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Scholarly Analysis on Reform for Law of Contempt in Australia

Summary

The present law of contempt in Australia has been criticised on various grounds. The most commonly expressed criticism are:

a) Unduly restricts freedom of speech and of the media;
b) Rules are unclear and imprecise; and
c) Procedures are unfair.

There are those in the community who think that the law of contempt should be codified.

Disadvantage of the current law

The primary disadvantage of the present law is the threat it poses to freedom of speech. It is for this reason that it does not form part of the American common law (*Bridges v California (1941) 314 U.S. 252, 284, 287*). The High Court acknowledges this risk in *Gallagher v Durack (1983) 57 A.L.J.R. 191 , 192, 194* . Despite statements that his power will be used sparingly, (*R v Commissioner of Police of the Metropolis: exparte Blackburn (No 2) [1982] 2 Q.B. 150, 155; McLeod v St Aubyn (1889) 14 App. Cas. 549 , 561)* , it is the potential for abuse that has led to several calls for its abolition (*United Kingdom , Report of the Committee on Contempt of Court (1974) Cmod 5794, 69; Bailey S.H. ., ' The Contempt of Court Act 1981' (10981) 45 Modern Law Review 301 , 314).*

Further problems include the propriety of courts sitting in judgment in their own cause intention to bring into contempt is not necessary ingredient of the offence. No trial by jury is necessary to judge the issue.

Terms of Reference

Whether replacing common law contempt with statutory offences?

In Australia, contempt of court still largely exists at common law. Although some provisions are found in statute, the common law remains critical to interpreting the statutory provisions, including the test for strict liability contempt. Also, there is variance in the way in which contempt of court fits into the framework of criminal law in the states and territories. In New South Wales and Victoria, there has been partial codification of the criminal law, but both statutory and common law offences, including contempt of court, continue to exist outside those Acts. The other states have adopted comprehensive criminal codes. As an example of the interrelationship between statute and common law, section 8 of the Criminal Code Act 1899 (Queensland) provides that:

'Nothing in this Act or in the Code shall affect the authority of courts of record to punish a person summarily for the offence commonly known as 'contempt of court', but so that a person cannot be so punished and also punished under the provisions of the Code for the same act or omission'.

In 1987, the Australian Law Reform Commission recommended the following:

- The common law principles of contempt should be abolished and replaced by statutory provisions that would govern all Federal Courts except the High Court;
- Current forms of contempt should be replaced by criminal offences. To establish that a person is criminally liable, specific criteria should be met. These would clarify the law and limit liability to situations where the conduct is sufficiently severe;
- With the exceptions of contempt in the face of the court and disobedience contempt, new contempt offences should be tried in the same way as normal criminal offences; rather than by summary procedure, to ensure the protection of an accused's rights.
- Contempt in the face of the court should be treated as a criminal offence, and the matter should continue to be heard summarily. However, the accused person should be able to require the original judge not to be in charge of the trial;
- The law governing disobedience contempt should be replaced by a statutory system of "non-compliance proceedings". Where a person has disobeyed an order, the other

party should be able to request that the court impose sanctions (such as imprisonment or fines) to punish disobedience or pressure the disobeying person into complying with the order;

- Where the abolition of the common law forms of contempt would otherwise leave the courts without power to punish certain forms of interference with the administration of justice, the Crimes Act 1914 (Cth) should be amended to remedy this situation;
- Specific recommendations for the reform of contempt in family law matters, including replacing the system of contempt and quasi-contempt in the Family Law Act 1975 (Cth) with a single procedure for the enforcement of orders. A number of policy considerations should be kept in mind when enforcing orders: punishment should be used as a last resort when counselling has failed to resolve the issue; a wider range of sentencing options should be available; in punishing those who do not comply with orders , the court should consider how disobeying person's conduct harmed others, but must also consider how the punishment would effect any children involved;
- A specific offence should be created for breach of restraining injunction. Where a person has breached a custody order by abducting a child , the police should have explicit power to arrest the abductor;
- Each Family Court Registry should establish an 'enforcement list' to ensure that non-compliance proceedings are heard as quickly as possible.

Although the Australian Law Reform Commission's report focused on contempt at a Commonwealth level, it stated that the majority of its recommendations were suitable for use by state and territory governments. In this regard, it appears there were attempts by the federal and state governments to agree on a uniform contempt law, but state and territory interest in the project lapsed, and it appears this is no longer being actively. There has been substantial implementation of the report's proposed reforms relating to family law.

Implementation

A discussion paper dealing with some aspects of the report was circulated to the Chief Justices of the High Court, Federal Court and Family Court and the item was placed on the agenda of the Standing Committee of Attorneys – General for discussion of a possible uniform contempt law. In 1992, a position paper was prepared and circulated, outlining the federal government's position on the Commission's recommendations. Although four jurisdictions initially agree to work together for the purpose of agreeing on uniform contempt legislation, state and territory interest in the project lapsed and the project is no longer being actively pursued.

However, there has been substantial implementation of the report's proposed reforms in family law. The *Family Law Amendment Act* 1989 (Cth), which came into force on 25 Jan 1990, implemented significant aspects of the recommended reforms for enforcing the orders of the Family Court. As implemented, the legislation required that breaches of orders are only to be punished where that conduct was intentional and done without a reasonable excuse; that, as a general rule, before imposing sanctions for a breach of an order, the parties must have attended counselling; and that imprisonment for non-compliance should only be used as a last resort.

