial reluctance to permit recording in the courtroom springs instead from fear that it will jeopardise the judge's control over the recording of proceedings and thereby create the potential for the public image of the courts to be tarnished in some way.

This is a weak contention, compared with the counter-argument that, as the judges themselves recognise on occasions, there is a clear public interest in having court proceedings recorded fairly and accurately by the media for the purposes of reporting them to the public.

There are however, other categories of media contempt in which an enhanced emphasis on protection of the rights of individuals rather than of the system of the administration of justice by the courts would do nothing to diminish, and might in fact reinforce, the case for imposing prohibitions and restrictions.

This is particularly the case with the sub judice doctrine, except for that part of it which I have called the "prejudgement principle". Although in the current law of contempt it is phrased as a rule designed to protect the integrity of legal proceedings, it is the rights and expectations of the parties to those proceedings - in particular, defendants in criminal trials - which are chiefly in jeopardy when media publicity exerts influence on a participant in the proceedings.

Criminal jury trials

In this particular context, I disagree with proponents of "free speech at all costs" when they seek to show that the fairness of criminal jury trials would not be put at risk by the removal of all restrictions on media coverage and commentary. The argument for this extreme proposition would seem to be based on two contentions: first, that nobody has ever proved conclusively that juries are influenced by media publicity when reaching their verdict, and secondly, that in any event defendants have ample opportunity, which they usually exploit, to generate counter-publicity. Both these arguments can be rebutted.

In relation to the first of them, a major function of the sub judice restrictions is to prevent the jury being informed, not of impressions or opinions of media writers (which may or may not count for too much in their minds), but of allegations or indeed incontrovertible facts which, out of concern to maintain the presumption of innocence and the criminal standard of proof, are normally withheld from the jury in the courtroom under the laws of evidence and criminal procedure. These include such material as an allegation that the defendant has confessed to the crime being charged or is of generally bad character, or particulars of his or her criminal record.

It is absurd to argue that such revelations of fact, or alleged fact, will not influence a juror - it is quite logical that they should influence any person making a decision as to guilt or innocence. Since our system of criminal trial conceals such material from the jury out of concern to preserve the presumption of innocence and the requirement that guilt be proved beyond reasonable doubt, there is ample justification, in terms of the rights of the accused rather than the "preservation of the integrity of proceedings", for sub judice restrictions to continue to apply to them.

So far as the second argument is con-

cerned, it is enough to say that it is based on the particular circumstances of a few, high-profile cases - cases such as Lionel Murphy and Lindy Chamberlain. While debates as to the legitimacy of sub judice restrictions should undoubtedly take account of such special cases, they should be primarily concerned with the much more normal situation where the defendant does not have significant access to the media and where it is all too easy for the media, relying on information supplied by police or prosecution authorities, to depict the circumstances of the case in a manner which is prejudicial to the defendant.

As the Ananda Marga case so strikingly demonstrated, and as has occurred all too often in the southern states of the U.S.A., such prejudice to the rights of defendants in a criminal trial can all too easily be reinforced by, and can reinforce, pre-existing community prejudices based on such factors as religion or race. The imbalance between prosecution and defence as regards influencing media attitudes in those circumstances is quite overwhelming.

Even with sub-judice restrictions applying, the defendant may still get a raw deal because the prosecution authorities do not want to be seen to be coming to the rescue of any person who the media have branded as "public enemy number one". With no sub-judice restrictions, the situation would be even worse.

On this basis, a sub-judice law seeking to prohibit the publication of material influencing a jury, a witness or even a judge or magistrate does not have to be justified in terms of preservation of the system of the administration of justice. It is entirely desirable out of concern for the rights of those individuals who are parties to the relevant legal proceedings – notably, defendants in criminal proceedings.

Some of the arguments just outlined apply also to another species of media contempt – that is, breaches of suppression orders made with a view to averting prejudice to trials. While I fully subscribe in general terms to the principle of "open justice", it is clear that inquests, committal proceedings, Royal Commissions and the like receive evidence in public which would not be admissible in a forthcoming or current trial, which if reported to the public, would be highly prejudicial to the defendant in such a trial. Limited inroads on the publication of such evidence by means of suppression orders seem a necessary qualification to the "open justice" principle.

