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**BROADCASTERS' SUBMISSION TO THE NSW LAW REFORM  
COMMISSION ON "CONTEMPT BY PUBLICATION"**

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**This is a collective submission from Australian broadcasters in response to the  
Law Reform Commission's Discussion Paper No. 43 "Contempt by Publication"**

**This paper is submitted by:**

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**Broadcasters' Submissions to Law Reform Commission:  
"Contempt by Publication"  
(Discussion Paper 43)**

These submissions respond to the list of proposals set out in the Commission's publication "Contempt by Publication: Discussion Paper 43 Summary".

**1. General submission on need for reform**

In our submission it is vital that liability for sub-judice contempt does not act to the detriment of the principles of open justice and freedom of speech.

The principles of freedom of speech and open justice need not be in conflict:

- A vital, independent and open system of justice and media are integral parts of a democratic society;
- The public have limited contact with the justice system; and
- The media, by reporting and providing scrutiny of the justice system, are performing an integral role in public education and confidence in the justice system.

Thus, it is critical that the media are encouraged to report, scrutinise and criticise the justice system as far as is possible.

In the face of evidence that juries and judges are capable of making (and routinely do make) determinations free of influence, there remains little basis for rules, such as the sub-judice rule, having a wide operation. If there is to be any legislative modification by the law it should reflect this.

The public's confidence in the justice system in part depends upon its confidence that the system is open to public scrutiny.

In this context, we are concerned that the proposals proceed from the assumption of retention of liability and that some of the Commission's proposals restrict, to an unacceptable extent, the ability of the media to report on and inform the public of matters before the Courts.

The Australian media recognise that, in some circumstances, it is necessary to limit freedom of expression so as to ensure that trials, and criminal jury trials in particular, are not compromised. There is no evidence that the Australian media has shirked this responsibility. Nor is there any evidence that the Courts have allowed them to do so under existing laws.

It is submitted that there has been no demonstrated need for codification of the law of contempt. Broadcasters have developed well established pre-broadcast procedures based on the common law as it stands. While we acknowledge that there may be some areas of uncertainty within the common law framework, to the extent that these do exist, we do not agree that codification is the most effective means of addressing these issues. Change for the sake of change should be avoided. Interestingly, Discussion

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Paper 43 does not contain an examination of the shortcomings of the existing common law regime. Rather, it appears to make a general assumption that reform is necessary and proceeds to justify proposals for reform in particular areas.

In this context, the impact upon the introduction of a complete or partial codification which would apply only to New South Wales publications should be considered. At the present time, the common law applies throughout Australia. If the different tests and statutory requirements and consequences are adopted in New South Wales only, publishers of nationally distributed publications (whether by print or electronic media) would be placed in a difficult position when deciding whether or not to publish particular material. National publishers would in effect apply the harshest rules, causing the benefits of any changes to be largely lost.

The preferred option is for the common law to remain in place and for the proposals, as a whole, not to be adopted. The following comments on certain of the individual proposals made by the Commission are offered on the assumption that the Commission's recommendation for legislation in this area of the law is accepted.

## **2. Proposal 2**

In the case of media organisations, liability should be limited to the organisation itself. Individual persons should not be liable. The present proposal would expose a substantial number of persons within a particular media organisation to prosecution. Nothing is gained by such exposure. Any liability should be that of the organisation as a whole. There are many instances where individual persons may exert the degree of control referred to in the proposal, but in respect of whom it would be unfair to lay charges for contempt.

As an alternative, the common law approach should remain in place. That approach results in most cases with the prosecuting authority only proceeding against an individual employee of a media organisation where there is clear and unarguable responsibility for the decision to publish.

The proposal should only contemplate liability for a person who is in a position to authorise publication, has authorised publication, and where the authorisation was with wilful disregard for the consequences of the publication.

