The Law Reform Commission

Contempt

Summary of Report

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This is a summary of the report of the Australian Law Reform Commission on the law of contempt in Australia.

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Contents

Terms of Reference

I, GARETH JOHN EVANS, Attorney-General of Australia, HAVING REGARD TO–

(a) the existing law of contempt;
(b) the provisions of Article 19 of the International Covenant on Civil and Political Rights, that everyone shall have the right to freedom of expression;
(c) the provisions of Article 14 of the International Covenant on Civil and Political Rights, that everyone shall, in the determination of any judicial proceedings, be entitled to a fair trial;
(d) the need to ensure that judicial proceedings are conducted in an orderly fashion; and
(e) the need to ensure that courts, tribunals and their officers are not unjustifiably brought into disrepute.

In pursuance of section 6 of the Law Reform Commission Act 1973, HEREBY REFER to the Law Reform Commission the following matters for report–

(a) whether the law and procedures relating to contempt of court applied by Federal Courts and courts of the Territories, and by State courts in relation to the exercise of Federal jurisdiction, are adequate and appropriate;
(b) whether the laws and procedures relating to contempt of Tribunals and Commissions created by or under laws of the Commonwealth are adequate and appropriate;
(c) the appropriate legislative means of reforming those laws and procedures, having regard to any constitutional limitations on Commonwealth power; and
(d) any related matter.

DATED 7 April 1983

GARETH EVANS
Attorney-General

Participants

The Commission

The Division constituted to deal with this Reference comprised the following members of the Commission.

President

The Hon Xavier Connor, AO, QC, LLB (Melb) (from 1985)
The Hon Justice MR Wilcox, LLB (Syd) (Acting Chairman, 1984–5)
The Hon Justice MD Kirby, CMG, BA, LLM, BEc (Syd) (to 1984)

Commissioner in Charge

Professor MR Chesterman, BA, LLB (Syd), LLM (Lond)

Commissioners

Sir M Byers, CBE, QC, LLB (Syd) (retired December 1985)
Professor AD Hambly, LLB (Melb), LLM (Harv) (July 1983 to July 1984)
Professor D St L Kelly, BCL (Oxon), BA, LLB (Adel) (July 1984 to December 1984)
The Hon Justice JM Maxwell
The Hon Justice FM Neasey, LLB (Tas) (retired October 1984)
The Hon Justice DM Ryan, QC, BA, LLB (Melb)
Mr T Simos, QC, M Litt (Oxon), LLM (Harv), BA, LLB (Syd)
Professor A E-S Tay, AM, PhD (ANU)

Officers of the Commission

Secretary and Director of Research

Stephen Mason, BA, LLB, MTCP (Syd)
Mr IG Cunliffe, BA, LLB (ANU) (to April 1986)

Legislative Drafting

Mr JC Finemore, AO, OBE, QC, former First Parliamentary Counsel, Victoria
Stephen Mason, BA, LLB, MTCP (Syd) assisted in settling the draft legislation in Appendix A

Legal and Research Staff

*Ms Pauline Kearney, BA (Macq), LLB (NSW), Senior Law Reform Officer
*Mr Ian Freckelton, BA, LLB (Syd), Senior Law Reform Officer (to October 1986)
Mr Stephen Odgers, BA, LLB (ANU), LLM (Columb), Senior Law Reform Officer (to January 1986)
Mr Richard Phillipps, BA (Griff), LLB (NSW), Law Reform Officer (to April 1985)
Ms Loretta Re, BA, LLM, Dip Ed (Melb), Senior Law Reform Officer
Ms Ann Riseley, LLB (Adel), GDLP (SA), Senior Law Reform Officer

* Principal responsibility

Mr John Schwartzkoff, BA, LLB (Syd), Senior Law Reform Officer (to May 1985)
Mr Peter Waters, BA, LLB (ANU), Law Reform Officer (to February 1985)
Ms Jennifer Fitzgerald, BEc (ANU), LLB (Qld) (February 1984 to February 1985)
Ms Kerry Nicol (March 1984 to February 1985)
Ms Susan Wilson (March 1984 to February 1985)
Mr Max Keogh, LLB (NSW) (April 1984 to June 1984)

The Commission is grateful for the assistance of Ms Fitzgerald, Ms Nicol and Ms Wilson provided by the Commonwealth Employment Program, and for the secondment of Mr Keogh from the Australian Film Commission.

Principal Executive Officer

Mr Barry Hunt, BA (Syd)

Library

Ms Joanna Longley, BA (CCAE), Librarian (from September 1986)
Ms Virginia Pursell, BA (NSW), Dip Lib (CCAE), Librarian (to September 1986)
Ms Susan Collins

Word Processing

Mrs Lorraine Lepore

Consultants to the Commission*

Mr K Anderson, SM, Deputy Chief Stipendiary Magistrate (NSW)
Mr M Armstrong, Member, Australian Broadcasting Tribunal
Acting Station Sergeant G Brown, Australian Federal Police (from September 1986)
Ms J Burrett, Director of Court Counselling, Family Court of Australia
Professor E Campbell, Professor of Law, Monash University
Mr I Coleman, Barrister, Sydney
Mr A Deamer, Solicitor, John Fairfax and Sons Ltd
Mr HM Di Suvero, Lecturer in Law, University of New South Wales
Inspector P Duffy, Australian Federal Police (to September 1986)
Ms R Durie, Freehill, Hollingdale and Page
Mr AR Green, formerly of Department of Youth and Community Affairs (NSW)
Dr J Griffiths, Dawson Waldron, Sydney; former Director of Research, Administrative Review Council
Dr JF Hookey, Human Rights Commission
Mr KG Horler, QC, Barrister, Sydney
Mr G James, QC, Barrister, Sydney
Mr P Loof, Attorney-General's Department, Canberra
Mr P Manning, ABC Public Affairs Television
Professor H Mayer, former Emeritus Professor of Political Theory, University of Sydney
The Hon AR Moffitt, CMG, QC, former President, New South Wales Court of Appeal
Mr T Molomby, Australian Broadcasting Corporation
The Hon Justice TR Morling, Federal Court of Australia

Mr WH Nicholas, QC, Barrister, Sydney
Mr S O'Ryan, Barrister, Sydney
Mr D O'Sullivan, Editor-in-Chief, West Australian Newspapers
Ms D Rowan, Administrator, Christies Beach Womens Shelter (SA)
His Honour Judge JH Staunton, CBE, QC, Chief Judge of the District Court of New South Wales
Mr NW Swancott, Australian Journalists' Association
Dr DM Thomson, Senior Lecturer in Psychology, Monash University
The Hon Justice R Watson, Family Court of Australia
The Hon Justice P Young, Supreme Court of New South Wales.

Until his appointment as a member of the Commission, Mr P Cashman, head of the Public Interest Advocacy Centre, Sydney, was a consultant.

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Mr A Walker, Indexer, Sydney

* The recommendations in this report and statements of opinion and conclusion are necessarily those of the members of the Law Reform Commission alone. They may not be shared by the consultants nor by the departments or organisations with which they are associated.

Summary

Contempt of court

1. *What is it?* Contempt of court is a doctrine of common law according to which courts are empowered to inflict summary punishment on those who interfere with the administration of justice. The principal types of conduct which may constitute contempt are:

- improper behaviour in a courtroom during a hearing ('contempt in the face of the court');
- endeavouring improperly to influence participants in proceedings;
- contempt by publication, notably –
  - publishing material which tends to prejudice the fair trial of a case;
  - publishing allegations tending to undermine public confidence in the administration of justice;
  - publishing an account of the deliberations of a jury;
- failure to comply with a court order or undertaking given to a court ('disobedience contempt');
- other forms of interference with the administration of justice including–
  - failing to carry out one's duties as a court officer;
  - taking reprisals on witnesses or jurors on account of what they have said or done in court.

Statutory provisions prohibit similar types of interference with the proceedings of tribunals and commissions.

2. *Special features of contempt.* Although persons found guilty of contempt are generally punished by the courts in much the same way as criminal offenders, contempt law has a number of special features which mark it off from the criminal law:

- The trial of an alleged contempt takes place under a special summary procedure, usually in the court affected by the alleged contempt. Juries are not involved, nor is the standard procedure for trying minor criminal offences before magistrates used. In cases of contempt in the face of the court, the judge whose proceedings were affected normally deals with the matter.
- In many branches of contempt, there is no obligation on the prosecution to prove that the person charged acted with guilty intent.
- The sentencing powers of superior courts in contempt cases are unlimited.
- Where a person is found guilty of 'disobedience contempt', a sanction may be imposed not by way of punishment but in order to compel compliance with the relevant court order. An open-ended gaol sentence, terminating only when the order has been obeyed, is sometimes imposed for this purpose.

3. *Considerations underlying reform.* Major criticisms have been levelled at the law of contempt:

- it limits freedom of expression to an excessive extent;
- its substantive principles are too vague;
- its procedures are unfair; and
- it is often not effective in achieving its avowed aims.

Any program of reform of the law of contempt necessarily involves the balancing of broad competing interests. In determining, for example, what restrictions (if any) should be imposed on the publication of material relating to a current or forthcoming criminal trial, a balance must be struck between freedom of speech and open justice on the one hand and the right of an accused to a fair trial on the other. In recent decades, recommendations for reform have been made by official inquiries into contempt law in a number of common law jurisdictions. In England and India major reforming legislation has been enacted. The Terms of Reference require the Commission, in formulating recommendations for reform, to have regard to:

- the existing law of contempt;
- the provisions of art 19 of the International Covenant on Civil and Political Rights (ICCPR), that everyone shall have the right to freedom of expression;
- the provisions of art 14 of the ICCPR, that everyone shall, in the determination of any judicial proceedings, be entitled to a fair trial;
- the need to ensure that judicial proceedings are conducted in an orderly fashion; and
- the need to ensure that courts, tribunals and their officers are not unjustifiably brought into disrepute.

4. *Extensive research and consultation undertaken.* An extensive program of research and consultation has been carried out by the Commission in the preparation of this Report. It includes:

- A thorough study of the academic legal literature on contempt and of psychological and empirical studies on topics relevant to particular aspects of contempt law (in particular, the influence of publicity on jurors).
- The sending of detailed questionnaires on the law of contempt to all Australian judges and magistrates and to the members of federal tribunals and standing commissions.
- Over 300 interviews throughout Australia with individuals and groups having a particular interest in the operation of contempt law, including judges, magistrates, commissioners and tribunal members, legal practitioners and employees of media organisations at all levels.
- Research into the patterns of conviction and sentence for contempt and allied offences.
- Consideration of 187 written submissions received from the public and 71 oral submissions made in public hearings throughout Australia.
- Consultation with representatives of relevant government bodies.

5. *'Broad brush' approach to reform recommended.* For reasons relevant to each separate category of contempt, a 'broad brush' approach to reform is advocated, along the following lines:

- The common law principles of contempt of court should be abolished and replaced by statutory provisions governing both substance and procedure.
- The rules governing contempt, except for contempt in the face of the court and disobedience contempt, should be recast as criminal offences, to the extent that they do not already overlap with the criminal law. Normal procedures for the trial of criminal offences should apply instead of summary contempt procedures.

- Contempt in the face of the court should be replaced by a group of criminal offences, but the mode of trial should continue to be a summary one. The accused person should be entitled to require, however, that the case should not be tried by the judge or magistrate presiding at the time of the alleged offence.
- The law governing disobedience contempt should be replaced by a statutory regime of 'non-compliance proceedings', in which the party entitled to the benefit of the order or undertaking allegedly disobeyed should continue to be able to obtain sanctions to coerce the disobeying party into obeying at some future time, or to punish him or her for past disobedience.
- 'Contempt' in relation to commissions and tribunals should continue to take the form of specific statutory offences.

Although this pattern of reform may appear necessarily to involve sweeping changes to the whole range of contempt, it would be possible to implement it only partially. It would be possible, for instance:

- to leave the law as to disobedience contempt more or less intact while converting the rest of the law of contempt into criminal offences;
- to implement the recommendations regarding disobedience contempt with respect to a chosen court or group of courts only, such as the Family Court of Australia and other courts exercising jurisdiction under the Family Law Act 1975 (Cth); or
- to implement the reforms in relation to grounds of contempt liability only, while leaving contempt procedures intact.

Implementation of the reforms recommended would not entail substantial government expenditure.

6. *Limitations on reform.* The reforms recommended do not extend to the following matters because they are viewed as outside the Terms of Reference:

- Contempt of parliament.
- Existing criminal offences relating to the administration of justice, except where the abolition of contempt law renders amendment of the criminal law in this area necessary or desirable.
- The content of court orders, even where disobedience of such orders commonly attracts contempt sanctions.

A further set of limitations arises from constitutional inhibitions on Commonwealth legislative power. Reform by the Commonwealth should be confined to:

- federal courts, other than the High Court;
- courts of the Territories, except the Northern Territory and Norfolk Island; and
- federal proceedings conducted by State courts and courts of the Northern Territory and Norfolk Island –
  - so far as the replacement of disobedience contempt powers by a statutory procedure of sanctions for disobedience of orders is concerned;
  - so far as conduct (other than conduct within the courtroom) constituting deliberate interference with federal proceedings in such courts is concerned, but without any abolition of the powers of relevant courts to punish such conduct as contempt; and
  - so far as empowering courts to restrict reporting of proceedings on the ground of prejudice to a forthcoming or current trial is concerned, where the trial to be protected is a trial of a federal offence by a jury.

7. *Uniformity desirable but not essential.* Although the recommended reforms are confined to a limited range of courts and proceedings, they are suitable for adoption throughout Australia. Implementation by legislation covering the range of courts and proceedings just indicated should take place as soon as possible. It should not await the preparation of uniform State legislation. But the governments of the States and the 'self-governing' Territories (Northern Territory and Norfolk Island) should be apprised of the recommendations and encouraged to give serious consideration to their implementation (with such modifications as may be appropriate to suit local conditions) by State or Territory legislation.

Improper behaviour at hearings

8. *Existing law.* This branch of contempt law is concerned with conduct occurring in or near a courtroom, which has the effect of disrupting or impeding the hearing of a court case, detracting from the influence of judicial decisions, impairing confidence and respect in the court and its judgments, or harming proceedings in other ways. The presiding judge or magistrate has wide-ranging powers to deal with such conduct, including:

- expelling disruptive persons from the court;
- determining what kinds of conduct taking place within the courtroom, or in the vicinity of the court, constitute contempt in the face of the court on the broad ground that it interferes or tends to interfere with the course of justice;
- deciding whether or not a person who may be guilty of contempt should be charged with contempt;
- if proceedings for an alleged contempt go ahead, determining what has occurred and whether the person charged should be found guilty; and
- in the event of a guilty verdict, determining a penalty (the limitations of which, in the case of superior courts, are not specified by law).

It is not clear what element of intent must be established against a defendant who has been charged with contempt in the face of the court.

9. *Conflict with traditional principles.* The principal objection to the summary jurisdiction conferred on courts to deal with contempt in the face of the court is that it conflicts with many of the traditional safeguards which have been developed within the common law, and are set out in the International Covenant on Civil and Political Rights, in order to protect citizens from unfair convictions. These are:

- *Precision in the definition of offences.* The power of a presiding judge to determine, with reference only to very broad criteria of liability, what constitutes contempt in his or her courtroom is at odds with the principle that criminal offences should be sufficiently precise to enable all citizens to understand what types of conduct will attract criminal penalties.
- *Absence of bias.* The trial of an alleged contempt by the person who has instigated the proceedings and is often, for practical purposes, the victim of the alleged offence creates at least an appearance of bias on the part of the court. In addition, the possibility of actual bias cannot be overlooked.
- *Presumption of innocence.* In a trial of contempt in the face of the court, the presiding judge takes on the role of chief prosecution witness, informs the accused that there is a *prima facie* case of contempt against him or her, and then requires that the accused 'show cause' why a verdict of guilty should

not be reached. This is inconsistent with the principle that an accused person should be presumed innocent until proved guilty.

- *Confronting witnesses.* A person accused of contempt of court does not have the opportunity to cross-examine the person who is effectively the chief prosecution witness, because this person is also the judge.
- *Limited sentence.* In the case of contempt of superior courts, the normal rule that the maximum sentence for a criminal offence is stipulated by law does not apply.
- *Unrestricted right of appeal.* To the extent that offenders found guilty of contempt in the face of the court may not be entitled to full rights of appeal against conviction and/or sentence, normal criminal procedures whereby such an appeal is always available are contravened.

10. *Arguments in favour of the existing procedure.* The peculiar features of the law of contempt in the face of the court have been justified as follows:

- The power of a presiding judge to punish summarily contempts occurring within the courtroom is a long-established feature of Anglo-Australian law, originating in the earliest days of the development of a centralised system of courts in England.
- The power of a court to deal summarily with contempt in the face is said to be 'inherent' in the notion of a court. It is essential to enable courts to maintain their authority and prevent abuse of their process, and thereby to perform the tasks entrusted to them.
- The conferring of a wide range of discretionary powers – ranging from the power to give warnings and expel unruly persons from the court to the power to send a convicted contemnor to prison – gives the presiding judge maximum flexibility in determining a response to improper behaviour.
- The power to deal summarily with improper conduct in the courtroom enables the presiding judge to deal swiftly with the matter, thereby protecting the integrity and due conduct of the proceedings and demonstrating to the offender and to others that such conduct will not be tolerated.
- The summary procedure ensures that due account is taken of matters such as the tone and demeanour of the alleged offender and precludes the need to call upon the judge to be examined and cross-examined in a trial of the alleged offence.

11. *Arguments in response.* A number of counter-arguments can be made:

- The historical reasons for the development of the summary contempt procedure are no longer applicable. The authority of courts does not depend nowadays on naked displays of brute force, but on community acceptance of the system of administration of justice.
- Although the need to maintain control within the courtroom may justify conferring certain protective powers upon presiding judges (for example, the power to remove a disruptive person from the courtroom), it does not necessarily justify a broad power for the judge to stipulate what forms of disruption should attract criminal penalties and to determine both liability and punishment.
- There is an unacceptable level of uncertainty in the law of contempt in the face of the court.

- The incorporation of procedural safeguards into the summary contempt procedure out of concern for natural justice makes it unlikely that an alleged contempt will be dealt with without significant delay. This undermines the alleged justification that immediate punishment is essential to preserve judicial authority.

12. *Recommendations.* The substantive law of contempt in the face of the court should be replaced by a series of offences. These should be:

- acting so as to cause substantial disruption of a hearing;
- witness misconduct (ie, refusal to appear, to be sworn or make an affirmation or to answer a question lawfully put);
- using photographic equipment in court, without leave; and
- broadcasting a sound recording of a hearing in court, without leave.

A requirement of guilty intent (*mens rea*) should apply to each of these offences. There should be two possible modes of trial for the offences:

- trial by the presiding judge; or
- trial by a single judge or three-member bench from within the same court, excluding the trial judge.

If either the presiding judge or the person charged require the latter mode of trial, this should be adopted. The offences should be subject to a fixed maximum penalty. A witness who refuses to be sworn or make an affirmation, or to answer a question lawfully put, should also be able to be dealt with in non-compliance proceedings (described below).

Other forms of interference with proceedings

13. *Role of contempt law in protecting court proceedings.* Several types of conduct may attract contempt sanctions on the ground that they constitute an interference with court proceedings, though they do not involve acts or omissions within the courtroom (as just discussed) or any form of publication (as discussed below). They are:

- Pressure, inducement or persuasion designed to influence participants in proceedings (for example, judges, jurors, witnesses or parties) to act in a certain way in relation to the proceedings.
- Reprisals against participants so as, in effect, to 'punish' them on account of what they have said or done in the relevant proceedings.
- Obstruction of participants or of court process – where participants are physically prevented from attending court or otherwise playing their appropriate role, or where court documents being delivered or despatched to the court or to a participant in the proceedings are stolen or otherwise prevented from reaching their destination.
- 'Abuse of process' – this includes such matters as forging court documents, preparing and presenting them in a deceptive manner or using them for an improper purpose.
- Dereliction of duty by court officers and others having a duty to the court.
- Interference with a ward of court.

