



# REFORMING THE LAW OF CONTEMPT OF COURT: A MODERN STATUTE

KO TE WHAKAHOU I TE  
TURE MŌ TE WHAWHATI  
TIKANGA KI TE KŌTI:  
HE TURE AO HOU







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The Law Commission is an independent, publicly funded, central advisory body established by statute to undertake the systematic review, reform and development of the law of New Zealand. Its purpose is to help achieve law that is just, principled and accessible, and that reflects the heritage and aspirations of the peoples of New Zealand.

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24 May 2017

Hon Amy Adams  
Minister Responsible for the Law Commission  
Parliament Buildings  
WELLINGTON

Dear Minister

**NZLC R140 – Reforming the Law of Contempt of Court: A Modern Statute**  
**Ko te Whakahou i te Ture mō Te Whawhati Tikanga ki te Kōti: He Ture Ao Hou**

I am pleased to submit to you the above Report under section 16 of the Law Commission Act 1985.

Yours sincerely

A handwritten signature in blue ink that reads "Douglas White." The signature is written in a cursive, slightly informal style.

*Douglas White*  
President

# Foreword

The law of contempt of court will be unknown to many people. Yet it is important law because it provides the ultimate sanction of imprisonment for those who seek to prevent the justice system from operating fairly, effectively and expeditiously. The law of contempt of court ensures:

- court hearings are not disrupted;
- trials are not prejudiced by unfair publicity;
- jurors decide cases only on lawfully admitted evidence;
- judgments and court orders are enforced; and
- the judiciary is protected as far as practicable from false and egregious attacks which undermine public confidence in its independence, integrity and impartiality.

All of these outcomes are essential in a constitutional democracy such as New Zealand. They are all part of the rule of law which New Zealanders expect will underpin the administration of justice and which will apply to everyone, including Parliament and the government of the day.

Without these outcomes New Zealand's standing as a country with an enviable justice system, a judiciary of high standing and an absence of corruption would be at risk.

There are increasing signs, especially in this digital age, of people “thumbing their noses” at the rule of law, including examples of court hearings being disrupted, online publicity unfairly prejudicing trials, jurors googling information, people failing to comply with court orders, and false and egregious attacks on the judiciary going unanswered.

When it comes to the publication of information unfairly prejudicing trials and false attacks on the judiciary, it is important to recognise that such publications are not protected by the right to freedom of expression.

Freedom of expression is of course an important right in New Zealand affirmed by the New Zealand Bill of Rights Act 1990. But it is not an absolute right.

The New Zealand Supreme Court has held the right to a fair trial may be more important. Fair trials may be prejudiced by the publication of information about a defendant and by jurors discovering information online which is not part of the evidence at the trial.

Similarly, the publication of false attacks that undermine public confidence in the judiciary may be in contempt of court. The right to freedom of expression does not protect the publication of untrue factual allegations and opinions based on them.

Contempt of court is a serious business. People who are held in contempt may be imprisoned or fined. People who are at risk of penalties of this nature – including news media representatives and users of online media platforms such as bloggers – need to know where the line between freedom of expression and contempt is drawn.

At present the law is a mix of common law (court decisions) and statutory provisions. The Law Commission was asked to review the law to consider whether it should be modernised and brought into one new easily accessible and understandable Act of Parliament.

After consulting widely over several years, we have concluded that the law should be brought up-to-date in one statute. In particular, we recommend the abolition of the various old common law contempts of court and their replacement with new statutory offence provisions that are easier to understand and apply. We also propose new provisions specifically empowering courts to make take down orders for material on the internet and social media platforms that is liable to affect the administration of justice adversely.

At the same time, we recommend the High Court should retain its inherent jurisdiction so it may still address any conduct not otherwise covered by the new statute.

If Parliament accepts our recommendations and enacts our proposed new offences, it will be important for the new offences to be enforced in appropriate cases. The Crown Law Office and the Police will need adequate resources to ensure they can bring to account those who commit the new offences. If the new offences are not enforced, there is a real risk the rule of law will be undermined with the adverse consequences already mentioned.

A handwritten signature in blue ink that reads "Douglas White." The signature is written in a cursive, slightly informal style.

*Douglas White*  
President



# Acknowledgements

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- Emeritus Professor John Burrows QC
- Bruce Gray QC
- Dr David Harvey, Director of the New Zealand Centre for Information and Communication Technology Law
- The Hon Sir John McGrath, retired Supreme Court Judge
- Professor ATH Smith

An important feature of our Report is the draft Administration of Justice (Reform of Contempt of Court) Bill prepared by Ian Jamieson of the Office of Parliamentary Counsel. We are particularly grateful to Mr Jamieson and the Office for its assistance.

The Commissioner responsible for this reference is Douglas White. The legal and policy advisers for this Report were Jo Dinsdale, Simon Lamain and Kristen Ross.

We acknowledge also the valuable contribution made to this reference by former Law Commissioner Judge Peter Boshier and by former legal and policy advisers Cate Honoré Brett, Tania Chin and Lecretia Seales.

## **LECRETIA SEALES**

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Until her death in 2015 Lecretia was the senior legal and policy adviser responsible for the Review of the Law of Contempt reference. Lecretia was an outstanding senior adviser at the Commission who made a real contribution to law reform in New Zealand. We wish to acknowledge her significant contribution to this reference. Her professionalism, commitment and caring personality is greatly missed at the Commission.



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# Executive summary

## WHAT IS THE LAW OF CONTEMPT?

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- 1 The law of contempt of court is essential for the justice system to work fairly, expeditiously and cost effectively.
- 2 Contempt is committed by those who disrupt court business, interfere with fair trials, fail to comply with court orders or make false and egregious attacks on the judiciary as an institution. Contempt is not concerned with preventing legitimate criticism of judges or their decisions or with protecting the feelings of individual judges.
- 3 The ultimate sanctions for contempt are imprisonment or a significant fine. These sanctions create a strong incentive for people to comply. Consequently, in many cases, courts are able to rely on the existence of the power to ensure court business does proceed fairly, expeditiously and cost effectively.

## WHY IS THE POWER IMPORTANT?

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- 4 If courts did not have the power or authority to punish for contempt, there is every prospect they would cease to function properly, with disrupted and delayed hearings and adjourned and rescheduled trials. The direct and indirect costs to the parties and the state from these outcomes would be serious and substantial.
- 5 Public confidence in the administration of justice would suffer because of unenforced court orders. There would also be adverse financial consequences for successful parties, and unanswered attacks on the independence, integrity and impartiality of the judiciary.
- 6 Courts need the authority or power to punish for contempt to preserve an effective, efficient and expeditious court system and to maintain the rule of law in our constitutional democracy.

## WHY SHOULD WE REFORM THE LAW?

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- 7 New Zealand should retain the law of contempt of court, but there are three main reasons why we should reform it.
- 8 First, it is not readily accessible to those it affects. This is because it is to be found partly in a number of different Acts of Parliament and partly in decisions of the courts, some recent, but others old. The law is a peculiar mixture of legislation and case law. Now is the time to collect the law together in one Act. This will make it much more accessible.
- 9 Second, the law is not clear or easily understandable. Courts are still developing the boundaries of the law, especially the line between contempt and freedom of expression and the relationships between the relevant legislation and the case law. Aspects of the law are out of date. The language of contempt is antiquated and inappropriate in modern society. Even the word contempt itself is odd in this context.
- 10 People the law of contempt affects are entitled to know in advance what the law is. News media representatives and bloggers who report court proceedings need to know where the line is drawn between contempt and freedom of expression. Jurors, whose work underpins

our criminal justice system, need to know they may not make their own inquiries on the internet, and the reasons for the prohibition. People should not be at risk of imprisonment or a substantial fine without this knowledge, especially as they may commit contempt now without being charged with any statutory criminal offence or without having a trial. Enacting a modern statute will make the law much more understandable.

- 11 Third, in several significant respects the law is not working as it should. In particular, it has not kept pace with the digital age. These challenges include the ready availability of a vast amount of online information and the unrestricted ability of people to communicate their views by way of the internet and social media. These developments have led to a variety of problems for the administration of justice.
- 12 Anyone, including the media, a blogger or a juror, is able to google information about a trial and the people involved in it. This creates real risks of prejudicial pre-trial publicity and of a jury convicting a defendant on the basis of information not proved in evidence and tested at trial. This could jeopardise a defendant's right to a fair trial.
- 13 Court orders requiring people to take down objectionable material from online sites, some of which may be overseas, are difficult to enforce, especially in circumstances where the material is hosted on less reputable servers that provide a degree of anonymity and have little incentive to comply with the order. There are examples of people simply ignoring or circumventing such orders and a concerning reluctance on the part of authorities to take action. The rule of law is undermined when courts cannot enforce orders.
- 14 False and egregious attacks on the independence, integrity and impartiality of the judiciary, including views published online, are frequently left unanswered. This tends to undermine public confidence in one of the important arms of government and hence the rule of law. If judges face overt or covert bullying or pressure, or personal ridicule or threats, their impartiality or ability to adjudicate without fear or favour may be called into question.
- 15 The law needs to respond to these developments by ensuring courts have adequate and up-to-date powers to address them.

## OVERVIEW OF RECOMMENDED REFORMS

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- 16 To reform the law, the Law Commission is recommending a new statute to be called *The Administration of Justice (Reform of Contempt of Court) Act* containing replacement offences, new enforcement provisions and new processes for them.
- 17 To ensure courts retain all powers necessary to maintain public confidence in the administration of justice, however, the Act will not codify the law completely. The High Court will retain a residual authority to deal with any conduct not covered by the Act. This will reinforce the constitutional independence of the courts and the judiciary and will uphold the rule of law.
- 18 A draft Bill implementing these reforms in clear modern language is included in our Report, together with commentary on the Bill's provisions.

## STRUCTURE OF THE REPORT

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- 19 The Report is divided into seven chapters.

### Chapter 1 Introduction

- 20 This chapter explains what the law of contempt of court covers, why it is important and why we need reform. It also outlines the process we undertook to conduct our review and introduces our recommendations.

### Chapter 2 Publication contempt

- 21 This chapter mainly addresses publications that interfere with a person's right to a fair trial. This is most often the context in which a publication interferes with the administration of justice. The chapter also considers publications that interfere with access to justice by trying to influence the course of those proceedings or pressuring a litigant to settle or withdraw. The chapter focuses on temporary suppression of information that poses a real risk of prejudice to a fair trial. Accredited media will receive a right to be heard in relation to any suppression decision under the recommended provisions. We also recommend a new statutory offence to replace the common law in this area.

### Chapter 3 Disruptive behaviour in the courtroom

- 22 This chapter looks at how the courts deal with disruptions in the courtroom. The primary issue we consider for the purpose of our recommendations is whether there should be a statutory procedure for managing disruptions in the courtroom. The chapter also considers and recommends some changes to the scope of disruptive behaviour. Under the proposed new provision there will be an increase in the level of maximum fines available.

### Chapter 4 Juror contempt

- 23 This chapter considers the law of contempt as it applies to jurors. In this chapter we address the problem of the googling juror, who undertakes his or her own research, and the problem of jurors or others disclosing confidential jury deliberations during or after the trial. Our recommendations aim to clarify the law as it applies to jurors as well as proactively managing the risk that jurors will unwittingly jeopardise a fair trial.

### Chapter 5 Non-compliance with court orders

- 24 This chapter concerns the contempt of failing or refusing to comply with a court order. In civil proceedings, contempt is an important enforcement mechanism that is available to litigants if court orders made in their favour are not complied with. Here we consider whether Parliament should enact a new statutory regime to respond to non-compliance with court orders in civil proceedings.

### Chapter 6 Abusive allegations and false allegations against judges and courts

- 25 This chapter deals with the contempt of undermining confidence in the court itself by false and egregious attacks on the judiciary. We consider whether this contempt, known as “scandalising the court” or “scandalising the judiciary”, should be abolished as a form of contempt under the common law. We recommend that it should, but that there should be a new offence enacted in its place to address untrue allegations or accusations that pose a real risk of undermining public confidence in the judiciary and the courts.

## Chapter 7 Inherent jurisdiction, prosecutions, and penalties

- 26 This chapter considers whether, in view of the new statutory offences we have recommended throughout the Report, we should abolish all common law contempt and replace it with statutory offences, perhaps including a general residual offence. The chapter also discusses the prosecution procedure for the new statutory offences and whether we need some special arrangements for prosecuting these new offences. Finally, it explains the rationale behind penalty levels for the new offences.

# Recommendations

## CHAPTER 2 PUBLICATION CONTEMPT

### RECOMMENDATIONS

- R1 For the purpose of preserving the right to a fair trial, a new statutory provision should be enacted prohibiting publication or reporting of an arrested person's previous convictions and any concurrent charges. The provision should require the pre-trial or trial court to keep the prohibition under review and authorise the court to lift, extend or vary the prohibition as necessary in any particular case. The prohibition should apply from the time a person is arrested and only where the person is arrested for an offence for which he or she is liable to be tried by a jury (a category 3 or 4 offence).
- R2 A new statutory provision should authorise a court to make an order postponing publication of other information if the court is satisfied that this appears to be necessary to avoid a real risk of prejudice to a fair trial. The court might make such an order at any time after a person is arrested and before the trial has been completed and must make it for a limited period, not extending beyond the completion of the proceedings.
- R3 A new statutory provision should authorise a court to make an order that an online content host take down or disable public access to any specific information covered by the statutory prohibition in R1, or any suppression order made under R2.
- R4 A provision modelled on section 210 of the Criminal Procedure Act 2011 should give members of accredited media, and any other person reporting on the proceedings with the permission of the court, standing to initiate or be heard on any application for an order in respect of R1 to R3 or any application to renew, vary or revoke any order.
- R5 Subpart 7 of Part 6 of the Criminal Procedure Act 2011 should be amended to give a right of appeal against any decision to make or refuse to make a suppression order under R2 or R3 or to renew, vary, or revoke a suppression order under R2 or R3 or lift, extend or vary the prohibition in R1.
- R6 A new statutory offence provision modelled on section 211 of the Criminal Procedure Act 2011 should provide:
  - (a) It is an offence for any person, knowingly or recklessly, to publish material in breach of the statutory prohibition in R1 or any suppression order under R2 or take down order under R3.
  - (b) The offence in (a) should be punishable:
    - (i) in the case of an individual, by a term of imprisonment not exceeding 6 months or a fine not exceeding \$25,000; or
    - (ii) in the case of a body corporate, by a fine not exceeding \$100,000.
  - (c) It is a strict liability offence for any person to publish material in breach of the statutory prohibition in R1 or any suppression order under R2 or take down order under R3.



(d) The offence in (c) should be punishable:

- (i) in the case of an individual, by a fine not exceeding \$10,000; or
- (ii) in the case of a body corporate, by a fine not exceeding \$40,000.

R7 There should be a new offence to replace the common law contempt of publishing information that interferes with a fair trial, which should be abolished: see R61 below. The new offence should apply from the time a person (the arrested person) is arrested for an offence for which he or she is liable to be tried by a jury (a category 3 or 4 offence). Under the new offence provision, a person would commit an offence if:

- (a) he or she intentionally publishes information that is relevant to an arrested person's trial; and
- (b) there is a real risk that the publication prejudices the arrested person's right to a fair trial.

R8 The maximum penalty for the offence in R7 should be a term of imprisonment for up to 6 months or a fine not exceeding \$25,000, or in the case of a body corporate a fine not exceeding \$100,000.

R9 It should be a defence for a person prosecuted for the offence in R7 to prove on the balance of probabilities that:

- (a) after taking all reasonable care the person was unaware and had no reason to be aware of the possibility or existence of the trial; or
- (b) the person was the online host or distributor of the publication and after taking all reasonable care he or she was unaware and had no reason to be aware that it contained the information that created a real risk of prejudicing the arrested person's right to a fair trial; or
- (c) the publication was a good faith contribution to a discussion of public affairs; or
- (d) the publication was a fair and accurate report of court proceedings held in public and published at the time and in good faith.

R10 Appeals in respect of the offences in R6 and R7 should be under subpart 3 (Appeals against conviction) and subpart 4 (Appeals against sentence) and not under subpart 5 (Appeals against finding of or sentence for contempt of court) of Part 6 of the Criminal Procedure Act 2011 because the offences in R6 and R7 are ordinary offences and not contempt of court.

## CHAPTER 3 DISRUPTIVE BEHAVIOUR IN THE COURTROOM

### RECOMMENDATIONS

R11 New statutory provisions dealing with disruptive behaviour in the court should:

- (a) Authorise the judge to deal with the immediate disruption by citing the person for disrupting the court and, if necessary, ordering the person to be taken into the court cells until the rising of the court that day.

- (b) Give the person the opportunity to exercise his or her right to consult and instruct a lawyer under section 24(c) of the New Zealand Bill of Rights Act 1990.
  - (c) Allow the person a reasonable opportunity to apologise to the court.
  - (d) Require the judge to review the matter before the rising of the court that day and decide whether he or she considers further punishment may be necessary by having the matter set down for determination.
  - (e) Apply the Bail Act 2000, with the necessary modifications, as if the person cited for disrupting the court was charged with an offence that carries the penalties required by that Act.
  - (f) If the matter is set down for determination, require the judge to give the person written reasons specifying the behaviour the judge believes constitutes disruptive behaviour in the court and makes the person liable for further punishment.
  - (g) If the matter is set down for determination, direct the judge to consider whether exceptional circumstances warrant a different judge hearing the case.
  - (h) Give the judge hearing the case the discretion to receive any explanation offered by the person to ensure the case proceeds on a reliable factual platform.
  - (i) Clarify that a person found guilty of, and punished for, disruptive behaviour in the court is not convicted of an offence.
- R12 Conduct giving rise to a potential determination of disruptive behaviour in court should be focused on conduct that interrupts proceedings and poses a threat to the due administration of justice.
- R13 On making a finding that a person is guilty of disruptive behaviour in court, the court may sentence the person to a term of imprisonment not exceeding 3 months or a fine not exceeding \$10,000.
- R14 The Sentencing Act 2002 should apply in respect of any sentence imposed by the court under the new provision as if the person had been convicted of an offence.
- R15 Appeals against any finding that a person is guilty of disruptive behaviour under the new provision should be heard under subpart 5 of Part 6 (sections 260 to 269) of the Criminal Procedure Act 2011.
- R16 The new statutory provisions that deal with disruptive behaviour in court should apply to all courts, the Human Rights Tribunal, and any other tribunals that currently have the power to impose sanctions for disruptive behaviour.
- R17 The new statutory provisions dealing with disruptive behaviour in court should be located in a new Administration of Justice (Reform of Contempt of Court) Act.

## CHAPTER 4 JUROR CONTEMPT

## RECOMMENDATIONS

- R18 It should be an offence for a member of the jury constituted for a trial intentionally to investigate or research information when he or she knows or ought reasonably to know that it is or may be information relevant to the case.
- R19 The maximum penalty for the offence in R18 should be a term of imprisonment not exceeding 3 months or a fine not exceeding \$10,000.
- R20 The Ministry of Justice should be invited to review educational information provided to those called for jury service and to jurors to ensure it provides adequate guidance on the problems, risks and consequences if jurors undertake their own investigations or research.
- R21 It should be standard practice in cases that have attracted public attention for the trial judge to clarify whether potential jurors have already been exposed to information about the case to a degree that means they may not be able to try the case fairly on the evidence presented in court. The judiciary should be invited to consider how to promote more standard practices amongst jury warranted judges in this area.
- R22 The juror oath and affirmation should be changed to ensure the juror expressly agrees to decide the case according to the evidence presented in court, and not to undertake their own investigations or research.
- R23 The judiciary should be invited to review guidelines to ensure jurors are put on notice that undertaking their own investigations or research will be an offence punishable by fine or imprisonment. More comprehensive and consistent directions that provide jurors with a clear explanation of why their decision must be based only on the evidence presented in court and the risks if they undertake their own investigations or research should be developed and should become standard practice.
- R24 It should be an offence for any person, including a person who is or has served on a jury, intentionally to disclose, solicit or publish details of a jury's deliberations.
- R25 The offence in R24 should be punishable:
- (a) in the case of an individual, by a term of imprisonment not exceeding 3 months or a fine not exceeding \$10,000; or
  - (b) in the case of a body corporate, by a fine not exceeding \$40,000.
- R26 It should not be an offence under R24:
- (a) for a juror to disclose information and to raise concerns about misconduct with the trial judge during the proceedings; or
  - (b) for any person after the proceedings have been completed or the jury has been discharged, to disclose information to one or more **listed agencies** if that person has reason to believe that an offence may have been committed or that the conduct of a juror may provide grounds for a mistrial or an appeal. The **listed agencies** to which a disclosure may be made are the Police, the Solicitor-General, counsel who acted for the Crown or counsel who acted for the defence.

- R27 It should not be an offence under R24 for a juror or former juror to disclose any information to any researcher who has an authorisation from the Judicial Research Committee for the conduct of research about juries or jury service or for any researcher working under such an authorisation to solicit such information.
- R28 It should not be an offence under R24 for a juror or former juror to disclose any information to a health practitioner (including a counsellor) registered under the Health Practitioners Competence Assurance Act 2003.
- R29 The Ministry of Justice should be invited to review educational information provided to those called for jury service and to jurors to ensure it provides adequate and clear guidance on the problems, risks and consequences if jurors disclose information about the case.
- R30 The judiciary should be invited to review guidelines to promote standard practice among jury warranted judges regarding giving directions to jurors about the problems, risks and consequences if jurors disclose information about the case.
- R31 Appeals in respect of the offences in R18 and R24 should be under subpart 3 (Appeals against conviction) and subpart 4 (Appeals against sentence) of Part 6 of the Criminal Procedure Act 2011 because the offences in R18 and R24 are ordinary offences and not contempt of court.

## CHAPTER 5 NON-COMPLIANCE WITH COURT ORDERS

### RECOMMENDATIONS

- R32 New statutory provisions should be enacted to replace the common law in respect of contempt involving a breach of or failure to comply with an applicable court order.
- R33 Under the new provisions, a person who has obtained an applicable court order may apply to the court for an order that the other party has failed to comply with the order.
- R34 Under the new provisions, the Solicitor-General should have discretion to apply to the courts for an order that a person has failed to comply with an applicable court order.
- R35 For the purposes of the new provisions, an **applicable court order** means, whether or not the order is in a judgment, a court order to do or abstain from doing something that is not paying a sum of money or any undertaking given to the court where, on the faith of that undertaking, the court has sanctioned a particular course of action or inaction. Orders for the recovery of land should also be excluded. The relevant court would be the court in which the applicable court order was made or any court to which the proceedings have been transferred for enforcement, or any court of appeal hearing an appeal in respect of the proceedings.
- R36 The court may make an order finding the person has failed to comply with an applicable court order if satisfied beyond reasonable doubt that:
  - (a) the applicable court order has been made in clear and unambiguous terms and is binding on the person;
  - (b) the person has knowledge or proper notice of the terms of the court order being enforced; and

(c) the person has, without reasonable excuse, intentionally failed to comply with the applicable court order.

R37 Where the person who has failed to comply with the applicable court order is a company or incorporated society the court may make an order finding any director or officer of the company or incorporated society has failed to comply with an applicable court order under R36.

R38 On making a finding that a person has failed to comply with an applicable court order, the court may sentence the person to:

- (a) a term of imprisonment not exceeding 6 months; or
- (b) a fine not exceeding \$25,000.

R39 On making a finding that a person has failed to comply with an applicable court order, the High Court may issue a sequestration order against the property of the non-complying party.

R40 The Sentencing Act 2002 should apply in respect of any sentence imposed by the court under the new provision as if the person had been convicted of an offence.

R41 Appeals against any finding that a person has failed to comply with an applicable court order under the new provision should be heard under subpart 5 of Part 6 (sections 260 to 269) of the Criminal Procedure Act 2011.

## CHAPTER 6 ABUSIVE ALLEGATIONS AND FALSE ACCUSATIONS AGAINST JUDGES AND COURTS

### RECOMMENDATIONS

R42 The common law of contempt of scandalising the court should be abolished.

R43 It should be an offence for any person (i) to publish an untrue allegation or accusation against a judge or a court (ii) when there is a real risk that the publication could undermine public confidence in the independence, integrity or impartiality of the judiciary or a court.

R44 The maximum penalty for the offence in R43 should be a term of imprisonment up to but not including two years or a fine not exceeding \$50,000 or, in the case of a body corporate, a fine not exceeding \$100,000.

R45 It should be a defence for a person prosecuted for the offence in R43 to prove on the balance of probabilities that:

- (a) the allegation or accusation was true (i.e. a defence of truth should be available to the person publishing the material); or
- (b) the person was the online host or distributor of the publication and was unaware it contained the allegation or accusation.

R46 The Solicitor-General should be responsible for receiving complaints and filtering potential prosecutions by investigating and deciding whether there is a sufficient evidential base to bring a prosecution and whether prosecution is in the public interest. In deciding whether there is sufficient evidence, the Solicitor-General would be able to take account of the

absence of any complaint about the judge's conduct to the Police or the Judicial Conduct Commissioner and the adequacy of any explanation.

- R47 If the Solicitor-General has reason to believe that a person may have committed an offence against R43, the Solicitor-General may, but is not obliged to, take any of the following action:
- (a) request the alleged offender to retract the allegation or accusation or apologise for it, or both;
  - (b) request the alleged offender to retract the allegation or accusation pending the hearing of the charge;
  - (c) request an online content host to take down or disable public access to any specified information relating to the allegation or accusation that the host has made accessible to members of the public: or
  - (d) apply to the High Court for an order under R48.
- R48 If the Solicitor-General makes an application under R47(d), the High Court may, if satisfied that there is an arguable case that a person has committed an offence against R43, order the person to:
- (a) take down or disable public access to material;
  - (b) retract the allegation or accusation;
  - (c) not encourage any other persons to engage in similar communications;
  - (d) publish a correction; or
  - (e) publish an apology.
- R49 The Court may:
- (a) make any order under R48 on an interim basis, pending the filing of a charge;
  - (b) vary or discharge any interim order; or
  - (c) make an interim order permanent, but only if the interim order is accepted or a person is convicted of the charge.
- R50 In addition to any of the orders the Court may make under R48, the Court should have power to order that an online content host take down or disable public access to any material related to the suspected offence that the host has made accessible to members of the public.
- R51 When making an order that a correction or apology be published under R48, the Court should, subject to the New Zealand Bill of Rights Act 1990, be able to include requirements relating to:
- (a) the content of the correction or apology;
  - (b) the time of publication of the correction or apology; and
  - (c) the prominence to be given to the correction in the particular medium in which it is published.

