A Decade of Contempt and the Media:
Ensuring That Justice Must Be Seen to be Done

Katherine Giles, Senior Associate at MinterEllison, discusses the previous decade in contempt law and where the 20s might take us.

> *'... the principle of open justice – is one of the most pervasive axioms of the administration of justice in our legal system. It informs and energises the most fundamental aspects of our procedure and is the origin, in whole or in part, of numerous substantive rules.'*[1]

In the last decade, media organisations in Australia have played a crucial role in promoting and protecting open justice. Underpinning the law of contempt is the broad notion that justice should be open, and must be seen to be done. It is media organisations that largely assume responsibility for presenting arguments to the court as to why a court should remain open, or why it should not suppress the publication of information, when applications are made to a court to sit in camera or to issue non-publication or suppression orders. In playing this role, media organisations are required to put forward open justice arguments, and a contention that the public have the right to know what transpires in the courts.

The benefits of open justice include providing a check on the veracity of witnesses, benefits to litigants looking for public vindication, community legal education, reducing the likelihood of uninformed and inaccurate commentary about court cases, reassuring the public that justice is administered fairly, impartially and in accordance with the rule of law, and preventing the exercise of arbitrary power by judges. Balanced against this are the costs of open justice. These costs include the loss of privacy and reputation, media focus, embarrassment, distress, shame and financial harm to those involved.[2]

It can also include threats to personal and national security.

Debates surrounding the benefits and costs, and the general rule underpinning the law of contempt may have developed over many centuries.[3] However, the last decade has rendered this concept subject to changes in the media landscape, the pervasive access to social media, and the user generated content and media cycle that comes with it. As my colleagues Peter Bartlett and Tess McGuire recently noted:

> *'Our society has adapted and embraced the vast change that social media and technology have caused, but our media laws have not. The limited ability of our defamation and suppression order regimes to respond to the disruption has received much attention over the past year. Action is needed. Not mere tinkering at the edges, but reform that seeks to restore a balance between protecting reputations and freedom of speech.'*[4]

Media contempt can take the form of a breach of contempt in the face of the court, sub judice contempt, breach of suppression order, scandalising the court, breaching jury secrecy, and disobedience of court orders or disrupting the court for example, using cameras or sound recording equipment in court or refusing to answers questions or follow directions in court. The fundamental objective of the law of contempt is providing a fair trial, ensuring compliance with the courts orders and protecting the administration of justice. However, the media also have an important role to play in upholding and protecting these objectives, and the impact on media freedoms is balanced with the proper administration of justice, and the rights and legitimate expectations of individuals involved in legal proceedings. The media act as a surrogate for the public, and the courts facilitate media access to the courts.[5] Given the impact on media freedom, it is not surprising that these laws are routinely criticised, and over the last decade have been the subject of numerous enquiries and reports.

In the last decade a number of decisions demonstrate the role of the media in ensuring that justice must be seen to be done. In *News Digital Media Pty Ltd v Mokbel* (2010) 30 VR 248 Warren CJ and Bryne J noted the tension between open justice and the administration of justice, but indicated that an interest in Mokbel did not *'rank*

1 The Honourable JJ Spieglman, 'Seen to be Done: The Principle of Open Justice' – Pt I' (2000) 74 *Australian Law Journal* 290 (Pt II at 378), 292.

2 The Right Honourable Beverley McLachlin --- 'Courts, Transparency and Public Confidence - To the Better Administration of Justice' [2003] DeakinLawRw 1; (2003) 8(1) Deakin Law Review 1.

3 C J Miller and David Perry, *Miller on Contempt of Court* (Oxford University Press, 4th ed, 2017) 2.

4 Peter Bartlett and Tess McGuire, 'The year in Australian media law', *Medium* (May, 2019) available at https://pressfreedom.org.au/the-year-in-australian-media-law-3163135f4fdc?gi=ba2b5c8c5c05

5 Hon Chief Justice Marilyn Warren, 'Open Justice in the Technological Age' (2014) 40(1) *Monash University Law Review* 45; Jason Bosland, 'Two Years of Suppression under the *Open Courts Act 2013* (Vic)' (2017) 39(1) *Sydney Law Review* 25.