It is also not clear whether an "organisation in a position to exercise a significant degree of control over the contents of the publication" or "supervise the system for ensuring that the material was not published" would include a station which broadcasts networked or syndicated programs.. A regional station which broadcasts networked or syndicated programs, particularly news programs, is limited in its capacity to exercise control over the content of its broadcasts. Nor do small radio operations have the resources to establish a system for vetting all material provided by a program supplier. We would not be in favour of any amendment to the law of contempt which places the responsibility on a networked regional broadcaster in the circumstances. We note that were Proposal 8 adopted and appropriately applied, these concerns may be addressed.

In the context of live-to-air radio programs there is limited, if any, opportunity to supervise program content.

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### 3. Proposal 3

The common law test for liability, as it has developed through a number of decisions, should be retained. The introduction of the concept of "substantial risk" does nothing to clarify the test to be applied. It is noted in paragraph 4.20 of the *Discussion Paper* that the Commission apparently accepts that it is "not clear how the Australian courts would interpret the phrase 'a substantial risk'". The proposed test cuts down the scope currently available for the courts to convict only in the clearest cases of risk of prejudice. The test proposed is unrealistic and unreasonable, given that the courts are here dealing with the commission of criminal offences.

It is understood through discussion with the Commission that it proposes to amend this proposal so that its declared intent of making the test for liability higher than the common law test is put into effect. If that is achieved, namely that a prosecutor would have to demonstrate the clearest case of prejudice and which is capable of precise definition, then such a proposal is considered preferable to the current formulation which fails to achieve the declared intent.

### 4. Proposal 4

Again, the common law adequately deals with the categories of statements which may constitute contempt. Providing illustrations in statutes does not assist. It has the unfortunate effect of focussing attention on whether or not a statement fits within one or more of the illustrations rather than having regard to the surrounding facts of each individual publication to determine the likelihood of prejudice.

In particular, we consider that the phrases:

- "or from which it could be reasonably inferred";
- "could be reasonably regarded"; and
- "illustrative",

are imprecise and defeat the purpose of a list of circumstances in which contempt may arise.

### 5. Proposal 5

We are of the view that the trial judge's determination in the criminal trial should be irrelevant to the issue of liability.

Making a judge's reasons admissible in subsequent proceedings invites the prospect that it should be given some weight when unrelated considerations are in issue. If admissible, the veracity of the reasons are open to attack by either the prosecution or the defence, which is undesirable. A review of the trial judge's decision in subsequent proceedings is to be avoided.

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## 6. Proposal 6

Proposal 6 suggests that a publication is not incapable of constituting a contempt by reason only that a previous publication has already given rise to a substantial risk of prejudice to the fairness of legal proceedings. If a previous publication has prejudiced a jury there should be some acknowledgment that the publisher is not totally responsible for the influence that their publication may have had upon the trial. A second publisher should not take full blame for any prejudicial effect which publication may have when part of the damage was in fact done by the material being published in the first instance by another publisher.

## 7. Proposal 7

The problem with this defence for media publishers is that it is likely to be very difficult to establish that all reasonable steps were taken to ascertain **any** fact that would cause the publication to breach the sub-judice rule. The defence will, therefore, have very little application to media organisations who are generally unaware of **all** the detailed facts surrounding particular proceedings.

Further, the term "reasonable" has had an ignoble history in relation to publication.

For example, s.22 of the *Defamation Act 1974 (NSW)* is a legal "dead letter". Often, members of the media in discharging their function to enable the flow of information about Court proceedings are not placed in a position where they can ascertain all the facts. It is no answer to suggest that they should wait until the information can be obtained.

By and large, the media is the only group within society that provides the public with an insight into the working of judicial proceedings. There is no evidence to suggest that the media in Australia has in the past in any way shirked its responsibility to prevent publication of material which is prejudicial to trials. It should not be punished in cases in which it has taken care to ensure that there is no prejudice, but has nonetheless inadvertently published prejudicial material.

In relation to proposal 7, the defence proposed appears in reality to be a test of negligence rather than innocent publication, as can be seen from paragraph [54] of the Report. "Reasonable care" is simply defined as taking all reasonable steps to ascertain any facts which may render a publication contemptuous.