- R52 A provision modelled on section 210 of the Criminal Procedure Act 2011 should give members of accredited media, and any other person reporting on the proceedings with the permission of the court, standing to be heard on any application for a take down order under R48(a) or any application to renew, vary or revoke any order.
- R53 Subpart 7 of Part 6 of the Criminal Procedure Act 2011 should be amended to give a right of appeal against any decision to make or refuse to make any order under R48 or R50 or to renew, vary, or revoke an order made under R48 or R50.
- R54 It should be an offence for a person knowingly or recklessly to breach any order made under R48 or R50.
- R55 The offence in R54 should be punishable:
- (a) in the case of an individual, by a term of imprisonment not exceeding 6 months or a fine not exceeding \$25,000; or
  - (b) in the case of a body corporate, by a fine not exceeding \$100,000.
- R56 It should be a strict liability offence to fail to comply with an order made under R48 or R50.
- R57 The offence in R56 should be punishable:
- (a) in the case of an individual, by a fine not exceeding \$10,000; or
  - (b) in the case of a body corporate, by a fine not exceeding \$40,000.
- R58 Appeals in respect of the offences in R43, R54, and R56 should be under subpart 3 (Appeals against conviction) and subpart 4 (Appeals against sentence) of Part 6 of the Criminal Procedure Act 2011 because the offences in R43, R54, and R56 are ordinary offences and not contempt of court.

## CHAPTER 7 INHERENT JURISDICTION, PROSECUTIONS AND PENALTIES

### RECOMMENDATIONS

- R59 The new Administration of Justice (Reform of Contempt of Court) Act should not limit or affect any authority or power of the High Court to punish any person for contempt of court in any case to which the provisions in the new Act do not apply. Section 9(a) of the Crimes Act 1961 should be amended so that the inherent jurisdiction of the High Court to punish for contempt is subject to the Administration of Justice (Reform of Contempt of Court) Act.
- R60 In any case to which the provisions in the new Administration of Justice (Reform of Contempt of Court) Act applies the jurisdiction of a court to punish any person for contempt of court is replaced fully by the jurisdiction of the courts under the Act.
- R61 The new Administration of Justice (Reform of Contempt of Court) Act should abolish as part of the common law of New Zealand the following forms of contempt:
- (a) contempt in the face of the court;
  - (b) publishing information that interferes with a fair trial;
  - (c) contempt by jurors;



- (d) contempt by disobeying court orders; and
- (e) scandalising the court.

- R62 To address any doubt over the contempt powers of the Supreme Court and the Court of Appeal a new provision should be enacted to make it clear that both appellate courts have the same authority over contempt as the High Court has under its inherent jurisdiction.
- R63 The new offences recommended in chapter 2 (R7), chapter 4 (R18) and (R24) and chapter 6 (R43) should, subject to the recommendations in (R64) to (R68) below, be prosecuted in the usual way in the District Court.
- R64 Where charges in respect of the following new offences relate to a trial in the High Court, the prosecution should be transferred to the High Court for trial:
- (a) publication of information that poses a real risk of prejudice to a fair trial (R7),
  - (b) intentional investigation or research by a juror into the case they are hearing (R18); and
  - (c) disclosure of jury deliberations (R24).
- R65 All prosecutions for the new offence of publishing an untrue allegation or accusation against a judge or a court where there is a real risk that the publication could undermine public confidence in the independence, integrity or impartiality of the judiciary or a court (R43) should be transferred to the High Court for trial.
- R66 The Solicitor-General should be responsible for receiving and investigating complaints and filing a charging document for the new offence of publishing an untrue allegation or accusation against a judge or a court where there is a real risk that the publication could undermine public confidence in the independence, integrity or impartiality of the judiciary or a court (R43).
- R67 The Police should be responsible for receiving and investigating complaints and laying charges for all the other new offences recommended in this Report for inclusion in the new Administration of Justice (Reform of Contempt of Court) Act.
- R68 The Crown Prosecution Regulations 2013 should be amended to include the following offences in the Schedule:
- (a) publication of information that poses a real risk of prejudice to a fair trial (R7); and
  - (b) publication of an untrue allegation or accusation against a judge or a court where there is a real risk that the publication could undermine public confidence in the independence, integrity or impartiality of the judiciary or a court (R43).



# Part 1

## OUR REPORT



# Chapter 1

## Introduction

### WHAT IS CONTEMPT OF COURT?

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- 1.1 Contempt of court promotes the fair, expeditious and cost effective administration of justice. Courts have developed today's contempt laws over centuries to prevent or punish conduct seen as interfering with the administration of justice. Over recent years, however, there have been significant statutory inroads into contempt.

#### Contempt of court defined and described

- 1.2 For the purposes of our review, it is convenient to identify different types of contempt. The principal types of conduct are contempt in the face of the court, contempt outside the court (which includes publication contempt), contempt by jurors, contempt by disobeying court orders and contempt by scandalising the court.<sup>1</sup>
- 1.3 Contempt in the face of the court covers conduct that disrupts or is likely to disrupt court proceedings, such as interrupting the proceedings by words or actions, insulting a judicial officer, juror or lawyer or, in the case of a witness, refusing, without justification, to be sworn or answer questions. Much of this form of contempt is now in statutory form.<sup>2</sup>
- 1.4 Contempt outside the court covers publication contempt, but also other conduct that interferes or is likely to interfere with the fair administration of justice, such as actions interfering with or abusing court processes, including interfering with parties, judges, juries or witnesses. Publication contempt covers publications that are prejudicial to a fair hearing or publications that prejudge issues in pending proceedings.<sup>3</sup>
- 1.5 Contempt by jurors covers matters such as refusal to be sworn or give a verdict or accessing information about a trial through private research or discussing the trial or jury deliberations with outside parties.
- 1.6 Contempt by disobeying court judgments or orders and breaching undertakings given to a court is self-explanatory. Whereas the other types of contempt are viewed as criminal contempts, historically this type has generally been classified as civil contempt. The Supreme Court has, however, decided there is no relevant distinction between imprisonment for criminal and civil contempts, and the protections for defendants in criminal contempt proceedings under the New Zealand Bill of Rights Act 1990 (NZBORA) should apply equally to defendants in civil contempt proceedings.<sup>4</sup> Aspects of this contempt are now also in statutory form.<sup>5</sup>

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1 See generally David Eady and ATH Smith *Arlidge, Eady & Smith on Contempt* (4th ed, Sweet & Maxwell, London, 2011); David Eady and ATH Smith *Arlidge, Eady and Smith on Contempt: Second Cumulative Supplement to the Fourth Edition* (Sweet & Maxwell, London, 2015); *Laws of New Zealand* Contempt of Court (online ed).

2 See below at [1.19].

3 *Attorney-General v Times Newspapers Ltd* [1974] AC 273 (HL). This decision was challenged in the European Court of Human Rights, which found the United Kingdom law of contempt of court as it was applied in that case to be a breach of the right to freedom of expression affirmed in Article 10 of the European Convention on Human Rights: *Sunday Times v United Kingdom* (1979) 2 EHRR 245 (ECHR). The Contempt of Court Act 1981 (UK) was enacted subsequent to that decision.

4 *Siemer v Solicitor-General* [2010] NZSC 54, [2010] 3 NZLR 767 at [57].

5 See below at [1.18(c)] and Appendix 1.

- 1.7 Scandalising the court covers conduct that brings a court into disrepute, lowers a judge's authority or interferes with the lawful process of the court, such as "scurrilous" abuse of the court, attacks on the personal character of a judge and allegations of bias or partiality on the part of a judge or court.

### The common law origins of contempt of court

- 1.8 New Zealand adopted contempt of court, originally part of the common law of England, by virtue of the English Laws Act 1858. The English judges who created the common law of contempt relied on the inherent jurisdiction of the superior courts to do so. The High Court has an inherent jurisdiction to deal with matters that are necessary to administer the laws of New Zealand.<sup>6</sup>
- 1.9 In New Zealand the common law authority of the High Court under its inherent jurisdiction to punish for contempt is preserved by:
- (a) section 12 of the Senior Courts Act 2016, which confirms that the inherent jurisdiction of the English High Court is retained by the New Zealand High Court;<sup>7</sup>
  - (b) section 9 of the Crimes Act 1961, which provides:

No one shall be convicted of any offence at common law, or of any offence against any Act of the Parliament of England or the Parliament of Great Britain or the Parliament of the United Kingdom: provided that

    - (a) nothing in this section shall limit or affect the power or authority of the House of Representatives or of any court to punish for contempt, ...
- and
- (c) section 165(3) of the Senior Courts Act, which clarifies an express contempt of court provision by providing:

Nothing in this section limits or affects any power or authority of a court to punish any person for contempt of court in any case to which this section does not apply.
- 1.10 Section 9 of the Crimes Act is an important provision because it recognises that the "power or authority of any court" to punish for contempt, including the High Court's common law authority under its inherent jurisdiction, is an exception to the rule that all criminal offences in New Zealand are statutory. The common law inherent jurisdiction has survived the codification of the criminal law and the abolition of common law offences.<sup>8</sup>
- 1.11 In this context it is important to recognise the distinctions between the substantive jurisdictions and ancillary or procedural powers of the different courts:
- (a) The High Court has an inherent substantive jurisdiction to hear and determine a range of matters, including contempt of court.<sup>9</sup>

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6 The Senior Courts Act 2016, s 12, which came into force on 1 March 2017, replaced s 16 of the Judicature Act 1908.

7 The Senior Courts Act 2016, s 12(a) and (b).

8 See below at [1.57]–[1.63].

9 See *McGechan on Procedure* (online looseleaf ed, Thomson Reuters) at [SC 12.02]; Sir Jack Jacob "The Inherent Jurisdiction of the Court" (1970) CLP 23; R Joseph "Inherent jurisdiction and inherent powers in New Zealand" (2005) 11 *Canta LR* 220; and MR Ferrere "The Inherent Jurisdiction and its Limits" (2013) 13 *Otago LR* 107.

- (b) Courts with substantive jurisdiction conferred solely by statute, such as the District Court, do not have an inherent jurisdiction but do have inherent powers that are incidental or ancillary to their statutory jurisdictions.<sup>10</sup>
  - (c) The Supreme Court and the Court of Appeal, which have statutory jurisdictions, do not have any inherent jurisdiction as such. Their contempt jurisdiction is therefore limited to any relevant statutory powers such as those conferred by section 165 of the Senior Courts Act or, possibly, to exercising the powers of High Court Judges in their capacities as judges of the High Court.<sup>11</sup> With the repeal of section 35(4) of the Supreme Court Act 2003, which provided that the Supreme Court had the same power and authority as the High Court to punish for contempt, the Supreme Court itself no longer has that express power and authority. We recommend in chapter 7 that any doubt about the contempt powers of the Supreme Court and the Court of Appeal should be avoided by the enactment of new provisions making it clear that, at least in respect of contempt of court, both appellate courts have the same authority as the High Court has under its inherent jurisdiction.<sup>12</sup>
- 1.12 The authority of the High Court to commit for contempt is exercised under the inherent jurisdiction of that Court and under any statutory powers conferred expressly or by necessary implication on that court.<sup>13</sup>
- 1.13 The power of the District Court to commit for contempt is incidental or ancillary to its substantive statutory jurisdiction either because the power is conferred expressly by statute,<sup>14</sup> or because it is necessarily implied to enable the Court to discharge its statutory jurisdiction effectively. As the Supreme Court put it in *Zaoui v Attorney-General*:<sup>15</sup>
- Courts which do not possess an inherent substantive jurisdiction (as is the case where their substantive powers are entirely statutory) nevertheless have inherent or implied procedural powers necessary to enable them to give effect to their statutory substantive jurisdiction.
- 1.14 To avoid confusion between the “authority” of the High Court under its inherent jurisdiction and the “inherent” or “implied” powers of statutory courts under their statutory jurisdictions,<sup>16</sup> we propose to describe the common law contempt authority of the High Court as its “authority under its inherent jurisdiction” and the “inherent” or “implied” ancillary power of the District Court as an “implied power”. In our view this reflects the differences between the authority or power of the two Courts and recognises the more limited nature of the implied powers under the statutory jurisdiction of the District Court.<sup>17</sup>
- 1.15 In some areas of contempt (publication contempt, common law contempt by jurors, and scandalising the court) the District Court has no authority or power at all, express or implied. To address these areas of contempt, the High Court’s inherent jurisdiction extends to upholding the authority of statutory courts and tribunals.<sup>18</sup> Under its inherent jurisdiction, subject to any

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10 *Siemer v Solicitor-General* [2013] NZSC 68, [2013] 3 NZLR 441 at [113]–[114].

11 Senior Courts Act 2016, ss 103 and 104.

12 See chapter 7 at [7.22] and R62.

13 As to the meaning of “necessary implication” see *R (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax* [2002] UKHL 21, [2003] 1 AC 563 at [45]; *B v Auckland District Law Society* [2003] UKPC 38, [2004] 1 NZLR 326 at [58]; and *Cropp v Judicial Committee* [2008] NZSC 46, [2008] 3 NZLR 774 at [26].

14 For example, see District Court Act 2016, s 212.

15 *Zaoui v Attorney-General* [2005] 1 NZLR 577 (SC) at [35]. The Supreme Court was here considering the inherent jurisdiction more generally and in relation to the power to grant bail.

16 In some cases the courts have used the term “inherent powers” instead to refer to these, which can cause confusion with inherent jurisdiction. See for example *KLP v RSF* [2009] NZFLR 833 (HC); *McMenamin v Attorney-General* [1985] 2 NZLR 274 (CA).

17 For example, see below at [2.2] and [7.4].

18 *Quality Pizzas Ltd v Canterbury Hotel Employees Industrial Union* [1983] NZLR 612 (CA) at 616.



qualification by statute or statutory rule, the High Court has authority to punish for contempt of a lower court's processes in order to enable that court to act effectively as a court.<sup>19</sup>

1.16 In recent years the High Court in New Zealand has exercised its common law authority under its inherent jurisdiction to hold persons in contempt of court in cases involving:

- approaches by a Radio New Zealand reporter to jurors from the trial of David Tamihere for the murder of two Swedish tourists after the discovery of the body of one of the tourists nearly a year after the trial;<sup>20</sup>
- newspaper reports of the previous convictions and bail status of a person charged with further offences while on bail, which infringed the fair trial rights of the person;<sup>21</sup>
- statements in a radio interview by a plaintiff in a civil proceeding, criticising the defendant;<sup>22</sup>
- attempts by a Member of Parliament, TV3 and Radio New Zealand to influence the outcome of a case before the Family Court by criticising the Court's decision and attempts by the Member of Parliament to persuade a party to give up the case;<sup>23</sup>
- releasing material to the media in breach of a court order;<sup>24</sup>
- non-compliance with a High Court interim injunction requiring a litigant in person not to publish certain allegations against a chartered accountant and his firm;<sup>25</sup>
- breaches of a pre-trial High Court suppression order by publication of suppressed material on a website by a person who was not a party in the criminal proceeding;<sup>26</sup>
- publishing hyperlinks to a spreadsheet on an overseas website from which EQC claimants could download information in breach of a High Court injunction prohibiting disclosure of the spreadsheet information;<sup>27</sup>
- breach by a blogger of undertakings given to the District Court to take down posts on his website;<sup>28</sup>
- failures by company directors and former directors to comply with court orders requiring company documents to be delivered up to liquidators;<sup>29</sup> and
- an intemperate outburst by a member of the public when a jury was delivering its verdicts.<sup>30</sup>

1.17 Recent examples of High Court cases where persons have been held not to be in contempt are:

- newspaper publication of material sympathetic to a defendant, published before his retrial;<sup>31</sup>

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19 *Quality Pizzas Ltd v Canterbury Hotel Employees Industrial Union*, above n 18, at 616.

20 *Solicitor-General v Radio New Zealand Ltd* [1994] 1 NZLR 48 (HC). Discussed in chapter 4 at [4.58]–[4.64].

21 *Solicitor-General v Wellington Newspapers Ltd* [1995] 1 NZLR 45 (HC); *Gisborne Herald Co Ltd v Solicitor-General* [1995] 3 NZLR 563 (CA).

22 *Duff v Communicado Ltd* [1996] 2 NZLR 89 (HC).

23 *Solicitor-General v Smith* [2004] 2 NZLR 540 (HC); *Solicitor-General v Smith* [2004] 2 NZLR 570 (HC) (penalty decision).

24 *Solicitor-General v Miss Alice* [2007] 2 NZLR 783 (HC).

25 *Siemer v Solicitor-General* [2010], above n 4. Discussed in chapter 5 at [5.30].

26 *Siemer v Solicitor-General* [2011] 3 NZLR 101 (HC); *Siemer v Solicitor-General* [2012] NZCA 188, [2012] 3 NZLR 43; and *Siemer v Solicitor-General* [2013], above n 10. Discussed in chapter 5 at [5.41].

27 *Solicitor-General of New Zealand v Krieger* [2014] NZHC 172 at [49]. Mr Krieger, by providing hyperlinks to the overseas websites, facilitated disclosure of the spreadsheet in breach of the court order. The Court considered that it did not matter that the websites were overseas, as the information was disclosed in New Zealand when EQC claimants downloaded it.

28 *Blomfield v Slater* [2015] NZHC 2239. Discussed in chapter 5 at [5.69].

29 *Grant v Grewal* [2016] NZHC 1564; *Grant v Bhana* [2016] NZHC 2755.

30 *Forest v R* [2016] NZHC 3198.

31 *Solicitor-General v W & H Specialist Publications Ltd* [2003] 3 NZLR 12 (HC).



- a media and billboard campaign by a supermarket chain criticising another supermarket chain for appealing against a High Court decision overturning a local authority planning decision;<sup>32</sup> and
- publication of newspaper articles relating to the Police search of training camps in the Urewera and the seizure of military-style weapons in breach of District Court suppression orders made at bail hearings and the Crimes Act provision relating to intercepted communications.<sup>33</sup>

### Statutory incursions into the law of contempt of court

- 1.18 New Zealand has retained the common law of contempt of court, but over time it has also been replaced, modified or supplemented in several significant respects by various statutory provisions. The replacement provisions are contained in:
- (a) The Crimes Act with administration of justice offences such as perjury,<sup>34</sup> making false oaths,<sup>35</sup> false statements or declarations,<sup>36</sup> fabricating evidence,<sup>37</sup> conspiring to bring false accusations,<sup>38</sup> conspiring to defeat the course of justice<sup>39</sup> and corrupting juries and witnesses.<sup>40</sup>
  - (b) The Criminal Procedure Act 2011 with offences for breaches of name and evidence suppression orders.<sup>41</sup>
  - (c) Particular statutes with specific provisions making it an offence to breach or fail to comply with particular types of court orders made under those statutes.<sup>42</sup>
- 1.19 The statutory provisions modifying or supplementing the common law are:
- (a) Specific provisions replacing in part the High Court's common law power to commit for contempt in the face of the court.<sup>43</sup>
  - (b) Specific provisions conferring limited jurisdiction on other courts, particularly the District Court, to commit for contempt in the face of the court and disobeying court judgments or orders.<sup>44</sup>
  - (c) Specific provisions in Court Rules relating to the procedures for the enforcement of court judgments and orders.<sup>45</sup>
- 1.20 As a result of the enactment of these various statutory provisions, the law of contempt of court in New Zealand is now a mix of court decisions based on the common law inherent jurisdiction and on legislation, including powers implied under that legislation.

32 *Progressive Enterprises Ltd v North Shore City Council* [2006] 2 NZLR 262 (HC).

33 *Solicitor-General v Fairfax New Zealand Ltd* HC Wellington CIV 2008-485-000705, 10 October 2008. Discussed in chapter 2 at [2.17]–[2.18].

34 Crimes Act 1961, ss 108 and 109.

35 Crimes Act 1961, s 110.

36 Crimes Act 1961, s 111.

37 Crimes Act 1961, s 113.

38 Crimes Act 1961, s 115.

39 Crimes Act 1961, s 116.

40 Crimes Act 1961, s 117.

41 Criminal Procedure Act 2011, s 211.

42 See Appendix 1.

43 Senior Courts Act 2016, s 165.

44 District Court Act 2016, ss 134, 135 and 212.

45 See High Court Rules, Part 17 and r 7.48; District Court Rules 2014, Part 19 and rr 7.41 and 14.19.

## Features of contempt

- 1.21 The principal distinguishing feature of the contempt jurisdiction is that it is summary. This means contempt matters are dealt with by a judge alone, rather than a judge and jury, and sometimes by the judge immediately on the spot. The summary procedure allows prompt intervention because judges need to be able to control their courtrooms. Ordinary criminal processes were historically regarded as too slow and cumbersome to provide adequate protection for the administration of justice. Describing the summary procedure, McGrath J noted:<sup>46</sup>
- [6] Under the summary procedure, there is no preliminary inquiry, committal procedure or requirement for an indictment. Historically the judge could take the initiative in the proceeding, determine the grounds of complaint, identify witnesses and inquire into what they had to say. The judge would then determine guilt or innocence and the sentence to be imposed. More recently, when out of court conduct is involved, contempt proceedings have been brought by a law officer, usually the Solicitor-General.
- [7] Over the years, the summary process has come to include the safeguards normally available to accused persons to protect their rights with the exception of the right to trial by jury.
- 1.22 Punitive measures for contempt of court were typically a fine or a sentence of imprisonment. At common law, there was no limit on the term of imprisonment that a judge might impose. It could be for any finite period determined by the judge or for an indeterminate period, ending only when the person held to be in contempt apologised and purged their contempt by complying with the relevant order of the court.
- 1.23 At common law there was no right of appeal in cases of criminal contempt, but that omission was rectified by legislative amendment.<sup>47</sup>
- 1.24 Currently, because contempt is summary, the maximum penalty that may be imposed must be less than two years' imprisonment.<sup>48</sup> A person charged with an offence punishable by imprisonment of two years or more has a right under NZBORA to a jury trial.<sup>49</sup>
- 1.25 Traditionally, forms of contempt were either criminal or civil, depending on their purpose. Conduct requiring punishment for undermining the administration of justice was criminal contempt, while civil contempt was reserved for situations involving enforcement of compliance with a court order or judgment in a civil action. As discussed in chapter 7, that distinction is less relevant today.
- 1.26 Unlike other conduct resulting in criminal penalties, criminal contempt cases receive a civil file number in the court system because they are commenced by way of an originating or interlocutory application. There is no formal charge or plea, and convictions are not recorded on the offender's criminal record. Proceedings are generally brought by Crown counsel in the name of the Solicitor-General, rather than by the Police Prosecution Service. For some forms of contempt, the Court may also act on its own initiative.

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<sup>46</sup> *Siemer v Solicitor-General* [2010], above n 4.

<sup>47</sup> Criminal Procedure Act 2011, pt 6, subpt 5.

<sup>48</sup> *Siemer v Solicitor-General* [2010], above n 4.

<sup>49</sup> New Zealand Bill of Rights Act 1990, s 24(e).

## WHY IS CONTEMPT OF COURT IMPORTANT?

- 1.27 Public confidence in the justice system is essential for the courts to uphold the rule of law and ensure the fair administration of justice. Contempt of court plays a crucial role in protecting the justice system and public confidence in its fair, expeditious and cost effective administration.
- 1.28 Some of the ways in which the authority, independence and impartiality of courts may be undermined – or held in contempt – are more obvious than others. For example, courts cannot operate effectively if people behave abusively in court or disobey a judge’s lawful instructions. In the same way, people who are brought before the courts on a criminal charge cannot be assured of their fundamental right to a fair trial if, as a result of a prejudicial media campaign, a fair trial is put at risk.
- 1.29 But there are also more subtle ways of interfering with a court’s ability to uphold the rule of law. For example, if judges are subjected to overt or covert bullying or pressure from politicians not observing the principle of comity between the different branches of government,<sup>50</sup> or from others, then people may call judges’ independence, integrity and impartiality into question. Similarly, people such as lobbyists or social media bloggers may subject a judge to personal ridicule or threats in which case, arguably, the judge’s ability to adjudicate without fear or favour may be compromised or may be seen to be compromised.
- 1.30 Although the ways in which people may commit contempt differ considerably, they all have in common a tendency to undermine the administration of justice. Contempt safeguards the administration of justice.
- 1.31 The administration of justice depends on unhindered access to courts which, under our constitutional arrangements, are separate from the executive and legislative branches of government. We require courts to provide fair and expeditious hearings before impartial judges and juries. New Zealanders expect:
- (a) impartial courts will hear and determine court proceedings, both criminal and civil;<sup>51</sup>
  - (b) juries will base their verdicts only on facts proved by properly adduced evidence, able to be tested in court, and reached after free, frank and confidential discussions, and the finality of verdicts, subject to appeals and legal challenges, will be protected;<sup>52</sup>
  - (c) bearing in mind the costs to the country and the parties as well as the volume of cases, courts will hear and determine individual cases as expeditiously and efficiently as possible;<sup>53</sup> and
  - (d) except in unusual circumstances, proceedings will be open to the public and news media.<sup>54</sup>
- 1.32 To achieve these outcomes, courts need the authority or power to make and enforce appropriate orders and sanctions such as pre-trial suppression orders or orders prohibiting the publication of prejudicial reports about a case before it is heard. It is well-established that a defendant’s right

50 The principle of comity between the various branches of government means that each branch (the legislative, executive and judicial) should recognise and respect the functions the others perform in our constitutional arrangements and try not to do anything that may improperly interfere with those functions.

51 New Zealand Bill of Rights Act 1990, ss 25 and 27.

52 Discussed in chapter 4 at [4.5]–[4.10].

53 For example see High Court Rules, r 1.2, which provides that “[t]he objective of these rules is to secure the just, speedy, and inexpensive determination of any proceeding or interlocutory application”.

54 The New Zealand Bill of Rights Act 1990, s 25(a) and the Criminal Procedure Act 2011, s 196(1) give statutory recognition to this presumption that court hearings will be open. See also *Erceg v Erceg (as trustees of Acorn Foundation Trust)* [2016] NZSC 135 at [2]; *Y v Attorney-General* [2016] NZCA 474, [2016] NZAR 1512 at [25]–[29].

to a fair trial, affirmed by NZBORA, may justify orders of this nature taking priority over the right to freedom of expression.<sup>55</sup>

- 1.33 The effective and expeditious enforcement of court orders and undertakings is in the public interest. This reflects a public expectation that those who ignore court orders will be brought to account quickly.<sup>56</sup> The ultimate sanction may be imprisonment.
- 1.34 Courts maintain public confidence in the justice system by ensuring they hear and determine proceedings, civil and criminal, impartially and without disruption. Courts should also be able to enforce their judgments and orders and deal with false and egregious attacks on them or the judiciary. Public confidence in the judiciary needs to be maintained because the general acceptance of judicial decisions, by the public and governments, is essential for the peace, welfare and good government of the country.<sup>57</sup>
- 1.35 It is important to emphasise, however, that, contrary to some public perceptions, contempt of court is not concerned with archaic deference to the court or with protecting the feelings of individual judges. What is in issue is the safekeeping of an impartial and effective system of justice.<sup>58</sup> As Eichelbaum CJ and Greig J put it in *Solicitor-General v Radio New Zealand*:<sup>59</sup>
- ... the objective of the law of contempt is not to shield the judiciary or the judicial system from criticism. Least of all is it a matter of protecting the decision of the Judge or the jury in an individual case from appropriate comment. It is justice itself that is flouted by contempt of Court, not the individual Court or Judge attempting to administer it ...
- 1.36 By protecting the administration of justice and maintaining public confidence in the justice system, contempt of court plays a crucial role in our justice system.