In 1992, the *Report of the Joint Select Committee on Certain Aspects of the Operation and Interpretation of the Family Law Act 1975* concluded that the Court making full use of the powers under the Act. As a result, the *Family Law Amendment Act 2000* (Cth) was passed.

The main way in which the Act sought to improve the enforcement orders was the introduction of a three –level system, which requires the court to take different kinds of action depending on the nature of the breach, ranging from measures to improve communication, to punishment as a last resort. The enforcement of orders regime was further reformed by the *Family Law Amendment Act 2003* (Cth).

The Common Law

Legal recognition of the offence of scandalizing the court has long history. It was established in 1765 (*Roach v Garvan 26 E.R . 683*) and recently both the High Court (*Gallagher v Durack (1983) 57 A.L.J.R. 191*) and the Privy Council (*Lutchmeerparsaid Badry v D.P.P. [1983] 2 W.L.R. 161)* affirmed its existence. In R v Gray (*R v Gray [1900] 2 Q.B. 36, 40)*, Lord Russell C.J. defined the offence as constituted by

"[a]ny act or writing published calculated to bring a court or a judge of the court into contempt, or to lower his/her authority, is a Contempt of Court".

At one time it had become so rarely prosecuted that the Privy Council was tempted to suggest that it had become obsolete in England (*McLoed v St Aubyn (1889) 14 App. Cas. 549, 561*).

Australian courts embraced this concept of contempt at an early date. Indeed, Australian courts have heard charges of such contempt in a number of cases. The two leading cases before *Gallagher v Durack* were *R v Dunbabin* ; *exparte Williams ((1935) 53 C.L.R. 434)* and *Attorney – General for New South Wales* v *Munday* ([1972] 2 N.S.W.L.R.887).

Case Laws

R v Dunbabin was decision of the High Court of Australia. The contempt consisted of an article containing criticism of two High Court decisions, suggesting that they were the result of antagonism towards the Federal Cabinet. The Court was further accused of 'hair splitting' in an attempt to find the relevant Acts of Parliament is invalid. The general tone of the article was one of sarcasm and irony. The leading judgment is considered to be that of Rich J., who said that contempt:

"may also arise from publications which tend to detract from the authority and influence of judicial determinations, publications calculated to impair the confidence of the people in the Court's judgments because the matter published aims at lowering the authority of the Court as a whole or that of its Judges and excites misgivings as to the integrity, proprietary and impartially brought to the exercise of the judicial office (*(1935) 53 C.L.R. 434, 442)*"

This decision has been criticized as too restrictive of freedom of speech (*Borrie G.J. and Lowe N. . The Law of Contempt (1973) 159 ; Gallagher v Durack (1983) 57 A.L. J.R. 191, 194 per Murphy J.)* . It is suggested that much of this criticism is derived from excessive attention to the last phrase of the test propounded by Rich J , Hope J.A.in *Attorney –General for New South Wales* v *Munday* stated

"the mere fact that criticism has some effect in impairing public confidence in a court or judge cannot be the sole test of whether it amounts to contempt of court (*Attorney –General*

(NSW) v Munday6 [1972] 2 N.S.W.L.R. 887, 910)". He went on to suggest that to the extent that *R v Dunbabin* went beyond cases such as *R v Gray* it should be limited to its particular facts. It is suggested that the question is not whether a comment attacks the impartiality or integrity of the courts. The basis of the offence, as suggested by Dixon .J . in *R v Dunbabin* , is

"whether, if permitted and repeated , it will have tendency to lower the authority of the court and weaken the spirit of obedience to the Law to which Rich J, has referred (*R v Dunbabin (1935) 53 C.L.R. 434, 447)*".

This was not recognised by the majority judgement in *Gallagher v Durach* . The essence of this form of contempt is that the harm to public confidence in the courts outweighs the possible harm to freedom of speech ((*1983)57 A.L.J.R. 191, 192)*.

Sentencing

The sentence of three months imprisonment accorded Mt Gallagher is by no means unique. *(Rv Bolam and Others , exparte Haigh (1949) 93 Sol.J. 220 ; Re Wiseman [1969]* N.Z.L.R. *55; Rv Skipworth (1973) L.R. 9 Q.B. 230)*. . In theory, there is no maximum term of imprisonment (*Enfied London Brough Council v Mahoney [1983] W.L.R. 749, 755*). This is to some extent counterbalanced by the ability of a court to release a contemnor from prison at any time. Nonetheless the usual sanction has been the imposition of fines.

Recommendations

- The preservation of individual liberty is of paramount importance. Everyone has the right to freedom of expression. Everyone has the right to a fair hearing, by courts and tribunals, of any criminals charges against him or, in a civil case, of any matter involving his/her rights or obligations;
- Obviously these rights sometimes compete with each other and on occasions collide. It is unfair for the right of freedom of expression to be misused so as to prejudice a person's prospects of obtaining justice before courts;
- The International Covenant on Civil and Political Rights itself provides that the right of freedom of expression mentioned in Article 19 carries with it special duties and responsibilities and may therefore be subject to certain restrictions provided by law including those necessary for respect of the rights or reputations of others. Article 14 provided that everyone shall in the determination of any judicial proceeding be entitled to a fair trial;
- If the legislation is to be enacted in Australia relating to contempt of court, although the United Kingdom Act 1981 will of course be considered in the drafting process, care must be exercised before applying its provisions to this country. Also, it would be most unwise for Parliament to convert the present common law of contempt into a series of statutory offences. The administration of justice requires that judges control their courts and are able to deal speedily and fairly with contemptuous conduct whilst events atre fresh in the minds of all.

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