14. *Is the summary contempt procedure appropriate?* The use of the summary contempt procedure to deal with such conduct is open to criticism because it lacks certain safeguards which an accused person in a criminal trial would have:

- Evidence is by affidavit so there is no opportunity for the accused to observe the prosecution witnesses giving evidence in chief.
- The accused may be called upon to file affidavits by way of defence before the case for the prosecution has been fully set out in its affidavits.
- The accused has no right to apply for a *nolle prosequi*, that is, a decision by the Attorney-General or the Director of Public Prosecutions not to proceed with the prosecution.
- As there is no 'dress rehearsal' for the trial in the form of committal proceedings, the accused is deprived of the advantage of hearing the prosecution witnesses and observing their demeanour and the opportunity of testing the evidence of the prosecution by further investigation. Having not had this opportunity, counsel for the accused may feel constrained in his or her tactics.
- The primary issue before the court is the reliability of opposing testimonies in a case reflecting seriously on the accused. Cases such as these are generally viewed as pre-eminently suited to juries, and the right of the accused to go before a jury is viewed as a most valuable right.
- There is not always a right of appeal against a contempt conviction, especially when the case is heard by a full court.

As long as appropriate measures to protect the proceedings are taken (for example, injunctive relief against threats of violence or the laying of appropriate criminal charges) it is not essential that an alleged act of interference with proceedings is tried as quickly as possible under a summary procedure.

15. *Relationship between contempt and the substantive criminal law.* There is considerable overlap between contempt taking the form of interference with proceedings and the criminal law. A number of offences covering various forms of pressure, persuasion or inducement bearing upon a participant in court proceedings are set out in the Crimes Act 1914 (Cth), chiefly in Part III. These include:

- the corrupt offering or receipt of bribes and other benefits to or by judges, magistrates and Commonwealth officers (s 32, 33, 73);
- intimidating or threatening witnesses about to appear (s 36A);
- offering bribes or other benefits or inducements to persons called or to be called as witnesses (s 37);
- conspiring with others to 'obstruct, prevent, pervert, or defeat the course of justice in relation to the judicial power of the Commonwealth' (s 42); and
- attempting 'in any way not specially defined in this Act' to obstruct, prevent, pervert or defeat the course of justice (s 43).

The principal substantive distinctions between contempt by interfering in the course of justice and the relevant criminal offences are that:

- the latter always require proof of a genuinely wrongful intention, whereas this requirement is not clearly established for contempt; and
- contempt is more flexible than the criminal law and the criteria for liability are broader.

16. *Recommendations.* In view of the unsuitability of the summary contempt procedure in this context, contempt law and procedure should be abolished in respect of deliberate interference with proceedings. Conduct of this sort should be regulated solely by the criminal law. But in order that courts should have adequate protection against such interference, they should be empowered to grant injunctions against interference, to direct that alleged offenders be prosecuted and to re-

mand them on bail or in custody. Also, existing criminal offences should be extended and supplemented as outlined in the ensuing paragraphs.

17. *Pressure, inducement or persuasion affecting participants other than parties.* Some changes to the Crimes Act 1914 (Cth) would be necessary to deal with this type of conduct if contempt law and procedure were abolished. They are relatively slight, chiefly because of the breadth of the statutory offence of attempting to pervert the course of justice (s 43). The following amendments are recommended:

- Section 36A, which at present covers intimidation and reprisals affecting witnesses only, should be extended to cover intimidation of other participants as well.
- A new offence of seeking improperly to influence a participant to act otherwise than in accordance with his or her duty should be inserted in the Act.
- Sections 42 and 43 should be extended so as to cover conspiracies and attempts (respectively) to pervert the course of justice in relation to proceedings in Territory courts as well as proceedings in federal matters.

18. *Pressure, inducement or persuasion affecting parties.* There is a distinction between parties to civil proceedings and other participants so far as pressure, inducement or persuasion is concerned. Witnesses, judges, jurors, legal practitioners and court officers are all subject to mandatory duties in relation to proceedings, so that any pressure, inducement or persuasion seeking to deflect them from performing these duties is *prima facie* unlawful. On the other hand, participants to civil proceedings are free, generally speaking, to initiate or desist from participation at will. The legal system tolerates and, indeed, encourages certain types of inducement to desist from litigation: for example, an offer to settle a case. A key distinction in this area is between conditional and unconditional pressure or inducement. So far as parties to civil proceedings are concerned, the law of contempt bears only on conditional pressure not to participate (ie, pressure which will be withdrawn if the party desists from the litigation). The line between lawful and unlawful pressures of a conditional nature, directed against parties with a view to forcing them to desist, is best drawn by reference to a definition of unlawful reprisals. The ruling principle should be: if the pressure takes the form of a threat of a reprisal or 'punishment' for refusing to desist, and the reprisal, if carried out, would be unlawful (under criteria shortly to be outlined), then the threat itself should be deemed a form of unlawful pressure and should constitute an offence. Unconditional pressure or persuasion should not attract liability.

19. *Reprisals.* The taking of reprisals against a participant as a form of punishment for his or her participation in legal proceedings may be punished as contempt or, in some cases, as a statutory offence. Because a reprisal may consist of an otherwise lawful act, the intention with which the act is done is significant, especially in cases of reprisals against parties. Again, there is a distinction between the degree of protection required for participants other than parties and that necessary for parties. In cases of reprisals against parties, only conduct which is unlawful apart from the element of reprisal and conduct which inflicts harm on the party in an area of interests covered by anti-discrimination legislation should be prohibited. It is recommended that s 36A of the Crimes Act 1914 (Cth) should be amended to cover reprisals affecting all participants, though where the reprisals affect parties to civil proceedings, liability should only arise where:

- the conduct is unlawful in its own right (eg, an assault); or
- the party is adversely affected in relation to employment, accommodation, the provision of goods, services or facilities, access to places or vehicles, or the membership of associations.

A consequential right to claim damages follows from the operation of the Crimes Act 1914 (Cth) s 21B.

20. *Obstruction of participants, court process or evidence.* Conduct amounting to physical obstruction of a participant or of documents or material items of evidence may amount to contempt or may be an offence under the criminal law. The conduct may be unlawful in its own right (for example, an assault or a theft) or it may fall within one of a number of offences prohibiting such behaviour in the Crimes Act 1914 (Cth) (s 39, 40, 42, 43, 50, 76). Notwithstanding the breadth of the statutory offences dealing generally with obstruction of the course of justice (s 42 and 43), there may be instances of obstruction which are caught only by contempt law. Specific offences dealing with obstruction of court process and obstruction of participants with intent to frustrate or impede proceedings should therefore be created if contempt law is abolished.

21. *Abuse of process.* Courts have inherent jurisdiction to deal in various ways with 'abuse of process'. This comprises conducting legal proceedings:

- which involve a deception on the court, or are fictitious or constitute a mere sham;
- where the process of the court is not being fairly or honestly used but is employed for some ulterior or improper purpose or in an improper way;
- which are manifestly groundless or without foundation or which serve no useful purpose; or
- which cause or are likely to cause improper vexation or oppression because they are numerous or involve repetition.

Courts may deal with cases of abuse of process in a variety of ways, including awarding costs against the party responsible, terminating proceedings, striking out pleadings, declaring a person a vexatious litigant or, in the case of a legal practitioner, referring the matter to the appropriate professional disciplinary body. In addition, abuse of process may constitute a crime or be punishable as contempt. In this area, contempt plays a residual role, but there do exist acts of abuse of process which do not amount to a criminal offence, but which may cause detriment to other parties and which cannot be rectified by the exercise of alternative powers or the awarding of costs. In order to fill the gap left by the abolition of contempt:

- the Crimes Act 1914 (Cth) should be amended to prohibit conduct which amounts to the fabrication of court process; and
- an offence of breach of confidentiality of documents produced on discovery or otherwise involved in court proceedings should be created.

22. *Breach of duty by court officers.* A breach of duty by persons owing a duty to the court – for example, legal practitioners, registered trustees in bankruptcy, liquidators and official managers in company insolvency, sheriffs, bailiffs and other officers and jurors – may be punishable as contempt. Such duties derive from a number of sources: an Act of Parliament, a contract of employment, the nature of the office held, the professional ethics of the person involved, a court order, or the character of the function in the proceedings. Similarly, the ways in which a breach of duty may be dealt with are varied. Contempt law in this area plays a residual role and contains vague and uncertain criteria. Much of it is outdated. The only offence recommended in substitution for contempt law is one of wilful non-compliance by an officer of the court (defined so as to exclude legal practitioners) with an order of the court relating to the performance of a person's function as officer.

23. *Interference with wards of court.* Any interference in the exercise of the wardship jurisdiction of a court may constitute contempt. The offence has traditionally been one of strict liability, so it is no answer that the accused did not know that the child was a ward of court. In addition, contempt may be committed by the publication of material relating to proceedings held in closed court in respect of wards, and by disobeying orders made in respect of wards. The basis of the jurisdiction is not the protection of the administration of justice in particular proceedings, or as a continuing process, but the protection of the individual ward. Consequent on the abolition of contempt in this area, the interests of wards should be protected by the making of such express orders in relation to them as the circumstances warrant, and wilful disobedience of such orders should be the subject of a specific offence. Liability for the publication of information relating to wardship proceedings in breach of a suppression order should be on the same basis as other instances of breach of suppression order (as discussed below).

Contempt by publication: general considerations

24. *Role of contempt law.* Contempt law restricts publication by the media in a number of ways:

- *Influence on trials.* It prohibits publication of material which may influence the conduct of a current or forthcoming trial (the *sub judice* rule).
- *Jury secrecy.* In certain circumstances, it may prohibit the publication of accounts of the deliberations of juries, though its impact in this area is far from clear.
- *Pre-judgment or 'embarrassment'.* It seeks to prohibit publications which, while not influencing the outcome of a trial, have a tendency to prejudge the issues to be decided or to 'embarrass' the court involved, and so impede the administration of justice. This is a subsidiary aspect of the *sub judice* rule.
- *Public denigration of judges or courts.* It prohibits the publication of material which denigrates judges or courts so as to tend to undermine public confidence in the administration of justice ('scandalising').

25. *Underlying values.* Four broad policy considerations of fundamental importance underlie the principles of contempt law in this area. They are:

- *Freedom of expression.* Freedom of expression, including freedom of the press, is a fundamental value in a democratic society. It is provided for by art 19 of the International Covenant of Civil and Political Rights (ICCPR), and has been acknowledged by the High Court as a consideration of fundamental importance in decisions dealing with contempt by publication.
- *Open justice.* It is recognised in Australia that the proceedings of courts and other bodies exercising judicial or quasi-judicial power should be open to public scrutiny and criticism. The right of litigants to a public hearing is provided for in art 14(1) of the ICCPR, subject to appropriate qualifications.
- *Fair trial.* To the extent that the principles of freedom of publication and open justice permit or encourage the publication of material which might influence or prejudice the outcome of a trial, they come into conflict with the interests of society in ensuring that all citizens should enjoy a fair trial of any matter, criminal or civil, in which they are involved. The right of individuals to a 'fair . . . hearing by a competent, independent and impartial tribunal' is guaranteed by art 14(1) of the ICCPR.

- *Preservation of public confidence in the administration of justice.* Restrictions are imposed by the law of scandalising on public criticism of courts and judges on the ground that it is inimical to the best interests of society as a whole to allow confidence in the judiciary to be undermined in this way. Accordingly, this law requires that criticism, generally speaking, should be honest, fair and well informed.

Reform of the law of contempt by publication calls for reconciliation of these four considerations.

26. *Emphasis on fair trial and open justice.* In general, the recommendations for reform retain the current emphasis on the need to protect trials, particularly jury trials, from prejudicial influence. But the principle of open justice is also preserved, subject only to carefully defined judicial powers to make orders restricting reporting proceedings. Where the basis of imposing a restriction on publication is that the administration of justice as a whole might suffer, restrictions are only recommended where the risk of damage appears indisputable.

27. *The concept of publication.* The common law of contempt treats as a 'publication' any material disseminated by recognised institutions of the media, such as newspapers, radio stations or television channels. Narrower forms of dissemination of information have also been treated as publications: for example, distribution of pamphlets on the footpath outside court buildings, performances of a play and wax effigies on public display. A question also arises as to how far a publication can be said to extend, geographically speaking. The concept of publication is crucial in contempt law because it marks the limits of a range of situations in which contempt may be held to have been committed without proof of an intention knowingly to interfere with the administration of justice. In determining what is a publication and in ascertaining the range of publication, it is essential to consider the policy objectives of the particular rules of contempt law involved.

28. *Mental element.* Where there is an alleged contempt by publication at common law, it is not essential to prove '*mens rea*', ie that the accused acted with the intent knowingly to interfere with the administration of justice by influencing trial proceedings or undermining public confidence in the courts (as the case may be), or was recklessly indifferent as to the likelihood of interference. It is enough that the act of publication alone was an intentional act.

29. *Appropriateness of a mens rea requirement.* Arguments in favour of a *mens rea* requirement are based primarily on the traditional principle of the criminal law that no-one should be found guilty of a criminal offence unless he or she had a genuinely 'guilty mind'. The principal arguments against introducing a general requirement of *mens rea* are:

- Where the purpose of a criminal offence is to regulate the conduct of large institutions in the interests of individual citizens, liability is often 'strict' or is based on a generalised notion of 'fault', including negligence. An example is industrial safety legislation.
- In some cases, criminal liability may be framed in terms of conduct which creates a risk of harm to other members of society, rather than conduct actually inflicting such harm. An example is the offence of negligent driving.
- A requirement of proof of *mens rea* would give rise to serious practical problems in the law of contempt by publication, because normally the publication charged emanates from a large media corporation and it would be very difficult to determine whose state of mind was relevant.

- Because the law of contempt covers a wide range of situations, it is unduly rigid to insist that the same requirements as to intention should apply in all instances.

It is recommended that a requirement of *mens rea* should not be introduced. A principle of liability based on fault, as elaborated below, should apply.

30. *Persons involved in the publication.* Generally speaking, the proprietor, the corporation and/or the editor or equivalent in a broadcasting station are the persons prosecuted for contempt by publication. Sometimes, however, liability extends beyond these categories. The principle of editorial responsibility, together with responsibility on the part of the publishing body itself or its owners, should be retained. In addition, subsidiary employees or 'outsiders' who deliberately supply prejudicial material to a publishing organisation in the hope and expectation that it will be published should be held liable under s 5 of the Crimes Act 1914 (Cth), on the basis that they have 'aided, abetted, counselled or procured', or were 'knowingly directly or indirectly concerned in' the offence. In a case of scandalising, an 'outsider' should be held liable if he or she knew, or should reasonably have known, that the remark would be published.

31. *'Innocent' publication.* While contempt liability is appropriate where there has been a lack of due care, it is unjust to impose liability and punishment when the contempt was wholly accidental and unavoidable. There is no deterrent aim to be served by imposing contempt liability on publications in the complete absence of fault on the publisher's part. Consequently, there should be a defence of innocent publication, by virtue of which a person responsible for a publication which is in breach of the *sub judice* rule should be able to escape liability by establishing that:

- he or she had no knowledge of one or more facts relevant to liability (for example, that the proceedings allegedly prejudiced had been set in train); and
- *either* reasonable care was taken to ascertain such facts, *or* they would not have been ascertained even with the exercise of reasonable care.

There should be no liability for breach of a suppression order in the absence of knowledge of the order. A similar defence should apply to scandalising.

32. *Avoiding 'unnecessary' contempts.* Three measures would help to prevent avoidable instances of contempt by publication:

- improving training for journalists in this area of the law;
- improving channels of communication from the courts and the police to the media (eg through establishing computerised records of cases coming up for trial and designating police/media liaison officers); and
- making contempt law more accessible to journalists by putting it in statutory form.

Influence on juries by publications

33. *Criminal jury trials.* The common law principles of *sub judice* prohibit, from the time when the procedures of the criminal law have been set in motion until a verdict has been delivered, publications which, as a 'matter of practical reality' have a 'real and definite tendency to prejudice or embarrass' the pending or current trial. Publications which may infringe this criterion of liability include:

- an allegation that the accused has committed the alleged offence;
- particulars of the past criminal record of the accused or of other criminal charges laid against him or her;

- an allegation which bears upon the character or credibility of the accused or a witness; and
- an allegation that the accused has confessed to the offence, or has made admissions relating to the offence.

The scope of potential liability is curtailed by a number of exceptions and defences. These include:

- fair and accurate reporting in good faith of legal or parliamentary proceedings;
- discussion of matters of continuing public interest which bear only indirectly and unintentionally upon a pending trial; and
- reporting of the 'bare facts' of the offence.

34. *Preventative strategies for dealing with influence on juries.* The law of contempt is not the only branch of law to address the problem of improper influence of jurors. In some cases, the law authorises the imposition of a prior specific restraint on publication, rather than waiting until it has occurred and then inflicting punishment. Where provided by statute, a court may sit *in camera* for specified reasons, including the avoidance of prejudice. Although at common law, courts have no inherent power to order that a hearing should take place in private, magistrates hearing committal proceedings may exclude the public where 'the ends of justice' so require. Similarly, although a court has no power at common law to make a suppression order prohibiting or postponing the reporting of evidence given aloud in open court solely on the grounds of possible prejudice to a forthcoming trial, this may be permissible under statute. Depending on the statute, breach of a statutory suppression order may be contempt or a specific statutory offence.

35. *Remedial strategies for dealing with influence on juries.* Where publicity which may influence a jury in a criminal trial has occurred, counsel for the party allegedly affected may ask the court to adopt one or more of the following expedients to remedy, as far as possible, its effects:

- warning the jury about any prejudicial publicity that has or may have come to their notice and directing them to ignore it when reaching their deliberations;
- adjourning the trial for long enough to allow the effects of publicity to die down;
- changing the venue of the trial;
- questioning the jurors to ascertain whether they have come into contact with the publicity;
- declaring in advance that, if the ultimate verdict of the jury is one of guilty, the judge is prepared to report to the relevant appeal court that the conviction should be set aside;
- discharging the jury; and
- setting aside the verdict on appeal.

36. *Underlying premises.* The law restricting publicity bearing on a jury trial is founded on three broad propositions:

- Jurors, in reaching their verdict, should not be subject to preconceptions or prejudices which may divert them from deciding according to the law and the evidence presented to them in the courtroom. Contempt law reinforces the rules of evidence and procedure which are designed to ensure that allegations which are of little probative value, but which are prejudicial, are not admitted in evidence before the jury. It reinforces the fundamental principle that an accused person must be presumed innocent unless and until guilt is proved beyond reasonable doubt.

- Media publicity, whether before or during a trial, may have the effect of implanting such preconceptions or prejudices so as to have an impact on the jury's decision.
- These prejudices and preconceptions may survive throughout the jury's deliberations, despite the effect of the evidence itself and of any warning given by the judge to ignore publicity.

In general, the types of publicity most likely to influence a jury are allegations of specific inadmissible facts (in particular, details of a prior criminal record or of an alleged confession) and value-laden comment (particularly when it reinforces community prejudice). Irrespective of the actual impact of prejudicial publicity upon the jury in a particular case, the trial will not appear to be fair if such publicity is wholly ignored by the law.

