



## Submission of the Office of the Director of Public Prosecutions

To Senate Standing Committee on Legal and Constitutional Affairs

### Law of Contempt

The Office of the Director of Public Prosecution NSW (ODPP) is an independent prosecuting body primarily responsible for the prosecution of serious offences in the District and Supreme Courts in NSW.

An invitation has been received for the ODPP to make a submission to the Senate Standing Committee on Legal and Constitutional Affairs which is conducting an inquiry into the law of contempt. Four matters have been referred to the Committee.

The ODPP makes the following submissions in relation to those four areas:

1. *The Recommendations of the 1987 Australian Law Reform Commission ("ALRC") report on contempt, in particular the recommendation that the common law principles of contempt be abolished and replaced by statutory provisions*

The ALRC report recommendations were limited to the Commonwealth jurisdiction by virtue of the inhibitions on Commonwealth power. In effect the proposed reforms were confined to federal courts other than the High Court, and federal proceedings conducted by state courts.

As a result the recommendations are outside of the scope of operation of the ODPP.

2. *The recommendations of the 2003 New South Wales Law Reform Commission (NSWLRC) on contempt by publication and the need to achieve clarity and precision in the operation of the law on sub-judice contempt*

The ODPP has a strong interest in the sub judice rule and the law concerning contempt by publication. Reports by the media (particularly in regional centres where the jurors are more likely to have come into contact with the offending publication) not infrequently cause criminal trials to be aborted. Generally, such publications will be brought before the trial judge for a determination as to the correct course of action. On appropriate occasions, the ODPP will oppose an order for the trial to be aborted where it is apparent that the prejudice is limited in scope and able to be contained, and/or that any prejudice can be cured by judicial direction. Applications to abort the trial are often difficult for trial judges to determine, and frequently cause significant frustration for the court, and for all concerned in the proceedings. The better position would obviously be that the offending publications did not occur in the first place.

The NSWLRC report made 39 recommendations. Submissions were received from a wide range of contributors. In essence, the report proposed the introduction of legislation to replace the common law in the area of sub judice contempt. The ODPP supports the

proposal to codify the law in this area. Codification will clarify the law in relation to sub judge contempt and thereby decrease the potential for contempt to be committed by publication of prejudicial material in circumstances where the publisher was ignorant of the law or was unclear as to its effect.

#### *The changing media environment*

The past couple of decades have witnessed substantial advances in technology and significant changes in the way news is communicated. There has been an evolution towards social media and a marked trend away from traditional news sources controlled by large media organisations towards individual/small publishers of news in online forums. The proliferation of online platforms for comment has greatly expanded the potential for prejudicial publication concerning criminal trials. The diversification of news and information sources away from large media organisations towards individuals and groups posting comments online has also made controlling the content of publications harder to achieve.

Since 2003, when the NSWLRC issued its report, the media landscape has changed quite dramatically. It is instructive to note that Twitter, one of the largest online news and social networking services, was not launched until 2006. Facebook only launched in 2004 and was not available to the general public until 2006. The advent of freely available online forums on which members of the public can post material which can quickly gain a wide audience has heightened the need for clearly expressed and readily accessible laws governing sub judge contempt. The source of offending material can no longer be assumed to be a journalist, editor or a publisher in the traditional sense, who has the benefit of a legal department or experienced senior staff to vet a story prior to publication.

The proposed legislation will need to take account of the changing media environment to ensure that all manner of publications are covered by the sub judge provisions, including new and emerging social media platforms.

#### *The cost of sub judge contempt*

Recommendations 34 and 35 by the NSWLRC concerned amendments to the *Costs in Criminal Cases Act 1967 (NSW)* whereby the Supreme Court was enabled to make an order for costs against the publisher of material which constituted a contempt of any court hearing a criminal trial by jury. This measure is supported by the ODPP. When a trial is aborted due to the publication of prejudicial material, it will generally not recommence for several months, both due to the difficulty in obtaining an earlier listing, and because the court will generally require a considerable period of time to elapse to allow the effect of the offending publication to dissipate in the community of potential jurors. This results in costly wasted effort by both parties for work performed in preparation for the trial, and places pressure on the courts by exacerbating the trial back-log. It is therefore appropriate that in the right circumstances certain costs should be recoverable from the contemnor.

### *3. The development and operation of statutory provisions in Australia and overseas that codify common law principles of contempt*

As stated above, the ODPP supports the development of uniform statutory provisions governing the law of sub judge contempt. This would be the most effective way of promoting knowledge and understanding of the law and its effect, which should lead to

greater compliance by potential publishers.

4. *The importance of balancing principles, including freedom of speech and expression, the right of fair trial by an impartial tribunal, public scrutiny of the operations of the court system and the protection of the authority, reputation and due process of the courts*

These issues were thoroughly canvassed in the NSWLRC report. The Commission found that the retention of the sub judice rule was compatible with the public interest in freedom of expression and open justice. This conclusion is supported by the ODPP.

Should you require further information about any of the issues raised in this submission, inquiries should be directed to Johanna Pheils, Deputy Solicitor (Legal)

**Office of the Director of Public Prosecutions**

**31 October 2017**