We note that in paragraph [54], the Commission proposes that a media proprietor should only have the benefit of this defence if every employee involved in the publication process took reasonable care. In modern newspapers, not every employee has responsibility for checking that material is not contemptuous. It should be made clear that the defence will be available to media proprietors in cases in which employees comply with editorial processes designed to ensure that contemptuous material is removed and one or more employees reviewed the publication and took steps to ascertain the facts which could render it contemptuous.

At a minimum, we suggest that the words "reasonable steps" rather than "all reasonable steps" be used, that some consideration be given as to what steps will suffice for this purpose; that these be articulated, and that any proposal reflect that articulation. For

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example, is it sufficient for a media proprietor to do an Internet and clippings search and to call the police to see whether proceedings have commenced, or is some other step required?

If individual liability is retained, we also suggest that the wording of proposal 7 be changed to make it clear that an individual employed by a media organisation involved in publishing contemptuous material will not be liable if some other employee of that organisation took reasonable steps. That is, compliance with procedures designed to minimise the risk of contempt constitutes taking "reasonable steps" for the purpose of the defence. This would better reflect the division of responsibility in modern editorial teams.

In relation to proposal 8, we consider that the use of the words "having taken all reasonable care" implies that there is a substantial positive obligation on distributors such as newsagents to check for contemptuous material. Notwithstanding the Commission's view that the standard of care required of vendors would be low, we consider this wording undesirable.

## **8. Proposals 11 & 12**

This is one area where legislation could have a beneficial effect. It is agreed that any legislation should not follow the English common law test: are proceedings imminent? However, the current proposal appears to leave open the question of whether the sub-judice period commences when a warrant for arrest is issued. It is suggested that proposal (a) should read something like "arrest, whether with or without a warrant".

## **9. Proposal 13**

We consider this proposal should be limited to the parties to civil proceedings.

The term "impose improper pressure" is vague and uncertain. Media organisations have no interest in the publication of material which has that effect.

Liability for contempt of civil proceedings should be retained with respect to possible prejudice of jurors or witnesses.

The rule against publications which place improper pressure on parties to proceedings serves a useful public purpose. Parties to proceedings often threaten to, or do, make public statements for the purpose of extracting a beneficial settlement or otherwise influencing the other party to the proceedings. In particular, applicants in unfair dismissal proceedings and litigants in person in particular threaten not infrequently to make allegations about the conduct of their employers (generally, and not just in relation to the litigation) for the purpose of seeking to extract a beneficial settlement. It is important that parties be restrained from misusing publicity in this way, but does not form a basis for restraining the media.

Litigants have an opportunity to publicly discuss issues which arise in proceedings both in Court, where statements may be reported, and after the proceedings have been finalised.

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Relevant considerations differ in the case of media proprietors not involved in civil proceedings that comment upon them. Such comment will rarely if ever be intended to influence the proceedings. It is important to protect public discussion by persons not directly involved in proceedings of the issues which arise from them, including issues of public interest regarding the conduct of parties.

If this proposal is to be pursued, there should be a defence which confirms the protection of disinterested analysis of issues in civil proceedings.

#### **10. Proposal 14**

Adopting the words of the Commission at paragraph 7.51 in the *Discussion Paper*, the proposed restriction on publication of opinions as to sentence between conviction and sentencing is an "unnecessary (and) unjustifiable infringement on freedom of discussion". It is suggested that the possibility that a sentencing judge may "be embarrassed" by media comment about sentencing in particular proceedings is so remote as not to require the intervention of legislation. Further, it is suggested that this restriction is inconsistent with the accepted position that a judge is not susceptible to influence from media publications. Moreover, the common law is available if a particular media organisation oversteps the mark with the nature of its comments. That should be a sufficient safeguard and it is unnecessary to place a complete prohibition on comments as to sentences.