37. *The law's focus on 'tendencies'.* The prohibitions imposed by contempt law are defined in terms of publications which have a 'tendency' to prejudice the relevant trial. Arguments about the appropriateness of this criterion focus on two matters:

- *Uncertainty.* The common law doctrine that criminal offences should be clearly and unambiguously defined finds expression in the phrase 'provided by law' in art 19 of the ICCPR, describing the permissible restrictions on freedom of expression. Yet, as it is impossible to foresee all the ways in which media publicity might influence a jury in a current or forthcoming trial, it may be preferable to have a broad criterion of liability which clearly expresses the underlying aim to be achieved and which is inherently adaptable to new situations. Further, the common-form types of report or comment which it prohibits are well established within the case law and well recognised by the media. Nevertheless, in accordance with fundamental principles regarding certainty in defining criminal liability, the law in this area should be expressed more precisely.
- *Breadth of criterion of liability.* The *sub judice* rule is said to impose an excessively broad prohibition on publicity relating to jury trials. No attempt is made in contempt proceedings to ascertain whether the relevant jury did in fact come into contact with the relevant publicity or, if it did, whether and to what extent it was influenced. The question whether publicity has a 'tendency' to prejudice a particular trial is judged in the abstract, that is, without reference to the particular way in which the trial develops and the significance which, with hindsight, the publicity is actually found to have. Nor is there any correlation between contempt convictions and jury discharge. On the other hand, it is argued that there would be an insufficient deterrent to prejudicial publication, and therefore inadequate protection of the right to a fair trial, if the only publications actually held to be in contempt were those which were clearly established to have been heavily influential, if not the deciding factor, in determining a jury verdict. The criterion of liability should not be narrowed to the extent that nobody should be found guilty of contempt unless actual prejudice were proved. This would be impossible to administer and would significantly endanger accused persons. Nevertheless, the criterion should be narrowed to the extent that a publication should infringe the *sub judice* rule only when it gives rise to a substantial risk of prejudice. Further, only publication within specifically defined categories should be deemed capable of creating such a risk.

38. *Recommendations regarding structure of liability.* A publication should attract liability under the *sub judice* doctrine in its application to criminal trials by jury if and only if:

- it occurs within a specified time limit;
- it contains one or more 'prescribed statements';
- in the particular circumstances of the case, as assessed at the time of the publication, it creates a substantial risk that the trial will be prejudiced by virtue of possible influence on the jury;
- any corporation or person charged is 'responsible' for, or liable in respect of, the publication in accordance with the principles outlined above; and
- the case does not fall within any of the exceptions or defences provided.

39. *Time limits.* Two factors are important when considering an appropriate starting time for restrictions to apply. It must be early enough to restrict potentially highly prejudicial publicity surrounding, for example, an arrest. On the other hand, it must be certain enough to be practicable. The time of issue of warrant for arrest, or the time of arrest without warrant, or (if there is no arrest) the time when charges are laid is an appropriate starting point. The restrictions should continue to apply until the verdict of the jury, a plea of guilty, discontinuance of proceedings, or failure to execute a warrant after one year. In view of the low incidence of re-trials, they should not continue after a guilty verdict merely because of the possibility that a re-trial might be ordered following a successful appeal. But they should revive if a new jury trial is ordered.

40. *Prescribed statements.* The primary justification for 'prescribing' the publication of specific statements as capable of giving rise to liability are:

- They comprise the types of material which, according to empirical and psychological studies, are most likely to exert influence on a jury (to the extent that the particular jury's deliberations are not wholly irrational and unpredictable).
- Generally speaking, the common law of contempt already prohibits prejudicial material falling within this list and the media have learned to live with this fact.
- A number of the prescribed categories of statement correspond with material which, in the normal course of events, would not be admissible at the trial.

41. *Criminal trials by jury: prescribed statements.* Certain categories of published statement should be specified as capable of creating a substantial risk of prejudice to the fair trial of a person for an offence by virtue of the influence it might exert on jurors. These are statements to the effect that, or from which it could reasonably be inferred that:

- the accused is innocent or is guilty of the offence;
- the jury should acquit or should convict;
- the accused has one or more prior criminal convictions;
- the accused has committed, or has been charged or is about to be charged with another offence or is or has been suspected of committing another offence;
- the accused was or was not involved in an act, omission or event relating to the commission of the offence, or in conduct similar to the conduct involved in the offence;
- the accused has confessed to having committed the offence or has made an admission in relation to the offence;

- the accused has a good or bad character, either generally or in a particular respect;
- the accused, during the investigation into the offence, behaved in a manner from which it might be inferred that he or she was innocent or guilty of the offence;
- the accused, or any person likely to provide evidence at the trial (whether for the prosecution or the defence), is or is not likely to be a credible witness;
- a document or thing to be adduced, or likely to be adduced, in evidence at the trial of the accused should or should not be accepted as being reliable; and
- the prosecution has been undertaken for an improper motive (subject to the defence that the statement was true or was believed on reasonable grounds to be true).

42. *Overriding test of substantial risk of prejudice.* Factors such as the extent of dissemination of publicity within the community and the anticipated lapse of time between the publicity and the verdict should be taken into account in determining whether this criterion of liability is satisfied. However, the fact that prejudicial matter has already been published should not be enough of itself to exonerate a publication which, taken by itself, creates a substantial risk of prejudice to the relevant trial.

43. *The making of statements at legal proceedings.* This should be exempt from liability.

44. *Defence of fair, accurate and contemporaneous reporting of legal proceedings.* It should be a defence to a prosecution arising out of the publication of a prescribed statement if the publication was a fair and accurate report of legal proceedings held in public and was published contemporaneously with, or within a reasonable time after, the proceedings (including committal proceedings, proceedings before a coroner and proceedings before a Royal Commission or some similar inquiry). Appropriate emphasis should be placed on the requirements of fairness and accuracy, though to insist that there should be no report of the evidence in a case until all the evidence has been given would be to impose too heavy a burden on the media. The requirement that the report be reasonably contemporaneous exists chiefly to stop restrictions on reporting prior convictions from being circumvented by simply reporting the proceedings in which the convictions were imposed.

45. *Exceptions to this defence.* The defence should not apply where:

- in the course of the jury trial allegedly prejudiced, the material in question has been disclosed to the court before the jury has been empanelled, or otherwise in the absence of the jury; or
- where the publication is made contrary to law or a lawful order prohibiting or restricting publication.

46. *Suppression orders on grounds of prejudice.* A judge, magistrate or other person presiding at legal proceedings (including inquests and Royal Commission hearings) should have power to suppress reporting of any part of the proceedings on the ground that a report would create a substantial risk of prejudice to the fair trial of any person for an indictable offence. This power should supersede any existing power (whether broader or narrower) conferred in order to avert such prejudice. It is chiefly relevant to bail and committal proceedings, where prejudicial allegations may be made regarding the character of the accused, or his or her involvement with the offence, even though they might not be admitted at the subsequent trial. The more drastic expedient of wholly prohibiting the reporting of evidence at committal proceedings if the accused so desires is rejected, chiefly because

it would severely inhibit public scrutiny of such proceedings by effectively eliminating media reports of them. The suppression power is important for public inquiries such as inquests and royal commissions; it strikes an appropriate balance between:

- preservation of the right of persons charged in consequence of the inquiry's findings to have a fair trial: and
- preservation of the public interest in knowing what is said at such inquiries, which are generally established to investigate broad issues of major public importance.

47. *Defence of fair, accurate and contemporaneous reporting of parliamentary proceedings.* It should be a defence to a prosecution arising out of the publication of a prescribed statement if the publication was a fair and accurate report of parliamentary proceedings and was published contemporaneously with, or within a reasonable time after, the proceedings. This defence should operate as a confirmation and supplementation of common law privilege.

48. *Public safety defence.* It should be a defence to a prosecution arising out of the publication of a prescribed statement if the defendant proves that the publication was necessary or desirable:

- to facilitate the arrest of a person for an offence;
- to protect the safety of a person or of the public generally; or
- to facilitate investigations into an alleged offence.

To fall within this defence, the published material should be confined to particulars which are necessary or desirable to achieve one or more of these purposes.

49. *'Public interest' defence.* It should be a defence to a prosecution arising out of the publication of a prescribed statement if the following conditions are satisfied:

- the publication was made in good faith in the course of a continuing public discussion of a matter of public affairs or otherwise of general public interest and importance, not being the matter involved in the trial of the relevant offence; and
- the discussion would have been significantly impaired if the statement concerned had not been published at the time that it was published.

This defence is narrower than the existing version at common law, chiefly because:

- the dressing-up of material as a 'public interest' discussion should not serve to exonerate prejudice which results from careless failure by the media to make themselves aware of current trials, let alone prejudice of a trial whose existence is known to them; and
- where the element of prejudice is genuinely inadvertent, and could not have been foreseen even with the exercise of reasonable care, a 'public interest' defence is not required because the recommended defence of 'innocent publication' (outlined above) covers the situation.

50. *Less stringent restrictions for civil jury trials.* The restrictions imposed by contempt law on publications relating to civil trials before a jury should be significantly less stringent than those imposed to protect criminal jury trials, for the following reasons:

- The liberty of the subject is not potentially at stake in a civil trial.
- In civil cases, there is nothing approaching the strong presumption of innocence in criminal cases.

- The law of evidence does not shield from the civil jury the same broad range of allegations that are treated as inadmissible in a criminal trial on the ground that they are likely to be more prejudicial than probative.
- In civil cases, the law of contempt contributes to the operation of sham 'stop writs' of defamation, which are often issued to gag public debate on matters of public interest.

51. *Civil trials by jury: recommended restrictions.* A publication should attract liability under the *sub judice* doctrine in its application to civil trials by jury if and only if the following conditions are satisfied:

- it occurs after the time when it is known that the trial will take place before a jury and pre-trial proceedings have reached the stage where the case is genuinely ready to proceed;
- it falls within one of the following categories of prescribed statement –
  - a statement that a person likely to provide evidence at the trial is or is not a credible witness;
  - an assertion as to what the outcome of the trial might or ought to be;
  - a statement as to the probative value of any evidence that might be given or tendered at the trial; and
  - a statement regarding the character of a party in the proceedings;
- in the particular circumstances of the case, as assessed at the time of the publication, the publication creates a substantial risk that a fair trial of the issues in the proceedings would be prejudiced, by virtue of the influence it might exert on the jury;
- any corporation or person charged is responsible for the publication in accordance with earlier recommendations; and
- the case does not fall within any of the following exceptions or defences –
  - the statement was made in a hearing of legal proceedings;
  - the publication formed part of a fair, accurate and reasonably contemporaneous report of legal proceedings;
  - the publication formed part of a fair, accurate and reasonably contemporaneous report of parliamentary proceedings;
  - the publication falls within a 'public interest' defence similar to the common law version;
  - the publication is 'innocent'; or
  - the publication falls within the 'public safety' defence.

The adoption of the recommended starting point for restrictions would be enough of itself to prevent 'stop writs' of defamation being given strength by contempt law. Only when the action had been pursued to the point where the case was genuinely ready for trial would the restrictions apply. 'Stop writs' might still be effective, however, by virtue of defamation law. The repetition of the relevant allegations may make it harder to defend the writ, or may give grounds for a higher award of damages.

52. *'Remedial' measures.* From the point of view of the party prejudiced, it is generally more important that appropriate measures are taken to minimise the effect of prejudicial publicity, rather than the energies of the law being solely devoted to punishing the publisher. Some suggestions (not amounting to formal recommendations) as to how such measures might be strengthened are as follows:

- *Change of venue.* It should be confirmed that prejudicial publicity is a recognised ground for ordering a change of venue of a forthcoming trial.
- *Postponement of trial.* It should be confirmed that prejudicial publicity is a ground for ordering the postponement of a trial.

- *Interrogation of potential jurors.* It should be confirmed that a trial judge has a discretion to question individual jurors to determine whether they have seen, read or heard specific prejudicial publicity and, if so, whether it has had any effect upon them.
- *Conditional verdict.* Trial judges should have the power, when prejudicial publicity has created a risk of unfairness to the accused, to order, with the consent of the parties, that if the jury find the accused guilty, a re-trial should take place.

Two other remedial measures which are *not* recommended are the interrogation of potential jurors by counsel (along the lines of the American *voir dire* procedure) and waiver of trial by jury by the accused. Neither of these expedients should be introduced for the sake only of reducing the impact of publicity. If either of them is to be introduced at all, it should be under general legislation directed to a wider range of purposes. In trials of federal offences, the latter expedient is ruled out by s 80 of the Commonwealth Constitution, as currently interpreted.

Secrecy of jury deliberations

53. *Issues involved.* The key question in the area of jury secrecy is whether there should be restrictions on the publication, if not also the disclosure in private, of jury deliberations. The principal arguments in favour of such restrictions are:

- The maintenance of public confidence in the jury system and in the system of appeals demands that, subject only to appeal on specified grounds, jury verdicts are final. The quality of finality will be lost if jurors are allowed to describe what happened, or allegedly happened, in the jury room.
- The number of appeals against convictions would rise beyond reasonable limits if jury irregularities or 'second thoughts' were made public.
- The role of juries in infusing a lay element into the criminal law by occasionally bringing in an apparently perverse verdict would be prejudiced by the disclosure, on a regular basis, of jury deliberations.
- Jurors are likely to be diverted from the proper performance of their task if they are uncertain whether confidentiality will be maintained.

The principal arguments against such restrictions are:

- There have been some instances of disclosure and publication over the years without any demonstrable harm resulting.
- A general prohibition on jury room disclosures would prevent the disclosure and rectification of serious miscarriages of justice resulting, for example, from bribery or threats made against jurors, or gross misconduct by them.
- Public interest demands that adequate research be done into the behaviour of juries, in order to aid understanding of the processes and dynamics of jury room deliberations.
- It is only on rare occasions that jurors have been sufficiently motivated to come forward and reveal what occurred in the jury room.

54. *Uncertain role of contempt law.* There is no established principle of common law prohibiting disclosure or even publication of jury deliberations. However, the possibility that publication of jury deliberations might constitute contempt, on the grounds of its effect on the administration of justice as a continuing process, has been raised in England.

55. *Statutory reform.* In a number of common law jurisdictions, notably, Victoria, England and Canada, the common law rules governing disclosure and publication of jury room deliberations have been substantially superseded by legislation imposing significant restrictions.

56. *Approach to reform.* In addition to clarifying the law, any restrictions imposed by legislation should be sufficient to preserve finality of jury verdicts and to ensure a secure and private environment for jury decision-making. But they should not exceed these aims, and should leave scope for miscarriages of justice in specific cases and defects in the general operation of the jury system to be exposed and remedied.

57. *Recommendations: disclosure of jury deliberations.* A series of statutory offences should be created along the following lines:

- A juror should not disclose a deliberation of the jury before the jury has been discharged or, if the accused has been convicted, before sentence has been passed, except to the presiding judge.
- The identity of a juror in a particular trial should not be disclosed without that juror's consent or the leave of the court.
- A juror should not disclose a deliberation of a jury for a material benefit, except by leave of the court.
- A person should not offer a material benefit to a juror for the disclosure of a deliberation of the jury, except by leave of the court.
- A person should not harass a juror to obtain the disclosure of a deliberation of the jury or the name of any member of the jury.

58. *Recommendations (by majority): publication of jury deliberations.* Publication of jury deliberations in a manner which identifies or renders identifiable the trial in question should be prohibited, unless:

- the publication is made with the leave of the court;
- the publication is protected by the defences of fair, accurate and reasonably contemporaneous reporting of legal or parliamentary proceedings; or
- the publisher proves that –
  - more than two months before the publication, the relevant deliberations were disclosed to the Attorney-General, the Director of Public Prosecutions or any other person prescribed for the purposes of receiving such disclosures and investigating them; and
  - the publisher honestly believed on reasonable grounds that the publication was necessary to rectify or prevent a miscarriage of justice.

There are two separate minority views within the Commission. According to one such view, the above prohibitions should apply irrespective of whether the publication identifies (or renders identifiable) the trial in question. The other is that the prohibition should cease 12 months after the verdict or 6 months after all appeal proceedings relating to the trial have finished (whichever is the later).

Influence on other participants by publications

59. *Judicial officers.* Existing contempt law reflects uncertainty as to whether judicial officers, that is to say, judges and magistrates, are capable of being influenced by what is said in the media. The balance of authority, however, seems to be that they are not. Of significance is the nature of the role played by the judicial officer.

In proceedings before a jury, judges do not make primary findings of fact, assess the credibility of witnesses or perform the other tasks needed to reach a verdict. In any case, such proceedings are protected by the restrictions imposed on the ground of possible influence of the jury. Committal proceedings before a magistrate are similarly protected. In trials of summary offences, however, magistrates make final determinations as to guilt or innocence and may have the power to impose significant penalties. It is common to withhold the criminal record (if any) of the accused from the magistrate until liability is determined. On the other hand, magistrates make rulings as to the admissibility of evidence and are expected to put out of their minds any evidence they have heard but held to be inadmissible. Therefore, only a limited range of protection is necessary for trials of summary offences. It is, however, desirable to protect judges and magistrates from publicity which may influence, or appear to influence, sentencing decisions. The main reasons are as follows:

- This is a matter on which wide discretions are exercised by the judge or magistrate.
- An offender who has received a stiff sentence following a media campaign in favour of this may well feel that the media, rather than the court, determined the sentence.
- A sentenced offender, or the Crown law authorities, may be influenced by media reactions in determining whether to appeal against the sentence.

Yet general debates on sentencing policy must always be allowed to occur. Community attitudes are a relevant factor in determining sentences. As far as civil proceedings heard by a judge alone are concerned, there is no duty on the part of the court to maintain procedural and evidentiary safeguards in favour of a particular party, as there is with the accused in a criminal trial, nor is there is a prospect of imprisonment or other punishment.

60. *Recommendation: trial of summary offences.* The following categories of statement should be prohibited where they create a substantial risk that the fair trial of a person for an offence would be prejudiced by virtue of influence on a judge or magistrate conducting the trial summarily:

- that the accused has one or more prior convictions;
- that the accused is of good or bad character, generally or in a particular respect;
- that the accused has confessed or made an admission in relation to the offence; and
- that the accused, or any prospective witness is or is not likely to be a credible witness.

The periods covered by the prohibition should be analogous to those recommended in relation to criminal trial by jury. The defences recommended in relation to criminal trials by jury should apply.

61. *Recommendation: publication of opinions as to sentence.* Publications expressing opinions as to the sentence to be passed on any specific convicted offender, whether at first instance or on appeal, or on any specific accused person in the event of conviction, should be prohibited, subject to the defences of fair, accurate and contemporaneous reporting of legal or parliamentary proceedings. The prohibition should apply to trial by magistrates, or by judges sitting with or without juries, but should not apply to general comments on sentencing policy. So far as sentences at first instance are concerned, it should operate between the time when charges are laid and the time of sentence, irrespective of whether a plea of guilty or

not guilty is entered. If a sentence is appealed against, it should operate for so long as the appeal is pending.

62. *No other restrictions on basis of influence of judicial officers.* There should be no other restrictions on publications on the ground that the conduct of legal proceedings by a judicial officer might be influenced.

63. *Witnesses.* The issue with respect to witnesses is the extent, if any, to which publicity about a case may distort their testimony. At common law, a publication may be held in contempt on the ground that it might influence the testimony of one or more witnesses at a current or forthcoming trial. Examples include:

- criticism of a prospective witness on the ground that his or her evidence is likely to be untruthful or unreliable, and that it should not be given;
- an interview with a prospective witness (on the ground that this may 'lock the witness in' to the account given in the interview);
- an interview with another prospective witness;
- criticism of a party;
- publication of a photograph of an accused person, in circumstances suggesting that the person has been accused of the relevant offence, where there is a possibility that the identity of the accused will come into question at the trial.

Many of the types of publication which may be held to be in contempt on the ground of possible influence of a witness would be prohibited on other grounds. Others would amount to intimidation or improper influence of witnesses, which are the subject of existing criminal offences. The publication of photographs, however, raises problems. Eyewitness identification is an extremely finely balanced affair, and there have been a number of convictions based wholly or substantially on identification evidence, which have later been found to be unsafe and have been overturned.

64. *Recommendation: protection of testimony.* The only additional restrictions recommended to protect witnesses in legal proceedings from influence should be:

- *Publication of photographs.* The publication of a photograph, film, sketch or other likeness, or a description of physical attributes, of a person should be prohibited where —
  - the publication suggests that the relevant person is suspected of, or has been charged with, a criminal offence;
  - the publication might impair the reliability of any evidence of identification that might be adduced in a prosecution for the offence; and
  - the publication cannot be justified on the basis that it may facilitate the arrest of the person or investigation of the offence, or out of considerations of public safety.
- *Intention to distort testimony.* A publication which tends to exert influence on the testimony to be given by a witness in any proceedings (for example, because it prejudges the outcome of the relevant proceedings, or reflects on the truthfulness or reliability of a party or a witness, or contains a report of an interview with a witness) should be prohibited where an intention to distort testimony can be proved. This matter is covered in an earlier recommendation, dealing generally with improper pressure on participants in a trial.