## WHY LAW REFORM IS NEEDED

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- 1.37 No-one has seriously called for the abolition of the law of contempt of court, but at the same time there have for many years been suggestions that the law is outdated and confusing and should be clarified and modernised.<sup>60</sup> There have also been suggestions it should be completely, or at least substantially, codified in statutory form and the power to punish for contempt under the inherent jurisdiction abolished.<sup>61</sup>

## Problems and issues with contempt of court

- 1.38 These calls for reform reflect a number of significant problems and issues with the accessibility, understandability and workability of the law today.

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55 *Siemer v Solicitor-General* [2010], above n 4, at [37]; and *Siemer v Solicitor-General* [2013], above n 10, at [158].

56 *Siemer v Solicitor-General* [2010], above n 4, at [26]–[27].

57 Murray Gleeson “Public Confidence in the Judiciary” (2002) 76 ALJ 558 at 560; and James Plunkett “The role of the Attorney-General in defending the judiciary” (2010) 19 JJA 160 at 162.

58 See *Solicitor-General v Radio New Zealand Ltd*, above n 20, at 53; *Solicitor-General v Wellington Newspapers Ltd*, above n 21, at 47 (upheld by CA); *Siemer v Solicitor-General* [2010], above n 4, at [27]; *R v Cara* [2005] 1 NZLR 823 (HC) at [13]; *Blomfield v Slater*, above n 28, at [47]; *N v M* [2014] NZHC 239 at [29]; *Queen Elizabeth the Second National Trust v Netherland Holdings Ltd* [2014] NZHC 1094, [2015] NZAR 1815 at [22]–[24]; and *Re Swaptronics* [1998] All ER (D) 407 (Ch) at [20].

59 *Solicitor-General v Radio New Zealand*, above n 20, at 53.

60 Lord Phillimore *Report of the Committee on Contempt of Court* (House of Commons, Cmnd 5794, December 1974); Law Reform Commission of Canada *Contempt of Court* (LRCC Report 17, 1982); Australian Law Reform Commission *Contempt* (ALRC Report 35, 1987); and Law Reform Commission of Western Australia *Report on Review of the Law of Contempt* (LRWA, PN 93, 2003); and *Siemer v Solicitor-General* [2009] NZCA 62, [2009] 2 NZLR 556 at [116].

61 Law Reform Commission of Canada, above n 60; Australian Law Reform Commission, above n 60; and Law Reform Commission of Western Australia, above n 60.

### Accessibility

- 1.39 The rule of law means a country's citizens should be able to ascertain its laws, particularly if a breach of those laws could result in a prison sentence or significant fine.<sup>62</sup> The common law of contempt, being judge-made and therefore contained in individual court decisions, is not always easy for the public to find or necessarily understand. Since ignorance of the law is no defence in a contempt proceeding, people should have an opportunity to know what the law requires. It is difficult to see why these laws should not be in a statute.
- 1.40 At the same time, it needs to be recognised that while expressing contempt law in legislative form will assist its credibility, there will still be limits on how precisely legal obligations are able to be expressed. Legislation will need to state principles in relatively broad terms and leave their application to be resolved in the context of particular situations. For example, contempt law needs to accommodate freedom of expression values as far as possible.<sup>63</sup>

### Understandability

- 1.41 The nature and scope of the different types of conduct constituting contempt at common law is uncertain. There are uncertainties over the remaining differences between criminal and civil contempt, the authority of the High Court under its inherent jurisdiction and the implied powers of other courts to punish contempt summarily and the adequacy of the processes for doing so. There is also a lack of certainty as to what conduct actually amounts to committing contempt and the requisite mental element in respect of that behaviour.
- 1.42 Given the criminal nature of most contempt, it is important members of the public know what behaviour is unacceptable and what the consequences of such behaviour may be. It is problematic, therefore, that the scope of contempt remains unclear.
- 1.43 The relationship between various statutory provisions that Parliament has enacted in place of contempt and the remaining common law is also not as clear as it should be. There is some uncertainty whether provisions such as those in the Criminal Procedure Act, making it an offence for any person to breach a suppression order made under that Act have replaced the common law contempt of disobeying this type of court order or whether such conduct could alternatively be proceeded against as a contempt of court.
- 1.44 There are currently various statutory provisions of this kind dealing with conduct that was previously dealt with by the common law of contempt. These provisions do not all expressly state whether they are in substitution for the common law, and it can be difficult to assess whether they have replaced it. In *Solicitor-General v Fairfax New Zealand Ltd*, a Full Court of the High Court considered that breaches of suppression orders should have been pursued as criminal charges under the relevant statutory offence provisions rather than as common law contempt.<sup>64</sup> On the other hand, a recent English case has taken the view the fact that conduct was also covered by a statutory offence was not a barrier to prosecuting that conduct also as common law contempt.<sup>65</sup>
- 1.45 The interrelationship between common law contempt and statutory provisions continues to cause difficulties. We could clarify the position more easily by statute than by relying on incremental rulings of appellate courts.

62 See Tom Bingham *The Rule of Law* (Penguin, London, 2011) at ch 3.

63 *Gisborne Herald Co Ltd v Solicitor-General*, above n 21, at 574; and *Siemer v Solicitor-General* [2013], above n 10, at [158].

64 *Solicitor-General v Fairfax New Zealand Ltd*, above n 33, at [135]–[138]; see also chapter 2 at [2.17] and chapter 5 at [5.43].

65 *Solicitor-General v Cox* [2016] EWHC 1241 (QB), [2016] 2 Cr App R 15 at [31]; see also chapter 2 at [2.18] and chapter 5 at [5.44].



- 1.46 The antiquated language and technical legal meaning of several expressions used in the law of contempt create further problems today:
- The ordinary modern meaning of contempt is “a feeling that a person or a thing is beneath consideration or worthless, or deserving scorn or extreme reproach”.<sup>66</sup> The technical legal meaning of contempt of court is “anything which plainly tends to create a disregard of the authority of Courts of justice; as the open insult or resistance to the Judges who preside there, or disobedience to their orders”.<sup>67</sup>
  - The ordinary modern meaning of “in the face of” is “despite” or “confronted by”.<sup>68</sup> The technical legal meaning of “contempt in the face of the court” is “some form of misconduct in the course of proceedings, either within the court itself or, at least, directly connected with what is happening in court”.<sup>69</sup> Another definition is “any word spoken or act done, in or in the precincts of the Court, which obstructs or interferes with the due administration of justice or is calculated to do so”.<sup>70</sup>
  - The ordinary modern meaning of “to scandalise” is to “offend the moral feelings, sensibilities, etc, of; shock”.<sup>71</sup> The technical legal meaning of “scandalising the court” is “something published which was calculated to lower the authority of a Judge and the Court”.<sup>72</sup>
- 1.47 With the differences between the ordinary modern meanings of these expressions and their technical legal meanings, the time has come for the old jargon of the law to be replaced with understandable modern language.
- 1.48 Some have also called for the historical forms of legal contempt, such as scandalising, to be abolished.<sup>73</sup>

### Workability

- 1.49 In several significant respects the law is no longer working adequately. In particular, it has not kept pace with the digital age. By the digital age we mean the growth of the internet with its websites and social media platforms and their widespread use in New Zealand to record, report, obtain, communicate and share information, opinions and comments of all types. It is not an exaggeration to suggest the advent of the digital age has had and will undoubtedly continue to have profound effects on the practical application of the law of contempt of court. These effects were simply unforeseeable when the courts developed the common law and when Parliament enacted many of the relevant statutory provisions.
- 1.50 The digital age now sees:<sup>74</sup>
- 3.1 million New Zealanders aged over 10 personally owning a mobile device;
  - 79 per cent of New Zealand households connected to the internet;
  - 3.4 million New Zealanders using the internet every week;

<sup>66</sup> Tony Deverson and Graeme Kennedy (eds) *New Zealand Oxford Dictionary* (Oxford University Press, Melbourne, 2005) at 234.

<sup>67</sup> Peter Spiller *Butterworths New Zealand Law Dictionary* (6th ed, LexisNexis NZ, Wellington, 2005) at 62.

<sup>68</sup> *New Zealand Oxford Dictionary*, above n 66, at 379.

<sup>69</sup> Eady and Smith *Arlidge, Eady and Smith on Contempt*, above n 1, at [10-2].

<sup>70</sup> *Laws of New Zealand Contempt of Court* (online ed) at [8].

<sup>71</sup> *New Zealand Oxford Dictionary*, above n 66, at 1005.

<sup>72</sup> *Solicitor-General v Radio Avon Ltd* [1978] 1 NZLR 225 (CA) at 231.

<sup>73</sup> We discuss this in chapter 6 at [6.37].

<sup>74</sup> The Nielsen Company *Media Trends 2016: How New Zealanders consume newspapers, magazines, TV, radio and digital content* (The Nielsen Company, 2016).

- 88 per cent of online New Zealanders visiting social media every month (75 per cent Facebook, 61 per cent YouTube, 23 per cent Google, 20 per cent LinkedIn, 20 per cent Instagram); and
  - 25 per cent of online New Zealanders subscribing to digital content.
- 1.51 The ready availability of vast amounts of information online means that anyone is now able to obtain detailed information about people, places, events and issues involved in court cases. That information together with opinions or comments, both informed and uninformed, can be disseminated to the world instantaneously, permanently, and directly or indirectly.
- 1.52 These developments have had a significant impact on the law of contempt of court. For example:
- the media and other interested people, such as bloggers, are able to obtain information about a defendant's previous convictions and publish the information online;
  - there have been breaches of District Court name suppression orders by a blogger;<sup>75</sup>
  - jurors are able to google information about issues in criminal trials and take the information into account in reaching their verdicts;<sup>76</sup>
  - there has been Facebook criticism of judges;<sup>77</sup>
  - a juror has posted on Facebook;<sup>78</sup> and
  - mobile phone cameras have been used in court.<sup>79</sup>
- 1.53 Practical difficulties also arise when a court order requires a publisher to take down objectionable material from an online site. In the absence of a reputable server it can be especially difficult to require the publisher to comply. In a recent case a party ordered by the court to take down material simply transferred the material to another website on a server located outside New Zealand, which remains active more than six months later.<sup>80</sup> When material is located on overseas websites but accessible in New Zealand, jurisdictional issues can also arise for the courts and enforcement agencies.<sup>81</sup>
- 1.54 Courts need adequate and up-to-date powers to address these problems, especially when a defendant's right to a fair trial may be prejudiced.

### *Jurisdiction issues*

- 1.55 While, as we discussed in [1.8] to [1.15], there is no question the High Court has authority under its inherent jurisdiction to deal with all forms of contempt, people have sometimes been confused over the extent to which the implied powers of courts created by statute enable those courts to address some forms of contempt.
- 1.56 Currently, as we have discussed, the High Court's protective jurisdiction fills any perceived jurisdictional "gap" in this area. Where the High Court possesses inherent jurisdiction to do

<sup>75</sup> *Police v Slater* [2011] DCR 6 (DC); *Slater v New Zealand Police* HC Auckland CRI 2010-404-379, 8 July 2011; *Slater v R* [2011] NZCA 568.

<sup>76</sup> *Attorney-General v Dallas* [2012] EWHC 156 (Admin); *Dallas v United Kingdom* (2016) 63 EHRR 13 (ECHR). Discussed at [4.17] and n 321 below.

<sup>77</sup> *R v Bonacci* [2015] VSC 121; *La Rue v Ministry of Justice Collections Unit* [2016] NZHC 666.

<sup>78</sup> *Attorney-General v Davey* [2013] EWHC 2317 (Admin).

<sup>79</sup> *Solicitor-General v Cox*, above n 65.

<sup>80</sup> *Blomfield v Owner and/or Administrators of www.laudafinem.com* [2016] NZHC 2425.

<sup>81</sup> See Law Commission *Extradition and Mutual Assistance in Criminal Matters* (NZLC, IP 37, 2014) and Law Commission *Modernising New Zealand's Extradition and Mutual Assistance Laws* (NZLC, R137, 2016) for a discussion on some of the issues that arise under the Mutual Assistance in Criminal Matters Act 1992.



something that cannot be done by a District Court, the High Court may use its powers in aid of the District Court.<sup>82</sup>

### *Codification of the law*

1.57 A related issue is whether, in a modern democracy, the authority or power to punish people by imprisonment or by a fine should be authorised by legislation rather than being left to the judges who exercise the power. Would the law have greater democratic legitimacy if Parliament made it?

1.58 Contempt is now the only conduct where criminal punishment may be imposed in New Zealand without the authority of statute. When the Criminal Code Act 1893 codified the general criminal law of New Zealand, Parliament decided, as a matter of principle, that the scope of the criminal law is a matter for Parliament rather than the courts. The Criminal Code Act 1893 did not, however, expressly mention or exclude the law of contempt. Instead, it contained a provision stating:<sup>83</sup>

Every one who is a party to any crime or misdemeanour shall be proceeded against under some provision of this Act, or under some provision of some statute not inconsistent therewith and not repealed, and shall not be proceeded against at common law.

1.59 On the face of it this provision and its successor in the Crimes Act 1908<sup>84</sup> abolished the common law contempt jurisdiction. But the then Supreme Court did not agree. In *Attorney-General v Blomfield* a majority of the Full Court of the then Supreme Court decided the common law jurisdiction to commit for contempt survived.<sup>85</sup>

1.60 In accordance with the interpretation favoured by the courts, Parliament added a proviso in 1961 to the relevant section, stating:<sup>86</sup>

[N]othing in this section shall limit or affect the power or authority of the House of Representatives or of any court to punish for contempt.

1.61 Consequently, the authority of the High Court under its inherent jurisdiction to punish for contempt at common law remains in existence alongside the offences in the Crimes Act and other statutes. Rosara Joseph notes that “the earliest legal history shows that courts have assumed the power to punish those who obstruct the administration of justice”.<sup>87</sup> The High Court’s inherent authority to punish contempt is part of the remaining vestige of the historical power of the sovereign to punish by committal to prison.<sup>88</sup> Its origins pre-date the creation of a representative Parliament in England and later in New Zealand.

1.62 Codifying the law of contempt today would therefore bring contempt into line with every other criminal offence in New Zealand.

1.63 From a constitutional perspective, replacing the current common law contempt with statutory offences would also enable the public to have its say on the shape of the contempt laws and the values the laws should embody today. If Parliament votes on the contempt laws, this

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82 *Quality Pizzas Ltd v Canterbury Hotel Employees Industrial Union*, above n 18, at 616.

83 Criminal Code Act 1893, s 6.

84 The Crimes Act 1908 contained a similar provision (section 5), though the words “any crime or misdemeanour” were replaced by “any offence”, which was defined in section 2 as including “any act or omission for which any one can be punished, either on indictment or summary process”.

85 *Attorney-General v Blomfield* (1913) 33 NZLR 545 (SC) per Stout CJ at 555–556, Williams J at 561, and Denniston J at 564–565. See also: *Nash v Nash*, *In re Cobb* [1924] NZLR 495 (SC) at 498 per Salmond J; *In re Gregory* [1940] NZLR 983 (SC); *Attorney-General v Blundell* [1942] NZLR 287 (SC); *Siemer v Solicitor-General* [2010], above n 4, at [60]–[63].

86 Crimes Act 1961, s 9; discussed above at [1.9].

87 Joseph, above n 9, at 228.

88 For a full historical account, see Eady and Smith *Arlidge, Eady and Smith on Contempt*, above n 1, at ch 1.

should encourage public acceptance of the laws and may, ultimately, give rise to greater public confidence in the administration of justice.

### Other relevant developments

- 1.64 Other relevant developments have also highlighted problems with the law of contempt in recent years. These include the greater recognition of freedom of expression and open justice, the focus on the costs of the justice system, reforms in overseas jurisdictions and New Zealand appellate court decisions.

#### Freedom of expression

- 1.65 The right to freedom of expression is well-established, but with its affirmation in section 14 of NZBORA in 1990 there is greater recognition of its significance generally and in the context of the law of contempt specifically.<sup>89</sup> This has led to understandable media concerns about the chilling effect of contempt of court on reporting court proceedings and criticisms of judges because of the uncertainties in the law.<sup>90</sup>

- 1.66 At the same time, however, the Supreme Court has made it clear that the power of the High Court to hold those who disobey court orders in contempt, when exercised in accordance with established principles, is a justified limitation on the right to freedom of expression.<sup>91</sup>

- 1.67 The digital age has also brought challenges for freedom of expression. These challenges are well described in *Ash Free Speech: Ten Principles for a Connected World*:<sup>92</sup>

Television, the internet and social media have both magnified and dramatised the tensions between free speech and fair trial. Occasionally, they have helpfully revealed jurors' prejudices that undoubtedly existed in earlier times....

The main question, though, is whether the tropical storms of publicity around cases involving well known people and sensational circumstances make it more difficult to achieve a fair trial.

- 1.68 The importance of responsible media that know where the line between freedom of expression and contempt is drawn has perhaps never been greater.<sup>93</sup> *Burrows and Cheer: Media Law in New Zealand* observes:<sup>94</sup>

It is fundamental that, in the absence of a suppression order, the media can fully report proceedings at a public trial. However, this protection extends only to a fair and accurate report. If the report is seriously inaccurate, and if a juror or witness reading it could be misled by it, this could be a contempt.

The public's expectation the media will act responsibly when exercising freedom of expression rights is reinforced by the standards in the various codes of conduct adopted for the media.<sup>95</sup>

89 *Siemer v Solicitor-General* [2013], above n 10, at [20]; *Solicitor-General v Fairfax New Zealand Ltd*, above n 33, at [78]; *Progressive Enterprises Ltd v North Shore City Council*, above n 32, at [17]; *Bouwer v Allied Press Ltd* (2001) 19 CRNZ 119 (CA) at [7]; *Gisborne Herald Co Ltd v Solicitor-General*, above n 21, at 571 and 575.

90 Ursula Cheer *Burrows and Cheer: Media Law in New Zealand* (7th ed, LexisNexis, Wellington 2015) at ch 9.

91 *Siemer v Solicitor-General* [2010], above n 4, at [24]–[25]; *Siemer v Solicitor-General* [2013], above n 10, at [158]–[159] and [229].

92 Timothy Garton Ash, *Free Speech: Ten Principles for a Connected World* (Yale University Press, New Haven, 2016) at 297.

93 *Siemer v Solicitor-General* [2013], above n 10, at [173].

94 Cheer, above n 90, at 589.

95 Cheer, above n 90, at ch 14; Broadcasting Standards Authority *Broadcasting Standards in New Zealand Codebook* < [www.bsa.govt.nz](http://www.bsa.govt.nz) >; New Zealand Press Council *Statement of Principles* < [www.presscouncil.org.nz](http://www.presscouncil.org.nz) >.

### *The importance of open justice*

- 1.69 The community has an interest in court proceedings being open to the public.<sup>96</sup> The media have a role in attending as surrogates of the public and reporting on proceedings. Freedom of the media as a vehicle for comment on public issues is fundamental to our constitutional democracy.<sup>97</sup> Section 14 of NZBORA expresses the right to freedom of expression in terms of the right to “seek, receive and impart information and opinions”. This right to seek information protects open justice. It is often this aspect of open justice, implicit in freedom of expression, which weighs more strongly in favour of the media and others reporting on court proceedings than other aspects of freedom of expression. At the same time, courts have recognised the fair trial rights of a defendant in a criminal trial may sometimes require an exception to the presumption of open justice.<sup>98</sup>

### *The focus on the costs of the justice system*

- 1.70 The justice system in New Zealand is expensive.<sup>99</sup> It is therefore important to ensure cases are heard efficiently, expeditiously and without undue delay or interruption. The law of contempt has a significant role to play in achieving these crucial outcomes and in avoiding the significant costs inevitably involved in abandoned trials.<sup>100</sup>

### *Overseas reforms*

- 1.71 A number of overseas jurisdictions have reviewed the common law of contempt and enacted a range of measures to clarify the law. It is significant that reforms in other jurisdictions have tended to focus on specific aspects of the law rather than attempting full codification. For instance, in England and Wales the Contempt of Court Act 1981 only modified the way in which the common law relating to strict liability operated, and the Criminal Courts and Justice Act 2015 only created new offences relating to juror contempt in the form of amendments to the Juries Act 1974.<sup>101</sup>
- 1.72 In Australia, there are variations in the way in which contempt fits into the framework of criminal law in the states and territories.<sup>102</sup> Australia has partially codified its criminal law, but both statutory and common law offences, including contempt of court, continue to exist outside the statutes.
- 1.73 In Canada, contempt of court is the only surviving common law offence. In 1982, the Law Reform Commission of Canada published a report proposing to abolish the common law of contempt and replace it with four new offences to be incorporated into the Criminal Code.<sup>103</sup> This proposal has not, however, been implemented.
- 1.74 In Ireland, the law of contempt is almost entirely governed by common law. In 1994, a report by the Irish Law Reform Commission recommended that some statutory offences should be introduced to replace the existing common law. Those recommendations were not

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<sup>96</sup> *L v R* [2015] NZCA 279, [2016] 2 NZLR 21 at [24].

<sup>97</sup> *Gisborne Herald Co Ltd v Solicitor-General*, above n 21, at 571.

<sup>98</sup> *Siemer v Solicitor-General* [2013], above n 10, at [158]–[159]; *L v R*, above n 96, at [25].

<sup>99</sup> The Ministry of Justice’s Annual Report for the year ending 30 June 2015 shows a total expenditure on courts of \$436,820,000. Operating costs included \$6,320,000 for juror fees and expenses.

<sup>100</sup> See chapter 2 below at [2.7].

<sup>101</sup> See ATH Smith “Repositioning the law of contempt: the Criminal Justice and Courts Act 2015” [2015] Crim L Rev 845 at 849.

<sup>102</sup> David Barker *Essential Australian Law* (2nd ed, Cavendish Publishing, Sydney, 2005). See Law Commission of England and Wales *Contempt of Court – A consultation paper* (LC, CP209, 2012) at Appendix C: Contempt in overseas jurisdictions.

<sup>103</sup> The four proposed offences were: disruption of judicial proceedings, defiance of judicial authority, affront to judicial authority and interference with judicial proceedings. Law Reform Commission of Canada, above n 60, at 21–31.

implemented, but the courts have continued to reiterate the need for reform.<sup>104</sup> In June 2016, the Commission published an issues paper on contempt of court.<sup>105</sup> The Commissioner responsible for the project has advised us that the Irish Law Reform Commission is actively considering the submissions it received on the issues paper and carrying out follow-up consultation with interested parties. The Commission intends to complete work and publish its report by the end of 2017.

### *New Zealand appellate court decisions*

- 1.75 In 2009, the Court of Appeal commented on the difficulties of reconciling some aspects of the law of contempt with NZBORA, suggesting “consideration should be given to legislative reform in this area of the law as happened in the United Kingdom”.<sup>106</sup> Since then two Supreme Court decisions involving Mr Siemer have clarified several aspects of the law of contempt. These two cases, because of their significance, are discussed in some detail in our Report. In the first case Mr Siemer, who had been held in contempt for breaching a court order, argued unsuccessfully that he had a right to elect trial by jury.<sup>107</sup> In the second case, Mr Siemer appealed unsuccessfully a finding of contempt by challenging the validity of the suppression order he had been found in contempt for breaching.<sup>108</sup> For completeness, we note that Mr Siemer has now been declared a vexatious litigant.<sup>109</sup>

## OUR REVIEW

### The Terms of Reference

- 1.76 In 2013, the then Minister Responsible for the Law Commission, Hon Judith Collins, asked the Law Commission to undertake a first principles review of the law of contempt and to make recommendations to ensure the law was appropriate for modern New Zealand.
- 1.77 The Terms of Reference specifically asked the Commission to consider whether the common law of contempt should be amended or replaced by statutory provisions and, in particular, asked for an examination of:
- contempt by publication, including the dissemination of information by members of the public via social media;
  - juror contempt;
  - the contempt known as “scandalising the court”;
  - civil contempt and enforcement of court orders; and
  - other contempts relating to interference with the administration of justice.
- 1.78 In conducting this review, the Commission was to take into account:
- the rights and freedoms recognised in NZBORA;
  - the development of the internet and new media; and

<sup>104</sup> *Irish Bank Resolution Corp Ltd v Quinn* [2012] IESC 51 at [32] per Hardiman J dissenting.

<sup>105</sup> Law Reform Commission of Ireland *Contempt of Court and Other Offences and Torts involving the Administration of Justice* (LRC IP 10, 2016) available at < [www.lawreform.ie](http://www.lawreform.ie) >.

<sup>106</sup> *Siemer v Solicitor-General*, above n 60, at [116].

<sup>107</sup> *Siemer v Solicitor-General* [2010], above n 4 [‘the first *Siemer* case’]. This is discussed in further detail in chapter 5 at [5.30]–[5.34].

<sup>108</sup> *Siemer v Solicitor-General* [2013], above n 10 [‘the second *Siemer* case’]. This is discussed in further detail in chapter 2 at [2.36]–[2.38].

<sup>109</sup> *Siemer v Attorney-General* [2016] NZCA 43, [2016] NZAR 411 (leave to appeal to Supreme Court declined: [2016] NZSC 75).

- the need for the laws of New Zealand to be understandable and as accessible to the public as possible.

## Conduct of the review

- 1.79 The Commission began work on the reference in 2013. In doing so, it had the benefit of:
- (a) Dr Julie Maxton’s Auckland University 1990 doctoral thesis on the law of contempt which described the history and development of the law and identified issues and problems with it.<sup>110</sup>
  - (b) Professor ATH Smith’s 2011 discussion paper prepared for the Attorney-General which provided a complete overview of the current law and raised a number of questions about reform of aspects of the law.<sup>111</sup>
  - (c) Discussion papers and reports prepared by overseas law reform agencies over recent years providing an overview of the law in comparable jurisdictions and recommendations for reform.<sup>112</sup>
- 1.80 In May 2014, the Commission produced an Issues Paper *Contempt in Modern New Zealand*, which outlined the Commission’s proposals for modernisation and reform. The Commission invited public submissions and comments on the Issues Paper, with the period for submissions closing at the end of August 2014. The Commission received 26 formal submissions, including submissions from the law societies, some media organisations, interested academics and students, the Police and the Crown Law Office and comments from the Chief District Court Judge.
- 1.81 Following the consultation period, the Commission undertook targeted discussion with members of the judiciary, the Crown Law Office and a number of academics with a view to settling policy and completing a report that would include a draft Bill by March 2015. Parliamentary Counsel prepared a draft Bill for the Commission during this period.
- 1.82 Due to the Government prioritising other Commission work, the contempt reference was put on hold at the end of 2014. In February 2016, work recommenced under the lead of a new Commissioner, as the Commissioners previously involved in the project had left the Commission.
- 1.83 Because of the delays in completing our Report and the changes in Commissioners, the Commission made some changes in its approach to some of the issues raised by this reference. During 2016 we therefore referred a preliminary draft of our Report to a group of independent reviewers: Emeritus Professor John Burrows QC, Bruce Gray QC, Dr David Harvey, Director of the New Zealand Centre for Information and Communication Technology Law, the Hon Sir John McGrath, retired Supreme Court Judge, and Professor ATH Smith of Victoria University of Wellington. We also referred the draft Report to the Heads of Bench,<sup>113</sup> the Solicitor-General, Ministry of Justice officials, the Judicial Conduct Commissioner and representatives of the defence bar for their comments, and we had further meetings with the Solicitor-General, the Deputy Solicitor-General (Criminal) and the Police.