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The Northern Territory government and aboriginal community take on Telecom

Paul Nicols examines a challenge to the decision by Telecom not to supply standard telephone services to remote Aboriginal communities in the Northern Territory

Telecom's failure to provide basic telephone services to remote Aboriginal communities in the Northern Territory has provided the basis for the first legal action under the recently enacted **Australian Telecommunications Corporation Act 1989.**

The Northern Territory Government, on behalf of a number of affected communities, has commenced legal proceedings in the Federal Court against Telecom based on the provisions of the new Act.

The affected communities currently rely on unreliable high frequency radio links.

Telecom plans to link the communities by means of the land-based Digital Radio Concentrator System. However, the timetable for completion of the introduction of DRCS has been delayed - first from 1990 to 1992 and now, possibly even further into the future.

Telecom has, however, offered to supply several of the remote communitites with a standard telephone service on an interim basis using the satellite-based Iterra service (normally marketed to mining companies and other business users) at normal commercial rates.

Telecom's Community Service Obligations

The Northern Territory Government's action is based principally on s.27 of the new Act which sets out the Community Service Obligations Telecom must address. These are:

"(1) Telecom shall supply a standard telephone service between places within Australia.

(2) The public switched telephone service shall be the standard telephone service.

(3) Telecom shall supply the standard telephone service as efficiently and economically as practicable.

(4) Telecom shall ensure:

(a) that, in view of the social importance of the standard telephone service, the service is reasonably accessible to all people in Australia on an equitable basis, wherever they reside or carry on business; and

(b) that the performance standards for the standard telephone service reasonably meet the social, industrial and commercial needs of the Australian community."

The communities argue that s.27 imposes an enforceable statutory duty on Telecom to supply a standard telephone service that is reasonably accessible to each of them on an equitable basis.

This proposition throws up at least three major issues for determination:

1. Can the community service obligations contained in s.27 of the new Act be enforced by the communities?
2. What is meant by "reasonably accessible"?
3. What is an "equitable basis"?

Section 6 of the Telecommunications Act 1975 (the old Act) provided as follows:

"(1) The Commission shall perform its functions in such a manner as will best meet the social, industrial and commercial needs of the Australian people for telecommunications services and shall, insofar as it is, in its opinion, reasonably practicable to do so, make its telecommunications services available throughout Australia for all people who reasonably require those services."

Sub-section 6(2) (b) provided that in performing these functions, Telecom should have regard to:

"(i) the desirability of improving and extending its telecommunication services in the light of developemtns in the field of communications;

(ii) the need to operate its services as

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(d) knowingly made false estimates of the costs and usages of the new satellite

(e) as a consultant and commentator, was biased and not independent

(f) did not carry out his economic researches properly

(g) as a consultant and commentator, has deliberately endeavoured to deceive and mislead the Government of Australia and others

After an abor ted first trial the second trial commenced before Justice Matthews on 6 March 1989. After 14 hearing days the jury retired to answer a number of specific questions of fact which included questions directed to the defences of truth and comment.

After more than five hours of deliberation the jury was unable to answer unanimously the questions put to them. Accordingly, to avoid the necessity of a third trial both counsel agreed to accept a majority general verdict – that is a simple verdict... that the defamation had been proved or not proved.

The jury returned a general verdict in favour of the plaintiff and awarded damages of $150,000.

Justice Matthews then heard legal argument on the defence of qualified privilege under s. 22 of the Defamation Act.

Section 22(1) of that Act provides:

"1. where in respect of matter published to any person

(a) the recipient has an interest or apparent interest in having information on some subject;

(b) the matter is published to the recipient in the course of giving to him information on that subject; and

(c) the conduct of the publisher in publishing that matter is reasonable in the circumstances.

There is a defence of qualified privilege for that publication."

In determining the application of s. 22 of the Act, it was conceded by Counsel for the plaintiff that the "interest" requirement of sub-sections 1(a) and (b) had been made out. The issue to be determined was whether the defendant's conduct in publishing the defamator y material was reasonable in the circumstances.

Truth

Justice Matthews considered the implications of the jury's verdict in relation to the defence of truth. As the whole thrust of the defendant's case on truth was to show that the study prepared by the plaintiff for the Australian Telecommunications Employees' Association was not only misleading and inaccurate but that it must have been deliberately so, the jury's verdict indicated that the plaintiff's assertions that the conclusions he reached in his study were honestly arrived at had been accepted and that the most serious imputations alleging dishonesty, deception, bias, not reputable as a consultant and commentator and unfitness to hold that position were false.