65. *Parties.* Published material may bring pressure to bear on one or more of the parties to a case, to the extent that they feel compelled to withdraw their claim or defence, or to seek a compromise of the proceedings. But the question whether a publication should be prohibited on account of such influence generally arises un-

der the heading of contempt by deliberate interference (outlined above), rather than contempt by publication.

Publications which prejudge or 'embarrass'

66. *The principles involved.* A publication may be held to be in contempt on the ground that it prejudges issues in a current case (the 'prejudgment principle') or creates embarrassment to the court which is trying the case, particularly in the period between the entry of a conviction in a criminal case and the passing of sentence (the 'embarrassment' principle). The principles are chiefly relevant to civil proceedings (whether being heard at first instance or on appeal), sentencing proceedings in criminal cases and criminal appeals. They do not, however, receive uniform support in the cases. The underlying policy consideration seems to be the preservation of confidence of litigants, and of the public generally, in the operation of the judicial system, rather than the necessity to stave off any genuine usurpation of the role of the court. The 'comfort' of judges and litigants is also at issue. Many publications which would infringe these principles would be prohibited by restrictions imposed on other grounds. It is recommended that there should be no restriction on publications solely on the ground that they tend to interfere with the administration of justice by virtue of containing a prejudgment of issues before the court in a current or forthcoming trial, or that they tend to 'embarrass' a court in the discharge of its duties.

Scandalising

67. *What is it?* Scandalising is a branch of contempt law which prohibits the publication of certain allegations against judges or courts. These include:

- allegations containing scurrilous abuse;
- allegations that they are corrupt, or in some other way lack integrity, propriety or impartiality; or
- allegations that in making their decisions they bow to the wishes of outside individuals, pressure groups or institutions.

A person may be convicted of scandalising without having had the intention of impairing public confidence in the administration of justice, so long as the remarks in question are published intentionally and tend to have this effect on public confidence. There is no formal defence of justification (whether established by proving truth, or truth coupled with public benefit, or in any other version). It is not entirely clear if privilege may be pleaded as a defence by persons who publish fair and accurate reports of parliamentary proceedings during which scandalising remarks are made. Nor is it clear how far privilege protects an advocate who makes scandalising remarks in court.

68. *Necessary to maintain public confidence in the court system.* The law of scandalising is justified in terms of maintaining the rule of law. This is said to be dependent on the maintenance of public confidence in judges and in the judiciary as an institution. Criminal sanctions are necessary to repress and punish the making of public statements merely on the basis that they tend to impair such confidence. A criterion of this breadth is necessary to avoid difficult questions of proof and to enable courts to step in as soon as the potentially damaging statement is made. Punishment should be inflicted irrespective of the truth or falsity of such

statements because it is inappropriate for judges to have to rule on the truth or falsity of scandalising allegations relating to themselves or their colleagues. A jury should also not have to decide an issue of this nature. A genuine complaint about judicial misbehaviour should be made privately to an appropriate official. Only the law of scandalising is addressed to the specific aim of protecting public confidence in the administration of justice.

69. *Reasons for reform.* The law of scandalising is open to objection on several grounds:

- The existing broad principle of liability inhibits freedom of expression to an unacceptable degree, because criminal liability is imposed without it being necessary to establish that the community, or any institution or person within it, has been harmed or put in jeopardy in any significant way.
- Liability is imposed without the offence being defined in sufficiently precise terms to give fair warning to individuals as to what types of statements are prohibited.
- The exisiting categories of scandalising are based upon no more than judicial surmise as to what the public expectation of the judicial role is or ought to be. This is based on a traditionalist concept of judicial impartiality, according to which judicial decision making is no more than the application of strict legal principles to the case at hand. It ignores the fact that numerous non-legal assumptions underlie judicial decisions, and is largely outdated.

70. *Options for reform.* Broadly speaking, there are three possible options for reform:

- total abolition of the offence;
- curtailment of its scope (including possibly the establishment or enlargement of one or more formal defences); and
- preservation of the *status quo.*

The principal argument in favour of abolition is that retention of the offence, whether or not curtailed in scope, will continue to perpetuate the image of the judiciary as a specially favoured institution where public criticism is concerned. The administration of justice and the reputation of the judiciary and of individual judges could be adequately protected by the existing laws of civil defamation and appropriate amendments to criminal defamation and seditious libel. But judges are, or consider themselves to be, severely inhibited in practice from suing for defamation, and outmoded and repressive laws governing criminal and seditious libel should not be resuscitated. It is recommended that a limited offence be retained. It should be an offence to publish an allegation which imputes misconduct to a judge if, in the circumstances, the publication of the allegation is likely to cause serious harm to the reputation of the judge in his or her official capacity. It should be a defence that the allegation was true, or that the defendant honestly believed on reasonable grounds that the allegation was true. In addition, the defences of fair, accurate and reasonably contemporaneous reporting of legal or parliamentary proceedings should apply.

Procedure in contempt by publication cases

71. *Instigation of proceedings.* The primary responsibility for the prosecution of contempt by publication belongs to the Attorney-General. The Director of Public Prosecutions has concurrent powers, but the extent of these is uncertain. In addi-

tion, proceedings may be instigated by a party to a case affected by a publication, or possibly by any person, and the court itself may act on its own motion. It is alleged that prosecution policy discriminates against newspapers, and also that it is unpredictable. It is recommended that all available channels of prosecution should be preserved. The Attorney-General's traditional powers of prosecution should be retained, but day-to-day responsibility for the prosecution of offences in the area of contempt by publication should be undertaken by the Director of Public Prosecutions. In addition, the recommended offences should be open to prosecution by private individuals and at the instance of the court involved.

72. *Mode of trial: sub judice.* An alleged contempt by publication of a superior court of record, such as the Supreme Court of a State or Territory or the Federal Court, is heard by the court itself, except in New South Wales where it is heard by the Court of Appeal. Cases involving inferior courts are heard by the Supreme Court of the relevant State or Territory or (in New South Wales) the Court of Appeal. At the hearing, the defendant is called upon to show cause why he or she should not be punished for contempt. Evidence is submitted on affidavit, with each side being entitled to apply for leave to cross-examine the other's witnesses on their affadavits. The onus is on the prosecution to prove the ingredients of the offence beyond reasonable doubt. At common law, there are no fixed limits on the punishment which may be imposed for contempt. The summary mode of trial is well established. Its main advantage is speed and convenience. However, there are clear advantages in adopting criminal modes of trial. In relation to offences against the *sub judice* doctrine, these are:

- Other things being equal, it is desirable to maintain uniform procedures for the trial of what are in essence criminal offences.
- It is strongly arguable that a jury, rather than one or more members of the judiciary, is the body best equipped to resolve questions such as whether a publication creates a substantial risk of prejudice by virtue of influence on jurors.
- In most cases, the contempt trial is not held immediately. Instead, the practice has developed of postponing the hearing of the contempt proceedings until after the trial allegedly affected has come to a conclusion.
- Although many of the primary facts in a *sub judice* case – for example, the fact of publication – are often uncontested, key issues such as intent, knowledge and reasonable care are sometimes in dispute. A jury rather than a single judge or a bench of judges is the more appropriate body to deal with such conflict.

It is recommended that offences substituted for the *sub judice* rule should be referred to the ordinary criminal courts, as indictable offences which are triable by jury but which may, with the consent of all concerned, be tried by a magistrate in appropriate circumstances.

73. *Mode of trial: scandalising.* The main advantages of the summary procedure for scandalising offences are that it enables the court quickly to vindicate its authority, and avoids the necessity of having a jury make decisions about such matters as the integrity and impartiality of courts and judges. However, it is open to objection on several grounds:

- The existing procedure raises a real possibility of bias, and may well infringe art 14 of the ICCPR, which provides for a fair trial before an 'impartial tribunal'.

- By virtue of this danger of bias, the existing procedure may impair public confidence in the administration of justice more than the allegedly scandalising remark is likely to do.
- The input of a jury into scandalising cases would act as a balance to any tendency on the part of judges to erect their own ideology of judicial conduct. It would avoid the danger that values underlying scandalising cases may become out of touch with those of the community at large.

On the basis that the law of scandalising should apply to a narrower range of allegations than at present, it is recommended that scandalising offences be tried by jury except in limited circumstances when, with the consent of all concerned, it may be tried summarily by a magistrate. Since the offence exists to uphold the public image of judges, and to punish and deter unwarranted aspersions on them it should be tried in a manner which is scrupulously fair and ensures maximum impartiality.

74. *Remedies.* At common law, there are no fixed upper limits to sentences (imprisonment or fines) for contempt. The deterrent effect of the law is enhanced by the fact that media organisations cannot predict in advance how much a conviction might cost them. Nevertheless, fixed maximum penalties should be set for the offences substituted for contempt by publication. Under sentencing principles applicable to criminal offences, repetition of an offence may be prevented by attaching conditions to bonds or recognizances. In addition, it should be possible to restrain initial publication by means of an injunction. Finally, s 21B of the Crimes Act 1914 (Cth), under which the court may order the payment of 'reparation' to the Commonwealth or any person suffering damage in consequence of an offence, should apply to the offences being recommended. This would, for instance, authorise an order for the payment of the costs of an aborted trial, in circumstances where publicity has resulted in the discharge of the jury.

75. *Breaches of suppression orders: procedural aspects.* The existing right, or 'standing', of media representatives to resist an application for a suppression order, to apply to have it lifted or to lodge an appeal against it should be confirmed. Unrestricted rights of appeal from the making of the order at first instance should be conferred (where these do not at present exist), and the court hearing the appeal should be entitled to substitute its own order for the one appealed against. Subject to a defence of 'innocent publication', where a suppression order is made pursuant to a statute, breach of the order should be made an offence under the statute and should be the basis of liability for punishment. At least where the basis of the restriction is the prevention of influence affecting a current or forthcoming trial, breach of a suppression order should be tried as a criminal offence, with limits to sentence stipulated by law in the ordinary way.

Non-compliance with court orders and undertakings

76. *Disobedience contempt described.* Disobedience contempt (civil contempt) is a distinct branch of the law of contempt. It involves the imposition of sanctions for the purpose of enforcing orders made by, and undertakings given to, courts, and for the punishment of disobedience to such orders. Disobedience contempt proceedings most commonly arise out of a failure to comply with an order which is of such a nature that it can only be obeyed – or indeed disobeyed – by the person to whom it is directed. Where possible, alternative methods of enforcing orders are

generally used, and proceedings for contempt are regarded as a remedy of last resort. Special considerations apply in family law matters: these are outlined below.

77. *Coercive role of disobedience contempt.* Proceedings for disobedience contempt may serve one or both of two distinct functions: enforcement of the order and punishment of disobedience of the order. Where the primary aim of the proceedings is to enforce a currently subsisting order, any sanction imposed will be coercive. The distinguishing characteristic of a coercive sanction is that it is expressed to last only until the occurrence of a specific event which is within the power of the person on whom the sanction is imposed to bring about. Sanctions which may be imposed for the purpose of coercion include:

- open-ended imprisonment;
- sequestration of assets; and
- accruing fines.

Given the wide variety of enforcement mechanisms available to a court, it is clearly not necessary to impose coercive sanctions in every case of continuing disobedience. Even where contempt proceedings have been instituted, such sanctions will not often be necessary because, before the hearing, the contemnor will have complied with the order or expressed a willingness to do so. In some cases, the imposition of a coercive sanction may be ineffective. Compliance may be beyond the capacity of the person bound by the order, or the disobeying party may be so determined not to comply that no sanction, even a long prison sentence, will induce compliance. An order should not be enforced by the imposition of coercive sanctions unless compliance is clearly within the capacity of the person bound, no reasonable alternative method of enforcement exists, and the sanction is likely to be effective in the particular case.

78. *Punitive role of disobedience contempt.* In many cases of disobedience contempt proceedings, enforcement has ceased to be an issue. The disobedient party may have complied with the order since the proceedings were instituted, or the order may no longer be capable of being complied with. In such a case, the primary goal of contempt proceedings is to punish the contemnor for past disobedience. Consequently, the limits of the sanction will be fixed in advance: for example, a fixed term of imprisonment or a fine. The imposition of punitive sanctions is justified in terms of upholding the authority of the court with a view to maintaining the effectiveness of court orders.

79. *Mental element.* A variety of mental attitudes towards the order of the court may accompany an act or omission constituting disobedience. The act or omission may be intentional, reckless, careless or quite accidental and totally unavoidable. An intentional act may be done with or without an intention to disobey the order, and with or without an intention to defy the court. Traditionally, the element of 'contumacy', that is, stubborn resistance to, or defiance of, the authority of the court was necessary to justify the imposition of punitive sanctions. This is no longer so. It is now established that the mental element for liability for contempt arising out of disobedience is simply that the disobeying party intended the conduct constituting the disobedience. It is recommended however that the disobeying party should be shown either to have intended to disobey, or to have made no reasonable attempt to comply with the order. In addition, a disobeying party should not be subject to punitive sanctions if he or she satisfies the court that the disobedience was attributable to an honest and reasonable failure to understand the nature of the obligations imposed by the order.

80. *Instigation of proceedings and discontinuance.* Disobedience contempt proceedings are generally instituted by the party in whose favour the order was made. In rare cases, they have been instituted by another party or by an officer of the court at the direction of the court. Traditionally, applicants have enjoyed the right to waive the contempt and to discontinue proceedings already instituted. In recent years, however, some constraints have been placed on this right in industrial and family contexts. The principal argument in favour of the abolition of waiver is that because disobedience represents a threat to the authority of the court and necessarily undermines the effectiveness of the courts in general, contempt proceedings serve not just the private interests of litigants, but a public interest in maintaining the system of justice. On the other hand, the primary purpose of contempt proceedings is the enforcement of orders and, if the party in whose favour the order was made chooses to waive his or her rights to enforcement, and if the behaviour of the contemnor is not otherwise contrary to law, there seems little reason why the court should insist on compliance. It is recommended that only the person entitled to the benefit of the relevant order should have standing to institute proceedings for disobedience contempt. This person should also be entitled to discontinue the proceedings. The court should not take an active role in the institution of proceedings, or in continuing the proceedings against the wishes of the aggrieved party, unless the disobedience constitutes a flagrant challenge to the court's authority. Disobedience which constitutes a flagrant challenge to the authority of the court should be made a criminal offence.

81. *Causing or aiding disobedience.* At common law, a person who knowingly causes, procures, or aids and abets a party to disobey an order, or deliberately prevents or hinders compliance, may be punished for contempt. In addition, a director or officer of a corporation who causes the corporation to disobey an order may be made subject to coercive sanctions. It is recommended that these principles should be retained.

82. *Sentencing.* A unique feature of disobedience contempt law is the imposition of open-ended sanctions for the purpose of coercing compliance.

- *Open-ended imprisonment.* At common law, a court has the power to commit a person to prison indefinitely as a means of coercing compliance with an order. In theory, the obstinate contemnor could spend the rest of his or her life in prison, although it is more likely that he or she would eventually be released even without having complied. An open-ended sentence may become manifestly out of proportion with the offence, and may result in widespread public sympathy for the person, thus undermining respect for the judicial system. In addition, there may come a time when it becomes obvious that nothing will induce obedience. Open-ended imprisonment should be abolished. There should be an upper limit for any sentence imposed for the purpose of coercion, with the court retaining the power to order the earlier discharge of the disobeying party prior to the expiration of the fixed term in the event of compliance with the order, or for any other appropriate reason.
- *Sequestration of assets.* This has the effect of putting the contemnor's property temporarily into the hands of sequestrators who manage it and receive the rent and profits from it. It may not be sold except (with the authorisation of the court) to enforce the payment of a sum of money. In practice, it is not often used, partly because of its effect on innocent third parties. However, writs of sequestration have been issued against corporate contemnors to enforce the payment of fines or costs ordered in contempt proceedings. Sequestration should be retained as a sanction to compel compliance but,

where possible, there should be a lapse of time between the issue of the writ and its execution in order to give the contemnor further time to comply.

- *Accruing fines.* In the event of continuing non-compliance, the court may impose a fine, assessed on a periodic basis, which accrues for the term of the disobedience. This is a particularly useful sanction against corporate offenders and should be retained. However, the amount payable per day and the aggregate amount should be subject to upper limits, and the total amount payable under the order should be determined by a court.

Fixed sentences of imprisonment and fines imposed for the purpose of punishment of disobedience should be subject to fixed limits. To deal particularly with situations where an act of non-compliance is also a criminal offence, the court should be required to take into account any physical or emotional harm suffered by any person as a result of the disobedience, and should have power to stay non-compliance proceedings if a criminal prosecution has been instituted. The full range of sentencing options available to criminal courts, in particular non-custodial sentences, should be available to courts dealing with disobedience contempt and persons imprisoned by way of punishment should have the same rights as regards parole etc as criminal offenders. There should also be a right to compensation for damage suffered by a party in consequence of disobedience of an order.

83. *Mode of trial.* Non-compliance with an order of a court is generally dealt with by the court which made the order. Persons in whose favour orders are made in civil proceedings should be entitled to the benefits of such orders without endless litigation, undue cost and unnecessary anxiety. Unlike other areas of contempt (for example, contempt in the face of the court), the court does not have an independent interest to protect, except in the rare cases where overt defiance of the court is an element in the disobedience. In such cases, as already recommended, a criminal offence should apply. For these reasons, proceedings for the enforcement of orders or the punishment of disobedience to orders should continue to be heard in the court which made the order. There should be a single unified procedure ('non-compliance proceedings') for cases where a successful party wishes to ask the court for coercive sanctions, punitive sanctions or both, on the ground of non-compliance, though the judge who made the order should not hear these proceedings if the respondent so requires. Such proceedings should also be available against witnesses who refuse to be sworn or to make an affirmation, or to answer a question lawfully put.

84. *Procedural safeguards.* The recommended procedure should implement the requirements of natural justice, which underlie many of the rules governing the existing procedures for dealing with contempt. It should incorporate safeguards normally associated with the trial of criminal offences. This means that a court should not impose sanctions for non-compliance unless it is satisfied that the order which is sought to be enforced has (with minor exceptions) been served personally on each person bound by the order, the application for sanctions has been served personally on the respondent and the application includes particulars of the acts or omissions relied on as constituting the failure to comply. The onus of proof of the non-compliance and the requisite mental element, together with the fact that it is necessary to invoke coercive sanctions rather than other enforcement remedies, should lie on the applicant, and these matters should be established beyond reasonable doubt. The rules of evidence applicable in criminal proceedings in a court of the State or Territory in which the court is sitting should apply. A determination made by the court should be subject to appeal in the same manner as any other final order of the relevant court. Non-compliance by a party to proceedings should

not be an automatic bar to continuance of the proceedings by that party: it should instead be a matter for the court's discretion.

Non-compliance in family law

85. *Frequent use of disobedience contempt powers.* The incidence of contempt proceedings to enforce court orders is significantly higher in family law matters than in any other type of case because:

- The things required to be done under an order made in family law can often only be done by the party to whom the order is addressed – for example, an order to provide access to a child at specified times and places or an order not to assault or harass one's spouse. In the event of non-compliance, there is little the court can do to enforce the order other than to impose sanctions upon the disobedient spouse.
- Many orders made in family law presuppose continued contact in some form between spouses and require compliance on numerous occasions. This is the case particularly with orders for payment of periodical maintenance and orders for access to a child.
- Resistance to an order made in a family dispute may be particularly strong. A number of family law disputes are bitterly fought and the orders made by the court at the end of the case can amount to a significant personal defeat for the losing spouse. They normally relate to matters about which the spouse has deep and intense feelings – for example, the custody of his or her child.

Many of the problems arising out of the enforcement of orders in family law are inherently intractable.