110 Julie Maxton “Contempt of Court in New Zealand” (PhD Thesis, University of Auckland, 1990).

111 ATH Smith *Reforming the New Zealand Law of Contempt: An Issues/Discussion Paper* (Crown Law Office, April 2011).

112 Australian Law Reform Commission, above n 60; Law Reform Commission of Western Australia, above n 60; Law Reform Commission of Ireland, above n 105; Law Commission of England and Wales *Contempt of Court: Scandalising the Court* (LawCom No 335, 2012); Law Commission of England and Wales *Contempt of Court: Juror misconduct and internet publications* (Law Com No 340, 2013); and Law Commission of England and Wales *Contempt of Court: Court Reporting* (Law Com No 344, 2014).

113 The Chief Justice of New Zealand, the President of the Court of Appeal, the Chief High Court Judge and the Chief District Court Judge.



- 1.84 The Commission received valuable comments from everyone who reviewed our draft Report. These have been taken into account by the Commission in making its policy decisions and recommendations and in finalising this Report.
- 1.85 We reengaged Parliamentary Counsel to assist with drafting a new Administration of Justice (Reform of Contempt of Court) Bill.

### **Our principal recommendation: an Administration of Justice (Reform of Contempt of Court) Act**

- 1.86 The Commission has concluded that the common law and existing statutory contempt of court provisions should be replaced by a new Act.
- 1.87 As discussed above, the common law is outdated and confusing and there are a number of problems only legislation can address. It is unrealistic and also inefficient to leave the courts to clarify the law incrementally. The Commission considers that a new Administration of Justice (Reform of Contempt of Court) Act is necessary to clarify and modernise the law.
- 1.88 Our conclusion has in part been driven by the following general principles:
- In accordance with the rule of law, it is desirable that the laws of New Zealand be as clear and accessible to the country's citizens as possible. This includes modernising language where appropriate.
  - Parliamentary authority for all criminal offences is desirable from a constitutional perspective.
  - Whether in statute or common law, we cannot always achieve certainty and predictability in areas of law where judgement must be exercised between competing values.
  - The courts retain the confidence of the community by being able to do their work through appropriate processes and by ensuring independent, fair and impartial adjudication.
- 1.89 A new Act would resolve current uncertainties over what conduct constitutes contempt at common law. Legislation would make the law in this area as clear as possible and much more accessible to those it is likely to affect. A new Act would also address the jurisdictional issues discussed earlier.<sup>114</sup> It would abolish antiquated forms of contempt and modernise the language and procedures applying to contempt of court.
- 1.90 Arguably legislation also gives greater constitutional legitimacy to the law because the legislative process enables the public to have its say on the shape of the law and the values the laws embody.
- 1.91 In our Report we propose a substantial but partial codification of the law. The Commission favours retaining the High Court's common law inherent jurisdiction to address matters not otherwise covered by the proposed new statutory provisions. Contempt is an area of law where we cannot always achieve certainty and predictability. We need some continued flexibility which the Court's inherent jurisdiction can provide. The new Administration of Justice (Reform of Contempt of Court) Act would, however, clarify the interrelationship between the High Court's remaining common law contempt and the new statutory provisions.
- 1.92 In considering statutory reform options, we have also assessed our recommendations carefully in an endeavour to ensure they are economically sound and are unlikely to have unintended consequences.

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<sup>114</sup> See above at [1.55]–[1.56].

- 1.93 A draft Administration of Justice (Reform of Contempt of Court) Bill is included in our Report. The Bill is designed to implement our various recommendations and is drafted in modern language. In accordance with good practice,<sup>115</sup> the Bill includes a provision (clause 3) explaining the principal purposes and objectives of the new legislation. We have also provided commentaries on the Bill's provisions and refer to the relevant clauses of the Bill in the course of our Report.
- 1.94 If the Bill is enacted, the success of our various recommendations will depend at least in part on those responsible for enforcing the new offences having the resources and willingness to do so.

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115 Law Commission *A New Interpretation Act: To Avoid "Prolivity and Tautology"* (NZLC R17, 1990) at [224] and *Law Commission Legislation Manual: Structure and Style* (NZLC R34, 1996) at [30]; and *Legislation Advisory Committee Guidelines on Process and Content of Legislation* (Wellington, 2014) at 46. See also: *Hessell v R* [2010] NZSC 135, [2011] 1 NZLR 607 at [42]–[43]; and Ross Carter Burrows and Carter *Statute Law in New Zealand* (5th ed, LexisNexis, Wellington, 2015) at ch 8.



# Chapter 2

## Publication contempt

### INTRODUCTION

- 2.1 Publishing material that prejudices the administration of justice may be contempt of court. Contempt arises when a publication crosses the line between fair and accurate reporting and interference with the course of justice. The contempt may take the form of interference with a particular case that is before the courts or may more generally prejudice the course of justice by eroding access to justice or public confidence in the justice system.
- 2.2 Contempt by publication is one of the few areas of contempt that remains purely judge-made common law.<sup>116</sup> The authority to punish the contempt falls within the High Court's inherent jurisdiction. Only the High Court has jurisdiction to punish for this form of contempt, even where it occurs in relation to proceedings in another court.<sup>117</sup>
- 2.3 In this chapter we consider the current law of contempt applying to publications that interfere with the right to a fair trial and examine the case law applying to public statements and other publications seeking to improperly influence a litigant or the courts. We then outline proposals contained in our Issues Paper and feedback from the submissions we received. The chapter concludes with our recommendations for reforming publication contempt.

### PROTECTING THE INTEGRITY OF A FAIR TRIAL

- 2.4 The authority and power of the courts to control information in the lead-up to, during and after a criminal trial is fundamental to the integrity of the trial process. Judges have powers to determine what information can be disclosed publicly and at what point before, during and after a trial.<sup>118</sup> They also have jurisdiction to punish those who disregard these prohibitions. Courts have inherent authority or implied powers to protect "the fair trial rights of an accused"<sup>119</sup> from the point when the laying of charges is "highly likely".<sup>120</sup> From that point onwards, a case is described as sub judice or literally "before the court or judge for determination".<sup>121</sup>
- 2.5 Throughout the protected fair trial period, which is generally the period between when a person is arrested and the trial is completed,<sup>122</sup> the law of contempt together with statutory and implied suppression powers serve the function of:<sup>123</sup>

<sup>116</sup> Courts also have statutory and implied powers to suppress publication of specific information. These powers are discussed below.

<sup>117</sup> See the discussion on the difference between inherent jurisdiction and the more limited implied powers of courts in chapter 1 at [1.11]–[1.16].

<sup>118</sup> As we discussed at [1.15] the District Court, not having inherent jurisdiction, is not able to punish contempt where a publication interferes with a fair trial.

<sup>119</sup> *Siemer v Solicitor-General* [2013] NZSC 68, [2013] 3 NZLR 441 at [114].

<sup>120</sup> *Television New Zealand Ltd v Solicitor-General* [1989] 1 NZLR 1 (CA) at 3.

<sup>121</sup> Bryan A Garner (ed) *Black's Law Dictionary* (9th ed, Thomson Reuters, Boston, 2009) at 1562.

<sup>122</sup> *Gisborne Herald Co Ltd v Solicitor-General* [1995] 3 NZLR 563 (CA) at 569-571. Discussed below at [2.20].

<sup>123</sup> For example, the courts have suppression powers under s 19 of the Bail Act 2000 and ss 200, 202 and 205 of the Criminal Procedure Act 2011, and the High Court has authority under its inherent jurisdiction to make orders suppressing publication of its judgments: *Siemer v Solicitor-General* [2013], above n 119, at [175].

- preventing the general public, from whom the jury pool will eventually be drawn, being exposed to information that is prejudicial and that may make it difficult for jurors to approach the trial with open minds;
  - ensuring the court's authority to determine what evidence will be admitted at trial is not pre-empted by the publication of information; and
  - preserving the integrity of evidence including, for example, the reliability of witness statements about matters such as identity.
- 2.6 Contempt in this context is a preventative jurisdiction concerned with protecting the administration of justice. Contempt is expected to have a chilling effect on people publishing material that poses a risk to a fair trial. It is of course also punitive because the Court may impose sanctions, including imprisonment for up to two years, after the event.<sup>124</sup>
- 2.7 Where a person's fair trial rights are compromised, the trial judge may have no option but to discharge the jury and abandon the trial. There is a significant cost for the state whenever a trial is abandoned. A retrial is expensive and time consuming. The Ministry of Justice advises that the typical cost incurred during the 2014/15 Financial Year for a District Court jury trial was \$8,170 per day or \$26,144 per trial. These figures include court costs, juror costs, judicial costs and legal aid costs, but exclude investigation or prosecution costs incurred by other agencies such as the Police, Crown Law, Crown Solicitors or the Department of Corrections. The figures also do not include any private costs incurred by a defendant. The average cost of a High Court trial is likely to be higher because High Court trials are generally longer and the judicial costs will be higher.<sup>125</sup> Abandoning a trial also impacts upon complainants and their families who have to endure the stress of a trial all over again. There is also stress and inconvenience for defendants and other witnesses.
- 2.8 Arguably suppression orders protect the integrity of the trial process more effectively than contempt because they prohibit outright the publication of certain information. For this reason, however, suppression orders also restrict freedom of expression more, so courts must use them with caution.
- 2.9 The Commission's overall approach to reform is to emphasise the importance of certainty in the law. We focus more on temporary suppression orders that prevent information posing a real risk of prejudice to a trial from being published and less on contempt to deter publication. Such an approach reduces the need for people, especially the media, to second guess the courts as to whether a publication may be in contempt. It also avoids the costs and other detriments inevitably involved in an abandoned trial and the costs of contempt proceedings.

### The common law strict liability test for publication contempt

- 2.10 The established common law test New Zealand judges apply for publication contempt is whether "there [is] a real risk, as distinct from a remote possibility, [that the publication interferes] with the ... [right to] a fair trial".<sup>126</sup> Real risk has been defined as a risk that is "more than speculative. It must be likely that the administration of justice *could* be prejudiced".<sup>127</sup>

124 The Supreme Court in *Siemer v Solicitor-General* [2010] NZSC 54, [2010] 3 NZLR 767 determined that the maximum penalty allowed by the common law for contempt must be less than that specified in s 24(e) of the New Zealand Bill of Rights Act 1990, which guarantees a person charged with an offence the right to a trial by jury. Since 2013 this has been two years' imprisonment as a result of an amendment to s 24(e): New Zealand Bill of Rights Amendment Act 2011, s 4.

125 In the United Kingdom the Attorney-General's department estimated that one particular abandoned trial resulted in the waste of approximately £80,000 (\$145,000 NZ) of costs to the Court Service and Court Prosecution Service; Attorney General's Office (UK) "Two jurors found guilty of contempt of court" (press release, 9 June 2016).

126 *Gisborne Herald Co Ltd v Solicitor-General*, above n 122, at 567.

127 *Solicitor-General v W & H Specialist Publications Ltd* [2003] 3 NZLR 12 (HC) at [19] (emphasis added).

The standard of proof is the criminal standard of beyond reasonable doubt.<sup>128</sup> Critically, this assessment is not dependent on whether the real risk associated with a publication actually materialises.<sup>129</sup> A publication can be in contempt even though a fair trial eventuated.<sup>130</sup>

- 2.11 Nor does the test require an intention to interfere with the administration of justice. All that is required is that the defendant knowingly published the information. A Full Court of the High Court in *Solicitor-General v Radio New Zealand* has said “[this] element is satisfied by proof that the defendant knowingly carried out the act or was responsible for the conduct in question”.<sup>131</sup>
- 2.12 Furthermore, whether any harm to the trial actually eventuated is not relevant. First, it is not permissible to establish empirically whether a jury’s deliberations were improperly influenced by exposure to prejudicial pre-trial publicity because jury deliberations are confidential.<sup>132</sup> Second, the purpose of contempt is preventative.

### The High Court’s approach

- 2.13 It is not possible to formulate from the common law any bright line as to when it will be contempt to publish.<sup>133</sup> Whether a publication meets the threshold and poses a real risk to a trial is highly circumstantial. As the High Court has put it, “what counts is the overall impact”.<sup>134</sup> The Court considers both the nature of the information published and the broader context of the particular case when determining whether there is a real risk. The Court recognises that particular circumstances may diminish the degree of prejudice so judgement is important. As already noted,<sup>135</sup> the advent of the internet and the consequential durability and potential reach of any publication now pose significant challenges for the Court when applying the “real risk” test. Some internet-based publications and social media posts go viral. Consequently, they have much greater potential impact than those with more limited circulation or dissemination.

#### *Publication of prior criminal convictions or information indicating bad character*

- 2.14 Prohibiting the publication of a defendant’s prior convictions or concurrent charges while his or her case is before the court is as close to a bright line as it is possible to have in publication contempt. In what is still regarded as one of New Zealand’s leading contempt cases, *Gisborne Herald Co Ltd v Solicitor-General*, the Court of Appeal said:<sup>136</sup>

[T]o publish the criminal record of an accused or comment on the previous bad character of an accused before trial is a prime example of interference with the due administration of justice and, subject to considerations such as time and place, almost invariably is regarded as a serious contempt.

#### *Publication of disputed or crucial evidence*

- 2.15 Where publications canvass issues that are likely to be disputed in court, including, for example, questions of identity, they are likely to pose a real risk of interference. Again, this is not a

128 *Solicitor-General v Wellington Newspapers Ltd* [1995] 1 NZLR 45 (HC) at 47.

129 See for instance *Solicitor-General v TV3 Network Services Ltd* HC Christchurch M 520/96, 8 April 1997 at 7 per Eichelbaum CJ.

130 *Solicitor-General v TV3 Network Services Ltd* (1998) 16 CRNZ 401 (HC) at 410. See also *Solicitor-General v Fairfax New Zealand Ltd* HC Wellington CIV-2008-485-705, 10 October 2008 at [84].

131 *Solicitor-General v Radio New Zealand Ltd* [1994] 1 NZLR 48 (HC) at 55–56.

132 See below in chapter 4 from [4.58].

133 See Ursula Cheer *Burrows and Cheer: Media Law in New Zealand* (7th ed, LexisNexis, Wellington, 2015) at 567: “... it is not possible to lay down an exhaustive checklist of items which it is contemptuous to publish. Attempts have been made to do so, but are subject to objection for at least two reasons. In the first place, it is impossible for anyone to foresee accurately and with omniscience every type of publication which is capable of creating prejudice. In the second place, it is not just the *type* of publication which is relevant, but also the *circumstances* of its publication.” (emphasis in original).

134 *Solicitor-General v TV3 Network Services Ltd*, above n 129, at 10.

135 See chapter 1 at [1.49].

136 *Gisborne Herald Co Ltd v Solicitor-General*, above n 122, at 568.

bright line, but publication of the photographs of suspects or an accused may create a risk where identity is in issue.<sup>137</sup> Similarly, witness statements published in the media can cause problems if they traverse matters that may prove either critical to the trial or, conversely, are inadmissible as evidence in court.<sup>138</sup> Social media, through which people can quickly disseminate photos or videos captured on smartphones, makes it very difficult to stop the publication of what may become disputed eyewitness accounts.

### *Specific content and overall context are considered*

2.16 The courts consider the content, its accuracy and tone, as well as the medium and durability of a publication. Sensational aspects of a case may make a publication more enduring.<sup>139</sup> While factual errors in reporting can generally be corrected by a subsequent judicial direction, courts consider sensationalism more difficult to eradicate.<sup>140</sup> The medium of publication is also relevant when assessing impact. Over 10 years ago in *Solicitor-General v Smith*, a Full Court of the High Court said “television is widely acknowledged to have a more powerful reach than does radio, or the print media” due to television’s “ability to depict people and places in a way that can manipulate the emotions of viewers”.<sup>141</sup> Today pictures and video can be posted on social media and have an even greater reach.

2.17 At the same time, however, even sensational and sustained reporting of high-profile cases has not always been held to be contempt. A significant example of this occurred when Fairfax Media published excerpts of intercepted communications which led to the Urewera raids. The raids had generated a substantial amount of publicity and public interest due to the use of roadblocks and the prospect of New Zealand’s first prosecutions under the Terrorism Suppression Act 2002. The intercepted communications were inadmissible due to the Solicitor-General’s decision not to grant consent to prosecution for terrorism charges, and were subject to suppression orders from pre-trial decisions and a statutory prohibition of publication.<sup>142</sup> Notwithstanding this, a Full Court of the High Court in *Solicitor-General v Fairfax New Zealand Ltd* concluded that the Solicitor-General:<sup>143</sup>

[H]as not proved beyond reasonable doubt that, as a matter of practical reality, the actions of the respondents in publishing the Fairfax articles caused a real risk of interference with the administration of justice by compromising the fair trial rights of the accused.

2.18 In part the Court reached that conclusion because it considered the breaches of suppression orders and other unlawful conduct by the respondents should have resulted in their being prosecuted under the relevant statutory provisions rather than for common law contempt.<sup>144</sup> As discussed earlier in [1.44], this approach may be contrasted with a recent English decision where a court found two defendants who had covertly photographed court proceedings guilty of contempt even though there was a specific statutory offence that covered the conduct.<sup>145</sup>

137 In one case, *N.Z. Truth’s* publication of a photo of a person charged with murder was a contempt as it was reasonably clear that identity would be in issue and publication of the photograph could make “a perfectly honest witness feel certain of identity when he might otherwise have felt some doubts”; *Attorney-General v Tonks* [1934] NZLR 141 (SC) at 153.

138 *Television New Zealand Ltd v Solicitor-General*, above n 120, was an injunction case where TVNZ proposed to broadcast interviews of neighbours and friends of a person that Police were searching for in relation to a murder. The Court of Appeal, in obiter, said the proposed broadcast “verges on a report of interviews with potential witnesses, which may amount to contempt”: per Cooke P at 3.

139 See for example *Gisborne Herald Co Ltd v Solicitor-General*, above n 122, in which the publication detailed an attack on a Police officer by a person on bail at the time. The officer’s wife gave birth on the night of the attack and was sent to the spinal unit where the officer was being treated. The sensational aspect of the facts was relevant to the finding of contempt.

140 *Solicitor-General v TV3 Network Services Ltd*, above n 129, at 9.

141 *Solicitor-General v Smith* [2004] 2 NZLR 540 (HC) at [97].

142 *Solicitor-General v Fairfax New Zealand Ltd*, above n 130, at [3]–[4], [15]–[24] and [65].

143 *Solicitor-General v Fairfax New Zealand Ltd*, above n 130, at [134].

144 At [7.19]–[7.21].

145 *Solicitor-General v Cox* [2016] EWHC 1241 (QB), [2016] 2 Cr App R 15.



- 2.19 As we discuss later in Chapter 7, we consider it preferable in new legislation to expressly address the question of whether the statutory offences are intended to replace contempt.<sup>146</sup>

*Timing, locality and distribution of publication*

- 2.20 In earlier cases the timing of a publication was regarded as one of the most significant factors in determining whether the publication was in contempt. In the *Gisborne Herald* case, the Court of Appeal in 1995 said that, while “the exact lapse of time is not the touchstone”, a trial that is six to eight months away will make it difficult to justify the conclusion “that the influence of the article would have survived the passage of time”.<sup>147</sup> The general tenor of the case law emphasises that time causes memory to fade – known as the fade factor – and reduces the prejudicial effect an offending publication may have.<sup>148</sup> Publishing prejudicial information close to or during a trial has historically been much more likely to be in contempt.<sup>149</sup>
- 2.21 With the internet, the fade factor and concepts of time and place are less relevant today as search technologies mean publishing is a continuous act and content is not easily erasable. The internet challenges the concepts of practical and partial obscurity that were characteristics of earlier times.
- 2.22 The physical radius of distribution of a publication has also historically been considered relevant in assessing whether there is a risk to a fair trial. In the *Gisborne Herald* case, the Court held articles published in the *Gisborne Herald* paper, which included information about a defendant’s previous convictions and other charges, not to be in contempt in relation to a trial the accused faced in Napier because the *Gisborne* paper did not circulate in the Hawke’s Bay. The Court considered it “highly unlikely” that prospective jurors would have read it.<sup>150</sup>
- 2.23 The courts now have to consider a publication’s potential audience and reach – all factors that may be relevant to the possible impact on a potential juror – differently. In *Fairfax*, the Court considered how it could accurately assess the prejudicial tendency of the articles published by Fairfax, given what it described as an “avalanche of content” already publicly available in both mainstream and social media. The full affidavit that formed the basis of the articles and had been ruled inadmissible during a pre-trial hearing was available on a number of publicly accessible websites before Fairfax published part of it. The Court commented that managing the risk of jurors accessing the affidavit from websites was “a normal trial risk in today’s electronic environment which would usually be addressed by appropriate jury direction”.<sup>151</sup>
- 2.24 When assessing the reach or prominence of prejudicial content today, the Court may consider questions such as how high an item is ranked on a Google search and whether the item has been actively sent out to audiences (for example, via a television broadcast) or whether a potential juror would have to search out the material actively. For example, in a recent case concerning take down orders, the Court of Appeal upheld the High Court’s decision that old news articles that related to the original trial and remained online would not pose any real risk of prejudice

146 See chapter 7 at [7.20]–[7.21]. An example of a statutory provision that expressly addresses the question of replacing contempt is s 3 of the Protection from Harassment Act 1997 (UK). That provision provides that the offence under that section is an alternative and not a replacement for contempt.

147 *Gisborne Herald Co Ltd v Solicitor-General*, above n 122, at 570–571.

148 See for example *Solicitor-General v Broadcasting Corporation of New Zealand* [1987] 2 NZLR 100 (HC); *Solicitor-General v Fairfax New Zealand Ltd*, above n 130; *Television New Zealand Ltd v Solicitor-General*, above n 120; *Mwai v Television New Zealand Ltd* HC Auckland CP 630/99, 19 October 1993; *Rahimi v Television New Zealand* (2000) 6 HRNZ 79 (HC); and *Burns v Howling at the Moon Magazines Ltd* [2002] 1 NZLR 381 (HC); *Attorney General v Birmingham Post and Mail Ltd* [1999] 1 WLR 361 (QB); [1998] 4 All ER 49; *Attorney General v MGN Ltd and another* [2011] EWHC 2074 (QB).

149 *Solicitor-General v TV3 Network Services Ltd*, above n 130, at 409.

150 At the same time, the Court found that the article was nevertheless in contempt because there was a real risk of it interfering with a fair trial on different charges in *Gisborne: Gisborne Herald Co Ltd v Solicitor-General*, above n 122, at 570–571.

151 *Solicitor-General v Fairfax New Zealand Ltd*, above n 130, at [126]. See also chapter 4 at [4.15]–[4.17].

to a retrial.<sup>152</sup> The Court considered the defendant's name was not in public consciousness and as long as the articles remained only accessible at their original uniform resource locator (URL) a potential juror would have to search the names of the defendant or the complainant actively to uncover the material and there was only a remote possibility of that occurring.<sup>153</sup>

### Judge-alone trials

- 2.25 Publication contempt is less of an issue in judge-alone trials. The traditional approach followed by New Zealand courts is there is no real risk of adverse pre-trial publicity influencing a judge sitting alone.<sup>154</sup> In *Mwai v Television New Zealand Ltd* McGechan J said "I dismiss outright the possibility of effects upon any future trial Judge. There is no possibility".<sup>155</sup> The traditional approach recognises the effectiveness of judicial independence. A publication is unlikely to be held to be in contempt only because of any risk it will influence a judge-alone trial.
- 2.26 Contempt might, however, arise in relation to a judge-alone trial where there is a real risk that a publication might interfere with the evidence of witnesses. There is no recent authority, but in an older case publishing a photo of a person charged with murder was held to be in contempt because the photograph could influence a witness's evidence on identity and the identity of the perpetrator was in issue in the case.<sup>156</sup>

### Trial by media and maintaining public confidence in the courts

- 2.27 Publications have also been held to be in contempt when they seek to influence the outcome of a trial or usurp the role of the Court by prejudging issues before the Court. This is often referred to colloquially as trial by media. The concern here is not that the courts will be influenced but that perceptions of influence will undermine public confidence in the integrity of the courts.<sup>157</sup> In *Solicitor-General v Wellington Newspapers*, Eichelbaum CJ and Greig J explained the rationale behind this contempt:<sup>158</sup>

If Joe Public is accused of an offence of which he believes he is innocent he will not wish to be tried in the media. When charges are laid in Court the public must be assured the issues will be decided in the Courts and nowhere else.

The Full Court, however, went on to consider whether the publication "as a matter of practical reality" posed a real risk to the trial,<sup>159</sup> rather than whether it undermined public confidence in the courts. The Court held the newspaper guilty of contempt for reporting previous convictions and details concerning bail as well as publishing a prejudicial photograph.<sup>160</sup>

- 2.28 Notions of trial by media or usurping the role of the courts as contempt come from much earlier cases. In 1939, in *Attorney General v Tonks* the newspaper *The N.Z. Truth* published an article calling on the Magistrates Court to impose a lengthy sentence on an offender who had been

152 *L v R* [2015] NZCA 279, [2016] 2 NZLR 21 at [64]–[67].

153 At [64].

154 See *Hickmott v Television New Zealand Ltd* HC Auckland CP 213/93, 31 March 1993 at 5; *Mwai v Television New Zealand Ltd*, above n 148; and John McGrath QC "Contempt and the Media: Constitutional Safeguard or State Censorship?" (1998) NZ Law Review 371 at 378. In *Solicitor-General v Smith*, above n 141, the Full Court of the High Court noted at [79] that there was some English and Irish authority that "Judges, despite their training and experience, are only human and are not 'entirely aloof from the pressures to which other members of the public are susceptible'".

155 *Mwai v Television New Zealand Ltd*, above n 148, at 735.

156 *Attorney-General v Tonks*, above n 137, at 153.

157 *Gisborne Herald Co Ltd v Solicitor-General*, above n 122, at 569.

158 *Solicitor-General v Wellington Newspapers*, above n 128, at 47.

159 At 47.

160 At 48.

convicted of indecent assault.<sup>161</sup> The then Supreme Court found the publication to have been “calculated to prejudice, obstruct, or interfere with the due administration of justice” and held the editor of *The N.Z. Truth*, Mr Tonks, in contempt of court.<sup>162</sup> Myers CJ said that the public must have confidence that the courts are free from any extraneous influence.<sup>163</sup> He considered that “public confidence must necessarily be shaken if there is the least ground for any suspicion of outside interference in the administration of justice”.<sup>164</sup>

- 2.29 Contempt on this ground is, however, now less certain. There have been no recent New Zealand authorities and there is a question whether *Tonks* would be followed today. A recent example of a newspaper commenting on how an offender should be sentenced occurred when John Banks MP was before the High Court for sentencing in 2014 after he was found guilty of knowingly filing a false electoral return.<sup>165</sup> The *New Zealand Herald* published an article in print and online under the heading, “Most want Banks to be convicted”.<sup>166</sup> The article reported on an opinion poll undertaken by the newspaper as to whether Mr Banks should be discharged without conviction and, if not, what sentence was appropriate. The sentencing judge considered the article raised the possibility of contempt and referred the matter to the Solicitor-General. Contempt proceedings were not, however, taken against the paper.
- 2.30 In our view the current position is probably that older cases like *Tonks* might not be followed. More recent decisions in the Australian courts take a more robust approach to public confidence in the courts. The Supreme Court of Victoria has said “the media and the public know the courts are not, and must not be, influenced – easily or at all – by extraneous matter”.<sup>167</sup>
- 2.31 We suggest New Zealand courts would probably take a similar approach. Contempt proceedings were not, for example, taken against the *New Zealand Herald* in the Banks case discussed above.<sup>168</sup> There is a greater tolerance of comment prior to sentencing because sentencing is done by a judge sitting alone.
- 2.32 Contemporary New Zealand also places a high value on freedom of expression and is more tolerant of critical comment and robust discussion. Freedom of the press and other media (including social media) is not lightly interfered with in this context.