The judge did not, however, accept that the jury's verdict bound her to find that the imputation that the plaintiff did not carry out his economic researches properly was false. Justice Matthews described this imputation as "the relatively minor sixth imputation". It was her view that the evidence pointed overwhelmingly to the existence of a number of inaccuracies, misstatements and flawed processes in the plaintiff's study and although a number of these criticisms might not be directly attributable to any defect in the plaintiff's researches, it would be difficult to isolate the flaws in the reasoning from the flaws in the research.

This was a matter of some significance in Justice Matthews' view on the question of qualified privilege. If she was obliged to conclude, contrary to her own view of the evidence, that the jury's verdict involved the finding that the plaintiff had properly conducted his researches and, by extension, that there were no serious inaccuracies or misstatements in his study, then it would follow that Mr McGuinness could not have logically concluded, on the basis of the study alone, that its author was deliberately embarking on a process of deception. That, then would necessarily have been the end to any defence under s. 22.

Justice Matthews concluded that she was not precluded from finding that there were serious defects and flaws in the plaintiff's study by adopting the reasoning of Glass JA in **Austin v Mirror Newspapers Limited** (1984) where His Honour said "the Judge should himself determine any disputed facts save and except to the extent that they are governed by jury findings". Justice Matthews accepted that the jury's rejection of the defence of truth required her to accept that any inaccuracies or flaws as did exist in the study were honest mistakes and that the plaintiff believed that the material in the study was accurate and that he had properly and legitimately set out the arguments against the satellite. However this left open the question of whether Mr McGuinness could rationally have concluded from the study itself that it was a dishonest document.

Comment

Justice Matthews then considered the implications of the Jury's verdict in relation to the defence of comment.

There was no issue as to whether, assuming it to have been comment, it was based on proper material for comment. Both parties had accepted that it was the plaintiff's study alone which formed the basis of Mr McGuinness' observations. Thus no question arose as to the truth or otherwise of the factual basis for the comment.

Justice Matthews had no reservation in accepting Mr McGuinness' evidence that he was genuine in his criticism of the plaintiff's study and that he did hold the view that the study was a biased and dishonest document notwithstanding a pre-Austin case answer to interrogatory which said that at the time of publication the defendant did not intend the words contained in the matter complained of to convey any of the alleged defamatory imputations. Evidence was led at the trial that at the time Mr McGuinness wrote the editorial he did not know who the author of the study was. However in respect of the author or authors he believed that his criticisms were entirely justified.

This finding was extremely important on the issue of qualified privilege as a defendant will generally fail to establish reasonableness under s. 22(1) (c) without evidence of belief in the truth of what was published (**Barbaro v Amalgamated Television Services** (1989).

Justice Matthews then considered the rationality of Mr McGuinness' conclusions notwithstanding the jury's verdict had shown that his conclusions were wrong. Her Honour found that although the conclusions were wrong they were, in her view, anything but unfounded or irrational. She then considered whether Mr McGuinness' failure to seek out the palintiff prior to writing the editorial was reasonable. The failure to seek out the author of the study was explained on the basis that Mr McGuinness believed the document was such a dishonest one that he would have been wasting his time.

The jury's verdict which showed that Mr McGuinness was wrong led Justice Matthews to question whether this reflected upon the reasonableness of his conduct at the time. She took the view that although there was more than a hint of arrogance in the approach adopted by Mr McGuinness it was amply justified by the material he had before him. The requirement of reasonableness under section 22(1) (c) does not impose upon a publisher an obligation to seek out and obtain explanations from a person in all cases regardless of the strength of the adverse inferences to be drawn from that person's writings. Whether a publisher who wishes to rely upon a section 22 defence must make further enquiry will depend upon the circumstances of the case.

In assessing whether a reasonable publisher should have made further enquiry, one need only have regard to the material which was properly available to the publisher at the time of publication. The fact that a publisher's adverse conclusions are later shown to have been wrong will no doubt

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In other categories of media contempt, the proposed shift of emphasis from the protection of the administration of justice; in general to protection of individual rights does not furnish easy and immediate answers to the question of what prohibitions on publication, if any, should apply.