86. *Contempt powers under the Family Law Act.* A number of provisions in the Family Law Act 1975 (Cth) empower courts exercising jurisdiction under the Act to impose sanctions upon spouses who have failed to obey an order made or undertaken given in proceedings under the Act. The Family Court of Australia and other courts having jurisdiction under the Act have power to 'punish contempts' (s 35, 108). The sections do not stipulate maximum penalties, and they authorise the imposition of coercive as well as punitive sanctions. In addition, s 70(6) and 114(4) (the 'quasi-contempt' provisions) empower courts exercising jurisdiction under the Act to impose sanctions of a limited nature for breaches of a number of specified types of order without it being necessary to establish that the breach constitutes contempt. The quasi-contempt provisions are treated as appropriate for the 'less serious' instances of non-compliance with an order, whereas the contempt powers are reserved for 'serious' cases only.

87. *The Family Court's dilemma.* A central paradox is that, while the Family Court is often described as a 'helping' court in which conciliation is strongly stressed, the potentially draconian procedures of contempt are distinctly more prominent than in any other civil court. This is partly due to the factors explaining the frequent use of contempt powers in family law, outlined above, but also to the fact that the Family Court, until recently, lacked many of the alternative enforcement powers of other civil courts. The underlying dilemma of the Family Court is reflected in the fact that a significantly high proportion of contempt and quasi-contempt applications are not finally determined. Spouses are actively encouraged to postpone the hearing of such applications and to attempt to resolve their dispute through some alternative means, usually involving counselling and negotiations.

The seemingly unique outcome is that a court is consciously shying away from imposing sanctions on those who deliberately refuse or fail to obey its orders. If sanctions are imposed, they are often lenient. This creates a popular impression that the Court is 'soft' and will not take firm steps to enforce its authority. Such an impression may be enough of itself to increase the incidence of non-compliance, thereby producing a vicious circle. The dilemma is enhanced by the Court's overriding duty to take account of the interests of the children of a marriage. The merits of a case may point towards the imposition of a severe sentence for non-compliance, but concern for the welfare of the children may suggest a more lenient approach.

88. *Factors militating against the use of contempt powers.* There are three possible grounds for the Family Court refraining from invoking its disobedience contempt powers:

- *The overall welfare of the family.* Under s 43 of the Family Law Act, the Family Court, in exercising its powers is required to have regard, amongst other things, to the welfare of the family and the rights and welfare of children. This may render the mechanical application of sanctions wholly inappropriate. Changes in circumstances, including the relationship of spouses and the position of children, may have made the order itself inappropriate by the time that proceedings for contempt to enforce it have come on for hearing. The question whether the alleged breach of an order actually occurred is usually only one aspect of a broad continuing dispute, which might be better dealt with by counselling. On the other hand, a policy of deference by the Court to these considerations may result in the erosion of the Court's authority to an unacceptable degree. A Discussion Paper proposal to the effect that the basis of the Court's deference to overriding considerations in appropriate cases should be more explicit and that there should be a general discretion to refuse to hear and determine an allegation of disobedience contempt was subject to considerable criticism and has been rejected. Considerations such as the welfare of the children and the relationship of the parties should be relevant, not to the determination of whether or not non-compliance occurred, but only to whether or not sanctions should be imposed, and they should be specifically related to the particular categories of order to which they are relevant.
- *Interaction with criminal law.* In family law, there are a number of situations where the same act constitutes both non-compliance and a crime – for example, an assault in breach of a non-molestation order. Where conduct in breach of an order also constitutes a criminal offence, but the offence is of comparatively small scale and properly belongs within the jurisdiction of the Family Court, the Family Court will deal with the matter as a contempt or quasi-contempt, if the applicant undertakes not to institute a prosecution. On the other hand, if the criminal offence is of a more serious kind, it is regarded as more appropriate that the matter should be dealt with under the criminal law. In intermediate cases, it is a matter for the discretion of the court in each case. This approach is appropriate. However, there is a danger that the inherent criminal element in much of the conduct falling within the intermediate range will be lost when the matter is dealt with as disobedience. This is particularly so if the Family Court refrains, out of deference to 'overriding considerations', from determining the application or imposing penalties. The outcome may well be that conduct, which under criminal law and sentencing policy deserves and would attract a significant penalty, may be treated rather more leniently when it is dealt with by the Family Court as

disobedience. This is particularly relevant to assaults on spouses. There should be a legislative provision to the effect that the Court should have regard to the nature and extent of any physical or emotional harm sustained by the applicant spouse or by a child of the marriage, or any other person, as a result of conduct which is both disobedience and a criminal offence.

- *Other enforcement processes are available.* Contempt sanctions should not be imposed for the purpose of enforcement unless no reasonable alternative method of enforcement exists. Until recently, the powers of the Family Court to enforce orders against property other than by contempt or quasi-contempt were very limited. The range of alternative enforcement procedures available within the Family Court should be as wide as possible and the Court should have sufficient resources to render them effective.

89. *Aims in imposing sanctions.* The main aims of the imposition of sanctions for non-compliance with orders made in family law are, as in other types of proceedings, coercion and deterrence. In addition, because orders in family law matters often impose recurring obligations, a suspended sanction may be imposed in respect of past disobedience of an order with the aim of securing compliance with future obligations under the order. In family matters, it is particularly important that the full range of sentencing options – including weekend detention and community service orders – should be available. Variation of an order should not, however, be seen as an appropriate sanction, even if this may appear to achieve a coercive or deterrent aim.

90. *General recommendations affecting proceedings in family law.* There should be a single unified procedure (non-compliance proceedings) for the enforcement of orders made in family law. This should replace the existing 'hierarchy' of contempt and quasi-contempt, which has proved inadequate. All courts exercising jurisdiction under the Family Law Act 1975 (Cth) should be empowered to deal with non-compliance with orders made by other courts under the Act. Each Registry of the Family Court should establish an 'enforcement list' of cases, which should be heard in priority to other cases. As at present, proceedings arising out of non-compliance should take place in open court, subject to a residual power of the Court to conduct the hearing *in camera* if special circumstances so require. Generally speaking, the substantive and procedural law recommended for the enforcement of orders in family law should conform substantially to that relating to the enforcement of orders made in civil proceedings generally. To the extent that unique considerations applicable in family law need to be taken account of, there should be a distinction drawn between different types of orders.

91. *Non-molestation injunctions.* Under s 114(1) of the Act, courts exercising jurisdiction under the Act may grant injunctions for the protection of spouses and children. This overlaps with State and Territory domestic violence legislation, and s 114AB provides that the existence of proceedings for a restraining order under State or Territory legislation is a bar to the instigation of proceedings under s 114 for an injunction in respect of the same matter. There is widespread dissatisfaction with the operation of non-molestation injunctions and with the procedure for imposing criminal penalties (under contempt or quasi-contempt provisions) when an injunction is breached. Provided that certain conditions are satisfied, it is possible to have a power of arrest without warrant attached to an injunction by order of the court. But in practice an order attaching a power of arrest is rarely made. If proceedings are taken out following an assault, the offender is usually dealt with leniently. The very existence of injunctive proceedings under the Family Law Act contributes to police reluctance to prosecute domestic assault. A possible approach

is to abolish injunctive relief where an assault which could be punished under the criminal law is alleged, and leave it to the police to prosecute the matter as a criminal offence. This approach is, however, unduly rigid. In those States and Territories which do not have domestic violence legislation, a spouse who had been assaulted would have to choose between invoking the full machinery of the criminal law and refraining completely from any legal action. Furthermore, invoking the criminal law may well be too drastic a step for many victims of domestic assault to contemplate, and in any case what they chiefly need and want is continuing protection, not punishment. The difficulties of proving an assault beyond reasonable doubt in a criminal prosecution may leave the victim without any remedy. Therefore, the injunctive process under the Family Law Act should be retained, though the policy of relegating most cases to be dealt with under State or Territory domestic violence legislation should also continue. The general policy underlying reform should be that, so far as possible, procedures for enforcement of non-molestation injunctions should be effective in terms of protecting a victim spouse from further violence or harassment, eliminating unnecessary delays in the granting of relief and leading to sanctions which will punish guilty respondents and deter them from future breaches. Specific reforms recommended are:

- notification of the right to prosecute assault as a criminal offence;
- making attachment of a power of arrest without warrant to a restraining injunction in certain circumstances mandatory;
- creation of a criminal offence of wilful breach of a restraining injunction under certain circumstances;
- making a spouse compellable as a witness (unless the court otherwise determines) in any prosecution for the recommended offence of breach of a non-molestation injunction.

92. *Access orders.* Orders to custodial parents to provide access at stipulated times give rise to a comparatively large number of contempt or quasi-contempt applications. Access orders impose regular and recurring obligations on the custodial parent over a long period of time. The process provides opportunities for resentment and hostility on the part of spouses and children to be ventilated. The situation may be further complicated by reluctance of children to go on access and by a custodial parent's belief that access is detrimental to the child. A particular problem is how to deal with allegations of child sexual abuse in the context of access denial. In practice, the approach of the court to access denial is particularly lenient. There are many reasons for this:

- The imposition of a sanction, particularly imprisonment of the custodial parent or a significant fine, is likely to be detrimental to the material and emotional welfare of the child, who may feel responsible for what has happened.
- Sanctions, or even merely the institution of proceedings to obtain them, may give the custodial parent a powerful emotional weapon for use against the access parent, and may prolong hostilities, thus doing more harm than good for the future operation of the access order.
- There may be 'reasonable cause' for even deliberate and persistent denial of access, for example –
  - fear, on good grounds, that the child's safety is put at risk during access periods;
  - belief that access is distressing for the child;
  - fear of violence by the access parent at access handover;
  - failure of the access parent to pay maintenance.

However, there are some arguments in favour of the adoption by the court of a firmer approach towards access denial:

- An access order, like any other, imposes a legal obligation on the person to whom it is addressed, and the court is bound by law to treat it as such. To decline to enforce it effectively converts the obligation to furnish access into a discretionary power.
- When custodial parents seek to 'justify' past denials of access by claiming that they were 'necessary for the child's welfare', they are effectively asserting that their view of what is best for the child should supersede the view of the court. They are thereby taking the law into their own hands.
- The arguments in favour of lenience ignore the long-term interests of children in maintaining a close relationship with both parents. Children who have been continually denied access to a parent during their early years may, when they reach adolescence or adulthood, be highly resentful of this deprivation and may feel that their long-term interests were sacrificed to the immediate selfish concerns of the custodial parent.
- The alleged harm done to a child by punishing the custodial parent may be exaggerated, particularly if one takes into account the inherent flexibilities in sentencing. A prison sentence need only be a matter of days, and a fine need not impoverish an already poor custodial parent to the extent where the child will suffer. More imporantly, sanctions such as community service orders and detention would make it easier for the court to deter the custodial parent from committing future breaches without hurting the child. In any event, sanctions may be imposed on a suspended basis.
- By treating non-compliance with access orders leniently, while non-compliance with other orders attracts severe sanctions, the court discriminates unfairly against access parents. In crude terms, this operates as a discrimination against fathers, who are most commonly both access parents and the subject of orders to pay maintenance.

Although it is necessary to maintain a considerable degree of flexibility in the enforcement of access orders, the law should be reformed so as to narrow the gap between the expectations of aggrieved access parents, who understandably believe that breaches of an order will attract effective sanctions, and the realities which at present confront them when their contempt applications come on for hearing. The following reforms are recommended:

- The court should always make a formal finding as to breach and mental element, irrespective of 'reasonable cause' or other considerations.
- The law should spell out the relatively narrow range of circumstances in which, despite a finding of breach coupled with the necessary mental element, the court should be required not to impose any sanction.
- The law should also list certain considerations as relevant to the exercise of the court's discretion in imposing sanctions for breach of an access order. These should comprise the benefits derived for a child from maintaining contact with both parents, the child's reactions to access and the effect on the child of any sanction imposed on the custodial parent. The existence of prior maintenance default should not be included in the list.

In addition, where non-compliance proceedings have been instituted for the first time in respect of an access order, sanctions should not be imposed until the spouses have first been directed to attend confidential counselling and adequate time has elapsed to permit counselling to have full effect, unless counselling has al-

ready occurred since the order was made or the court is satisfied that, in the special circumstances of the case, it should be dispensed with. Where the custodial parent has abducted and concealed the child, resulting in continued and total denial of access, the Family Court should have power to issue a warrant to a police officer for the arrest of the custodial parent. Finally, although the variation of a subsisting order should not be decreed as a formal sanction for non-compliance, the Family Court, when hearing proceedings to vary an access order, should consider making a temporary order for increased access as compensation for access that has been wilfully and unjustifiably denied.

93. *Custody orders.* Breach of a custody order entails the removal of a child from the care and control of the parent to whom the court has entrusted it. In extreme form, the non-custodial parent abducts the child and conceals its whereabouts, or takes it out of Australia, so as to frustrate the custody order indefinitely. When found, the child is usually restored to the custodial parent, unless the lapse of time has been so great that the child would suffer unduly. If the child is taken out of Australia, the abducting parent, or persons assisting, may be prosecuted for a criminal offence; if not, proceedings may be instituted for contempt or quasi-contempt. In addition, there are relevant offences under State and Territory law. A serious deficiency in the law is that the court lacks power to issue a warrant of arrest for the abducting parent. Judges differ as to the appropriate way to deal with an abducting parent. Significant prison sentences are sometimes, but not always, imposed for first offences. Second offences of this sort seem to be infrequent. In order to overcome the anomalies of the present law, it was proposed in a Discussion Paper that a new offence should be created in the Family Law Act. It would have been constituted by removal of the child from, or failure to return the child to, the custody of a parent contrary to an order granting custody to that parent, coupled with concealment of the whereabouts of the child, both with the intention of depriving the parent of custodial rights. However, this would inevitably detract from the development of a uniform approach to sentencing, and the creation of the proposed offence is not recommended. This makes it all the more important that police, having traced an abducted child, should have explicit power not only to take possession of the child but also to arrest the abductor, or other persons involved, who could then be brought before the court. Consistently with the approach to breaches of access orders, and taking into account that, in rare cases, there may be good reason for an access parent to remove the child from the custodial parent, notwithstanding the serious disruption of the child's life involved, the court should be required to refrain from imposing sanctions in certain limited circumstances.

94. *Orders relating to property.* The guiding principle developed within the existing law and endorsed above is that, as far as possible, orders relating to money or property should be enforced by measures taken against the property itself, rather than by sanctions imposed on the spouses in non-compliance proceedings. The Family Court should possess a full array of enforcement powers against property, comparable to the powers vested in State and Territory Supreme Courts. Existing provisions should be supplemented as follows:

- a sheriff or bailiff should be appointed to the Family Court;
- such officer should have a power to evict a spouse from property;
- such officer should have a power to seize goods which are the subject of an order for specific delivery;
- the Family Court should have power to make orders charging debts against property of a spouse;

- the power of sequestration of assets for coercive purposes should be preserved, but sequestrators should not be given a power of sale of sequestrated assets.

95. *Maintenance orders.* Discussion to date has focussed on the question whether and, if so, in what circumstances maintenance defaulters should be imprisoned. Under existing law, mere failure to pay maintenance cannot be the basis for a custodial sentence, but where it amounts to contempt or quasi-contempt, such a sentence is possible. The principal arguments in favour of retaining imprisonment for deliberate maintenance default are:

- Maintenance instalments are essential for the upkeep of the spouse and children to whom they are to be paid.
- Breach of an obligation to support one's own children is more reprehensible than failure to pay other debts.
- Failure to meet a maintenance obligation imposes a burden on the Commonwealth to take over the responsibility of supporting the spouse and his or her dependants.

Studies show that imprisonment, or the threat of imprisonment, is a highly effective means of enforcing payment. The arguments against the retention of imprisonment for maintenance default draw upon a long tradition of opposition to the use of prison sentences against debtors. They include the following:

- Imprisonment does not serve as a general deterrent against failure to meet financial obligations amongst the population at large.
- Most debtors who go to prison are not persons who have the means to pay and persistently refuse to do so, but are persons incapable of managing their own affairs or overwhelmed by a burden of debt through misfortune.
- It is impossible to establish sufficient procedural protection to ensure that a defaulter genuinely has the capacity to pay.
- There are more effective ways to secure enforcement of money orders.
- Imprisonment is very costly for the state. It is likely to be cheaper for relevant authorities to assume in full the obligation of maintaining the aggrieved spouse and any children.
- Imprisonment is counter-productive because it will often result in the debtor losing pay, or even his or her job, and becoming less able to meet the outstanding liability.

For these reasons, it is recommended that imprisonment should only occur in the context of non-compliance proceedings and that unsuspended custodial sentences should be a weapon of last resort. Sanctions should not be imposed unless the defaulter has the capacity to pay and attempts to enforce the order by other means have been tried unsuccessfully or would, if tried, be likely to prove unsuccessful.

96. *Maintenance default and access denial.* Another issue is whether deliberate and unjustified denial of access should be formally treated, at least in some circumstances, as a justification for maintenance default. There would seem to be some justice in this. However, to the extent that the default is in payment of child maintenance, the consequence would be that, unless the state intervenes by paying social security benefits, the child suffers. Moreover it would be anomalous to treat access denial as an excuse or a formal mitigating factor in the context of non-compliance if it continued to have no significance in the context of other modes of maintenance enforcement (whether administered by the state or by the courts). Accordingly, while a court hearing non-compliance proceedings for maintenance de-

fault should not be formally precluded from treating access default as a mitigating factor when considering sanctions, there should be no formal requirement that it must take this into account.

Contempt in relation to commissions and tribunals

97. *Nature of courts, commissions and tribunals.* The question whether and, if so, to what extent the law of contempt should be applied to commissions and tribunals in a federal sphere requires consideration of the nature of courts, commissions and tribunals and, specifically, consideration of those characteristics of each which are relevant to the law of contempt.

- *Courts.* Courts exercise judicial power, as opposed to legislative and executive power. They also make binding and authoritative decisions as to rights. Often, however, tribunals do likewise. In addition, all courts properly so called have certain 'inherent' powers at common law, including the power to punish for contempt.
- *Royal commissions.* Royal Commissions of Inquiry are *ad hoc* bodies appointed by the Queen or her vice-regal representative to inquire into and report on a designated subject. A royal commission is not a court and does not exercise judicial power, but is an exercise of the executive prerogative with statutory powers added. They may be investigatory or advisory or a mixture of both.
- *Standing commissions and tribunals.* The operation of a standing commission or tribunal does not involve an exercise of judicial power nor an exercise of the executive prerogative. Rather, it is a body created by the legislature and granted statutory powers. They may be conveniently classified as adjudicatory, investigatory or regulatory.

98. *Characteristics relevant to contempt law.* A number of specific factors are relevant to the question of what contempt like provisions are appropriate.

- *Creation.* Unlike courts and tribunals, royal commissions are created by exercise of the executive prerogative. No constitutional or legislative process is required.
- *Subject matter.* The issues which courts have to determine vary from the most serious and important to the most trivial. They are determined by the parties and/or the law itself. The same is true of some tribunals. Royal commissions on the other hand tend to deal with matters of general public importance and their terms of reference are chosen by government as a matter of policy.
- *Nature of determination.* Courts not only make findings of fact, but also apply pre-existing legal rules and principles to those findings and make conclusive decisions as to legal rights. Royal commissions only inquire and, at the most, make recommendations. Some tribunals make final determinations, others only recommendations. Some do both in different contexts.
- *Rules of evidence.* In making findings of fact in a court, a judge or jury is bound by the rules of evidence, in particular, by the rule that only material relevant to the issues in the trial may be considered. In contrast, royal commissioners are normally given wide terms of reference, and the questions of fact which they may consider are left very much to their discretion. There are no rules of evidence to limit the materials that can be produced before

them. Standing commissions and tribunals vary considerably as to the scope of the questions they may consider, but are free to consider whatever material and evidence they may wish in deciding those questions.

- *Procedure.* Australian courts follow an adversarial procedure. In contrast, royal commissions are fundamentally inquisitorial. Standing commissions and tribunals tend to operate on a more informal basis than courts or royal commissions. Most have considerable discretion to determine the procedures they employ.
- *Membership.* Depending on the nature of the proceedings, the facts in a court hearing may be determined by a judge, a magistrate or a jury. Royal commissioners on the other hand are *ad hoc* appointments and are chosen by the government for a particular inquiry. They are not necessarily holders of judicial office, or even legally qualified. The membership of tribunals and standing commissions varies widely.
- *Context.* Courts adjudicate on rights and liabilities, applying the law to the facts. While policy issues can and do arise, the courts must generally be allowed to resolve issues in an atmosphere untainted by pressure or prejudice. On the other hand, royal commissions, particularly advisory ones, are often considering issues of public policy. So far as standing commissions and tribunals are concerned, some are expressly required to take into account public opinion, even sectional opinion.