### Injunctions to restrain a contempt

- 2.33 The High Court has inherent authority to prevent contempt of court by issuing an injunction to stop a publication of material that poses a risk to a fair trial.<sup>169</sup> The Court of Appeal has

161 *Attorney-General v Tonks* [1939] NZLR 533 (SC) at 537.

162 At 537.

163 At 537.

164 At 537.

165 *R v Banks* [2014] NZHC 1244, [2014] 3 NZLR 256 (reasons for verdict); *R v Banks* [2014] NZHC 1807 (sentence); conviction quashed and retrial ordered in *Banks v R* [2014] NZCA 575; judgment recalled and verdict of acquittal entered in *Banks v R* [2015] NZCA 182. Mr Banks, who had been a candidate for election as Mayor of Auckland, was found guilty and was convicted in the High Court on one charge under s 134(1) of the Local Electoral Act 2001 of being a candidate for election, transmitting a return of electoral expenses, knowing it to be false in one or more material particulars. He successfully appealed against the conviction and the Court of Appeal initially quashed the conviction and ordered a retrial, before subsequently recalling that judgment and entering a verdict of acquittal.

166 Derek Chang “Most want Banks to be convicted” *The New Zealand Herald* (New Zealand, 7 July 2014) at A8.

167 *R v The Herald and Weekly Times Pty Ltd* [2006] VSC 94 at [28].

168 Another example of a situation where the media have commented on a case when it is still before the court is the “March for Moko” campaign. The organisation of the march was started off by an article by Duncan Garner “A little boy is dead – now who will march for Moko?” *The Dominion Post* (online ed, 7 May 2016). Following the article a Facebook page was set up to gain wider attention. The Court of Appeal in *R v Liddell* [1995] 1 NZLR 538, (1994) 12 CRNZ 458 at 546 noted the potentially counter-productive nature of such campaigns to influence the courts.

169 These are known as *quia timet* (“because he fears”) injunctions. The Crown or defendant in a criminal trial may apply for an injunction. In other contexts, other parties to litigation may also seek *quia timet* injunctions to prevent other forms of contemptuous publication.



confirmed the High Court's inherent jurisdiction to prevent the risk of contempt by issuing an injunction.<sup>170</sup>

- 2.34 While courts have occasionally granted injunctions,<sup>171</sup> they have repeatedly cautioned that prior restraint on freedom of expression will only be appropriate in the clearest of cases.<sup>172</sup> Any such prior restraint must pass a high threshold.<sup>173</sup> The test for granting an injunction is that it must show there is “a real *likelihood* of a publication of material that will seriously prejudice the fairness of the trial”,<sup>174</sup> which sets a higher threshold than the real *risk* test used in contempt proceedings following publication.

### Statutory and implied powers of suppression

- 2.35 When summarising the relevant law in this area, we also briefly mention suppression orders because these are the other key mechanism used to protect the integrity of a fair trial. Courts have a range of statutory and implied suppression powers. Under the Criminal Procedure Act 2011 a trial court may suppress the name and identity of the defendant,<sup>175</sup> the identity of witnesses, victims and people connected with the trial (such as relatives and children)<sup>176</sup> and evidence and submissions.<sup>177</sup> The Act also provides for the automatic suppression of the identity of defendants and the identity of complainants in specified sexual cases,<sup>178</sup> and the identity of child complainants and witnesses in any case.<sup>179</sup> In addition, the Bail Act 2000 imposes restrictions on the publication of matters dealt with at any bail hearing.<sup>180</sup>

- 2.36 The majority of the Supreme Court in the second *Siemer* case confirmed that where there is no statutory power applicable, courts can use their inherent authority or implied powers to make any suppression order necessary to protect or uphold the administration of justice and protect the fair trial rights of an accused.<sup>181</sup> The majority said:<sup>182</sup>

[W]here publication of certain information would give rise to a real risk of prejudice to a fair trial right, freedom of expression may be temporarily limited by a suppression order in order to avoid that risk. In our view, this approach properly recognises the special importance of fair trial rights.

- 2.37 The District Court has jurisdiction to make suppression orders under the Criminal Procedure Act 2011 for the purposes outlined above at [2.35]. Applying the Supreme Court decision in the second *Siemer* case, it appears the District Court may use its implied powers to make a suppression order prohibiting the publication of other information in situations not covered

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170 *Television New Zealand Ltd v Solicitor-General*, above n 120, at 3.

171 For example, in *Television New Zealand Ltd v Solicitor-General* an ex parte injunction was originally granted restraining Television New Zealand from broadcasting certain material. The injunction was later rescinded on appeal by the Court of Appeal; *Television New Zealand Ltd v Solicitor-General*, above n 120, at 3. See also *Attorney-General v TV3 Network Services Ltd* HC Invercargill CP2/96, 8 March 1996, in which an injunction was granted to restrain TV3 from showing a documentary. Later, the High Court declined to extend the injunction in *Attorney-General v TV3 Network Services Ltd* HC Invercargill CP2/96, 16 August 1996.

172 See generally Cheer, above n 133, at 567–568; and Jesse Wilson “Prior Restraint of the Press” [2006] NZ L Rev 551. See also *Beckett v TV3 Network Services* (2000) 6 HRNZ 84 (HC) at [21], in which Robertson J stated that “[a]ny prior restraint of free expression must pass a high threshold”; and the reference to the need for “clear and substantial evidence” for an injunction to prevent contempt in *Hickmott v Television New Zealand Ltd*, above n 154.

173 *Bouwer v Allied Press Ltd* (2001) 19 CRNZ 119 (CA) at [10]; and *Beckett v TV3 Network Services*, above n 172, at [21].

174 *Television New Zealand Ltd v Solicitor-General*, above n 120, at 3 (emphasis added).

175 Criminal Procedure Act 2011, s 200.

176 Criminal Procedure Act 2011, s 202.

177 Criminal Procedure Act 2011, s 205.

178 Criminal Procedure Act 2011, ss 201 and 203.

179 Criminal Procedure Act 2011, s 204. Relevant also is the Children, Young Persons, and Their Families Act 1989, s 438 which prohibits reporting of Youth Court proceedings.

180 Bail Act 2000, s 19.

181 *Siemer v Solicitor-General* [2013], above n 119, at [114].

182 At [158].

by the Criminal Procedure Act where that is necessary to protect the fair trial rights of a defendant.<sup>183</sup> Exercising implied powers to make non-statutory suppression orders may include making orders requiring prejudicial material to be removed from publicly accessible websites (take down orders).<sup>184</sup>

- 2.38 The majority of the Supreme Court in the second *Siemer* case considered that an interim ban, pending trial, on publishing material that gives rise to a real risk of prejudice to a fair trial is a reasonable limit on the right to freedom of expression in section 14 of the New Zealand Bill of Rights Act 1990 (NZBORA).<sup>185</sup> It is worth noting that the Court used the same “real risk of prejudice test” that applies to contempt. Suppression and contempt might therefore be viewed as alternative ways of addressing the same issue. We will return later to the role of suppression orders when we consider possible reforms.

## PUBLICATION CONTEMPT IN CIVIL PROCEEDINGS

- 2.39 In this section we discuss the law of contempt as it applies to public statements or publications that place improper pressure on litigants in civil proceedings.<sup>186</sup> This category of contempt seeks to protect the public’s access to justice, free from restraint or intimidation, so they can determine disputes over their legal rights.<sup>187</sup> There are two aspects to improper pressure on litigants. The first concerns the litigants in a particular case, while the second concerns the public as potential litigants.<sup>188</sup> The risk is not just that the party in the case will be influenced, but that the conduct may inhibit people generally from using the courts to enforce their rights.<sup>189</sup>

- 2.40 In *Duff v Communicado Ltd* Blanchard J in the High Court held:<sup>190</sup>

A public statement about civil litigation currently before a Court will be in contempt of Court if:

- (a) it goes beyond fair and temperate comment; and
- (b) either,
  - (i) when viewed objectively, it can be seen to have a real likelihood of inhibiting a litigant of average robustness from availing itself of its constitutional right to have the case determined by the Court; or
  - (ii) it is actually intended by the maker of the statement to have that inhibiting effect on a litigant.

This test is primarily objective, focusing on the *probable tendency* of the publication rather than its actual effect; but it encompasses the unfair and intemperate comment of someone who has set out to inhibit a litigant regardless of whether the comment actually succeeds in doing so.

- 2.41 A Full Court of the High Court adopted this test in *Smith*.<sup>191</sup> In that case Dr Nick Smith MP, Radio New Zealand, and TV3 faced contempt proceedings in response to their involvement in a family court custody case involving one of Dr Smith’s constituents. As we noted in the

183 *L v R*, above n 152, at [37].

184 *L v R*, above n 152, at [13].

185 *Siemer v Solicitor-General* [2013], above n 119, at [159] and [229]. See also *Siemer v Solicitor-General* [2010], above n 124, at [24]–[25] and discussed in chapter 6 at [6.33].

186 In practice most civil proceedings are heard by a judge sitting alone, so there is limited risk that anything published may interfere with the decision. Civil jury trials are referred to in chapter 4 at [4.2].

187 *Attorney-General v Times Newspapers Ltd* [1974] AC 273 (HL) at 307; *Solicitor-General v Smith*, above n 141, at [41]–[44].

188 *Solicitor-General v Smith*, above n 141, at [45] and [47].

189 *Pharmaceutical Management Agency Ltd v Researched Medicines Industry Association New Zealand Inc* [1996] 1 NZLR 472 (HC) at 476.

190 *Duff v Communicado Ltd* [1996] 2 NZLR 89 (HC) at 98.

191 *Solicitor-General v Smith*, above n 141, at [41]–[44] citing *Attorney-General v Times Newspapers Ltd*, above n 187. See also chapter 6 at [6.22].

introduction to this chapter, the High Court's inherent jurisdiction includes this protective jurisdiction of upholding the authority of lower courts and tribunals.<sup>192</sup>

- 2.42 Dr Smith had issued press releases, conducted interviews on radio and television and phoned the caregiver of the child involved in the custody dispute. The High Court held that Dr Smith's comments in his media releases and on the radio were in contempt. The Court described the comments as one-sided, emotive and extreme and held they went well beyond what was fair and temperate and were made with the intention of persuading the caregiver to surrender custody.<sup>193</sup> The Court found that, objectively viewed, the comments were likely to inhibit a litigant of average robustness from availing themselves of having the Family Court determine their case.<sup>194</sup>
- 2.43 Radio New Zealand was also held in contempt in relation to its broadcast of its interview with Dr Smith. TV3, which had aired a documentary on the custody dispute, was held in contempt for the biased nature of the programme covering the issue. The Court found that TV3 intended to place improper pressure on the caregiver, and even if not intended, this was undoubtedly the effect of the programme. The pressure also translated to a risk of dissuading other similarly placed litigants from going to the Family Court.<sup>195</sup> The Court's decision in *Smith* reflected the essence of this contempt and provides the clearest illustration of what is being protected in this area.
- 2.44 While *Smith* still represents the law, a more recent High Court judgment in *Progressive Enterprises Ltd v North Shore City Council* raises questions over whether the standard of "a litigant of average robustness" is an appropriate one where the actual parties are in fact "formidably robust" parties.<sup>196</sup> In that case the National Trading Company Ltd (NTC) had received resource consent from the North Shore City Council to build a new supermarket. Progressive successfully challenged the consent in the High Court. The Council and NTC appealed. Pending the appeal, NTC launched a wide-ranging media campaign encompassing newspaper, radio, flyers and bus-shelter posters. The tenor of the campaign was that Progressive's court action was preventing NTC from opening a supermarket on the North Shore thereby depriving the public of lower prices. Progressive responded with contempt proceedings.
- 2.45 Justice Baragwanath considered that, if he applied the test developed in *Duff* and *Smith*, NTC's media campaign would be in contempt because it went beyond fair and temperate comment and would inhibit a person of "average robustness" from going to court. He concluded, however, that the tests in *Duff* and *Smith* "do not provide the whole of the guidance necessary in this case".<sup>197</sup> As both companies were "economically powerful and in direct competition",<sup>198</sup> the Judge considered a "litigant of average robustness" was an inappropriate measure of criminal liability where the party under attack is a "formidably robust party".<sup>199</sup>
- 2.46 Justice Baragwanath reverted to the underlying principles identified by the Court of Appeal in *Gisborne Herald*, namely that contempt proceedings ultimately turn on four key questions:<sup>200</sup>

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192 *Quality Pizzas Ltd v Canterbury Hotel Employees Industrial Union* [1983] NZLR 612 (CA) at 616.

193 Examples of the comments made included "this case almost amounts to state sanctioned child stealing" and "a warrant [from the Court] for the child to be ripped out of his family's arms"; *Solicitor-General v Smith*, above n 141, at [58].

194 *Solicitor-General v Smith*, above n 141, at [60].

195 *Solicitor-General v Smith*, above n 141, at [98]–[102].

196 *Progressive Enterprises Ltd v North Shore City Council* [2006] 2 NZLR 262 (HC) at [37].

197 At [28].

198 The Court noted that at the time, Progressive operated Foodtown, Woolworths and Countdown supermarkets and had approximately 44 per cent of the New Zealand supermarket expenditure on food and groceries and NTC's brands included Four Square, New World and PAK'n SAVE and had the remaining 56 per cent share; at [8].

199 At [37].

200 At [40].

- (a) As a matter of practical reality, was there a real risk, as distinct from a remote possibility, of interference with the administration of justice?
- (b) In the circumstances, was the conduct improper?
- (c) Was it proportionate to characterise the conduct as criminal?
- (d) If so, what penalty, if any, should be imposed?

The Judge held in that case the question was whether NTC's campaign "created a real risk that Progressive would be shamed into abandoning its opposition to NTC's application".<sup>201</sup> On evaluation, the Court could "see no risk whatever to that effect" so concluded that NTC's media campaign was not in contempt.<sup>202</sup>

- 2.47 While some might consider Baragwanath J to have expounded a new test of improper conduct for contempt, his decision should be regarded as taking a more discriminating approach that takes into account whether a media campaign against a strong, financially resourced opponent would, in reality, deter less robust individuals from resorting to the courts to determine their disputes. The decision recognises an ordinary person would look at NTC's media campaign and see it was a strategy against a formidable, well-resourced competitor and unlikely to be employed against a smaller shop owner. The Judge explicitly stated, if NTC employed the same strategy against a smaller competitor, the risk of unlawful interference might arise.<sup>203</sup>
- 2.48 *Progressive* links this form of contempt back to the overarching principle behind all contempt: whether there is a real risk that the conduct interferes with the administration of justice. Where the interference is to a citizen's resort to the courts, the parties and their financial positions in respect of each other form part of the context in which courts assess the risk.

## THE ISSUES PAPER AND SUBMISSIONS

### Key issues

- 2.49 In its Issues Paper the Commission identified a number of problems with the current law, the key ones being:
  - (a) uncertainty around the scope of publication contempt;
  - (b) difficulties over applying the "real risk" test and conflating that test with the test that applies for a miscarriage of justice; and
  - (c) conceptual and practical issues in applying existing law and reasoning in the age of the internet and new media platforms.

#### (a) Uncertain scope of contempt

- 2.50 The scope of contempt is uncertain. Contempt relies on the media and others who publish and comment on news and events correctly assessing whether their publication poses a real risk of interfering with the administration of justice. Those publishing material, which increasingly includes members of the public by way of social media, are essentially expected to predict where

<sup>201</sup> At [45].

<sup>202</sup> At [48].

<sup>203</sup> At [50]. See also *Doug Hood Ltd v Canterbury Regional Council* (1998) 13 PRNZ 80 (HC) at 86. Doug Hood sought an interim injunction preventing the release of a report into the collapse of the Opuha Dam, pending civil and criminal proceedings into the collapse. William Young J, in refusing to grant the relief, held that "Doug Hood Ltd can be, I think, regarded as a reasonably robust litigant which has already been involved in heavy publicity over its role in the collapse of the dam. I would think it quite able to deal with the media and quite unlikely to be cowed into an inappropriate settlement by reason of what is said in the report in issue".

the Court may, if called upon, ultimately draw this line. If the law is uncertain, those reporting on public events may be too cautious, and this may have a chilling effect on public discussion. On the other hand, uncertainty over the scope of publication contempt may result in too robust an approach being taken which may pose a risk to fair trial rights.

- 2.51 When those reporting on events get it wrong and compromise a person's fair trial rights, courts cannot adequately remedy this after the fact by holding those responsible in contempt of court. When this occurs before or during a trial, the trial may have to be abandoned and the jury discharged at significant cost to the state and the parties involved. As already noted, abandoning a trial also impacts upon complainants and their families, the defendant and other witnesses who have to endure the stress of a trial all over again.<sup>204</sup> When the breach of fair trial rights is not discovered until after the trial in which the defendant has been convicted, the conviction may be unsafe and may have to be set aside and a retrial ordered with further cost consequences.

#### *(b) Real risk test*

- 2.52 There have been issues around how the Court applies the real risk test. Under this test, the Court must assess the tendency of a publication to prejudice the administration of justice. The test does not require the publication actually to compromise fair trial rights or, in the civil context, actually deter a litigant. The Commission suggested in the Issues Paper that there should be clearer separation between (1) assessing whether something poses a risk and (2) determining whether that risk can be or has been mitigated. The question whether a publication is in contempt and the question whether the risk can be mitigated so the trial is ultimately fair are separate questions. The Commission suggested these questions may have become confused at times. The second question is relevant only to determining whether a prosecution should be stayed or whether there has been a miscarriage of justice, not whether the publication was in contempt.<sup>205</sup>

#### *(c) New media*

- 2.53 New means of sharing information in the internet age have changed the way we access information. As mentioned earlier, anybody may publish information and post images and video at any time.<sup>206</sup> This has broadened the application of contempt laws significantly and strengthens the arguments for having clear and readily accessible law.

### **Proposals and submissions**

- 2.54 In the Issues Paper the Commission proposed replacing the common law of contempt with statutory provisions. This would provide greater certainty to the law governing publication contempt. It would assist in addressing the other issues identified. A statutory offence would provide an opportunity to clarify and reshape the law and would have the important advantage of separating prosecutions for contempt out from the affected trial. The Commission favoured addressing issues around the scope of publication contempt by focusing more on statutory prevention, by temporarily suppressing publication of information, and less on contempt.<sup>207</sup>

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<sup>204</sup> See above at [2.7].

<sup>205</sup> Law Commission *Contempt in Modern New Zealand* (NZLC IP36, 2014) at [4.45]. The test for miscarriage of justice is "whether there has been actual prejudice, its extent, and whether there has been a miscarriage of justice, or a real risk one has occurred": *Solicitor-General v TV3 Network Services Ltd*, above n 130, at 410. The test for contempt of court has a lower threshold than the test that applies for a miscarriage of justice but uses similar language.

<sup>206</sup> See chapter 1 at [1.51] and chapter 2 at [2.16] and [2.24].

<sup>207</sup> It is well-established law that where publication of certain information would give rise to a real risk of prejudice to a fair trial right, freedom of expression may be temporarily limited by a suppression order in order to avoid that risk: *Siemer v Solicitor-General* [2013], above n 119, at [158].



- 2.55 The Issues Paper therefore proposed replacing the common law of publication contempt with statutory provisions that:
- (a) Prohibit the publication or reporting of a defendant's previous convictions and any concurrent charges faced during a specific pre-trial period – unless a court makes an order permitting publication in a particular case.<sup>208</sup> Breach of this provision would be an offence.<sup>209</sup>
  - (b) Provide a power for the courts to make orders prohibiting the publication of any other information during the specified pre-trial period if satisfied that suppression of that information is necessary to protect a fair trial. Breach of an order would be an offence.<sup>210</sup>
  - (c) Provide a power for the courts to make take down orders where information that would breach the prohibition in (a) or breach an order made under (b) was already publicly accessible through the internet. Breach of an order would be an offence.<sup>211</sup>
  - (d) Create a new offence, in substitution for common law publication contempt, covering any publication that created a real risk of interference with the administration of justice by prejudicing a fair trial.<sup>212</sup> This is essentially the current common law test.
  - (e) Provide that breaches of the offence provisions would all be prosecuted by laying a charge under the Criminal Procedure Act 2011.
- 2.56 We discuss this package of reforms below together with feedback we received from submitters.

*Statutory provision temporarily prohibiting publication of previous convictions*

- 2.57 The Issues Paper proposed prohibiting the publication or reporting of a defendant's previous convictions, and any concurrent charges faced, during a specified pre-trial period unless a court permitted publication in a particular case.<sup>213</sup> It would be an offence for anyone to breach the prohibition.
- 2.58 Publication of previous convictions and any concurrent charges is information that would normally give rise to a real risk of prejudice to a fair trial and would normally be contempt. Traditionally, the common law has excluded evidence of previous convictions (with some exceptions) as unduly prejudicial and therefore contrary to a fair trial.<sup>214</sup> The Issues Paper argued that the potential harm arising from disclosing this information justified the proposed prohibition on publishing or reporting this information during the pre-trial period. The courts have also been clear that freedom of expression rights yield to fair trial rights. The Supreme Court in the second *Siemer* case said that temporary limitation by a suppression order in order to avoid risk to a fair trial “recognises the special importance of fair trial rights”.<sup>215</sup>
- 2.59 The proposed prohibition would restrict the freedom of the media and others to publish material more than contempt currently does, but it would clarify the obligations of those publishing material pre-trial. The proposal would address the problem that arises from the absence of

208 Publication of matters relating to bail and matters dealt with at any bail hearings are already covered by a similar type of prohibition on reporting contained in s 19 of the Bail Act 2000, and that regime would continue to apply to matters covered there.

209 Law Commission, above n 205, at [4.71(a)].

210 At [4.71(b)].

211 At [4.72].

212 At [4.71(c)].

213 This new provision would be similar to the automatic identity suppression provisions in ss 201, 203 and 204 of the Criminal Procedure Act 2011. Note that matters relating to bail are already covered under the Bail Act 2000.

214 *Gisborne Herald Co Ltd v Solicitor-General*, above n 122, at 568.

215 *Siemer v Solicitor-General* [2013], above n 119, at [158].

- any bright lines in the common law of contempt. It would effectively deter publications that jeopardise a fair trial. As the majority of the Supreme Court in the second *Siemer* case said,<sup>216</sup> the media may be “neither dispassionate nor fully informed”, and may sometimes make the wrong judgements on what to publish. This consequentially prejudices criminal trials. There would be less risk for publishers who would no longer be called on to exercise judgement over where the courts might draw the line in any particular case.
- 2.60 Under the proposal the prohibition would apply unless the court made an order permitting publication. There would be scope to apply to the Court for permission to publish where that would not prejudice a fair trial. The prohibition would also be limited to the period prior to the commencement of the trial.
- 2.61 Some submitters expressed significant opposition to this proposal, but there was also some support. The three media organisations that made submissions raised concerns over the blanket nature of the prohibition and also over how it would work. The Crown Law Office also said it was not convinced that a statutory prohibition was either necessary or workable.
- 2.62 In summary the concerns submitters raised were:
- The fact of concurrent charges or previous convictions will not always be so prejudicial that it should not be published – a blanket prohibition is too blunt an instrument.
  - The risk that the prohibition could be easily (and inadvertently) breached, for example, where media were not aware that charges had been laid or were about to be laid.
  - How would a prohibition deal with existing publications that already contained the information?
  - Uncertainty over when the defined period should start and end. For example, should it start from the time when charges were imminent or an arrest was made?
- 2.63 These submitters also suggested that if the courts had the power to suppress any potentially prejudicial information and to make take down orders that would allow for a tailored approach for every case and would be better than a blanket prohibition.
- 2.64 Other submitters, however, were supportive of the proposed prohibition. The Auckland District Law Society Incorporated submitted the prohibition should apply from the earlier of the date of arrest or the date charges were laid. It supported the proposal because of the significant inequality of arms between the state and news media, and a defendant. In its view, pre-trial publicity can increase this inequality and increase the risk of prejudice. The Community Justice Project supported the clarity the prohibition would bring to the law and the reduced risk that defendants would face unfairness. Two barristers in their joint submission went further and said that there is no public interest in naming a person prior to their first Court appearance and that it should be an offence to do so.
- 2.65 The remaining submitters, including the New Zealand Law Society (NZLS) and the Police, did not express a view on the desirability of the prohibition but raised practical issues around its application. The NZLS said that some prior convictions and uncharged criminal conduct could be adduced in evidence as part of the prosecution case, so publication of some of the material caught by the prohibition would not be contempt. The Police raised definitional issues around the meaning of “publish” because it was concerned that disclosure through its vetting role might otherwise be caught. The District Court Judges in their comments also expressed concern that the proposed prohibition would increase work for trial judges who would have to consider

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216 *Siemer v Solicitor-General* [2013], above n 119, at [173].



applications to allow convictions to be published. They also noted, however, that the proposals around suppression orders (below) would increase court work, particularly if the media were able to make applications.

### *Statutory suppression and take down powers*

- 2.66 The Issues Paper proposed a new statutory provision giving the court power to make a temporary suppression order prohibiting the publication of any information during the period leading up to and during the trial if the court were satisfied that such an order was necessary to protect a person's right to a fair trial. Breach of such an order would itself be an offence.
- 2.67 The Issues Paper also proposed a new statutory provision enabling courts to make take down orders during the period leading up to and during the trial. Courts could make a take down order, for example, against an online content host requiring it to take down or disable public access to specified material if the court was satisfied such an order was necessary to protect a person's right to a fair trial. Courts have, on occasion, exercised their inherent authority or implied powers to make take down orders requiring the media to take down historical articles that may impact on a trial.<sup>217</sup> A take down order is a temporary measure and, under the proposal, it would be an offence for a person to fail to comply with any such order.
- 2.68 Submitters showed a degree of support for these proposals. Some said the provisions should ensure that the level of suppression was kept to the minimum needed to support a fair trial. Some favoured the real risk test being the standard that would be applied by the courts. Submissions from media organisations raised the problem of not knowing about existing suppression orders and strongly supported a centralised electronic register of suppression orders to facilitate compliance. As discussed later at [2.86], the Commission has previously supported the establishment of such a register.