An example is the difficult category of reporting of jury deliberations. Yet even here, it seems to me that the most constructive approach is to analyse carefully the possible detriment to the rights of the prosecutors and defendants - in particular, in cases where jury secrecy prevents the disclosure and reporting of misconduct in the jury room - and balance them against considerations in the opposite direction for example that it may be oppressive to individual jurors, and possibly detrimental to the proper discharge of their functions, to allow the media to report indiscriminately on what happened or allegedly happened in the jury room.

Contempt Law Reform and the Attitudes of Goverment

The Report of the Australian Law Reform Commission on Contempt, for which I took primary responsibility as Commissioner in Charge, was tabled in the Commonwealth Parliament in June 1987. Looking back on it from a distance of nearly two years, I have some regret that in its discussion of media contempt it did not draw sufficiently clearly and firmly the distinction which I have just elaborated - between protection of individual rights and protection of the system of administration of justice. But its recommendations did, on the whole, fall in line with the approach adopted in this paper.

The fate of the Report is not encouraging. Its official status within the Commonwealth Attorney-General's Department is that of being "under consideration". The Report recommendations in relation to contempt of Family Court orders, however, have been included in a Bill to amend the Family Law Act recently tabled in the Federal Parliament. There has also been some discussion at the State level in Victoria and, more recently, in New South Wales of a partial implementation of the Report but there has been no legislative changes as yet.

There are, I suppose, two main reasons why reform in this area is not attractive politically. One is that, particularly in the absence of high-profile cases such as those of Gallagher and Wran, there are not may votes to be gained from contempt reform. The other is that the majority of the members of an important, albeit muted, interest-group - the judiciary - have no wish to see their contempt powers curtailed by legislation.

Neither of these reasons is sufficient to justify perpetuation of an archaic approach, via the law of contempt, to the particular issues of media law which this paper has discussed. It is, I think, time for some renewed pressures upon Commonwealth and State governments to be exerted by media organisations and other concerned with the cause of freedom of the media and with the competing argument that such freedom should always respect the rights of individuals appearing in our courts.

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prohibit such conduct, specific provisions could be inserted in the Commonwealth Crimes Act so that the conduct can be adjudicated upon by the Federal Court rather than the ABT.

Offences to be specified

While standards compliance and service provisions are clearly of fundamental importance there is no reason why minimum requirements cannot be spelt out with precision. There may be some breaches which would warrant cancellation of a licence and these could be clearly specified.

Most contraventions, however, would be deserving of something less. It could be provided that all breaches other than those specified should be dealt with by a fine or other lesser forms of sanction.

Such an approach would make clear the consequences of particular kinds of delinquent conduct without putting a licensee in jeopardy for every transgression. If certain conduct is regarded as disqualifying a person from being a director, eg having a criminal conviction or being an undischarged bankrukpt, then the legislation should say so.

"The time has therefore come to scrap these regular rounds of morality plays and substitute a clearly specified range of offences ...."

The present provisions are little better than a charade because it is widely believed that a government conscious of viewer and employee outrage would not allow a station to go off air. But the fact that the Tribunal's punitive options are presently limited effectively to licence cancellation or a reprimand, leave open the possibility of the former, with perhaps catastrophic share price consequences in the event of a licensee being forced into a fire sale.

Irrespective of the degree of culpability attached to an individual proprietor, there is scant justice in a system which inflicts massive share losses on innocent and unsuspecting minority shareholders.

Conclusion

"Fit and proper person" inquiries have become a media circus attended by enormous publicity and damaging speculation about the ultimate outcome which, under the current cumbersome legislative minefield, are almost certain to take a number of years to resolve.

Such a broad and potentially all embracing test serves no useful purpose. Leaving high flying media proprietors to twist in the wind may gratify those seeking theatrical entertainment but it does nothing to achieve a quick and effective decision which meets legitimate community concerns and allows licence holders to get on with, or to get out of, the broadcasting business.

The time has therefore come to scrap these regular rounds of morality plays and substitute a clearly specified range of offences which are deserving of punishment by the ABT or preferably by the Federal Court. In the vast majority of cases, a fine, sometimes very hefty and perhaps geared to revenue or profits would be a more than adequate penalty as well as a significant deterrent to future unacceptable conduct.

Licence cancellation should be only a last resort imposed because of the repeated commission of serious offences.