99. *No general 'deemed contempt' provisions.* Legislation governing royal commissions and standing commissions and tribunals includes a variety of contempt-related provisions. These may take the form of a statutory prohibition of certain conduct for which a fixed penalty is provided, or a prohibition of any conduct which, if the body were a court, would constitute contempt of court ('deemed contempt'). The primary argument in favour of a residual category of 'deemed contempt' is that it is not possible to foresee all the actions which might prejudice an inquiry. However, liability under such a provision is potentially very broad. Conduct may be punished even though it does not fall within specifically prohibited activity. In addition, it is very difficult to transplant the technical notion of contempt from its judicial context to the administrative context of tribunals and commissions. Difficulties of interpretation arise, particularly in the area of *sub judice*. Furthermore, when a royal commission is investigating matters of considerable public importance and interest, the public should not be inhibited from debating them openly. For these reasons, there should be no general 'deemed contempt' provisions applicable to royal commissions or standing commissions and tribunals. Instead, a series of specific offences should be created. This is in line with the general approach to contempt of court.

100. *Improper behaviour at hearings.* Legislation applying to royal commissions and standing commissions and tribunals contains a number of offences including insulting obstructing, assaulting, hindering and interfering with persons exercising statutory functions in or near a place where a government body is sitting. In addition, it is an offence, *inter alia*, to trespass or to behave in an offensive manner on Commonwealth property. Like courts, a commission or tribunal, which is holding a hearing, must have some protection against disruption of its proceedings. However, they do not necessarily conduct their proceedings at fixed location and proceedings may be considerably more informal than a court hearing. Royal commissions and some standing commissions and tribunals have a distinctly political role and can expect considerable controversy and dissension. For these reasons, care should be taken in considering the extent to which a concern for maintaining the

dignity and authority of courts and enhancing public respect for the judicial system is relevant to royal commissions, standing commissions and tribunals. However, it is recommended that limited offences, in similar terms to those already recommended for courts, should apply: in particular, acting so as to cause substantial disruption of a hearing of the tribunal or commission. There should be a requirement of *mens rea* – that is, the alleged disruptor must intend disruption of the hearing or display reckless indifference. In addition, a power of expulsion should be conferred expressly upon commissioners and tribunal members, exercisable when they believe on reasonable grounds that the person to be expelled would otherwise genuinely disrupt the proceedings. For those commissions and tribunals which have the power to compel witnesses to be sworn or make an affirmation or answer a question, it should be an offence for a witness to refuse to do so.

101. *Interference with proceedings.* Many commissions and tribunals fall within Part III of the Crimes Act 1914 (Cth). Therefore, many of the offences in Part III, dealing with inducement, pressure or reprisals against witnesses and fabrication of evidence, apply to them. The offences of conspiring to pervert the course of justice and attempting to pervert the course of justice do not, however, apply. In addition, specific provisions making it an offence to interfere with witnesses or to take reprisals may be found in the legislation creating some bodies. Clearly some mechanism must exist to protect royal commissions, standing commissions and tribunals against deliberate and improper interference with their operations. It is recommended that a regime of offences similar to that recommended for courts, but containing appropriate modifications, be created for tribunals and commissions. A broad-ranging offence purporting to cover all forms of 'perversion' of any aspect of the proceedings of a commission or tribunal could not be satisfactorily formulated because of the wide range of functions performed by commissions and tribunals. It is preferable to focus separately on conduct intended to influence the major categories of participants in such proceedings and on conduct analagous to 'abuse of process' – that is, conduct which may impair the legitimacy of documentary or other material evidence being presented to a commission or tribunal. Where a tribunal has members who represent various constituencies, who will often wish to communicate its views to the member, with the intention that he or she should take them into account, the line between improper pressure and legitimate influence can be very difficult to draw. It may be done by focussing on the nature of the duties imposed on the member by virtue of his or her office. As recommended for court proceedings, the offence should be drafted in terms of 'influencing or attempting to influence' a member to 'act otherwise than in accordance with his or her duty'. The content of this duty, including the extent of any obligation to take account of the views of a 'constituency', would vary as between different tribunal and commission members. Other forms of interference will fall within the existing offences in Part III of the Crimes Act or the recommended new offences. So far as tribunals and commissions which are not covered by Part III are concerned, it is recommended that existing statutory offences dealing with these forms of interference should be retained, but that no new ones should be created without further investigation.

102. *Publications tending to influence proceedings.* The only circumstances in which commissions or tribunals in a federal sphere receive protection from prohibitions akin to the *sub judice* rule are where they are the subject of a 'deemed contempt' provision. Given the function of royal commissions, it is generally accepted that there is no justification for prohibitions imposed by the *sub judice* doctrine, at least so far as they seek to prevent a royal commissioner being influenced by publicity. On the other hand, while some commissions and tribunals – notably the

Australian Conciliation and Arbitration Commission – deal with matters which are the subject of intense public interest and which are highly political, others do not, and some protection against prejudicial publicity may be desirable. However, a Discussion Paper proposal to this effect was subjected to criticism, and it is recommended that the offences recommended above in substitution for the *sub judice* rule in relation to courts should not extend to proceedings before standing commissions and tribunals.

103. *Scandalising.* Under existing law, disparagement of royal commissioners or members of a number of federal commissions and tribunals may amount to an offence akin to scandalising by virtue of a 'deemed contempt' provision. There are also specific provisions making it an offence to insult, bring into disrepute or use words false and defaming of members of certain commissions and tribunals. Again, given the political context in which they operate, there seems little justification for the broad protection afforded by scandalising law. There seems little reason to think that an attack on a royal commissioner would be likely to affect the judicial system as a whole and, unlike judges who are traditionally inhibited from taking civil defamation proceedings, there is no reason why royal commissioners, who have entered the public arena, should not. Members of standing commissions and tribunals, however, sometimes make determinations affecting legal rights, and orders which are required to be obeyed. For this reason, it may be said that maintaining public confidence in them is specially important. In general, it is recommended that protection be limited to scandalising remarks which are uttered within the hearing room and create substantial disruption of a hearing. If any tribunal or commission is thought to need added protection, an offence similar to that recommended in substitution for the common law of scandalising should be formulated.

104. *Non-compliance.* Royal commissions and most standing commissions and tribunals have statutory power to summon people to give evidence and to produce documents. Failure to comply, without reasonable excuse, is an offence. In addition, some commissions and tribunals can rely on more general provisions dealing with non-compliance. Unlike superior courts, they do not have power at common law to impose coercive sanctions in an attempt to compel obedience to their orders. Nor should they. Nevertheless, if a commission or tribunal has been granted the power to make orders which must be obeyed, it is appropriate that non-compliance should constitute an offence. The offence should be created in terms of the specific order being disobeyed and the act constituting disobedience should accompanied by an intention to disobey, or at least recklessness as to whether it constitutes disobedience. General clauses of this nature should not be introduced unless the tribunal or commission in question has, or should have, the power to make a range of orders which need to be reinforced by the introduction of criminal sanctions for disobedience and disobedience of the relevant order is not already covered by a specific offence.

105. *Procedure.* The recommended offences should be tried as follows:

- *Mode of trial.* Under s 6O(2) of the Royal Commissions Act 1902 (Cth), royal commissioners who are judges have a summary power to punish contempt committed in the face of the commission. There are, however, considerable doubts about the constitutional validity of this provision. It should be repealed. Standing commissions and tribunals do not have power to punish for an offence in the nature of contempt. All such offences are prosecuted in the courts in the normal way. Commissions and tribunals should not be accorded a power to punish offences akin to contempt because –

- the sentence of imprisonment imposed or which it might be appropriate to impose may exceed the time during which the tribunal is sitting;
- such a power would almost certainly turn a commission or a tribunal into a court, with the consequence that only judges with tenure under s 72 of the Commonwealth Constitution could be appointed to it;
- it would be dangerous to vest non-judicial members with an autocratic power like contempt.

The question remains as to which is the appropriate court to deal with such offences. Under the Conciliation and Arbitration Act 1904 (Cth), certain offences are triable summarily by the Federal Court. If, however, offences in the nature of contempt are conceived of as criminal offences like any other, there is no reason why they should be subject to a special procedure. Furthermore, depending upon the penalty, trial by jury may in some instances be mandatory by virtue of s 80 of the Commonwealth Constitution. Therefore, with the exception of the special provisions pertaining to offences under the Conciliation and Arbitration Act, the recommended offences should be indictable offences triable summarily and should be tried in the appropriate State or Territory court as federal offences. Depending upon the seriousness of the particular offences, the appropriate court will be, in most cases, a magistrates' court.

- *Instigation of proceedings.* The Royal Commissions Act 1902 (Cth) provides that prosecutions of non-indictable offences against the Act may be instituted by the Attorney-General or by any other person, which presumably includes the royal commissioner. Offences relating to standing commissions and tribunals are normally prosecuted by the Director of Public Prosecutions, although the Attorney-General possesses a concurrent power at common law. In relation to offences against law of the Commonwealth, any person has power to prosecute an indicable offence through to committal stage and a summary offence through to verdict. This appears to be adequate for members of tribunals and commissions, for those rare cases where a relevant offence appears to have been committed but neither the Director of Public Prosecutions nor the Attorney-General is prepared to take action.
- *Evidence.* In the trial of an offence, commissioners and tribunal members should be competent to give evidence, but not compellable without the leave of the court trying the alleged offence. It is not recommended that a certificate as to the facts which constitute the alleged offence by the tribunal or commission affected should be admissible in evidence.
- *Penalty.* All offences should be punishable by a fixed penalty.

Summary of recommendations

General

1. *Approach to reform.* Reform of the law of contempt should proceed as follows:

- The common law of contempt of court including the procedure at common law for dealing with contempt, should be abolished and replaced by statutory provisions governing both substance and procedure.
- The principles of criminal contempt, except for contempt in the face of the court, should be recast as criminal offences, to the extent that they do not already overlap with criminal law. Normal procedures for the trial of criminal offences should apply instead of summary contempt procedures.
- Contempt in the face of the court should be replaced by a series of criminal offences, but the mode of trial should continue to be a summary one. The accused person should be entitled to elect, however, to be tried by a member or members of the court other than the member presiding at the time of the alleged offence.
- The law of civil contempt should be replaced by a statutory regime of 'non-compliance proceedings', in which the party entitled to the benefit of an order or undertaking allegedly disobeyed should be able to obtain sanctions to coerce the other party into obeying a subsisting order or to punish him or her for past disobedience.
- 'Contempt' in relation to commissions and tribunals should continue to take the form of specific statutory offences (para 44).

2. *Range of court and proceedings.* Reform should be implemented in relation to:

- federal courts, other than the High Court;
- courts of the Territories, except the Northern Territory and Norfolk Island; and
- federal proceedings conducted by State courts and courts of the Northern Territory and Norfolk Island –
  - so far as the replacement of civil contempt powers by a statutory procedure of sanctions for disobedience of orders is concerned;
  - so far as conduct (other than conduct within the courtroom) constituting deliberate interference with federal proceedings in such courts is concerned, but without any abolition of the powers of relevant courts to punish such conduct as contempt; and
  - so far as empowering courts to restrict reporting of proceedings on the ground of prejudice to a forthcoming or current trial is concerned, where the trial to be protected is a trial of a federal offence by a jury (para 66).

Improper behaviour at hearings

3. *Abolition of the common law.* The common law of contempt in the face of the court should be abolished.

- A series of statutory offences should replace the substantive law of contempt in the face of the court.
- A person accused of any one of these offences should not be tried by the presiding judge unless both the accused person and the presiding judge consent to this.
- The power of the presiding judge to resort to alternative means of dealing with improper conduct – in particular to order the removal of the offender from the courtroom – should be preserved (para 113).

4. *Offence of 'substantial disruption'.* The principal offence to be substituted for contempt in the face of the court should be drafted in terms of wilfully causing 'a substantial disruption' to the conduct of a hearing. This means that conduct which was disrespectful, offensive or insulting would not attract liability unless it amounted to substantial disruption (para 115).

5. *Ancillary offences.* Further offences should be created in partial substitution for contempt in the face of the court:

- Witness misconduct, that is to say –
  - not complying with a summons or subpoena to attend;
  - not remaining available to testify, until discharged;
  - refusing to be sworn or make an affirmation; and
  - refusing to answer, or prevaricating in answering, a question which the witness is bound to answer, having no privilege or other reason to justify the refusal (para 119).
- Taking photographs, videotape or films in court, unless leave has first been sought and obtained from the presiding judge or magistrate (para 126).
- Broadcasting or playing to the public a sound recording of a hearing before a court, without the leave of the court. The majority view is that the use of sound recorders to record proceedings should be permitted, unless it amounts to 'substantial disruption' (para 125).

6. *Mens rea.* A requirement of *mens rea* should apply to each of the offences created in partial substitution for contempt in the face of the court. Thus, a person should be liable for the offence of substantial disruption only if he or she intended to disrupt the relevant proceedings, or was recklessly indifferent as to whether the conduct in question would have this effect (para 116).

7. *Witness misconduct.* Where a witness refuses to be sworn, make an affirmation or answer a question, or prevaricates in answering a question, the aggrieved party should be entitled to institute proceedings under the recommended procedure for sanctions for disobedience of orders. A 'double jeopardy' provision should preclude the initiation of both a prosecution for the recommended offence and proceedings for non-compliance (para 121).

8. *Mode of trial and instigation of proceedings.* There should be two possible modes of trial for the recommended offences:

- trial by the presiding judge; or
- trial by a single judge or a three-member bench from within the same court, excluding the presiding judge.

The presiding judge should be empowered to instruct an appropriate court officer to instigate proceedings under the latter mode of trial. Alternatively, he or she may refer the matter to the appropriate Crown law authorities for them to do so. If the presiding judge or magistrate decides not to do either of these things, but determines instead that he or she may properly try the offence, the accused should then have the option, after being given a reasonable opportunity to take legal advice, to elect the latter mode of trial (para 130).

9. *Appeal.* Whichever mode of trial is chosen, there should be an unrestricted right of appeal against conviction and/or sentence (para 133).

10. *Arrest and remand.* Where the presiding judge considers that the issue of a summons might not ensure that the accused appeared to answer the charge, the judge should have the power to order that the accused be arrested and remanded in custody pending trial. This should be subject to existing rights for persons remanded in custody to apply to a superior court for release on bail (para 135).

11. *Testimony by presiding judge or magistrate.* In the trial of a recommended offence by the court constituted other than by the presiding judge, the presiding judge should be competent to testify, and should be compellable if leave is granted by the court trying the alleged offence (para 136).

12. *Sentence.* The recommended offences should be subject to a fixed maximum sentence (para 128).

13. *Expulsion from the court.* Existing common law powers for presiding judges and magistrates to expel persons from the courtroom where their conduct causes an interruption to the ordinary procedures of the court, or such interruption is reasonably to be apprehended, should be explicitly confirmed. The power of expulsion should continue to be subject to two qualifications:

- *Parties.* As at common law, a party to a case should not be expelled unless his or her conduct is so disorderly that the trial cannot proceed unless expulsion occurs. A convicted person should always be present in the court when sentence is passed.
- *Legal practitioners.* A legal practitioner taking part in a case should not be expelled from the courtroom unless no reasonable alternative is available. The presiding judge or magistrate should endeavour, so far as possible, to deal with the matter by referring the case to an appropriate professional disciplinary body (para 137–9).

14. *Procedure.* Whichever mode of trial is adopted, the following safeguards for the accused (as already developed within the law of contempt in the face of the court) should be prescribed:

- the charge should be in writing and specify the particulars of the alleged offence;
- the charge should contain a statement as to the rights of the defendant to elect the alternative mode of trial;
- there should be an adjournment for a reasonable period to give the defendant an adequate opportunity to obtain legal advice or legal representation and to prepare a case in defence (para 130).

15. *Conduct not within view of presiding judge.* In relation to conduct not within a courtroom, which at present may amount to contempt in the face of the court, or may fall within a statutory offence covering similar grounds, the following principles should apply:

- Where the conduct, although occurring outside the courtroom, has a disruptive effect on proceedings within the courtroom, it should be treated as capable of falling within the recommended offence of substantial disruption of a hearing.
- Where the conduct in question is not disruptive of a hearing, but falls within the common law concept of contempt in the face of the court (either because it occurs in the immediate vicinity of the court, or of the court building, or because it seriously jeopardises court proceedings so as to require immediate protective action), its legality should be determined in accordance with the law governing other forms of interference with proceedings (as outlined below) or the law governing contempt by publication.
- If the foregoing recommendation that there should be two possible modes of trial for the recommended offences were not adopted, the existing summary procedure, whereby the matter is dealt with by the presiding judge alone, should be confined by legislation to matters occurring within the sight and hearing of the presiding judge (para 142).

16. *Statistics.* Statistics should be maintained as to the incidence and outcome of the statutory offences recommended in substitution for contempt in the face of the court (para 143).

Other forms of interference with proceedings

17. *Abolition of contempt law and procedure.* The common law of contempt as it relates to interference with proceedings (other than by conduct amounting to contempt in the face of the court) should be abolished and replaced by criminal offences and criminal trial procedures (para 168).

18. *Protection of proceedings.* Courts should have the power to protect proceedings allegedly threatened by interference as follows:

- A presiding judge or magistrate should have the power to direct an officer of the court to prosecute a person who has allegedly committed an offence involving interference which threatens proceedings.
- The presiding judge or magistrate should have the power to order the remand in custody of a person accused of interference with proceedings, if necessary; alternatively, he or she should have power to remand the accused on bail subject to appropriate conditions.
- A person who claims to have been the victim of interference, or of threats of interference, should be entitled to apply to the presiding judge or magistrate for an injunction restraining the alleged offender from threatening or carrying out such interference (para 170).

19. *Inducement, pressure or reprisals affecting participants other than parties to the case.* The Crimes Act 1914 (Cth) should be amended as follows:

- Section 36A, which prohibits intimidation and reprisals affecting witnesses on account of their participation in judicial proceedings, should be extended to cover intimidation of other participants including judges, magistrates, jurors, legal practitioners and court officers.
- A new offence of seeking improperly to influence a participant to act otherwise than in accordance with his or her duty should be created.

- Sections 42 and 43 should be extended so as to cover conspiracies and attempts (respectively) to pervert the course of justice in relation to proceedings in Territory courts as well as proceedings in federal matters (para 188, 200).

20. *Reprisals against parties.* Conduct constituting reprisals against a party to civil proceedings for and on account of having taken part in court proceedings should be an offence where:

- the conduct is unlawful in its own right; or
- the party is adversely affected in relation to employment, accommodation, the provision of goods, service or facilities, access to places or vehicles or the membership of associations.

Parties to criminal proceedings should enjoy the same protection as other participants in legal proceedings (para 202).

21. *Threats of reprisals against parties.* Where a threat of a reprisal against a party to proceedings would, if carried out, constitute an unlawful reprisal under the recommended offence, the threat should itself be an offence, subject to proof of an intention to cause the party to desist, wholly or partly, from participation in the relevant proceedings (para 195).

22. *Unconditional pressure on parties.* Where pressure to desist from participation is exerted on a party, either in private or in public, without being accompanied by a threat of unlawful reprisals, such pressure should not attract criminal liability (para 196).

23. *Damages for reprisals.* The victim of an unlawful reprisal should be entitled to damages for injury suffered as a result of a reprisal falling within the recommended offences. This aim is sufficiently achieved by the operation of s 21B of the Crimes Act 1914 (Cth), making general provision for awards of 'reparation' to persons suffering damage as a result of offences within the Act (para 203).