### *Offence of real risk of prejudice to a fair trial*

- 2.69 The Issues Paper proposed the common law be replaced by a new offence covering publications that posed a real risk of prejudicing a fair trial. The new offence would essentially be a statutory form of contempt and would be prosecuted as an ordinary offence under the Criminal Procedure Act.
- 2.70 The Commission suggested the new offence should only cover interference with fair trial rights rather than publications that could interfere with the administration of justice in other ways. This was because the Commission considered there was uncertainty over whether these other systemic types of interference were still relevant and whether they should be retained.
- 2.71 Submitters were mainly in support of retaining the real risk test, but in a statutory offence provision. Some submitters were, however, concerned that the way the Commission had paraphrased the test in the Issues Paper suggested the Commission was proposing to lower the threshold and that any such lowering would potentially have a chilling effect on the media and free speech. The majority of submissions, including those from media organisations, all considered that the real risk test should remain.
- 2.72 Some submitters disagreed with the proposal that the new criminal offence be confined to fair trial rights. They suggested that, like the common law, the offence should also capture other

<sup>217</sup> See for example *L v R*, above n 152, at [1], [4] and [9]. In this case the Court of Appeal considered whether the High Court had correctly revoked take down orders it had earlier made requiring media entities to take down historical articles about a defendant facing a retrial. The articles had been lawfully published at the time of publication but the High Court ordered the media to remove them because of the risk of prejudice at the retrial. The Court later revoked the orders once it was satisfied that a juror would have to actively search to find the articles. The Court of Appeal held the orders had been correctly revoked and dismissed the appeal.

risks to the administration of justice. Their concern was that the Commission would leave a gap if the common law were abolished and the new replacement offence only covered interference with a fair trial. Crown Law, for example, noted that common law publication contempt was not focused so much on a fair trial as it was on the wider justice process. Crown Law suggested using the formulation in section 1 of the Contempt of Court Act 1981 (UK), which refers to interfering with “the course of justice in particular legal proceedings”.

## RECOMMENDED APPROACH

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- 2.73 In light of the feedback the Commission received and subsequent consideration following further discussions, we have decided to modify the approach initially put forward in the Issues Paper.

### Temporary prohibition on publication of previous convictions and concurrent charges

- 2.74 We have considered carefully the concerns raised by submitters, but continue to support enacting a statutory provision prohibiting publication of a defendant’s previous convictions and any concurrent charges faced during a specified pre-trial period unless a court permits publication. We consider the benefit of greater clarity and certainty in the law outweighs concern over editorial freedom for publishers to exercise their own judgement about what material poses a risk to a fair trial and whether a prosecution is likely if they publish it. In an era where almost anyone can publish almost anything they want through the internet and social media, there are significant risks to the administration of justice in relying on people to exercise their own editorial judgement.
- 2.75 We therefore recommend enacting a prohibition on the publication or reporting of a defendant’s previous convictions and any concurrent charges faced during the period up to the start of the trial. The prohibition would begin when the defendant is arrested and would remain until the beginning of the trial, at which point the trial court would review it and could lift, modify or extend the prohibition. We consider that the prohibition should apply from arrest because that is the earliest clear and readily determinable point.
- 2.76 At common law there is uncertainty around when the period begins. It is normally contempt to publish material that is prejudicial once the laying of charges is highly likely or is imminent or pending.<sup>218</sup> Introducing a specific point in time, the person’s arrest, makes the law much more certain. We considered the alternative approach taken in the United Kingdom, which involves the concept of “active” criminal proceedings and a list of provisions identifying when proceedings become active.<sup>219</sup> In our view the difficulty with this approach is that it has not created the level of certainty we prefer.<sup>220</sup> We acknowledge that there will be some occasions when highly prejudicial material may be published prior to arrest, but the proposed prohibition will cover most situations.
- 2.77 Under our recommendation the pre-trial court and the trial court would be free to make an order lifting or modifying the restrictions. The prohibition would be a short-term ban that would protect a defendant’s rights until a court could adequately assess the potential impact of the information on a future trial. Under the provision we are recommending, accredited news media will be able to apply to lift or vary the ban.

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218 *Siemer v Solicitor-General* [2013], above n 119, at [114]; *Television New Zealand Ltd v Solicitor-General*, above n 120, at 3.

219 Contempt of Court Act 1981, s 2(3) and Schedule 1.

220 See: David Eady and ATH Smith *Arlidge, Eady and Smith on Contempt* (4th ed, Sweet & Maxwell, London, 2011) at [5-62] and [5-67]–[5-103]; *Attorney-General v News Group Newspapers Ltd plc* [1989] QB 110, [1988] 2 All ER 906; *Attorney-General v Sports Newspapers* [1991] 1 WLR 1194 (QB), [1992] 1 All ER 503.

- 2.78 It is also important to consider how effectively and efficiently the court can modify or discontinue a statutory prohibition compared to making suppression orders to prevent publication of convictions or concurrent charges on a case-by-case basis. The process of making orders in each case would be more time consuming and costly and would place a greater burden on trial courts. It would put the onus on defence or prosecuting counsel to obtain, or on the court to make, a suppression order in respect of information that has such a strong tendency to interfere with the administration of justice. It is inefficient and the risk of publication in error is also too high. The recommended prohibition, which the court can vary or discharge, is more efficient and workable.
- 2.79 We also consider the concern that a prohibition is overly broad and is a blunt instrument can be reasonably well addressed by refining the proposal. The proposed new provision (clause 8) in the draft Bill has no retrospective effect so historical reports of convictions that remain in existence and were lawful when first published will not be caught. The prohibition applies to new reporting and news that is contemporaneous with the present charges. It would also apply to deliberate hypertext linking to any earlier or historical reports that contain previous convictions.
- 2.80 Historical reports that remain accessible, whether electronically or otherwise, and were lawful at the time they were made would be excluded from the prohibition and would instead be addressed by the courts where necessary by the making of a take down order. We discuss take down orders further below.<sup>221</sup>
- 2.81 The provision should also only cover situations where a person has been arrested for an offence for which he or she could be tried by a jury. This means that the prohibition would not apply in relation to what are known as category 1 and 2 offences, which involve less serious offending and which are normally tried by a judge alone in the District Court.<sup>222</sup>

### Statutory suppression orders

- 2.82 We recommend enacting new provisions giving the courts statutory powers to make temporary suppression orders prohibiting publication of other information during the period leading up to and during the trial. Courts would be able to make such orders at any time where appropriate after a person is arrested. Temporary suppression orders would be available to prohibit, for example, the publication of information indicating bad character, including criminal or gang affiliations of the defendant or a witness, where the relevant court is satisfied that this is necessary to protect a person's right to a fair trial. Another example would be photographic or pictorial information where identity may potentially be in issue at trial. We recommend, as discussed in chapter 7, that it should be an ordinary offence for anyone to breach a suppression order.

### *Criminal Procedure Act 2011 as a model*

- 2.83 We recommend the new provision be modelled on the statutory suppression provisions in sections 200 and 202 of the Criminal Procedure Act. The general provisions relating to suppression orders provided for in sections 207 to 210 of that Act should also apply to suppression orders made under our recommended new provision. As provided in section 210 of the Criminal Procedure Act, the accredited media should have standing to initiate, and be heard in relation to, any application for a suppression order or any application to extend a

<sup>221</sup> See [2.89]–[2.91].

<sup>222</sup> Criminal Procedure Act 2011, s 6(1): a category 1 offence is punishable with a maximum penalty of a fine only, and a category 2 offence is punishable by a term of imprisonment of no more than two years or a community-based sentence.

suppression order. There are advantages in having a consistent approach to suppression orders and the Criminal Procedure Act already provides a model in this area.

- 2.84 There should, however, be one important exception to simply mirroring the Criminal Procedure Act provisions. Suppression orders made under the new provision should always be only for limited duration and never permanent. The justification for suppression here is to protect the right to a fair trial, so when the trial and all rights of appeal are exhausted, there is no justification for continuing to suppress information on that ground. The courts may of course decide that there are other legitimate grounds for permanently suppressing some information, but information should not be permanently suppressed after all proceedings relating to the offence (including appeals) have been completed on the ground it interferes with a fair trial.
- 2.85 For consistency, the offence provision should be the same as that in section 211 of the Criminal Procedure Act 2011. It should provide for strict liability where any person publishes information in breach of a suppression order, punishable by a fine, and a more serious offence, with a higher penalty, where any person knowingly or recklessly publishes information in breach of a suppression order. The penalties for breaches of suppression orders should be similar to those in section 211. We discuss our overall approach to penalties further in chapter 7.<sup>223</sup>

#### *Central register of suppression orders*

- 2.86 The Law Commission's 2009 report *Suppressing Names and Evidence* recommended "the development of a national register of suppression orders should be advanced as a matter of high priority".<sup>224</sup> At that stage there was strong support in submissions on that reference for a central register of suppression orders to allow the media to check the terms and status of suppression orders the courts had made. Media organisations submitted that the ability of the media to obtain timely and accurate information from the court in relation to the existence, duration and scope of suppression orders would help to prevent inadvertent breaches.
- 2.87 Following the release of that report, the Ministry of Justice undertook some preliminary work and investigated ways of improving the media's access to information about suppression orders. The development of a suppression orders register, however, was not considered a priority at that stage and was not pursued.
- 2.88 In 2016, we asked the Ministry for an update on whether it was undertaking any further work on developing a register. The Ministry advised that it had done no further work. The Ministry considered a register would be costly and at that stage did not consider the benefits justified the cost. While we certainly recognise the need for a register to be cost effective, we consider there would be benefits in having a register. They would include avoiding the costs associated with inadvertent breaches of suppression orders and the costs associated with court staff having to check the status of suppression orders. We would therefore encourage the Ministry to review the position periodically.

#### **Take down orders**

- 2.89 We also recommend new statutory provisions providing for take down orders where information breaching any temporary suppression order is already publicly accessible on the internet. We recommend it should be an offence for anyone to breach a take down order. At present, courts make take down orders under their inherent authority or implied powers.<sup>225</sup>

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223 See chapter 7 at [7.60]–[7.66].

224 Law Commission *Suppressing Names and Evidence* (NZLC R109, 2009) at 5.

225 See for example *L v R*, above n 152.

Breaches of these orders are therefore not statutory offences, but are treated as contempt of court. A statutory regime would enable such issues to be addressed comprehensively and provide a straightforward regime for enforcement.

- 2.90 We considered whether the prosecution should be obliged in some way to review what potentially prejudicial information is publicly accessible through the internet before a trial to ensure that it makes an application for appropriate take down orders where they are warranted. We have, however, concluded that it is better to address this, as a matter of practice, in the Solicitor-General's Prosecution Guidelines than including it in legislation. We think it should be standard practice for Crown prosecutors to make inquiries and consider what information currently in the public domain may be prejudicial. This is a matter that ultimately goes to trial fairness, so the responsibility for reviewing existing information or seeking its removal should not fall solely on the defence.
- 2.91 We acknowledge that take down orders "may not be a perfect or complete solution, and will not prevent the determined internet user",<sup>226</sup> but we consider they will go some way towards minimising the impact of an offending publication. Court orders of this kind will deter the majority of users and thus will be efficient and cost effective. Where the relevant information is published outside New Zealand or on a server hosted outside New Zealand, determined parties in New Zealand will still be able to access the information, but the take down orders should prevent them from lawfully disseminating that information in New Zealand.<sup>227</sup>

### **Criminal offence – partial replacement of the common law**

- 2.92 We recommend a new offence to replace the common law partially. Under the new provision in clause 14 of the Bill, it would be an offence for any person intentionally to publish information that is relevant to any trial where there is a real risk that the publication of that information could prejudice a fair trial. We intend this new offence to be a statutory replacement for the current publication contempt as it applies to a fair trial. As is currently the case, the mental element of intention would apply only to the act of publication and there would be no requirement to prove any intent to prejudice the trial.
- 2.93 Where the act of publication is somehow accidental, for example, where the wrong version or an earlier draft of an article, which included offending material, was published in error or uploaded by mistake, the court would need to determine whether the mental element was satisfied and the offence committed. There should, however, be defences available to cover situations where there is an absence of fault. For example, where a person has taken reasonable care before publishing, but was genuinely unaware of the existence of a trial, the person should have a defence.
- 2.94 As we have already noted, the common law test for when the protected pre-trial period begins is uncertain.<sup>228</sup> The courts have said it begins once the laying of charges is highly likely or imminent.<sup>229</sup> This test evolved to cover situations where an alleged offender was known, but had evaded arrest by the Police. For reasons of certainty, however, we recommend that the new offence provision should expressly define the point in time from which the publication of information that could pose a real risk of prejudice to a fair trial will apply. We consider that it

226 ATH Smith *Reforming the New Zealand Law of Contempt: An Issues/Discussion Paper* (Crown Law Office, April 2011) at [2.69].

227 *Police v Slater* [2011] DCR 6 at [72]–[74]; *Solicitor-General of New Zealand v Krieger* [2014] NZHC 172 at [49]. Mr Krieger provided hyperlinks to overseas websites. The Court considered that disclosure of the information occurred in New Zealand when people downloaded the information.

228 See above at [2.76].

229 *Television New Zealand Ltd v Solicitor-General*, above n 120, at 3.



should be the earliest clearly identifiable date so recommend that the prohibition on publication should apply from the time a person is arrested.

- 2.95 We consider that the new offence provision should replicate the current broad approach in terms of who can potentially be charged in respect of a publication. Currently, at common law, all persons who contribute to the publication can potentially be prosecuted for contempt.<sup>230</sup> In the case of the news media, this includes the media company, the editor and the reporter involved.<sup>231</sup> In practice, however, it is rare for contempt proceedings to be brought against them all, and in some the media company has accepted responsibility for the reporter's actions.<sup>232</sup> The new offence in clause 14 of the draft Bill is intended to continue to cover everyone who contributes to the offending publication. We consider that whether or not any person involved in the publication should be charged with the offence should be a matter for prosecutorial discretion exercised in accordance with the Solicitor-General's Prosecution Guidelines.
- 2.96 Digital media and online publication on websites have, however, raised questions around whether distributors such as online hosts should be liable for content whether they had knowledge or not. We consider that distributors (including online hosts) should have available a defence if they had no knowledge that the publication contained the offending material and they had taken reasonable care. Clause 14(4)(b) of the Bill reflects this.
- 2.97 For reasons we explore later in chapter 7,<sup>233</sup> we have reached the view that Parliament should not completely abolish the common law. Rather, the common law should have a residual role in respect of areas not covered by the recommended new offence. This addresses any concern that abolishing the common law entirely could leave a gap in respect of publications that affect civil proceedings. As we discuss later, the High Court should retain its inherent jurisdiction to consider publications that may constitute contempt of civil proceedings and interfere with access to the courts or undermine public confidence in the courts.

## RECOMMENDATIONS

- R1 For the purpose of preserving the right to a fair trial, a new statutory provision should be enacted prohibiting publication or reporting of an arrested person's previous convictions and any concurrent charges. The provision should require the pre-trial or trial court to keep the prohibition under review and authorise the court to lift, extend or vary the prohibition as necessary in any particular case. The prohibition should apply from the time a person is arrested and only where the person is arrested for an offence for which he or she is liable to be tried by a jury (a category 3 or 4 offence).
- R2 A new statutory provision should authorise a court to make an order postponing publication of other information if the court is satisfied that this appears to be necessary to avoid a real risk of prejudice to a fair trial. The court might make such an order at any time after a person is arrested and before the trial has been completed and must make it for a limited period, not extending beyond the completion of the proceedings.

230 Cheer, above n 133, at 553.

231 Cheer, above n 133, at 553. There have been a few cases in which editors and reporters were personally proceeded against for contempt; see for example *Solicitor-General v Fairfax New Zealand Ltd*, above n 130, where the editor of the *Dominion Post*, Timothy Pankhurst, was charged as well as the publisher.

232 See for example, *Solicitor-General v Smith*, above n 141, at [119] where Radio New Zealand accepted responsibility for the statements of its presenter Ms Linda Clarke.

233 Chapter 7 at [7.18]–[7.21].

- R3 A new statutory provision should authorise a court to make an order that an online content host take down or disable public access to any specific information covered by the statutory prohibition in R1, or any suppression order made under R2.
- R4 A provision modelled on section 210 of the Criminal Procedure Act 2011 should give members of accredited media, and any other person reporting on the proceedings with the permission of the court, standing to initiate or be heard on any application for an order in respect of R1 to R3 or any application to renew, vary or revoke any order.
- R5 Subpart 7 of Part 6 of the Criminal Procedure Act 2011 should be amended to give a right of appeal against any decision to make or refuse to make a suppression order under R2 or R3 or to renew, vary, or revoke a suppression order under R2 or R3 or lift, extend or vary the prohibition in R1.
- R6 A new statutory offence provision modelled on section 211 of the Criminal Procedure Act 2011 should provide:
- (a) It is an offence for any person, knowingly or recklessly, to publish material in breach of the statutory prohibition in R1 or any suppression order under R2 or take down order under R3.
  - (b) The offence in (a) should be punishable:
    - (i) in the case of an individual, by a term of imprisonment not exceeding 6 months or a fine not exceeding \$25,000; or
    - (ii) in the case of a body corporate, by a fine not exceeding \$100,000.
  - (c) It is a strict liability offence for any person to publish material in breach of the statutory prohibition in R1 or any suppression order under R2 or take down order under R3.
  - (d) The offence in (c) should be punishable:
    - (i) in the case of an individual, by a fine not exceeding \$10,000; or
    - (ii) in the case of a body corporate, by a fine not exceeding \$40,000.
- R7 There should be a new offence to replace the common law contempt of publishing information that interferes with a fair trial, which should be abolished: see R61 below. The new offence should apply from the time a person (the arrested person) is arrested for an offence for which he or she is liable to be tried by a jury (a category 3 or 4 offence). Under the new offence provision, a person would commit an offence if:
- (a) he or she intentionally publishes information that is relevant to an arrested person's trial; and
  - (b) there is a real risk that the publication prejudices the arrested person's right to a fair trial.
- R8 The maximum penalty for the offence in R7 should be a term of imprisonment for up to 6 months or a fine not exceeding \$25,000, or in the case of a body corporate a fine not exceeding \$100,000.



- R9 It should be a defence for a person prosecuted for the offence in R7 to prove on the balance of probabilities that:
- (a) after taking all reasonable care the person was unaware and had no reason to be aware of the possibility or existence of the trial; or
  - (b) the person was the online host or distributor of the publication and after taking all reasonable care he or she was unaware and had no reason to be aware that it contained the information that created a real risk of prejudicing the arrested person's right to a fair trial; or
  - (c) the publication was a good faith contribution to a discussion of public affairs; or
  - (d) the publication was a fair and accurate report of court proceedings held in public and published at the time and in good faith.
- R10 Appeals in respect of the offences in R6 and R7 should be under subpart 3 (Appeals against conviction) and subpart 4 (Appeals against sentence) and not under subpart 5 (Appeals against finding of or sentence for contempt of court) of Part 6 of the Criminal Procedure Act 2011 because the offences in R6 and R7 are ordinary offences and not contempt of court.

# Chapter 3

## Disruptive behaviour in the courtroom

### INTRODUCTION

- 3.1 Disruptive behaviour in the courtroom can “pose an immediate and direct threat to the due administration of justice”.<sup>234</sup> When the behaviour of a person, who may be interrupting proceedings or refusing to comply with judicial directions in court, threatens the orderly and due disposition of court business, the presiding judge may have that person removed from the courtroom, held in contempt of court and punished by imprisonment or fine. Historically we know this as contempt in the face of the court.<sup>235</sup> As Lord Denning MR put it in *Morris v Crown Office*:<sup>236</sup>

The phrase “contempt in the face of the court” has a quaint old fashioned ring about it; but the importance of it is this: of all the places where law and order must be maintained, it is here in the courts. The course of justice must not be deflected or interfered with.

- 3.2 People do not expect judges to hold someone in contempt of court for low level interruptions.<sup>237</sup> Most everyday low-level interruptions are and should be able to be managed by other means. In some situations, the judge may be able to deal with the disruptive behaviour with a warning or by taking a short adjournment.<sup>238</sup> Indeed, sometimes the threat of contempt is enough to allow the judge to retain or regain authority over his or her court. People also do not expect judges to use contempt of court to regulate criminal conduct, for example, assaulting or threatening a judge or damaging court property. Assaults, threats and damage to property are offences that should be prosecuted and punished under the criminal law.<sup>239</sup>
- 3.3 People also do not expect judges to use contempt of court to regulate tikanga Māori and the use of te reo Māori in the courtroom. In the Issues Paper the Commission identified that tikanga and the use of te reo Māori in the courts has not always been welcomed. We noted that in *Mair v District Court at Wanganui* the undertaking of a karakia (prayer), despite the District Court Judge’s directions not to, resulted in a finding of contempt by the Judge and the imposition of a prison sentence.<sup>240</sup> We also mentioned *Kohu v Police* in which a District Court Judge found Māori defendants who wished to include tikanga in the courtroom to be in contempt and fined them heavily.<sup>241</sup>

<sup>234</sup> *Siemer v Solicitor-General* [2010] NZSC 54, [2010] 3 NZLR 767 at [34].

<sup>235</sup> *McAllister v Solicitor-General* [2013] NZHC 2217 at [24].

<sup>236</sup> *Morris v Crown Office* [1970] 2 QB 114 at 122B–C.

<sup>237</sup> *Re Swaptronics* [1998] All ER (D) 407 (Ch) at [20] per Laddie J – “it is all too easy for a court to be impressed by its own status”; SP Charles QC “Discipline within the Legal Profession” (paper presented to a meeting of the Medico-Legal Society, Melbourne, March 1977) at 82.

<sup>238</sup> Guidance for judges in the High Court also advises that it may be useful to turn a deaf ear and/or make an appeal to protesters to observe the dignity of the Court.

<sup>239</sup> See Law Commission *Suppressing Names and Evidence* (NZLC R109, 2009) at [8.15] where the Commission concluded it would be preferable for assaults and threats to be dealt with by the ordinary criminal process rather than by way of contempt. The ordinary criminal process has the benefit of a trial and other protections that apply when someone is charged under the general criminal law. The Commission confirmed this position in 2015: Law Commission *Review of the Judicature Act 1908: Towards a New Courts Act* (NZLC IP29, 2012) at [5.15]–[5.18].

<sup>240</sup> *Mair v District Court at Wanganui* [1996] 1 NZLR 556 (HC).

<sup>241</sup> *Kohu v Police* (1989) 5 CRNZ 194 (HC).

- 3.4 While the contempt authority or power was sometimes used in this way in the past, tikanga and te reo are recognised positively in courts today.<sup>242</sup> Furthermore, the use of Māori is authorised by section 7 of the Te Ture mō Te Reo Māori 2016 Māori Language Act 2016.
- 3.5 The comments on the Commission's Issues Paper provided by the Judges of the District Courts set out some of the more prominent initiatives that are underway in this area, which include: opening and closing of the courts in te reo, a revised tikanga education programme, use of pōwhiri at the swearing-in ceremonies of all new judges, and the establishment of the Kaupapa Māori Advisory Group, a judicial committee whose functions include promoting judicial understanding and application of tikanga Māori and ensuring judges are equipped to engage Māori court users with confidence. Similar developments are occurring in the Senior Courts too.
- 3.6 We have deliberately moved away from using the historical term “contempt in the face of the court” and use instead “disruptive behaviour in the courtroom” because we think the latter better captures the concept.

## CURRENT LAW

- 3.7 The power to punish disruptive behaviour in the courtroom takes both common law and statutory forms. As already noted,<sup>243</sup> all courts have authority or power enabling them to do what is necessary to exercise their functions, powers and duties and to control their own processes.
- 3.8 Before 1 March 2017, a variety of empowering statutory provisions covered this area.<sup>244</sup> Problematically, these statutory provisions overlapped and differed slightly in scope. To address this, the Law Commission in its 2012 report *Review of the Judicature Act 1908: Towards a New Courts Act* recommended Parliament should rationalise the various provisions into a standardised provision.<sup>245</sup> That recommendation was accepted and relevant provisions were included in legislation modernising the courts. The Judicature Modernisation Bill 2013 was divided at the final stages into a range of Bills, which respectively became the District Court Act 2016 and the Senior Courts Act 2016. The new Acts came into force on 1 March 2017.
- 3.9 Section 165 of the Senior Courts Act 2016 (set out below at [3.14]) covers contempt in the Supreme Court, the Court of Appeal and the High Court, and an identical section, section 212 of the District Court Act 2016, applies to the District Court (including the Family Court and the Youth Court). These provisions replicate the former statutory contempt of court provision in section 365 of the Criminal Procedure Act 2011. Parliament also made amendments to the Employment Relations Act 2000, Resource Management Act 1991, and Te Ture Whenua Māori Act 1993, to ensure one standardised provision for contempt of court applies across the Employment Court, Environment Court, Māori Land Court and the Māori Appellate Court.<sup>246</sup>
- 3.10 The 2012 Commission report *Review of the Judicature Act 1908: Towards a New Courts Act* dealt only with Courts and not tribunals. The standardisation exercise undertaken in the Judicature

242 Also note *McGuire v Hastings District Council* [2002] 2 NZLR 577 (PC) in which a Māori waiata was performed in the Privy Council at the end of the hearing to mark the occasion of The Right Honourable Lord Cooke of Thorndon's last sitting at the Judicial Committee of the Privy Council.

243 See chapter 1 at [1.14]–[1.16]; *McMenamin v Attorney-General* [1985] 2 NZLR 274 (CA) at 276; *Siemer v Solicitor-General* [2013] NZSC 68, [2013] 3 NZLR 441 at [114].

244 These provisions were the Supreme Court Act 2003, s 35; Criminal Procedure Act 2011, s 365; Judicature Act 1908, s 56C; District Courts Act 1947, s 112. Note all of these provisions were repealed on 1 March 2017 and have been replaced by the District Court Act 2016, s 212 and the Senior Courts Act 2016, s 165.

245 Law Commission *Review of the Judicature Act 1908: Towards a New Courts Act*, above n 239, at [9.6].

246 Employment Relations Act 2000, s 196; Resource Management Act 1991, s 282; Te Ture Whenua Māori Act 1993, s 90.

Modernisation Bill did not attempt to rationalise the various tribunal contempt provisions that remain scattered across the statute book.

### The issue

- 3.11 While the contempt of court provisions set out the conduct that can cause a person to be taken into custody and held in contempt, and the penalty that can be imposed for this conduct, the provisions provide no substantive guidance on procedure. In its report on the *Review of the Judicature Act 1908: Towards a New Courts Act* the Commission noted it would consider procedure in its contempt reference.<sup>247</sup> In the Issues Paper, *Contempt in Modern New Zealand*, the Commission raised the question whether a statute should prescribe a procedure for the courts and consulted widely on what such a procedure should be. We set out our findings and recommendations in this chapter. We also make recommendations on amending the existing wording of the provisions and penalty levels in the Senior Courts Act 2016 and the District Court Act 2016.
- 3.12 We briefly cover at [3.52]–[3.55] below the position of tribunals and explain how our recommendations should be applied to tribunals. Some tribunals, for example, the Human Rights Tribunal,<sup>248</sup> are essentially courts and therefore have the same or very similar powers as courts to punish for disruptive behaviour. We consider our recommendations on procedure, standardised wording and penalty levels should also apply to these tribunals.