at the highest level of principle.' Despite this, 24 non-publication orders were issued supressing the publication of Mokbel's prior convictions, charges against him and associations with other people involved in the Melbourne gangland war. The court also ordered that all media organisations remove all articles about Mokbel from the internet. The suppression orders were lifted when Mokbel later entered a guilty plea in relation to the drug trafficking charges in 2011. In contrast, in *Fairfax Digital Australia and New Zealand Pty Ltd v Ibrahim* (2012) 83 NSWLR 52 in which Bennett DCJ made orders purporting to operate throughout Australia during criminal proceedings involving Fadi and Michael Ibrahim and Rodney Atkinson, who were facing prosecution in the District Court of New South Wales on a number of charges. The orders prohibited any disclosure, dissemination or provision of access, by book, newspaper, magazine, radio or television broadcast or on the internet of any criminal proceedings involving the Ibrahims or Atkinson as parties or witnesses, material referring to other alleged unlawful conduct involving the Ibrahims or Atkinson, and conduct they were suspected of being complicit in or having knowledge of. Eight media companies challenged the validity of the orders in the New South Wales Court of Criminal Appeal. The court held that the order was an *'overreach'* and that '*the scope of the order is inherently suspect to the extent that it seeks to prevent the whole population of Australia having access to the offending material, at least for a period, in order to prevent possible access by a juror or member of the jury panel for a particular case.'* The court also held that orders must be necessary to avert an interference in the course of justice, and cannot be merely *'convenient, reasonable or sensible… or that would serve some notion of the public interest'*. Further to this, the court held that *'an order will fail the necessity test if it is futile… [a]s a matter of construction, that which is ineffective cannot be described as "necessary"'*. In addition, there was a concern that the orders would have an impact on ISPs and search engines. Accordingly, the orders made by Bennett DCJ were held to be ineffective and therefore not necessary, and as they did not satisfy the grounds of section 8(1)(a) of the *Court and Suppression and Non-publication Orders Act 2010* (NSW), they should not have been made.

Following *DPP (Cth) v Besim; DPP (Cth) v MHK (No 2)* [2017] VSCA 165, in June 2017 *The Australian* published the article *'Judiciary 'Light on Terrorism'*, including comments from Minister Greg Hunt, Alan Trudge and Assistant Minister Michael Sukkar criticising the judiciary whilst the judgments in *Besim* and *MHK* were reserved. The Judicial Registrar of the Court of Appeal sent letters to the Attorney-General with respect to the ministers, the publisher, editor and journalist who authored the article. The Court of Appeal convened a mention in both cases and the parties were all present in the court during which the parties all offered apologies, and the court accepted the apologies and stated that they would not refer the parties for contempt of court. Warren CJ observed that the comments were *'fundamentally wrong'* and that the delay in apologising was *'regrettable and aggravated the contempt'*, and went on further to state:

> *'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 disposition of the appeals that the court has presently under consideration.*
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> *The court was further concerned that the attributed statements were made by three ministers of the Crown. The statements on their face:*
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> - *fail to respect the doctrine of separation of powers;*
> - *breach the principle of sub judice; and*
> - *reflect a lack of proper understanding of the importance to our democracy of the independence of the judiciary from the political arms of government.'*

Most importantly the court noted that the parties should comprehend that the court hasn't been, and will not be affected by the statements made in The Australian, or elsewhere in the media. Noting further to this, that the parties should be assured that an article will not have an effect on the decision or decisions the court will make, and that the court will be independent, impartial and in accordance with the rule of law. No contempt charges were laid, and this is not a decision that involved the media. Nonetheless, it highlights the importance the court will place on upholding the legal notions of contempt of court, and emphasising that they do not exist to protect judges or their personal reputations, but rather to protect the independence of the judiciary that bind both governments and decisions, and instill public confidence in the judiciary.