#### **11. Proposal 19**

This proposal involves a considerable narrowing of the common law position. It is suggested that the second limb of the proposed defence imposes a burden on the media publisher which, in the vast majority of cases, it would not be in a position to overcome.

We support the retention of the public interest test and do not agree that it should be narrowed. On the contrary, it should be extended. The proposal fails to do this. If the public interest in publishing an article outweighs the public interest in restricting it in the interests of the proper administration of justice, then it is difficult to see why the publisher of the article should be convicted of a crime for publishing it. Courts have shown themselves to be quite able to apply the test in a way which is not overly favourable to media defendants and are unlikely to find in favour of a defendant that chooses to publish and prejudice a trial rather than waiting one or two days to do so. Whether or not the publisher realised that there were proceedings on foot is irrelevant. There is no evidence that the media has shirked its responsibility to find out whether proceedings are on foot.

If the defence is to be altered, then the second limb of the test should require the publisher to show that the statement creating the risk contributed to the public discussion, rather than requiring a publisher to prove that the public discussion would have been impaired if it were not published. The latter test would be difficult to apply. It is not clear what degree or type of impairment would be required to be shown nor from whose perspective "impairment" should be judged.

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The common law has proved to be perfectly adequate in setting down the parameters of this aspect of contempt law - eg, *Ex Parte Bread Manufacturers Limited v Truth and Sportsmen Limited* (1937) 37 SR (NSW) 242. How the proposal could work in practice is demonstrated by the following example: Newspaper A publishes an article which contains comments arguably in contempt of court but which clearly relate to a matter of public interest. Broadcast Station B publishes a summary of those comments. It would be difficult for Broadcast Station B to establish that the discussion of the matters of public interest would have been significantly impaired if the comments had not been published when that broadcast station is reporting the comments for the second time. It is submitted that the proposal is unnecessary. The situation is adequately covered by the existing common law.

## 12. Proposal 20

We consider the burden in this proposal should not be on the defendant. However, if the proposal goes forward, it should be presumed that if any information has been provided for publication by any police officer or other appropriate authority that the publication was reasonably necessary or desirable.

## 13. Proposal 21

We do not agree with this proposal. We consider it amounts to a legislative endorsement of the current and unfortunately widespread practice of making suppression orders, especially in the lower Courts. The Commission acknowledges that the media already exercises restraint in appropriate cases.

It is submitted that the provision of an express power as envisaged in the proposal is likely to result in a substantial and unnecessary increase in the number of suppression orders made by the courts. Accordingly, it is suggested that the legislation should ensure that it is clear that suppression orders are to be made only in exceptional circumstances. Any powers to make suppression orders should be confined so as to ensure that the principle of open justice is preserved.

To date, the legislature has identified those categories of cases in which the suppression of names is required to ensure complaints are laid and witnesses come forward, for example, sexual offences, children, blackmail etc.

We disagree that all NSW Courts should be given power to make such orders. The principle of open justice is of such importance that only the superior Courts should have power to compromise it by making suppression orders. In modern Australian society, most members of the public receive information about Court proceedings only from the media. To empower all Courts to restrict publication is likely to compromise the principle of open justice.

Experience demonstrates that lower Courts, tribunals, inquiries, boards etc. have shown a marked inclination to make orders in circumstances which compromise the principle of open justice. The norm should be that orders of this sort are contrary to the principles of open justice.

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It is not clear from the report what prejudice to the administration of justice is envisaged in cases where particular proceedings are not prejudiced. There is a danger that some judicial officers will rely upon this to suppress evidence routinely in cases in which some witness may be embarrassed, for example, on the basis that witnesses generally would be reluctant to come forward. This is particularly so if the legislation does not spell out that embarrassment is not sufficient grounds for an order. Embarrassment on the part of a witness should not be sufficient grounds for a suppression order. The importance of open justice is too great for it to be compromised on this basis.

Courts should only be allowed to make broad non-publication orders in circumstances in which a narrower order would not suffice. This is important to ensure that the public can learn about the substance of proceedings, if not certain sensitive details. We suggest that such a restriction on the power to make suppression orders be imposed.