### PROCEDURE

- 3.13 Contempt of court involving disruptive behaviour in the courtroom is subject to a summary procedure that is different from the process when a person is charged with a criminal offence.<sup>249</sup> There is no formal charge and no formal plea. There is no independent prosecutorial scrutiny as there is when a criminal charge is laid. This reflects the fact that contempt allegations of this nature are generally dealt with quickly and with a minimum of formality.
- 3.14 The contempt of court provision in the Senior Courts Act is section 165, which provides:

#### 165 Contempt of court

- (1) This section applies if any person—
- (a) wilfully insults a judicial officer, Registrar, officer of the court, or any juror, or any witness during his or her sitting or attendance in court, or in going to or returning from the court; or
  - (b) wilfully interrupts the proceedings of a court or otherwise misbehaves in court; or
  - (c) wilfully and without lawful excuse disobeys any order or direction of the court in the course of the hearing of any proceedings.
- (2) If this section applies,—
- (a) any constable or officer of the court, with or without the assistance of any other person, may, by order of a Judge or an Associate Judge, take the person into custody and detain him or her until the rising of the court; and
  - (b) the Judge or an Associate Judge may, if he or she thinks fit, sentence the person to—

<sup>247</sup> Law Commission *Review of the Judicature Act 1908: Towards a New Courts Act*, above n 239, at [9.9].

<sup>248</sup> Human Rights Act 1993, s 114.

<sup>249</sup> *McAllister v Solicitor-General*, above n 235, at [44].

(i) imprisonment for a period not exceeding 3 months; or

(ii) a fine not exceeding \$1,000 for each offence.

(3) Nothing in this section limits or affects any power or authority of a court to punish any person for contempt of court in any case to which this section does not apply.

3.15 As noted, this provision replaced the former contempt of court provisions, such as section 365 of the Criminal Procedure Act, and sits alongside a near-identical provision in section 212 of the District Court Act 2016.<sup>250</sup> The provision provides that if a person's actions are considered contempt of court, a Judge or Associate Judge may direct that he or she be held in custody until the rising of the court. In addition, the Judge or Associate Judge may impose a fine or period of imprisonment.

### Issues Paper and consultation

3.16 In the Issues Paper the Commission identified the procedure that the courts often, but not always, utilise whereby the judge deals with the disruption immediately by holding the disruptive person in contempt and imposing the punishment on the spot. The Commission expressed considerable unease with this situation because the judge imposes the punishment when there is likely to be high emotion in the courtroom. The judge "is required to simultaneously assume the role of complainant, witness, prosecutor and judge".<sup>251</sup>

3.17 The Commission also noted there has not always been consistency in imposing punishment. Some District Court judges have imposed relatively high sentences for contempt of court, which on appeal, have been reduced. For example:

- 28 days' imprisonment imposed on a 17-year-old defendant who failed to pay attention to the proceedings, put his finger in the air to his friends sitting in court and used the "f" word was reduced to seven days.<sup>252</sup>
- Two months' imprisonment imposed on a witness who refused to take the oath or give evidence in court proceedings was reduced to six weeks.<sup>253</sup>
- Six weeks' imprisonment imposed on a defendant for his angry outburst and use of the "f" word in court was reduced to seven days.<sup>254</sup>
- Six weeks' imprisonment imposed on a witness who refused to answer questions was quashed on appeal. After the original sentence was imposed the witness gave evidence. At the time the appeal was heard the witness had served three days of the sentence and had given her evidence.<sup>255</sup>

3.18 Since the publication of the Issues Paper, there has been a further example. In *Forest v R* the High Court on appeal reduced a six week sentence of imprisonment for contempt of court imposed on the brother of a defendant, following his outburst while the jury was delivering its verdict in his brother's trial, to four weeks.<sup>256</sup> The High Court characterised the offending as "more serious than that which is simply rude or disruptive in nature", but reduced the sentence to better reflect the defendant's attempts to make a genuine apology.

250 These new contempt of court provisions have been modelled on, and closely follow the wording of s 365 of the Criminal Procedure Act 2011.

251 *McAllister v Solicitor-General*, above n 235, at [44].

252 *Wanahi v R* HC Hamilton CRI-2007-419-061, 3 May 2007.

253 *Pandey v Police* HC New Plymouth CRI-2010-433-26, 15 December 2010.

254 *Kahu v New Zealand Police* [2015] NZHC 1925.

255 *Matika v Police* [2014] NZHC 1127. At the time the complainant was imprisoned for six weeks, she had a six week old baby who was being breastfed.

256 *Forest v R* [2016] NZHC 3198.

- 3.19 These factors led the Commission to ask whether the proposed statute should provide for a procedure by which the judge has a cooling off period before punishing a person for contempt. We also invited submissions as to what the procedure should be.
- 3.20 Among those consulted and those who made submissions on our Issues Paper, there was a consensus there should be a procedure for contempt of court that separated out the citation of the contempt from the process for determining contempt and imposing punishment. Citation is the notification given to the individual by the judge that their conduct is considered contempt, but it is not the final determination the conduct is contempt.

## CURRENT GUIDANCE

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- 3.21 We understand judges already receive guidance suggesting they use a separated procedure for dealing with disruptive behaviour in their courtroom. In *McAllister v Solicitor-General* the High Court confirmed that a separated or staged procedure should be followed.<sup>257</sup> Mr McAllister was selected to serve on a jury in the District Court. He refused to take the required oath or affirmation and was stood down from the jury panel. When it became apparent that it would not be possible to select a juror to replace him, Mr McAllister relented and told the District Court Judge he could serve after all. The Judge declined the offer and abandoned the trial. The following day the Judge held Mr McAllister in contempt and sentenced him to 10 days imprisonment.
- 3.22 Mr McAllister appealed to the High Court where Lang J held the District Court had not followed the correct procedure. Although the judge might use a summary procedure in determining whether the person was in contempt, and the process was distinct from the formal process used when a person is charged with a criminal offence, Lang J held that some minimum standards must still apply:

[45] ... The judge must identify the act or acts giving rise to the alleged contempt with sufficient particularity to ensure that the person understands what is being alleged. The person must also be given the opportunity to take legal advice so that he or she understands, and if appropriate has input into, the process to be followed and the possible range of outcomes. The judge will then need to ensure that counsel appointed or engaged to advise the person is also aware of the nature of the allegations.

[46] It is also essential, particularly where a sentence of imprisonment is a reasonable possibility, for the judge to proceed on the basis of a reliable factual platform. In many cases this will not be an issue. Where a person has abused or insulted the judge in the courtroom, for example, the judge will usually have observed and heard the events giving rise to the alleged contempt. The acts in question are also unlikely to be susceptible to more than one interpretation, and the offender's motivation will usually be obvious. In such cases there is unlikely to be any need for further factual material to be placed before the judge before he or she determines whether an act of contempt has been committed.

[47] In other cases, however, the physical acts giving rise to the alleged contempt may not comprise the whole of the relevant factual matrix. A finding of contempt may depend, for example, upon the judge's conclusion as to why a person has acted in a particular way. In such a case, the judge will need to ensure that the person is given an adequate opportunity to provide an explanation of his or her actions. This may include giving the person an opportunity to provide the judge with further relevant evidence before a final decision regarding the issue of contempt is made.

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<sup>257</sup> *McAllister v Solicitor-General*, above n 235. The Court of Appeal dismissed an application for leave to appeal: *McAllister v R* [2014] NZCA 175.



- 3.23 To meet these minimum standards, it would not be possible for a judge to impose a punishment of imprisonment or a fine at the same time as citing the person for contempt and having them removed from the courtroom. The minimum standards therefore required a separated summary procedure.
- 3.24 In *McAllister* the District Court Judge had provided Mr McAllister with adequate information about the acts in respect of which he was liable to be held in contempt and advised the duty solicitor of the allegations, but had not adequately considered the new explanations raised by Mr McAllister at the hearing. Further, the Judge was considering the imposition of a custodial sentence and failed to ensure that Mr McAllister was given an opportunity to advance important mitigating factors. Justice Lang held that, because the Judge had not given this opportunity, there was a risk the decision was based on an unreliable factual platform. Justice Lang held that the appropriate step was for the High Court to consider the evidence that had since become available, and found that Mr McAllister had been in contempt, although not to the extent that the District Court Judge had held him to be. Justice Lang considered a sentence of imprisonment was unnecessary and taking into account the day that Mr McAllister had spent in the court cells, the Judge quashed the sentence and substituted a fine of \$750.

## RECOMMENDED REFORMS

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### A separated summary procedure

- 3.25 While there is now High Court authority for a separated process for dealing with contempt for disruptive behaviour in the courtroom, we consider it should be put in statutory form so it is readily accessible and understandable. We see three steps being necessary:

**Step one:** citation and, if necessary, removal from the courtroom;

**Step two:** hearing; and

**Step three:** punishing the disruption.

#### *Step one: citation*

- 3.26 The first step would empower a judge to deal immediately with an in-court interruption by citing the disruptive person and, if necessary, having the person removed from the courtroom. The disruptive person would, if necessary, be held in the court cells until the rising of the court that day, or some earlier point that day if the disruptive behaviour is mitigated by an apology.
- 3.27 The power to remove someone from the courtroom is essential to ensure courts can progress their business efficiently. The citation and any necessary removal may take place any time the judge considers he or she needs to intervene. From this point on, the person is on notice that he or she will have to show why he or she should not be found in contempt and punished accordingly.
- 3.28 This first step would allow a judge to deal with an interruption immediately while also imposing a cooling-off period before making any finding and imposing further punishment. The cooling-off period should assist by allowing opportunities for the person cited to apologise to the court and the opportunity to obtain independent legal representation. The cooling-off period also allows the judge time to reflect on the disruptive behaviour, consider any apology, and decide whether to set the matter down for determination. In many cases steps two and three will not be necessary. For example, if the person cited returns from the cells and makes an apology for his or her behaviour, the judge may decide not to take further action. As the Judges of the District

Court pointed out in their written comments on the Issues Paper, in most cases a disruption is adequately dealt with by a few hours in custody and an apology.

- 3.29 Some judges we discussed this issue with expressed concern some disruptive conduct that may occur during a trial could require an immediate determination of contempt. They suggested to us that during an ongoing trial such action may be required if the disruptive person is the defendant or a witness who is not cooperating, or their disruptive behaviour reoccurs. We consider that where the disruptive behaviour is continuing and cannot be addressed by simply removing the person from the court, the judge may exercise his or her authority or power repeatedly by citing the person and, if necessary, ordering him or her to be placed in the cells until the rising of the court that day. Where the ongoing disruptive behaviour is that of a witness, a judge should use section 165 of the Criminal Procedure Act, which empowers a judge to imprison a witness who refuses to give evidence.<sup>258</sup>

#### *Step two: hearing*

- 3.30 Step two is the hearing to determine whether any further action is required. The case would need to be set down for determination if, after reflection and consideration of any apology, the judge decides the conduct of the person cited for disruption may be sufficiently serious to justify further punishment.
- 3.31 As discussed above, *McAllister v Solicitor-General*<sup>259</sup> outlines the minimum standards that must apply in this step. First, the judge must identify the act or acts with sufficient particularity to ensure that the person, and any counsel appointed or engaged to advise the person, understand the nature of the allegations. The person should receive the opportunity to take independent legal advice. Second, the judge should proceed on the basis of a reliable factual platform. This may require giving the disruptive person an adequate opportunity to explain his or her actions before making a final decision. We recommend statutory provisions clarifying these minimum standards:<sup>260</sup>
- (a) the judge should give written reasons to the person specifying the behaviour he or she believes may constitute disruptive behaviour in the courtroom and makes the person liable for further punishment; and
  - (b) the judge may receive any explanation he or she determines helpful to ensure the case proceeds on a reliable factual platform.
- 3.32 Once the judge has set the matter down for determination, the disruptive person, unless in custody for other reasons, may be released on bail during the period of adjournment. The Bail Act 2000 should apply, with the necessary modifications, as if the person cited were charged with an offence that carries the penalties required by that Act.

#### *Step three: punishing the disruption*

- 3.33 If the judge considers the behaviour constitutes disruptive conduct, the judge may impose a fine or a period of imprisonment. Depending on the circumstances, imposition of the punishment may happen at the hearing or at a later date.
- 3.34 In the past there was uncertainty whether the court could impose a community-based sentence for contempt. This is because the definition of offender in the Sentencing Act 2002 expressly

<sup>258</sup> Criminal Procedure Act 2011, s 165; Senior Courts Act 2016, s 43; District Court Act 2016, s 102.

<sup>259</sup> *McAllister v Solicitor-General*, above n 235, at [45]–[47].

<sup>260</sup> See cl 16(4)(b) and (c) of the draft Bill, Appendix 2.

includes a person dealt with for contempt of court,<sup>261</sup> while the relevant sections in the Act only empower the court to impose a community-based sentence where “the offender is convicted of an offence punishable by imprisonment”.<sup>262</sup> The High Court has, however, held recently in two decisions that a community-based sentence may be imposed under the Sentencing Act for contempt.<sup>263</sup>

- 3.35 We recommend the new statute contain a provision confirming that community-based sentences are available as an alternative to imprisonment and that the sentencing principles in the Sentencing Act apply.<sup>264</sup> We note the important point made in the comments of the District Court Judges that this would require pre-sentence reports and further adjournment and could extend the time. We do not consider this sufficient reason, however, for departing from general sentencing principles.

### A two-judge process is not necessary

- 3.36 In the Issues Paper the Commission raised the possibility that two judges should be involved in the process for contempt for disruptive behaviour in the courtroom so that after the person had been cited for contempt by the first judge determination and punishment of the contempt would be conducted by a second judge.
- 3.37 Most people consulted did not consider a two-judge process necessary. Those consulted considered it fundamental to the administration of justice that a judge is able to maintain order in his or her court. Where a judge cannot deal with the immediate disruption and enforce the standards he or she has set by holding the disruptive person to account, there is a risk that his or her authority is undermined.
- 3.38 There is also practical value in having the first judge, who witnessed the disruption, deal also with the punishment phase. He or she can confirm the sequence of events and form a view about the seriousness of the disruption in the proceeding at the moment it happened. It may be difficult or artificial for the second judge to reach a view on those matters.
- 3.39 A few submitters pointed out that a two-judge process may require the second judge to summon the first judge as a witness. This would be undesirable. Further, depending on the nature of the judge’s evidence, the judge may not be required to give evidence because section 74 of the Evidence Act 2006 provides judges are not compellable witnesses in respect of their conduct as judges.<sup>265</sup>
- 3.40 The comments from the District Court Judges recognised that having another judge impose the sentence could sometimes be beneficial, such as where there are disputed facts or a danger of bias. They also noted, however, that if it was a statutory requirement there would be serious rostering issues. In circuit courts, courts that sit infrequently, and single-judge courts there may be significant delays before a different judge becomes available. This would turn a short, summary procedure into a lengthy ordeal for all concerned.
- 3.41 In our view the issue turns on impartiality. Nobody disputed that a person cited for contempt must appear before an independent and impartial judge to determine the contempt. Impartiality is an essential requirement for a judge and must exist both as a matter of fact and as a matter

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261 Sentencing Act 2002, s 4; *Global Kiwi NZ Ltd v Fannin* [2016] NZHC 1767 at [15].

262 For example: Sentencing Act 2002, ss 45 and 55.

263 *Queen Elizabeth the Second National Trust v Netherland Holdings Ltd* [2014] NZHC 1094, [2015] NZAR 1815 at [47]–[49] and *Global Kiwi NZ Ltd v Fannin*, above n 261, at [28].

264 A Full Court of the High Court has stated that a penalty ought to be assessed applying a methodology akin to that used for sentencing a criminal offender: *Solicitor-General v Miss Alice* [2007] 2 NZLR 783 at [88]. Discussed at [5.68]–[5.69].

265 This issue is discussed in more detail in chapter 6 at [6.77].

of reasonable appearance. The right to an independent and impartial judiciary is protected in the New Zealand Bill of Rights Act 1990 (NZBORA).<sup>266</sup> The Judiciary's *Guidelines for Judicial Conduct* provide that a judge should disqualify him or herself:<sup>267</sup>

...in circumstances where a fair-minded, properly informed lay observer would have a reasonable apprehension that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide. The standard is one of real and not remote possibility, rather than probability. Judges are not disqualified from sitting merely because the issues involved in a case are in some indirect way related to the Judge's personal experience.

- 3.42 Having the judge who witnessed the disruption conduct the hearing appears to be at odds with this requirement of impartiality, given the judge is both witness and judge. A judge should, however, be able to act impartially, and "through training, professional experience and commitment to proper exercise of the judicial function will decide a case, at all stages, impartially according to the merits of what is put to the court as the judge sees it".<sup>268</sup> On taking up appointment, a judge must take an oath to "do right to all manner of people after the laws and usages of New Zealand without fear or favour, affection or ill will".<sup>269</sup> As McGrath J pointed out:<sup>270</sup>

The importance of that solemn commitment to independence and impartiality during judicial service is substantial. Adherence to that responsibility is a fundamental aspect of judicial integrity, commitment to which is the guiding principle in every decision that a judge takes. The oath is accordingly a continuous strong force for judicial neutrality.

- 3.43 The Judiciary's *Guidelines for Judicial Conduct* stipulate that a judge should not accede too readily to an allegation of bias and should be mindful of the burden that passes to other judges if he or she resorts to disqualification without need.<sup>271</sup> There would be a risk to the justice system if judges were always to disqualify themselves from cases in which there was only a remote possibility of bias.<sup>272</sup>
- 3.44 For these reasons, we do not consider the law should routinely require a second judge to conduct the hearing. Subject to the normal rules of recusal, we envisage a second judge would be required only in exceptional circumstances. Where a second judge is to hear and determine the case a transcript of the earlier hearing should, where proceedings were recorded, be available to the court.

### Criminal charge?

- 3.45 As already mentioned, a person is not charged with contempt of court.<sup>273</sup> Since a charge is not laid, the standard trial procedures and protections in the Criminal Procedure Act 2011 do not apply. Additionally, a person found in contempt of court is not convicted of an offence and will not have a criminal conviction entered against their name.<sup>274</sup> As Lord Esher MR explained:<sup>275</sup>

266 New Zealand Bill of Rights Act 1990, ss 25(a) and 27.

267 "Guidelines for Judicial Conduct" (March 2013) Courts of New Zealand < [www.courtsofnz.govt.nz](http://www.courtsofnz.govt.nz) > at [27].

268 *Saxmere Company Ltd v Wool Board Disestablishment Company Limited* [2009] NZSC 72, [2010] 1 NZLR 35 at [104].

269 Oath and Declarations Act 1957, s 18.

270 *Saxmere Company Ltd v Wool Board Disestablishment Company Ltd*, above n 268, at [105].

271 "Guidelines for Judicial Conduct", above n 267, at [29]. For a general discussion on recusal see also Grant Hammond *Judicial Recusal: Principles, Process and Problems* (Hart Publishing, Portland, 2009).

272 If a practice were to emerge in New Zealand of judges disqualifying themselves without having good reason, litigants may be encouraged to raise objections which are based solely on their desire to have their case determined by a different judge they think is more likely to decide in their favour: "Guidelines for Judicial Conduct", above n 267, at [27]–[30].

273 See [3.13] above.

274 *R v Palmer* [1992] 1 WLR 568 (CA) *R v Griffin* (1989) 88 Cr App R 63 (CA) at 67. Simon France (ed) *Adams on Criminal Law* (online looseleaf ed, Thomson Reuters) at [CA9.01].

275 *Osborne v Milman* (1887) 18 QBD 471 at 472.

The plaintiff was not a prisoner convicted of crime. There are none of the elements of a conviction of crime in the case of a proceeding under s. 32. There is nothing in the nature of a trial. There is no verdict of a jury or anything equivalent to it. There is no regular criminal charge formulated as in the case of an indictment found by a jury, or an information before justices. The evidence in such a case is on affidavit. Surely the Court would read an affidavit by the party proceeded against. If so, the proceeding cannot be of a criminal nature. The order is not a conviction, but a mere order made in the exercise of a summary jurisdiction to punish for contempt.

- 3.46 In the Issues Paper the Commission raised the possibility that the process for contempt for disruptive behaviour in the courtroom should commence as an ordinary prosecution with a formal charge.
- 3.47 Most people we consulted on this issue did not favour requiring a criminal charge to be laid and prosecuted under the Criminal Procedure Act 2011 in the usual way for offences.<sup>276</sup> Imposing the ordinary criminal process on this particular category of contempt of court would undermine the ability of judges to manage effectively their courtrooms. Also in order to be effective the prosecution of charges in this area would need to receive greater priority than category 2 offences normally receive. Even if prioritised, the prosecution process would lengthen and delay the process.
- 3.48 For these reasons we conclude that contempt for disruptive behaviour in the courtroom should not commence as an ordinary prosecution with a formal charge, and should not result in a criminal conviction. While the protections attaching to any criminal hearing are important, our proposed statutory procedure ensures a fair hearing.

### **Recommended approach: separate citation for contempt from contempt hearing**

- 3.49 We recommend that a statutory procedure for dealing with disruptive behaviour in the courtroom separate out the citation and removal from the courtroom from the hearing and punishment.<sup>277</sup> To do this, the new statutory provisions should enable the following:
- (a) Authorise the judge to deal with the immediate disruption by citing the person for disrupting the court and, if necessary, ordering the person to be taken into the court cells until the rising of the court that day. At this point the person is on notice he or she will have to show why he or she should not be held for disruption of the court and punished accordingly.
  - (b) Give the person the opportunity to exercise their right to consult and instruct a lawyer under section 24(c) of NZBORA.
  - (c) Allow a reasonable opportunity for the person cited for disruptive behaviour in the courtroom to make an appropriate apology to the court.
  - (d) Require the judge to review the matter before the close of day and consider whether he or she considers that further punishment may be necessary by having the matter set down for determination.
  - (e) If the matter is set down for determination, the Bail Act should apply, with the necessary modifications, as if the person cited for disruptive behaviour in the court were charged with an offence that carries the penalties required by that Act.

<sup>276</sup> The Crown Law Office questioned in its submission whether a standard criminal prosecution process would really be appropriate for contempt. It noted that currently the procedure is characterised by the use of written evidence rather than oral, limited cross-examination and matters being proved to the judge's satisfaction based on their own judicial knowledge and by taking judicial notice in light of their experience. These features do not lend themselves to a standard criminal prosecution.

<sup>277</sup> The appeals process, for appeals against any finding that a person is guilty of criminal contempt and also for an appeal against sentence, is currently provided in Subpart 5 of Part 6 of the Criminal Procedure Act 2011. It is not proposed that this will change.



- (f) If the matter is set down for determination, require the judge to give the person written reasons specifying the behaviour the judge believes constitutes disruptive behaviour in the court and that makes the person liable for further punishment.
- (g) If the matter is set down for determination, direct the judge to decide whether exceptional circumstances warrant a different judge hearing the case.
- (h) Give the judge hearing the case the discretion to receive any explanation offered by the person to ensure the case proceeds on a reliable factual platform.
- (i) Clarify that if a person is found guilty of disruptive behaviour in the court he or she will not be convicted of an offence.

3.50 Clauses 16 to 18 included in the draft Bill in Part 2 of the Report give effect to this recommended approach.

### Costs and unintended consequences

3.51 We are satisfied that overall the benefits of the three-step process should outweigh any additional costs associated with the new procedure and there should be no unintended consequences from our recommended reforms. Minor disruptions, which are resolved at step one, are more effectively filtered out without further punishment. Where offending conduct is more serious, steps two and three, which will be more time consuming, should ensure a more measured approach that better serves the interests of justice and result in fewer appeals.

### Reform should cover some tribunals

- 3.52 There are a few tribunals that have the same or very similar powers as courts to punish for disruptive behaviour. The Human Rights Tribunal is able to order that a person be detained in custody during a hearing where that person is disrupting a hearing.<sup>278</sup> A Commission of Inquiry has the same powers as the District Court in respect of citing parties and maintaining order<sup>279</sup> and, when headed by a present or former High Court Judge, has the same powers to punish for contempt as the High Court and in the same terms.<sup>280</sup> These bodies can also impose a fine or term of imprisonment on a person who disrupts the proceedings, misbehaves in the tribunal hearing or does not comply with the tribunal's orders during the hearing. In respect of both the Ombudsman<sup>281</sup> and the Independent Police Conduct Authority,<sup>282</sup> it is an offence to hinder or obstruct or fail to comply with a lawful requirement. The Customs Appeal Authority has the same powers as the District Court in respect of maintaining order at hearings.<sup>283</sup>
- 3.53 We recommend the new statutory procedure for disruptive behaviour in the court set out above at [3.49] and consistent penalty levels should also apply to those tribunals that can order detention and custody.
- 3.54 The majority of tribunals, however, do not have power to detain a person in custody where the person is disrupting the tribunal proceedings or to impose fines or commit to prison. The Residential Tenancies Tribunal, the Disputes Tribunal, the Copyright Tribunal, the Health Practitioners Disciplinary Tribunal, the Lawyers and Conveyancers Tribunal and the

<sup>278</sup> Human Rights Act 1993, s 114.

<sup>279</sup> Commissions of Inquiry Act 1908, s 4.

<sup>280</sup> Commissions of Inquiry Act 1908, s 13B.

<sup>281</sup> Ombudsmen Act 1975, s 30.

<sup>282</sup> Independent Police Conduct Authority Act 1988, s 37.

<sup>283</sup> Customs and Excise Act 1996, s 259.



Weathertight Homes Tribunal, for example, all fall within this group.<sup>284</sup> These tribunals can exclude people from the hearing where they are disruptive or misbehave, but cannot impose a fine or a term of imprisonment on a person for disrupting proceedings or refusing to comply with the tribunal's orders or directions.

- 3.55 The law does not treat disruptive behaviour, misconduct and non-compliance with an order as contempt where it occurs in one of these tribunals. Instead, it is an ordinary criminal offence. The person faces charges and prosecution in the District Court under the Criminal Procedure Act and if the person is found guilty a conviction is entered. We consider this approach remains appropriate because the tribunals in question, when constituted, were not given this jurisdiction to imprison or punish for contempt. We have therefore not recommended including these tribunals in our reforms.