24. *Obstruction of participants, court process or evidence.* Conduct which obstructs participants, court process or evidence should be prohibited as follows:

- *Obstruction of court process.* It should be an offence wilfully to prevent or hinder the filing, dispatch or other delivery of court documents with the intent of frustrating or impeding the commencement or continuation of judicial proceedings.
- *Obstruction of participants.* Section 40 of the Crimes Act 1914 (Cth), which prohibits obstruction of witnesses, should be extended to cover obstruction of parties, legal practitioners, judges, magistrates, jurors and court officers, with intent to frustrate or impede their participation in judicial proceedings (including the initiation of proceedings by intending parties) (para 208).

25. *Abuse of process.* The following amendments to the criminal law should be enacted in substitution for contempt as it relates to 'abuse of process':

- *Fabrication of court process.* Section 36 of the Crimes Act 1914 (Cth) should be extended to cover the fabrication of court process and the knowing use of such documents when they are fabricated.
- *Breach of confidentiality of documents.* It should be an offence for a person wilfully to disobey an obligation, arising under a court order or an undertaking (express or implied) to the court, restraining that person from disclosing the contents of a document involved in court proceedings to any other person or class of persons. This offence should be tried by the court in which the relevant proceedings are being conducted. The procedure should be the

same as recommended for offences replacing contempt in the face of the court (para 221).

26. *Breach of duty by court officers.* It should be an offence for a person who is an officer of the court (defined so as to exclude legal practitioners) wilfully to disobey an order of the court relating to the performance of the person's functions as an officer. This offence should not extend to legal practitioners because the combination of disciplinary powers, criminal liability and inherent powers of the court in cases of 'abuse of process' by practitioners constitutes an adequate array of remedies (para 232).

27. *Interference with wards of court.* Interference with wards of court should no longer be punishable as a criminal contempt. Instead, the interests of wards should be protected by the making of such express orders in relation to them as the circumstances warrant, and wilful disobedience of such orders should be the subject of a specific offence (para 237).

28. *Publication of material relating to wards of court.* Liability for publication relating to wards should be restricted to cases where an order restraining publication has been made. Liability should be on the basis of breach of order and should be dealt with in the same way as breaches of other types of suppression order (para 239).

Contempt by publication: general considerations

29. *Abolition of contempt.* The common law of contempt of court including the procedure at common law for dealing with contempt, so far as it relates to publications, should be abolished. It should be replaced by a comprehensive series of statutory provisions (para 267).

30. *Publication.* In determining whether material is disseminated sufficiently widely to constitute a 'publication' and what should be treated as the geographical range of publication, the law should adopt a flexible approach, paying particular regard to the aims sought to be achieved by the particular rule of contempt law involved (para 253).

31. *Responsibility for a publication.* The general principle of editorial responsibility, together with responsibility on the part of the publishing body itself (if it is a corporation) or its owners (if it is a unincorporated body) should be retained. Therefore, where a publishing organisation (or its proprietor or proprietors) is convicted of an offence, each officer or employee who was in a position to exercise editorial control in relation to the offending publication or whose duties included the establishment or supervision of a system for ensuring such offences were not committed, should be liable for the offence. If no such person exists, the directors or other persons responsible in general terms for the management of the organisation should be deemed liable. Any other employee, who has participated in the publication, should only be capable of being deemed liable if it is established that he or she acted with the intention of committing the relevant offence (para 261).

32. *Responsibility of 'outsiders'.* Liability of an 'outsider' (that is, a person not employed by the organisation) who has supplied material to the organisation should be determined as follows:

- *Sub judice.* An outsider should be liable if, in supplying the relevant material, he or she intended to prejudice the relevant trial or was recklessly indifferent as to this question. Such behaviour falls within s 5 of the Crimes

Act 1914 (Cth), which provides that any person who aids, abets, counsels, or procures or by act or omission is in any way directly or indirectly knowingly concerned in, or party to, an offence, shall be deemed to have committed that offence (para 263).

- *Scandalising.* On the basis that the outsider is the initial maker of the scandalising statement, the outsider should be liable if he or she knew or ought reasonably to have known that the allegation would be published, unless he or she establishes that the allegation was true, or that he or she honestly believed on reasonable grounds that the allegation was true (para 264).

33. *Defence of innocent publication.* There should be no liability in the absence of fault, in the sense of intentional or careless wrongdoing. The principle should be implemented as follows:

- *Publications tending to influence a current or forthcoming trial.* It should be a defence for any defendant (corporate or individual), who is deemed to be responsible for a publication, to establish on the balance of probabilities that he or she had no knowledge of the relevant facts (for example, that a trial was pending) and that, having regard to available resources, all reasonable care was taken to ascertain such facts, or they would not have been ascertained even with the exercise of reasonable care.
- *Breach of suppression orders.* The onus should lie on the media to take reasonable steps to discover the existence and terms of such orders. If such care is taken, there should be no liability in the absence of knowledge.
- *Scandalising.* There should be no liability for 'innocent publication' in this context. It should be a defence to a prosecution for scandalising that the allegation was true, or that the defendant honestly believed on reasonable grounds that the allegation was true (para 262).

Influence on juries by publications

34. *Criminal trials by jury: conditions of liability.* A publication should attract liability under the *sub judice* doctrine in its application to criminal trials by jury if and only if the following conditions are satisfied:

- it occurs within the time limits set out in recommendation 35 and 36;
- it contains one or more of the prescribed statements listed in recommendation 37 (these statements being such as are capable of creating a substantial risk that the trial will be prejudiced by virtue of possible influence on the jury);
- in the particular circumstances of the case, as assessed at the time of publication, the offending statement creates a substantial risk that the trial will be prejudiced by virtue of possible influence on the jury (in assessing this issue, pre-existing prejudicial publicity should not be treated as an exonerating factor);
- any corporation or person charged is responsible for the publication in accordance with the recommendations outlined in recommendation 31 and 32; and
- the case does not fall within any of the exceptions or defences recommended (para 296, 319).

35. *Criminal trials by jury: time limits for restrictions on publication.* The restrictions on publication should apply from the issue of a warrant for the arrest, the arrest, or the laying of a charge against a person for the offence, whichever occurs first. They should cease to apply when the person is discharged in respect of the offence, a plea of guilty is accepted, a verdict is delivered or the prosecution is discontinued, whichever occurs last. They should not apply during a period commencing at the end of 12 months after the warrant was issued and ending when the warrant is executed (para 297).

36. *Re-trials.* If a re-trial before a jury is ordered, the restrictions on publication should recommence once the order for re-trial is made, and should continue until the discharge of the person, the acceptance of a plea of guilty made by the person at the re-trial, the delivery of the verdict at the re-trial or the discontinuance of the prosecution, whichever occurs last. No restrictions between the first jury verdict and the order for re-trial (if any) are recommended on the basis of possible influence on a re-trial (para 298).

37. *Criminal trials by jury: prescribed statements.* Certain categories of published statement should be specified as capable of creating a substantial risk of prejudice to the fair trial of a person for an offence by virtue of the influence it might exert on jurors. These are statements to the effect that, or from which it could reasonably be inferred that:

- the accused is innocent or is guilty of the offence;
- the jury should acquit or should convict;
- the accused has one or more prior criminal convictions;
- the accused has committed, or has been charged or is about to be charged with another offence or is or has been suspected of committing another offence;
- the accused was or was not involved in an act, omission or event relating to the commission of the offence, or in conduct similar to the conduct involved in the offence;
- the accused has confessed to having committed the offence or has made an admission in relation to the offence;
- the accused has a good or bad character, either generally or in a particular respect;
- the accused, during the investigation into the offence, behaved in a manner from which it might be inferred that he or she was innocent or guilty of the offence;
- the accused, or any person likely to provide evidence at the trial (whether for the prosecution or the defence), is or is not likely to be a credible witness;
- a document or thing to be adduced, or likely to be adduced in evidence at the trial of the accused should or should not be accepted as being reliable; and
- the prosecution has been undertaken for an improper motive (subject to the defence that the statement was true or was believed on reasonable grounds to be true) (para 299).

38. *Statements made in legal proceedings.* The making of statements at hearings of legal proceedings should be exempt from liability (para 300).

39. *Defence of fair, accurate and contemporaneous reporting of legal proceedings.* It should be a defence to a prosecution arising out of the publication of a prescribed statement if the publication was a fair and accurate report of legal proceedings held in public and was published contemporaneously with, or within a reasonable time after, the proceedings (including committal proceedings, proceedings be-

fore a coroner and proceedings before a Royal Commission or some similar inquiry). The defence should not apply where, in the course of the jury trial allegedly prejudiced, the material in question has been disclosed to the court before the jury has been empanelled, or otherwise in the absence of the jury. In addition, the defence should not apply to a publication made contrary to law or a lawful order prohibiting or restricting publication (para 300).

40. *Suppression orders on grounds of prejudice.* A judge, magistrate or other person presiding at legal proceedings (including inquests and Royal Commission hearings) should have power to suppress reporting of any part of the proceedings on the ground that a report would create a substantial risk of prejudice to the fair trial of any person for an indictable offence. This power should supersede any existing power (whether broader or narrower) conferred in order to avert such prejudice (para 300).

41. *Defence of fair, accurate and contemporaneous report of parliamentary proceedings.* It should be a defence to a prosecution arising out of the publication of a prescribed statement if the publication was a fair and accurate report of parliamentary proceedings (including proceedings in a House of Parliament or before a committee of Parliament and including matter in a document presented to, or laid before, a House of Parliament or committee of Parliament) and was published contemporaneously with, or within a reasonable time after, the proceedings (para 301).

42. *Public safety defence.* It should be a defence to a prosecution arising out of the publication of a prescribed statement if the defendant proves that the publication was necessary or desirable:

- to facilitate the arrest of a person for an offence;
- to protect the safety of a person or of the public generally; or
- to facilitate investigations into an alleged offence.

To fall within this defence, the published material should be confined to particulars which are necessary or desirable to achieve these purposes (para 302).

43. *'Public interest' defence.* It should be a defence to a prosecution arising out of the publication of a prescribed statement if the following conditions are satisfied:

- the publication was made in good faith in the course of a continuing public discussion of a matter of public affairs or otherwise of general public interest and importance, not being the matter involved in the trial of the relevant offence; and
- the discussion would have been significantly impaired if the statement concerned had not been published at the time that it was published (para 303).

44. *Civil trials by jury: conditions of liability.* A publication should attract liability under the *sub judice* doctrine in its application to civil trials by jury if and only if the following conditions are satisfied:

- it occurs after the time specified in recommendation 45;
- it falls within one of the prescribed statements listed in recommendation 46;
- in the particular circumstances of the case, as assessed at the time of the publication, the publication creates a substantial risk that a fair trial of the issues in the proceedings would be prejudiced by virtue of the influence it might exert on the jury;
- any corporation or person charged is responsible for the publication in accordance with recommendations 31, 32; and
- the case does not fall within any of the exceptions or defences recommended (para 338).

45. *Civil trials by jury: time limits for restrictions on publication.* The restrictions on publication should apply from the time when:

- it is known that the trial will take place before a jury; and
- pre-trial proceedings have reached the stage where the case is genuinely ready to proceed and is only waiting for an appointed day of commencement to arrive, or for its turn on a court list (para 339).

46. *Civil trials by jury: prescribed statements.* Certain categories of published statement should be specified as capable of creating a substantial risk, by virtue of the influence it might exert on the jurors, that a fair trial of the issues in the proceedings might be prejudiced. These are statements to the effect, or from which it could reasonably be inferred that:

- a person likely to give evidence at the trial is or is not a credible witness;
- any evidence that might be given or tendered at the trial does or does not have probative value;
- a party in the proceedings has a good or bad character, generally or in a particular respect; or
- a certain outcome is likely or proper (para 338).

47. *Civil trials by jury: defences.* There should be no liability if:

- the statement was made in a hearing of legal proceedings (as in recommendation 38);
- the publication formed part of a fair, accurate and reasonably contemporaneous report of legal proceedings (as in recommendation 39);
- the publication formed part of a fair, accurate and reasonably contemporaneous report of parliamentary proceedings (as in recommendation 41);
- the publication falls within the 'public safety' defence (as in recommendation 42);
- the publication falls within a 'public interest' defence (being a modified version of recommendation 43);
- the publication was 'innocent' (as in recommendation 33) (para 338).

48. *All jury trials: 'remedial' measures.* Where appropriate, measures should be undertaken to remedy the impact of any prejudicial publicity that has occurred:

- *Change of venue.* It should be confirmed that prejudicial publicity is a ground for ordering a change of venue of a forthcoming trial (para 341).
- *Postponement of trial.* It should be confirmed that prejudicial publicity is a ground for ordering the postponement of a trial (para 342).
- *Interrogation of potential jurors.* It should be confirmed that a trial judge has a discretion to question individual jurors to determine whether they have seen, read or heard specific prejudicial publicity and, if so, whether it has had any effect upon them (para 343).
- *Conditional verdict.* Trial judges should have the power, when prejudicial publicity has created a risk of unfairness to the accused, to order, with the consent of the parties, that if the jury find the accused guilty, a re-trial should take place (para 344).

Secrecy of jury deliberations

49. *Disclosure of jury deliberations.* A series of statutory offences, relating to disclosure of jury deliberations should be created:

- A juror should not disclose a deliberation of the jury before the jury has been discharged or, if the accused has been convicted, before sentence has been passed, except to the presiding judge.
- The identity of a juror in a particular trial should not be disclosed without that juror's consent or the leave of the court.
- A juror should not disclose a deliberation of a jury for a material benefit, except by leave of the court.
- A person should not, without leave of the court, offer a material benefit to a juror for the disclosure of a deliberation of the jury.
- A person should not harass a juror to obtain the disclosure of a deliberation of the jury or the name of any member of the jury (para 369).

50. *Publication of deliberations of a jury.* Publication of jury deliberations in a manner which identifies or renders identifiable the trial in question should be prohibited, unless:

- the publication is made with the leave of the court;
- the publication is protected by the defence of fair, accurate and reasonably contemporaneous reporting of legal or parliamentary proceedings; or
- the publisher proves that:
  - more than two months before the publication, the relevant deliberations were disclosed to the Attorney-General, the Director of Public Prosecutions or any other person prescribed for the purposes of receiving such disclosures and investigating them; and
  - the publisher honestly believed on reasonable grounds that the publication was necessary to rectify or prevent a miscarriage of justice (para 369).

Influence on other participants by publications

51. *Trial of summary offences.* The following categories of statement should be prohibited where they create a substantial risk that the fair trial of a person would be prejudiced by virtue of influence on a judge or magistrate conducting the trial summarily:

- that the accused has one or more prior convictions;
- that the accused is of good or bad character, generally or in a particular respect;
- that the accused has confessed or made an admission in relation to the offence; and
- that the accused, or any prospective witness is or is not likely to be a credible witness.

The periods covered by the prohibition should be analogous to those recommended in relation to criminal trial by jury (recommendations 35, 36). The defences recommended in relation to criminal trials by jury should apply (para 380).

52. *Publication of opinions as to sentence.* Publications expressing opinions as to the sentence to be passed on any specific convicted offender, whether at first instance or on appeal, or on any specific accused person in the event of conviction, should be prohibited, subject to the defences of fair, accurate and contemporaneous reporting of legal or parliamentary proceedings (recommendations 39, 41). The prohibition should apply to trial by magistrates, or by judges sitting with or without juries. So far as sentences at first instance are concerned, it should operate

between the time when charges are laid and the time of sentence irrespective of whether a plea of guilty or not guilty is entered. If a sentence is appealed against, it should operate for so long as the appeal is pending (para 384).

53. *Protection of testimony.* The only additional restrictions recommended to protect witnesses in legal proceedings from influence should be:

- *Publication of photographs.* The publication of a photograph, film, sketch or other likeness, or a description of physical attributes, of a person should be prohibited where:
  - the publication suggests that the relevant person is suspected of, or has been charged with, a criminal offence;
  - the publication might impair the reliability of any evidence of identification that might be adduced in a prosecution for the offence; and
  - the publication cannot be justified on the basis that it may facilitate the arrest of the person or investigation of the offence, or out of considerations of public safety (para 395).
- *Intention to distort testimony.* A publication which tends to exert influence on the testimony to be given by a witness in any proceedings (for example, because it prejudges the outcome of the relevant proceedings, or reflects on the truthfulness or reliability of a party or a witness, or contains a report of an interview with a witness) should be prohibited where an intention to distort testimony can be proved. This matter is covered in recommendation 19 (para 392-4).

54. *Publications which put pressure on a party to a case.* There should be no prohibition based solely on the fact of publication of material which tends to exert pressure upon a party to a case to withdraw his or her claim or defence or to seek a compromise (para 399).

55. *Publication which prejudge or 'embarrass'.* There should be no restriction on publications solely on the ground that they tend to interfere with the administration of justice by virtue of containing a prejudgment of issues before the court in a current or forthcoming trial, or that they tend to 'embarrass' a court in the discharge of its duties (para 408).

Scandalising

56. *Abolition of common law.* Common law liability for scandalising should be abolished.

57. *A limited offence.* It should be an offence to publish an allegation which imputes misconduct to a judge if, in the circumstances, the publication of the allegation is likely to cause serious harm to the reputation of the judge in his or her official capacity. Responsibility for the publication should be determined as specified in recommendations 31 and 32 (para 460).

58. *Defences.* It should be a defence to a prosecution for the offence of publishing allegations of judicial misconduct if the defendant proves that the allegation was true, or that he or she honestly believed on reasonable grounds that the allegation was true. In addition, the defences of fair, accurate and reasonably contemporaneous reporting of legal or parliamentary proceedings (recommendations 39, 41) should apply (para 460).

Procedure in cases of contempt by publication

59. *Instigation of proceedings.* Responsibility for prosecution of the offences being recommended in place of contempt by publication should be undertaken by the Director of Public Prosecutions. This is not intended to derogate from the Attorney-General's traditional powers of prosecution, which subsist concurrently with those vested in the Director. Where it appears to a court that a person has committed one of the foregoing offences, the court should be empowered to direct an officer of the court to institute a prosecution. In addition, these offences should be open to prosecution by private individuals (para 469–70).

60. *Mode of trial.* Instances of alleged breach of any of the offences substituted for the *sub judice* rule should be referred to the ordinary criminal courts as indictable offences triable summarily. It should be at the option of the prosecutor or the accused to insist that the trial take place on indictment, before a jury. If neither side wishes this, the matter should go before a magistrate for summary trial, subject to his or her being satisfied that this is appropriate in the particular case. In cases of alleged breach of the offence created in substitution for scandalising, the appropriate mode of trial is that of trial by jury except in limited circumstances when, with the consent of all concerned, it may be tried summarily by a magistrate (para 476, 479).

61. *Sentencing.* Appropriate upper limits should be placed on prison sentences and fines which may be imposed for breaches of the recommended offences (para 482).

62. *Other remedies.* It should be possible to prevent publication of offending material by means of an injunction. This may be achieved as follows:

- The power of the Attorney-General to restrain publications which threaten to infringe the common law of contempt by publication should, in effect, be subsumed into the broad power possessed by the Attorney, as *parens patriae,* to obtain injunctions against the threatened commission of criminal offences, including those offences to be substituted for the law of contempt by publication under the foregoing recommendations.
- Private persons, including particularly parties to a case potentially threatened by intended publicity, should have standing to seek such an injunction when (as under present law) they are persons having a 'special interest' in the matter or, if the Commission's recommendations in its Report on Standing are enacted, when they are not 'merely meddling' in the matter (para 484).

The provisions of the Crimes Act 1914 (Cth) s 21B, empowering a court to award 'reparation' to those suffering damage as a result of federal offences, should apply to the offences recommended (para 485).

63. *Breaches of suppression orders: procedural aspects.* The existing right, or 'standing', of media representatives to resist an application for a suppression order, to apply to have it lifted or to lodge an appeal against it should be confirmed. Unrestricted rights of appeal from the making of the order at first instance should be conferred (where these do not at present exist), and the court hearing the appeal should be entitled to substitute its own order for the one appealed against. Subject to a defence of 'innocent publication' (recommendation 33), where a suppression order is made pursuant to a statute, breach of the order should be made an offence under the statute and should be the basis of liability for punishment. At least where the basis of the restriction is the prevention of influence affecting a current or forth-

coming trial, breach of a suppression order should be tried as a criminal offence, with limits to sentence stipulated by law in the ordinary way (para 488-91).