We strongly agree that reporting of bail and committal hearings should not be prohibited. In the absence of such reporting, most members of the public would have no way of knowing what took place in such cases and these proceedings effectively escape the scrutiny which the principle of open justice imposes.

Many criminal cases are disposed of at the committal stage and some are of public importance. In rare cases, such a restriction could interfere with constitutional freedom of speech and thus be read down. For example, if the media was prohibited from reporting upon the committal of a politician.

The media have, and should continue to have, standing to be heard on an application, variation or revocation of a suppression order and should have a right of appeal without restriction. In many cases, the media is the only group with an interest in promoting the principles of freedom of expression and open justice. If left to themselves, parties to many proceedings would consent to suppression orders.

In our experience, some judicial officers are extremely, and unnecessarily, cynical about the ability of the media to report proceedings and it appears will make suppression orders for that reason rather than because such an order is necessary in order to ensure a fair trial. The power of Courts, and inferior Courts in particular, to make suppression orders should be closely confined.

#### **14. Proposal 24**

It is submitted that a private individual should not have the right to commence proceedings for criminal contempt. Criminal proceedings should always be a matter for the State. We note that the discussion paper does not set out any reasons as to why this rights should be retained.

#### **15. Proposals 31 and 32**

The introduction of a power to order compensation for the cost of aborted trials is strongly opposed. There is no evidence to suggest an endemic problem requiring this excessive response.

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The various grounds of opposition raised in previous submissions and set out in chapter 14 of the Discussion Paper are repeated and adopted. In particular, concern is expressed that liability to pay substantial costs may result from a decision to abort a trial which was simply incorrect. There has been, in recent years, at least one example of a criminal trial aborted for dubious reasons by an over-cautious judge.

We note that the prospect of paying compensation to an accused and a fine for a contemptuous publication is sufficient penalty, particularly for smaller or regional broadcasters. The imposition of a costs order without any consideration of the size/capacity to pay of the contemnor will threaten to put smaller broadcasters out of business and have an adverse impact upon their ability to report on legal proceedings. The threat of such an order would positively discourage the provision of services by smaller broadcasters to those in country and rural areas.

It would be more appropriate to retain the current system of having a penalty possible and prison sentence than to make contemnors liable for the costs of trials aborted as a consequence of a contemptuous publication. To add a costs order to these penalties would make the punishment excessive and discourage the Media in executing its role as the only viable conduit to the public of the workings of the judicial system. For the reasons set out in our response to Proposal 1, this is a fundamental issue. Further, this legislation has not been pursued on two prior occasions.

In the event that costs are imposed upon media outlets responsible for sub-judice contempt and the consequent abortion of a trial, there should be provision to ensure that consideration would be given to the relative size of the defendant and its financial ability to pay. An inappropriate order of the Court could have counterproductive policy consequences if, for example, a small regional broadcaster is forced to close or reduce operations. Further, costs should only be imposed where there has been a successful prosecution for contempt and the court has found that the contempt was intentional.

## **SUGGESTED ALTERATIONS**

### **Proposal 5**

The admission of the fact that a jury has been dismissed is highly prejudicial to a defendant. The court hearing the contempt charges should be seen to be approaching the charges totally independently of other views on liability, especially judicial views.

### **Other Proposals**

In relation to the other proposals, if the Commission recommends reform there are a number which would be of positive effect in clarifying the law. These are Proposals 9, 10, 13, 15, 16, 17, 20 and 23.

In relation to Proposal 10, we would go further and suggest that the sub-judice rule should not apply to civil proceedings without a jury.

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We note that Proposal 22 will assist in clarifying for journalists their ability to rely on documents tendered or referred to in open court. The only alternation would be that the media should be able to rely on any document relied on in open court.

Further, in relation to Proposal 23, there is an urgent need to clarify the situation in relation to the contents of facts sheets and hand up briefs which are not marked as an exhibit in legal proceedings or read out in open court.

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