There have also been a number of reports and reviews considering contempt law.[6] All of these

6 See The Report of the Australian Law Reform Commission (ALRC), *Contempt* (June, 1987); NSW Law Reform Commission (NSWLRC), Discussion Paper 43, *Contempt by Publication* (July 2000); NSWLRC, Discussion Paper 100, *Contempt by Publication* (June, 2003), Australia's Right to Know, *Report of the Review of Suppression Orders and Media's Access to Court Documents and Information* (November, 2008).

recognise that there is a need to clarify the role of the media and the balance between open justice and the administration of justice. Most recently, on 15 August 2017 the Senate referred a number of issues to the Constitutional Affairs References Committee for inquiry and report by 25 November 2017, with the submissions to be referred to any future Senate inquiry into contempt. These included a consideration of a number of previous recommendations including that:

- the common law principles be abolished and replaced by statutory provisions – arising from the Australian Law Reform Commission (**ALRC**) report in 1987;
- the need to achieve clarity and precision in the operation of the law on sub judice contempt (arising from the NSWLRC report in 2003);
- the development and operation of statutory provisions in Australia and overseas that codify common law principles of contempt; and
- the importance of balancing principles, including freedom of speech and expression, the right of fair trial by an impartial tribunal, public scrutiny of the operations of the court system and the protection of the authority, reputation and due process of the courts.

The views of submitters were mixed, particularly in relation to whether the law of contempt should be codified, and the committee recommended that the submissions received to the inquiry be referred to any future Senate inquiry into contempt.[7]

In October 2018, the Victorian Law Reform Commission (**VLRC**) was asked to review and report on the law relating to contempt of court, the possible reform of the *Judicial Proceedings Report Act 1958* (Vic), and the legal framework for enforcement of prohibitions or restrictions on the publication of information and all types of contempt law. In 2019, the VLRC launched the review of contempt laws in Victoria. The launch followed public debate about the use of suppression orders, to consider whether jurors and court officers need to be educated about social media, and whether messages about court proceedings sent to groups through private messages through social media should be considered as a breach of a suppression or non-publication order. This review was ordered by the Attorney General in December 2019, after a jury delivered a unanimous guilty verdict in the trial of Cardinal George Pell for historic child sexual abuse offences. And was further propelled by the multiple charges brought by the Victorian Director of Public Prosecutions, Kerri Judd QC against 36 journalists and media organisations following the publication of headlines and other publications when Cardinal George Pell was convicted in December 2018. A key concern for the Commission, and a theme running through the consultation paper, is *'the lack of certainty and clarity in the common law of contempt of court, and the effect that uncertainty on the proper and effective administration of justice and public confidence in the work of the courts."*[8]

In February 2019, the Law Council of Australia called for an ALRC review of suppression orders and uniformity across jurisdictions.[9] Law Council President, Arthur Moses SC, stated that: *'At its core, this issue involves striking the right balance between open justice including the public interest in court reporting, and the right of the individual to a fair trial.'* He also noted that Australian journalists *'are amongst the best trained and respected in the world and informed reporting of our legal system maintains public confidence in the judiciary and the courts.'* In early 2019 the NSW Attorney-General Mark Speakman also asked the NSW Law Reform Commission to consider whether the laws around suppression and non-publication orders had the balance right. Preliminary submissions to the open justice review closed on 31 May 2019. And in January 2020, the Tasmania Law Reform Institute considered contempt law, jurors, social media and the right of an accused to a fair trial.[10] The Institute recommended that changes to the law are not necessary, and the preferred strategy to address juror misconduct is updating and improving juror pre-empanelment training, resources and education, and the introduction of model jury directions.

There have also been recent calls to introduce a Media Freedom Act that would recognise and affirm the importance of press freedoms, and attempt to balance open justice and the administration of justice, to ensure that justice continues to be seen to be done.

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7 Submissions were received by the Legal Services Commission of South Australia, Law Council of Australia, Office of the Director of Public Prosecutions (NSW), International Commission of Jurists Victoria, Ms Melville Miranda and Mr Dominic Kanak.

8 Victorian Law Reform Commission, *Contempt of Court: Consultation Paper* (2019) [2.42].

9 https://www.lawcouncil.asn.au/media/media-releases/law-council-calls-for-alrc-review-of-suppression-orders-uniformity-across-jurisdictions

10 Tasmania Law Reform Institute (**TLRI**), Final Report No. 30, *Jurors, Social Media and the Right of an Accused to a Fair Trial* (January 2020).