Non-compliance with court orders and undertakings

64. *Abolition of civil contempt.* The common law of civil contempt should be abolished. A new procedure, whereby a beneficiary of an order made in civil proceedings may apply to the court for the imposition of sanctions on a person for the purpose of securing compliance with the order, or for punishing disobedience to the order, or both, should be established. This procedure should extend to witnesses in any proceedings who refuse to be sworn or make an affirmation, or to answer a question lawfully put. Courts should have formal powers to order compliance with such obligations (para 535, 568).

65. *Coercive sanctions.* Sanctions should be imposed upon a person in non-compliance proceedings for the purpose of enforcement of an order only where compliance is clearly within the capacity of the party concerned, where no reasonable alternative method of enforcement exists, and to the extent only that they are likely to be effective in the particular case (para 511-2).

66. *Punitive sanctions.* Punitive sanctions should be imposed upon a person in non-compliance proceedings only to the extent that they are necessary to uphold the effectiveness of court orders (para 519).

67. *Mental element.* The applicant for sanctions should have the onus of establishing that the disobeying party wilfully intended to disobey the order or made no reasonable attempt to comply with the order. However, a person should not be subject to punitive sanctions if he or she satisfies the court that the disobedience was attributable to a failure, based on reasonable grounds (such as having taken legal advice), to understand the nature of the obligation imposed by the order (para 523, 525-6).

68. *Instigation of proceedings.* No person other than the party in whose favour the relevant order was made, or a person succeeding by operation of law to the rights of a party, should have standing to institute proceedings for non-compliance with orders (para 528).

69. *Waiver.* The right of an applicant to waive an alleged instance of non-compliance and to discontinue non-compliance proceedings should be retained. However, waiver should not preclude the possibility of prosecution for a criminal offence (recommendation 78), where appropriate (para 534).

70. *Mode of trial.* The summary procedure, involving trial by the court which made the relevant order, should be retained for non-compliance proceedings. The judge who made the order should not, however, deal with the matter if the respondent so requires (para 559-60).

71. *Procedural safeguards.* The existing common law 'natural justice' requirements should be preserved in non-compliance proceedings. This means that a court should not impose sanctions for non-compliance unless it is satisfied that:

- the order which is sought to be enforced was served personally on each person bound by the order or the relevant respondent had actual notice of the terms of the order;
- the application was served personally on the respondent; and
- the application includes particulars of the acts or omissions relied on as constituting the failure to comply (para 577).

72. *Onus of proof.* The onus of proving the following matters should lie on the applicant:

- conduct amounting to non-compliance;
- the mental element appropriate to the case; and
- the necessity of invoking coercive sanctions rather than some other enforcement remedies.

The respondent should bear the onus of proving:

- lack of capacity to comply at the relevant time; and
- the lack of any factor in the situation suggesting that sanctions will not be effective.

The onus of establishing the defence (against punitive sanctions) that there was an honest and reasonable failure to understand the order should also lie on the respondent (para 579).

73. *Standard of proof.* The matters required to be proved by the applicant in non-compliance proceedings should be proved beyond reasonable doubt. Matters required to be proved by the respondent should be proved on the balance of probabilities (para 581).

74. *Evidence.* The rules of evidence applicable in criminal proceedings in a court sitting in the State or Territory in which the court is sitting should apply in non-compliance proceedings. The right of a respondent to make an unsworn statement should thus depend on the rules relating to unsworn statements in the jurisdiction in which the court is sitting (para 582).

75. *Sentencing.* Maximum sentences should be prescribed by law.

- *Imprisonment.* There should be an upper limit for any sentence imposed for the purpose of coercion, with the court retaining the power to order the earlier discharge of the person prior to the expiration of the fixed term in the event of compliance with the order. A person imprisoned for the purpose of coercion should have the right to apply for release at any time, and should be released if willingness to comply with the order or any other good cause is shown. A sentence imposed for purely punitive purposes should be subject to an upper limit and to Commonwealth legislation governing persons imprisoned for federal offences (para 545–6).
- *Fines.* The court should have the power to impose an accruing fine for the purpose of coercing compliance with an order. The amount of a fine which may be imposed daily should be subject to an upper limit, and the total amount payable should be determined by the court. A one-off fine imposed for punitive purposes should be subject to a fixed upper limit (para 548, 551).
- *Sequestration.* Sequestration of assets should be retained as a sanction to compel compliance but, where possible, there should be a lapse of time between the issue of the writ and its execution in order to give the person further time to comply (para 547).
- *Other sanctions.* Alternative modes of punishment, for example, community service orders, work orders, periodic detention, attendance centre orders and weekend detention, should be available. The provisions of the Crimes Amendment Act 1982 (Cth) should be made available to cases of disobedience contempt falling within federal and Territory jurisdiction, whether the sanction is imposed on grounds of punishment, coercion or both (para 552).

76. *A compensatory remedy.* A compensatory remedy for disobedience contempt, either as a substitute for or in addition to the imposition of sanctions, should be created. This should take the form of a money award to the applicant, assessed according to what the court considers to be just and equitable, for the purpose of indemnifying him or her for the harm caused by the breach (para 554).

77. *Witness misconduct.* The upper limit of sanctions which may be imposed upon a witness for failure to attend or failure to be sworn or to make an affirmation should be lower than those which may be imposed upon a party (para 553).

78. *A new offence.* A new offence of wilful failure or refusal to comply with an order of a court in such a way as to constitute a flagrant challenge to the authority of the court, should be created. This should be an indictable offence, triable summarily. The court should be able to direct a prosecution (para 561).

79. *Overlap between non-compliance proceedings and criminal proceedings.* In cases where disobedience may constitute a criminal offence:

- A court imposing sanctions for disobedience should take into account the nature and extent of any physical, mental or emotional harm sustained by the applicant or any other person as a result of the disobedience.
- Where the conduct constituting disobedience is prosecuted as a criminal offence, the court dealing with the application for sanctions should have express power to stay the application (para 520).

80. *Respondents other than the disobeying party.* The following principles should apply in cases where non-compliance proceedings are brought against a person other than the person bound by the order:

- A person other than the party bound by an order should not be punished for aiding and abetting disobedience of the order unless the disobedience by the party bound has attracted or is such as to attract a sanction under the foregoing recommendations, and the person aiding and abetting had actual knowledge of the terms of the order and of the fact that the relevant conduct constituted disobedience.
- Generally speaking, coercive sanctions should not be available against 'aiders and abetters'.
- Officers of a corporation who knowingly cause the corporation to disobey an order should, however, be capable of being made subject to coercive sanctions (para 536).

81. *Appeals.* A determination made in non-compliance proceedings should be subject to appeal in the same manner as any final order of the relevant court (para 583).

82. *Debt recovery.* Imprisonment for debt default should be regarded as a weapon of last resort and, in non-compliance proceedings arising out of debt default, the creditor should bear the onus of proving:

- that such alternative means of recovery as have been tried have proved unsuccessful; and
- that any other lawful means of enforcement would be likely to be ineffective (para 513).

83. *Removal of persons from property.* Imprisonment should not be used for the purpose of enforcing an order for recovery of possession of land unless:

- it will be effective; and
- all alternative methods have been tried unsuccessfully or would not be effective (para 514).

84. *Right to continue proceedings.* A party who is guilty of non-compliance should not be automatically barred from continuing the proceedings: it should instead be a matter for the court's discretion (para 555).

Non-compliance proceedings under the Family Law Act 1975 (Cth)

85. *Non-compliance proceedings.* The existing 'hierarchy' of contempt provisions (s 35 and s 108) and 'quasi-contempt' provisions (s 70(6) and s 114(4)) should be abolished, and the new procedure of non-compliance proceedings, as just outlined, should be substituted. An aggrieved spouse should be able to institute non-compliance proceedings, in which the court is empowered to impose sanctions for coercive purposes, punitive purposes or both. The procedure should be established by amendment to the Family Law Act. It should operate in similar fashion to non-compliance proceedings in respect of orders in non-family matters, but with appropriate adjustments, as outlined below, to take account of family law considerations (para 632).

86. *An 'enforcement list'.* Each Family Court Registry should establish an 'enforcement list' to ensure that non-compliance proceedings are heard as expeditiously as possible. Spouses seeking sanctions should not be compelled to put their cases in this list, but should have the option of doing so. If it appears that spouses are using this procedure in order to get substantive matters heard quickly, the Court should adopt appropriate deterrent measures: for example, cost sanctions or re-listing after a significant delay (para 649).

87. *Enforcement of orders of other courts.* All courts exercising jurisdiction under the Family Law Act should be empowered to deal with orders made by other courts under the Act (para 644).

88. *Instigation of proceedings.* A child of the marriage should be specifically empowered to institute non-compliance proceedings where the order allegedly breached relates to the child's welfare (para 610).

89. *Discontinuance and waiver.* In the case of non-compliance proceedings arising out of failure to comply with an order under the Act, the court should be able to hear to their conclusion proceedings which have been discontinued by the applicant, if the court considers this to be in the best interests of a child of the marriage. The court should make use of existing powers to allow separate representation to a child of the marriage, so that the question whether proceedings should be taken over by or on behalf of the child may be properly argued (para 609).

90. *Double punishment.* In cases where the conduct constituting non-compliance has already been punished as a criminal offence, it should be within the court's discretion whether or not to impose punishment in addition to that already imposed under the criminal law. In exercising its discretion, the court should not impose further punishment for the element of disobedience unless the penalty already imposed is clearly inadequate to reflect this element. The court should be empowered to adjourn non-compliance proceedings when a prosecution is on foot (para 616).

91. *Alternative enforcement measures.* The range of alternative enforcement procedures available within the Family Court should be as wide as possible and the Court should have sufficient resources to render them effective. They should compare favourably with the enforcement processes of any other superior court in Australia (para 619).

Orders restraining molestation

92. *Notification of right to prosecute.* A spouse seeking an injunction based upon evidence of an assault should be notified of:

- the existence of a right to prosecute the assault, privately or with the help of the police, as a criminal offence under an appropriate State or territory law; and
- the availability of legal aid (para 669).

93. *Mandatory power of arrest.* The provisions of s 114AA of the Family Law Act, authorising a court exercising jurisdiction under the Act to attach a power of arrest without warrant to an injunction restraining assault, harassment or entering specified premises, should be amended so as to make attachment of the power of arrest mandatory so long as the pre-requisites stipulated in s 114AA are satisfied (para 670).

94. *A new criminal offence.* Any wilful breach of an injunction granted under s 114(1)(a), (b) or (c) of the Family Law Act against assault, harassment or entering specified premises, places or areas should be a criminal offence, provided that the respondent was present when the order was made or was personally served with a copy of the order before the breach occurred (para 671).

95. *Avoidance of conflicting orders.* In order to avoid problems which may arise out of conflicting orders:

- Restraining orders and injunctions should be formulated so as to allow for the operation of existing and future access orders.
- Where an access order is made while a restraining order or an injunction currently prohibits the access parent from going to or near the matrimonial home, or any other relevant place, the access order should make it clear whether or not it overrides this order or injunction to the extent necessary to allow the access parent to pick up or return the child before or after access (para 672).

96. *Compellability of spouse.* A spouse should be compellable as a witness in any prosecution for the recommended offence of breach of a non-molestation injunction, unless the spouse formally objects to giving evidence and the court is prepared to accede to the objection on the ground that the harm caused by the giving of the evidence outweighs the desirability of obtaining it (para 673).

97. *Ancillary recommendations.*

- To facilitate exercise of the power of arrest and prosecution for breach of a non-molestation injunction, injunctions should, so far as possible, comply with a standard form.
- A court dealing with an application for sanctions for non-compliance with such an injunction, or with a prosecution for the recommended offence of breach of an injunction, should have the power at any time during the proceedings to extend any existing injunction or impose a new one.
- So far as the Commonwealth has powers in respect of legal aid, it should ensure that legal aid is available for private prosecutions for breaches of such injunctions (para 674).

Access orders

98. *Formal finding as to breach should be made.* Irrespective of whether there is 'reasonable cause' justifying access default, or whether it would be inappropriate to impose sanctions in the particular case, the court should always, when dealing with an allegation of access default, determine whether it has occurred and was accom-

panied by the relevant mental element. This step is essential by way of acknowledgement that, unless legislative change on the general matter of access occurs, an access order, like any other court order, imposes binding legal obligations (para 698).

99. *Defence of justification.* The law should specify the circumstances in which, despite a finding of breach coupled with the necessary mental element, the court should be required not to impose any sanction for non-compliance with an access order. The only such circumstances should be where:

- the custodial parent honestly believed on reasonable grounds that the relevant denial of access was necessary to protect the health or safety of the child or of the custodial parent; and
- the access parent was not deprived of access for longer than was reasonably necessary to achieve this purpose (para 698).

100. *Special considerations affecting discretion in imposing sanctions.* In addition, the law should specify the following conditions as relevant (though not exclusively so) to the exercise of the court's discretion in imposing sanctions for a breach of an access order:

- the desirability, in the interests of the child, of the child's maintaining contact with each parent;
- the child's reactions to access and to the prospect of access; and
- the effect on the child of the imposition of any sanction contemplated by the court (para 698).

101. *Counselling.* When non-compliance proceedings have been instituted for the first time in respect of an access order, the Family Court should not proceed to impose sanctions until the spouses have first been directed to attend confidential counselling and adequate time has elapsed to permit counselling to have full effect. This rule should be departed from only where counselling has already occurred since the making of the order or the court is satisfied that, in the special circumstances of the case, it should be dispensed with (para 705).

102. *Power of arrest.* The Family Court should have power to issue a warrant to a police officer for the arrest of any person who is concealing a child in contravention of an access order. The follow up procedures for bringing the person before the court should be the same as already apply under s 114AA of the Act to a spouse arrested for breach of a non-molestation injunction (para 707).

103. *Persons who aid and abet breach of an access order.* The regime of non-compliance proceedings should be made expressly available to any person breaching the duty imposed by s 70(3), which refers to persons 'hindering or preventing' the access parent from obtaining access or 'interfering with rights of access'. This should be in addition to the recommendation that a person can be proceeded against for aiding and abetting the breach of any order (para 708).

Custody orders

104. *Arrest of abductor.* Where a child has been abducted in contravention of a custody order, the police, having traced the child, should have explicit power not only to take possession of the child but also to arrest the abductor. The court should be authorised to issue a warrant authorising police to seek out and arrest an abductor. On arrest of the abductor, he or she should be kept in custody and brought before the court under the procedure specified in s 114AA of the Act. This should be in addition to any warrant under s 64(9) of the Act to retrieve the child. Non-compliance proceedings and the warrant procedure should be available against any person (not merely a parent) involved in the abduction (para 718).

105. *Defence of justification.* In the event of a breach of a custody order, accompanied by the requisite mental element, by an access parent, the court should be required to refrain from imposing sanctions if:

- the access parent honestly believed on reasonable grounds that the failure to comply was essential to protect the health or safety of the child or of the access parent; and
- the breach of custody lasted no longer than was reasonably necessary to achieve this purpose (para 721).

Orders relating to property

106. *Court officers.* A sheriff or bailiff, having the capacity to exercise a full range of appropriate powers in the field of enforcement of debts, property transfers and orders for possession, should be appointed to the Family Court (para 724).

107. *Removal of a spouse from property.* Such officer should have the power to evict a spouse from property, whether to give effect to an order for the transfer of property or to an injunction made under s 114 (para 725).

108. *Seizure of goods.* Such officer should have the power to seize goods which are the subject of an order for specific delivery (para 726).

109. *Orders charging debts against property.* The Family Court should have power to make orders charging debts against property of a spouse (para 726).

110. *Sequestration.* The power of sequestration of assets for coercive purposes should be preserved, but sequestrators should not be given a power of sale of sequestrated assets (para 727).

Maintenance orders

111. *Use of imprisonment.* In cases of maintenance default, imprisonment should occur only in the context of non-compliance proceedings. Unsuspended custodial sentences should be seen as a weapon of last resort. So far as possible, non-custodial sentences such as periodic detention and community service orders should be used in preference to imprisonment (para 736).

112. *Punishment for maintenance default.* Two essential conditions should be satisfied in maintenance default cases:

- that the defaulter has the capacity to pay; and
- that attempts to enforce the order by other means, such as garnishment of wages or seizure or sale of property, either have been tried unsuccessfully or would, if tried, be likely to prove unsuccessful (para 736).

Contempt in relation to commissions and tribunals

113. *Creation of statutory offences.* There should be no general 'deemed contempt' provision applicable to royal commissions, standing commissions or tribunals. Existing deemed contempt provisions should be repealed and a series of specific statutory offences should be substituted (para 757).

114. *Offence of 'substantial disruption'.* An offence drafted in terms of wilfully causing 'substantial disruption' to the conduct of a hearing of a commission or tribunal should be created. The offence should apply to hearings in all federal commissions and tribunals, although if an existing statute already creates an offence in similar terms, it need not be superseded by the recommended offence. A requirement of *mens rea* should apply to the offence: that is, a person should be liable for the offence only if he or she intended to disrupt the relevant hearing, or was reck-

lessly indifferent as to whether the conduct in question would have this effect (para 761–2).

115. *Witness misconduct.* There should be created an offence of refusal to be sworn or make an affirmation, or to refuse to answer or prevaricate in answering, a question. The offence should apply to commissions and tribunals, where such an offence does not already exist, but it should be limited in application to those commissions and tribunals which have the power to compel witnesses to be sworn, to make an affirmation or to answer a question (as the case may be) (para 765).

116. *Power of expulsion.* A power to expel persons from a hearing should be conferred expressly upon commissioners and tribunal members, exercisable when they believe on reasonable grounds that the person to be expelled would otherwise disrupt the proceedings (para 768).

117. *Influencing commissioners or tribunal members.* It should be an offence to influence or attempt to influence a commissioner or tribunal member to act otherwise than in accordance with his or her duty. In the case of commissions and tribunals which have power to take evidence on oath, the offence recommended with respect to participants in court proceedings would apply (recommendation 19). A similar offence should be considered for commissions and tribunals which do not have power to take evidence on oath (para 772).

118. *Other kinds of interference.* The offences contained in Part III of the Crimes Act 1914 (Cth), including the new offences recommended above, should apply to commissions and tribunals already within the ambit of Part III. Statutory offences within statutes governing particular commissions and tribunals should be repealed where they cover the same ground as is covered in the Crimes Act. Existing offences dealing with interference applicable to commissions and tribunals not within the ambit of the Crimes Act should be retained, but no new ones should be created without further investigation (para 773).

119. *Sub judice.* The offences recommended above in substitution for the *sub judice* rule should not be extended to royal commissions or proceedings before standing commissions or tribunals (para 776).

120. *Scandalising.* The limited offence recommended in substitution for the common law of scandalising should not apply to royal commissions. Nor should it apply to standing commissions and tribunals, unless a tribunal or commission is thought to need special protection in this area (para 778, 780).

121. *Non-compliance with orders.* Existing provisions which make it an offence wilfully to disobey an order of a commission or tribunal without reasonable excuse should not be repealed. However, general clauses of this nature should not be introduced unless the legislature is satisfied that:

- the commission or tribunal in question has, or should have, the power to make a range of orders which need to be reinforced by the introduction of criminal sanctions for disobedience; and
- disobedience of the relevant order is not already covered by a specific offence (para 785).

122. *Mode of trial.* The offences recommended in relation to commissions and tribunals should be indictable offences triable summarily and should be tried in the appropriate State or Territory court as federal offences. The Royal Commissions Act 1902 (Cth) s 6O(2), which purports to empower a Commissioner who is a judge to punish contempt 'in the face of' the commission summarily, should be repealed (para 787, 790).

123. *Commissioners or tribunal members as witnesses.* In a trial of one of the recommended offences, a commissioner or tribunal member should be competent to testify, and should be compellable if leave is granted by the court trying the alleged offence (para 793).

124. *Sentencing.* All the recommended offences should be punishable by a fixed penalty (para 794).