### Drafting issues, consolidation and penalty levels

- 3.56 During the process of considering a statutory procedure for disruptive behaviour in the courtroom, we have reviewed the wording of the new contempt of court sections in the Senior Courts Act 2016 and the District Court Act 2016. In the Commission's report, *Review of the Judicature Act 1908: Towards a New Courts Act*, the Commission argued for a relatively narrow provision to cover disruptive behaviour in the courtroom. The Commission said it should not include conduct such as assaults or threats because the criminal law deals with that type of behaviour, whether it occurs in a court or elsewhere. The new provisions in the Senior Courts Act and the District Court Act reflect that recommendation. Having reviewed the wording again, however, we think Parliament should further refine it. The sections do not need to refer explicitly to insulting behaviour because that is a subset of misbehaviour which the criminal law already covers.<sup>285</sup>
- 3.57 We have also considered whether the current sections dealing with disruptive behaviour in the courtroom should remain in the Senior Courts Act and District Court Act. We recommend that, together with the new procedural provisions discussed above, they should be in the proposed new Administration of Court (Reform of Contempt of Court) Act. Our preference is for the new Administration of Court (Reform of Contempt of Court) Act to have a single set of provisions applying to all courts and those tribunals that currently have power to impose sanctions for disruptive behaviour. To achieve this, Parliament would need to make consequential amendments to the relevant Acts to apply these provisions to the Employment Court, Māori Land Court, Māori Appellate Court, Environment Court and Human Rights Tribunal. Clauses 16 to 18 of the draft Bill attached to the Report reflect this approach. The Bill also includes consequential amendments to the statutes establishing these courts.
- 3.58 Finally, we recommend that Parliament should update the penalty for disruptive behaviour in the courtroom. The monetary penalty in the Senior Courts Act and the District Court Act does not adequately cover the scope of conduct that may come within the provision. We recommend a maximum penalty of a term of imprisonment not exceeding three months or a fine not exceeding \$10,000. Our discussion around how we have set penalties is in chapter 7.<sup>286</sup>

284 For example see: Residential Tenancies Act 1986, s 112; Disputes Tribunals Act 1988, s 56; Copyright Act 1994, s 221; Health Practitioners Competence Assurance Act 2003, sch 1, cl 13; Lawyers and Conveyancers Act 2006, s 251; Weathertight Homes Resolution Services Act 2006, s 115.

285 Summary Offences Act 1981, s 4.

286 See [7.59]–[7.66].

## RECOMMENDATIONS

- R11 New statutory provisions dealing with disruptive behaviour in the court should:
- (a) Authorise the judge to deal with the immediate disruption by citing the person for disrupting the court and, if necessary, ordering the person to be taken into the court cells until the rising of the court that day.
  - (b) Give the person the opportunity to exercise his or her right to consult and instruct a lawyer under section 24(c) of the New Zealand Bill of Rights Act 1990.
  - (c) Allow the person a reasonable opportunity to apologise to the court.
  - (d) Require the judge to review the matter before the rising of the court that day and decide whether he or she considers further punishment may be necessary by having the matter set down for determination.
  - (e) Apply the Bail Act 2000, with the necessary modifications, as if the person cited for disrupting the court was charged with an offence that carries the penalties required by that Act.
  - (f) If the matter is set down for determination, require the judge to give the person written reasons specifying the behaviour the judge believes constitutes disruptive behaviour in the court and makes the person liable for further punishment.
  - (g) If the matter is set down for determination, direct the judge to consider whether exceptional circumstances warrant a different judge hearing the case.
  - (h) Give the judge hearing the case the discretion to receive any explanation offered by the person to ensure the case proceeds on a reliable factual platform.
  - (i) Clarify that a person found guilty of, and punished for, disruptive behaviour in the court is not convicted of an offence.
- R12 Conduct giving rise to a potential determination of disruptive behaviour in court should be focused on conduct that interrupts proceedings and poses a threat to the due administration of justice.
- R13 On making a finding that a person is guilty of disruptive behaviour in court, the court may sentence the person to a term of imprisonment not exceeding 3 months or a fine not exceeding \$10,000.
- R14 The Sentencing Act 2002 should apply in respect of any sentence imposed by the court under the new provision as if the person had been convicted of an offence.
- R15 Appeals against any finding that a person is guilty of disruptive behaviour under the new provision should be heard under subpart 5 of Part 6 (sections 260 to 269) of the Criminal Procedure Act 2011.
- R16 The new statutory provisions that deal with disruptive behaviour in court should apply to all courts, the Human Rights Tribunal, and any other tribunals that currently have the power to impose sanctions for disruptive behaviour.
- R17 The new statutory provisions dealing with disruptive behaviour in court should be located in a new Administration of Justice (Reform of Contempt of Court) Act.

# Chapter 4

## Juror contempt

### INTRODUCTION

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- 4.1 Trial by jury is a fundamental and important part of the New Zealand criminal justice system.<sup>287</sup> Persons charged with serious criminal offences must be tried by jury.<sup>288</sup> Persons charged with any offence for which, on conviction, they may be sentenced to two years' imprisonment or more are entitled to elect trial by jury.<sup>289</sup>
- 4.2 Trial by jury is now less significant in civil law, but is still used in claims for defamation, malicious prosecution, false imprisonment or other similar claims.<sup>290</sup> In this chapter we address the law of contempt of court as it applies to juries in criminal cases.
- 4.3 The starting point is to recognise the importance of the jury system in the criminal law context. In the judgment of the Full Court of the High Court in *Solicitor-General v Radio New Zealand Ltd* Eichelbaum CJ and Grieg J agreed with the submission of the then Solicitor-General that:<sup>291</sup>
- ... the jury system is fundamental to the administration of the criminal law in New Zealand. It has as its basis the quality of a collective decision made by a group of ordinary New Zealanders in accordance with their unanimous opinion on whether or not a prosecution brought on behalf of the community has been proved beyond reasonable doubt. The concept is vulnerable to attack and if it is to be maintained as the lynchpin of the criminal justice system the Courts must be vigilant to protect it.
- 4.4 As the right to trial by jury is affirmed by the New Zealand Bill of Rights Act 1990 (NZBORA),<sup>292</sup> we proceed on the basis that the concept is to be maintained as the lynchpin of the criminal justice system and that the following features of the jury system are crucial.
- 4.5 First, the jury must be impartial and free from any outside constraint.<sup>293</sup>
- 4.6 Second, jurors are required to comply with their oath or affirmation that they will try the case before them to the best of their ability and give their verdict “according to the evidence”.<sup>294</sup> The requirement to give their verdict “according to the evidence” means that jurors must base their verdict solely on the evidence admitted at the trial. This requirement reflects the elementary proposition that for a trial to be fair both the defence and the prosecution must know all the evidence the jury is going to consider in reaching its verdict and have the opportunity to test it.<sup>295</sup>
- 4.7 Third, in reaching their verdict jurors must not take into account extraneous material that is not in evidence. In particular, they should not carry out their own research or inquiries

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287 *Laws of New Zealand Juries* (online ed) at [1].

288 Criminal Procedure Act 2011, s 74: category 4 offences require trial by jury, subject to limited exceptions under ss 102 and 103.

289 New Zealand Bill of Rights Act 1990, s 24(e); Criminal Procedure Act 2011, ss 50 and 74.

290 *Laws of New Zealand Juries* (online ed) at [1].

291 *Solicitor-General v Radio New Zealand Ltd* [1994] 1 NZLR 48 (HC) at 51. Since 2009, majority verdicts have also been permitted: Juries Act 1981, ss 29C and 29D.

292 Section 24(e).

293 *Solicitor-General v Radio New Zealand*, above n 291, at 60.

294 Jury Rules 1990, r 22 and sch 1, form 2.

295 *R (CA679/2015) v R* [2016] NZCA 444 at [51].

or take into account information from the media, the internet or other sources.<sup>296</sup> Breaches of this requirement may constitute an irregularity sufficient to cause the verdict to be set aside, a conviction quashed and a retrial ordered.<sup>297</sup> Jurors responsible for the breach may also be committed for contempt of court.<sup>298</sup>

- 4.8 Fourth, jurors must reach their verdict following free, frank, private and confidential discussions.<sup>299</sup> As the English Court of Criminal Appeal has put it recently:<sup>300</sup>

Every member of the jury is entitled in the course of jury deliberations to express his or her views with the utmost frankness and clarity ... there are no degrees or limitations of the views which may be expressed ... everything that has been said in the course of these discussions must remain confidential to the members of the jury.

The Court added that confidentiality encouraged the frank exchange of views and meant that no juror was inhibited from expressing an unpopular view.<sup>301</sup>

- 4.9 Fifth, subject to appeals and lawful challenges, jury verdicts must be treated as final.<sup>302</sup>
- 4.10 Finally, the obligation of confidentiality and the need for finality mean that, save in exceptional circumstances, jurors must not discuss or disclose jury deliberations.<sup>303</sup> Indeed, save in cases involving exceptional circumstances, the evidence of jurors about their deliberations is inadmissible in court proceedings.<sup>304</sup> Other parties are also not entitled to seek such discussion or disclosure. Jurors and other parties who do so may be in contempt of court.<sup>305</sup>

## ACCESSING INFORMATION

- 4.11 Jurors do sometimes actively seek out information. Examples from cases illustrate that jurors have sometimes undertaken their own investigations or searched for information about the defendant or others involved in the case. Jurors have in the past visited the scene of the crime<sup>306</sup> and conducted experiments to determine how long a car engine takes to cool down<sup>307</sup> or how much heroin could be secreted in shoes.<sup>308</sup> Jurors have also asked chemists questions about the availability and price of ephedrine.<sup>309</sup> More recently in one reported case, print-outs containing definitions of “burden of proof” and “beyond a reasonable doubt” were found in the jury room. The material was from the United States and so did not accurately reflect New Zealand law.<sup>310</sup> None of these cases, however, involved prosecutions of the jurors for contempt of court.

296 *Mussa v R* [2010] NZCA 123 at [36]; *R v Thompson* [2010] EWCA Crim 1623, [2011] 1 WLR 200 (Crim App) at [5]; and *Attorney-General v Fraill* [2011] EWHC 1629 (Admin), [2011] EWCA Crim 1570 at [27]–[30].

297 *Laws of New Zealand Juries* (online ed) at [54].

298 *Laws of New Zealand Contempt of Court* (online ed) at [47].

299 *Solicitor-General v Radio New Zealand Ltd*, above n 291, at 54 and 60; and *Smith v R* [2017] NZCA 93 at [26].

300 *Attorney-General v Fraill*, above n 296, at [33].

301 At [33].

302 *Solicitor-General v Radio New Zealand Ltd*, above n 291, at 54.

303 *Solicitor-General v Radio New Zealand Ltd*, above n 291, at 53–54.

304 Evidence Act 2006, s 76(1) and (3).

305 *Solicitor-General v Radio New Zealand Ltd*, above n 291, at 53–54; *Attorney-General v Fraill*, above n 296, at [34].

306 *R v Gillespie* CA 227/88, 7 February 1989 (conviction quashed on the basis that inquiries may have influenced the verdict).

307 *R v Taka* [1992] 2 NZLR 129 (CA) (appeal against conviction dismissed, although the Court observed that such experiments were not permitted and could vitiate a verdict if there was reasonably well-grounded suspicion that verdict had been influenced).

308 *R v Sangraks* CA 503/96, 3 July 1997 (appeal dismissed, although the Court reaffirmed the observations made in *R v Taka*, above n 307).

309 *R v Bates* [1985] 1 NZLR 326 (CA) (a new trial was ordered on the basis of juror misconduct giving rise to a miscarriage of justice).

310 *R v Harris* CA 121/06, 27 September 2006 (appeal dismissed, the trial judge having adequately addressed the jury regarding the erroneous material in summing up).

- 4.12 As noted in chapter 1, the internet and developments in technology have dramatically changed the way people obtain, use and share information. One consequence for the justice system is that it has become much more difficult to shield jurors from exposure to extraneous information during a trial. It is also much easier for jurors to undertake their own research or share information about the trial outside of the courtroom.<sup>311</sup> Jurors no longer need to visit a scene. They can do so virtually through Google Earth without leaving their homes or with their phone on the bus. Jurors no longer need to go to chemists to find out the price of drugs, they can google the information. The “modern juror has at his or her fingertips a vast array of updated and archival information available via the Internet”.<sup>312</sup>
- 4.13 As the English Court of Criminal Appeal has pointed out:<sup>313</sup>
- Information provided by the internet (or any other modern method of communication) is not evidence. Even assuming the accuracy and completeness of this information (which, in reality, would be an unwise assumption) its use by a juror exposes him [or her] to the risk of being influenced, even unconsciously, by whatever emerges from the internet. This offends our long held belief that justice requires that both sides in a criminal trial should know and be able to address or answer any material (particularly material which appears adverse to them) which may influence the verdict.
- 4.14 Recent examples in the United Kingdom of the misuse of the internet by jurors include:
- contempt by a juror communicating with a defendant during a trial via Facebook and conducting an online discussion with the defendant (trial already completed when misconduct came to light and outcome not affected; juror sentenced to eight months’ imprisonment);<sup>314</sup>
  - contempt by a juror who did internet searches on legal terms and also on the defendant’s background and disclosed to other jurors during a trial that the defendant had previously been acquitted of rape (jury discharged and a retrial ordered; juror sentenced to six months’ imprisonment);<sup>315</sup>
  - contempt by a juror who posted a message on Facebook displaying pre-existing prejudice towards sex offenders (juror discharged and the trial continued; juror sentenced to two months’ imprisonment);<sup>316</sup> and
  - contempt by a juror who researched a defendant on the internet during a trial, leading the Lord Chief Justice to direct that notices to jurors in court buildings be rewritten in “plain English” so that no one should be in any doubt as to the obligations imposed upon them or as to the penal consequences of breaching them (juror sentenced to nine months’ imprisonment).<sup>317</sup>
- 4.15 In New Zealand the challenges posed for jurors by the internet are already addressed through the information given to them when they are called for jury service, the questions asked when they are empanelled and the directions given to them by the trial judge.

311 Jane Johnston and others *Jurors and Social Media: A report prepared for the Victoria Department of Justice* (2013) at [3.1]. See also *R (CA679/2015) v R*, above n 295, at [13] and [62]–[63].

312 D Harvey, “The Googling Juror: The Fate of the Jury Trial in the Digital Paradigm” (2014) NZ L Rev 203 at 206.

313 *Attorney-General v Fraill*, above n 296, at [30].

314 *Attorney-General v Fraill*, above n 296.

315 *Attorney-General v Dallas* [2012] EWHC 158 (Admin), [2012] 1 WLR 991. The jury had not been told about the allegation of rape, although in relation to the same incident the jury was told that the defendant was convicted of assault.

316 *Attorney-General v Davey* [2013] EWHC 2317 (Admin), [2014] 1 Cr App R 1.

317 *Solicitor-General v Smith* 9 June 2016, Divisional Court Attorney General’s Office (UK) “Two jurors found guilty of contempt of court” (press release, 9 June 2016).



- 4.16 A juror who searches for information or undertakes other investigative work is likely to be in contempt at common law since the juror's actions may compromise the defendant's right to a fair trial and interfere with the due administration of justice. The issue whether a juror would be in contempt for undertaking his or her own investigations has not yet been tested, although there have been cases where jurors have received and considered outside information,<sup>318</sup> and a recent case where a conviction was set aside on appeal because extrinsic material found in the jury room was held to be capable of affecting the jury's verdict.<sup>319</sup>
- 4.17 Where jurors undertake research after the trial judge has directed them not to undertake their own inquiries, the conduct would contravene a judicial direction. It would then be likely to be caught by the statutory contempt of court provision, which applies if any person wilfully and without lawful excuse disobeys any order or direction of the court in the course of the hearing of any proceedings.<sup>320</sup> In these circumstances it is not the research, but the fact the juror wilfully and without lawful excuse disobeyed an order or direction of the judge that gives rise to the contempt.<sup>321</sup>

### Issues Paper proposals

- 4.18 The Commission acknowledged in its Issues Paper that it is unrealistic to assume that jurors, who otherwise use the internet every day, will not be tempted to check for information relating to aspects of the case they are hearing. The Commission recognised that in this day and age, jurors need greater instruction and education. The Commission therefore suggested several proactive measures to minimise the risk that jurors would see or look for external material. The proposals put forward were:
- (a) a new statutory offence covering jurors who undertake their own research to replace the common law;
  - (b) more explicit information in the material given to those called for jury service about the risks and consequences of jurors undertaking their own research;
  - (c) enhanced inquiry when empanelling jurors to clarify whether jurors have been exposed to pre-trial publicity of a kind that might influence them in arriving at a verdict;
  - (d) amendments to the form of the oath/affirmation in the Rules<sup>322</sup> taken by jurors to include undertakings to base their verdict only on the evidence presented in court and not to conduct their own research;
  - (e) more consistent and comprehensive judicial directions that deal with the risks and consequences of jurors undertaking their own research; and
  - (f) giving jurors clearer and more consistent directions about their ability to ask questions of the judge during the trial.
- 4.19 The Commission consulted on these proposals and we set out the feedback we received in the context of our conclusions and recommendations below.

318 For example see *Naiker v R* [2016] NZSC 118.

319 In *R (CA679/2015) v R*, above n 295.

320 Senior Courts Act 2016, s 165; District Court Act 2016, s 212.

321 A recent case in the United Kingdom arguably implies that such conduct is both in breach of a direction, and of itself common law contempt, because it is conduct that specifically interferes with the administration of justice: *Attorney-General v Davey*, above n 316, at [2]–[4]. See also *Attorney-General v Dallas*, above n 315; and *Dallas v United Kingdom* (2016) 63 EHRR 13 (ECHR).

322 Jury Amendment Rules 2000, sch 1, form 2.



## Specific offence for juror research

- 4.20 In the Issues Paper the Commission proposed a new offence to dissuade jurors from undertaking their own research. This offence would replace common law contempt. The Commission proposed the threshold for the offence should be set so only jurors who intentionally searched for information knowing or believing it will relate to the case would be caught. Whether those jurors shared any information they found with other members of the jury could be a relevant factor in sentencing.
- 4.21 Most submitters supported a statutory offence for jurors who deliberately conducted their own research despite clear instruction not to do so. This was primarily because of the consistency and clarity that a statutory offence would provide.
- 4.22 Other common law jurisdictions have already responded to the googling juror problem in this way. In three states in Australia it is an offence for jurors to conduct their own investigations.<sup>323</sup> Likewise it is an offence in the United Kingdom for jurors to undertake research and an offence for jurors to share research with other jurors.<sup>324</sup>
- 4.23 The New Zealand Law Society (NZLS) suggested that we should consider whether it should be a complete defence, or at least recognised in mitigation of sentence, if a juror who has succumbed to the temptation of doing research then seeks discharge from the jury at the first available opportunity.
- 4.24 Having considered these submissions, we recommend creating a statutory offence where a member of a jury intentionally investigates or researches information about the case. This would clarify the current position, sending a clear message to jurors that research is simply not permitted. This new offence is critical to reform in this area because it will serve as a clear deterrent to jurors and thus set a standard to underpin our other proposed reforms. Judges would tell jurors clearly at various points during the trial they should not undertake their own research and would explain to them the reasons for the prohibition and the consequences of breaching it.
- 4.25 The threshold for the offence (which is in clause 19 of the Bill) is that a juror intentionally searches for information and does so when he or she knows or ought reasonably to know that it may be relevant to the case before them. No juror should be able to use the fact that he or she sought a discharge from the jury as a defence. A discharge may still lead to a jury trial being abandoned (with the adverse cost implications that flow from this) because the jury number falls below the minimum threshold.<sup>325</sup> Whether the juror seeks discharge at the first opportunity and also whether the juror shared any information he or she found with other members of the jury should be factors to be taken into account when penalty is being determined.
- 4.26 We recommend a maximum penalty of a term of imprisonment not exceeding three months or a fine not exceeding \$10,000. The discussion around how we have set penalty levels is in chapter 7.<sup>326</sup>

323 Under s 68C of the Juries Act 1977 (NSW) it is an offence for jurors to conduct their own investigations. Section 69A of the Juries Act 1995 (Qld) prohibits jurors from making inquiries and s 78A of the Juries Act 2000 (Vic) prohibits the making of inquiries. All of these provisions are considered broad enough to cover jurors undertaking research. In New South Wales, recent legislation has also prohibited the use of personal digital assistants during and after proceedings in court: see Court Security Act 2005 (NSW) amended by the Courts and Other Legislation Further Amendment Act 2013 (NSW). This new provision would seem to prohibit jurors using social media during trial.

324 In 2015, the United Kingdom enacted a recommendation of the Law Commission for England and Wales that research by jurors be made a statutory criminal offence in the Criminal Justice and Courts Act 2015 (UK). Section 71 amends the Juries Act 1974 (UK) to insert new sections 20A-20B: Law Commission of England and Wales, *Contempt of Court (1): Jurors Misconduct and Internet Publications* (LC340, 2013) at [3.78].

325 Juries Act 1981, s 22(1A). The court may proceed with fewer than 10 jurors only if all parties consent to doing so and the court, having regard to the interests of justice, considers that it should do so.

326 See chapter 7 at [7.59]–[7.66].

### Jury service educational material

- 4.27 Jurors receive written information and other instructions from the Ministry of Justice before they are empanelled. The information potential jurors receive when summoned states that jurors must not make their own inquiries about the case.<sup>327</sup> This is then further explained:
- Don't google the people or places in the case or visit the place the crime happened by yourself, unless the court arranges the visit.
- 4.28 The booklet also advises jurors to avoid news reports and media comments about the trial.<sup>328</sup> The jury panel watches a video presentation prior to empanelling telling them they must not make their own inquiries, such as researching information about the defendant or going to visit the crime scene independently.
- 4.29 In the Issues Paper the Commission proposed providing more explicit information about the risks of juror research in the material given to those called for jury service and to the panel from which the jury is selected.
- 4.30 Submitters agreed that potential jurors should be given information explaining why it is important that jurors not investigate or undertake their own research and the risks if they do. One submitter suggested to us that examples might also assist; for example, research could include asking questions about the trial on social media.
- 4.31 Since completing the Issues Paper and consultation in 2014, the Ministry of Justice has updated the jury service educational material on its website. It has also updated the material sent to jurors with their summonses. The material still does not, however, provide information on the reasons for the instructions or the risks for jurors if they conduct their own research. Jurors should be told about the need to ensure the defendant and the prosecution have a fair trial and the inadmissible nature of the material they discover. If our recommended new offence is enacted, that information should also be included in this material to show the consequences of any breach.
- 4.32 We recommend the Ministry of Justice update the juror service educational information to ensure it provides adequate and clear guidance on the problems and risks if jurors undertake their own research. Jurors should be told the reasons why doing their own research poses a risk to a fair trial. The material they find may be inaccurate or inadmissible. It will not have been put to the defendant or tested in court. Jurors must be told that undertaking their own research:
- will be contrary to their oath or affirmation which will require them to decide the case solely on the evidence at the trial;
  - may mean that the judge may have no option but to discharge the jury and abandon the trial because the defendant would not have a fair trial;
  - may result in significant costs due to an abandoned trial, both a financial cost to the justice system and a cost to complainants and other witnesses who will have to give evidence and endure the stress and inconvenience of a trial all over again; and
  - will create a risk that the juror may be charged with the proposed new offence, which will be punishable by imprisonment or fine.
- 4.33 We have discussed this recommendation with officials at the Ministry of Justice and they support reviewing the guidance the Ministry currently provides to jurors.

<sup>327</sup> Ministry of Justice *Jury Service: Information about jury service and being a juror* (Ministry of Justice, Wellington, 2016) at 6.

<sup>328</sup> At 7.

## More interactive approach to empanelling jurors

4.34 In high-profile cases at least, there is a reasonable likelihood that some jurors will come to their task with some previous knowledge of the case gleaned from exposure to material through the media. The jury selection process addresses pre-trial exposure to external information. This gives jurors an opportunity to disqualify themselves where they have prior knowledge of the case that may influence them. The trial judge will normally invite any person on the jury panel to seek to be excused if the person feels unable to discharge their obligation to try the case only on the evidence presented to them in the trial. Jurors are normally asked to approach the judge if they know anyone connected with the case or feel unable to decide the case impartially.

4.35 In the Issues Paper the Commission proposed an enhanced inquiry when empanelling jurors expressly to address pre-trial exposure. The Commission did not propose the type of process involving cross-examination of jurors used in the United States and Canada, but a more routine shift expressly to address pre-trial exposure.

4.36 The Commission noted this had already begun to occur in high-profile cases. In one of the Urewera raids cases, *Iti v R*, there had been a substantial amount of publicity and public interest because the case might have been New Zealand's first prosecution under the Terrorism Suppression Act 2002. The Court of Appeal described the jury empanelling process that had occurred in that case:<sup>329</sup>

Before the jury was empanelled, we understand they were told of the subject matter of the trial and directed to advise the Judge if as a result of what they had read or heard or opinions they had formed, they doubted their ability to try the case fairly on the evidence. We accept that not all potential jurors may have recognised what may well be unconscious prejudice. However, significant numbers did. We were told that about 60 persons sought to be, and were, excused. Even after the panel was selected and retired, we understand that at least one more came forward and withdrew.

4.37 The Commission suggested it could be standard practice in cases that have attracted public attention for the judge to tell jurors the subject of the trial and direct them to tell the judge whether, because of what they have read or heard about the case, they may not be able to try the case fairly on the evidence presented in court.

4.38 During our consultation, several submitters agreed that in high profile cases where there has been pre-trial publicity potential jurors should answer specific questions about their knowledge of the case. The Auckland District Law Society Incorporated (ADLS) felt that jurors should be separately questioned about:

- whether they have any knowledge of the case;
- if they have knowledge of the case, the extent of that knowledge;
- whether they have researched any matters that may be relevant and/or connected to the case; and
- whether they consider they can fairly try the case in all the circumstances.

4.39 The Wellington Community Justice Project went further, suggesting a mandatory questionnaire asking for specific information to determine a juror's level of exposure to pre-trial media coverage and subjective bias. It was concerned judges might be inconsistent in their approach to questioning jurors because:

... jurors may be genuinely unaware of the level of pre-trial media exposure to which they have been subjected and any prior opinions and/or views that they may hold on the case or defendant.

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329 *Iti v R* [2012] NZCA 492 at [55].

It was suggested that a questionnaire would be a more accurate indicator of a juror's ability to try a case fairly, and would maintain consistency during juror selection.

- 4.40 We recommend it be standard practice in cases that have attracted public attention for the judge to clarify whether potential jurors have already been exposed to information about the case to a degree that means they may not be able to try the case fairly on the evidence presented in court. If it becomes standard practice for judges to question jurors about pre-trial exposure, we do not think a mandatory questionnaire is required. The judiciary should consider developing appropriate questioning practices.

### Juror oath or affirmation

- 4.41 After being empanelled, jurors must take an oath or affirmation. Jurors are asked:<sup>330</sup>

Members of the jury: Do each of you swear by Almighty God (or solemnly, sincerely and truly declare and affirm) that you will try the case before you to the best of your ability and give your verdict according to the evidence?

- 4.42 By swearing to give their verdict “according to the evidence”, jurors are in law accepting that their verdict must be based solely on the evidence admitted at the trial. While this may not always be understood by jurors, it is also implicit in the oath or affirmation that jurors will not obtain or use extraneous material privately at any stage before or during the trial to reach their verdict. Where a juror reaches a verdict not in accordance with his or her conscientious assessment of the evidence called at trial, he or she will breach his or her oath or affirmation.<sup>331</sup>
- 4.43 In the Issues Paper the Commission asked whether the juror oath and affirmation should be amended to include a more explicit agreement to base the verdict only on the evidence presented in court and not to undertake their own research.
- 4.44 We received only a few submissions on this issue, but all supported this amendment. ADLS went further, suggesting that a written undertaking not to undertake their own investigations or research should also be given by each juror. The Law Commission for England and Wales recommended this in 2013.<sup>332</sup>
- 4.45 We recommend amending the wording of the oath and affirmation so jurors explicitly agree to base their verdict solely on the evidence presented in court and not to undertake their own research. This would ensure jurors specifically turn their minds to the fact that they may not undertake their own research. If a juror then undertakes his or her own research, it would be easier to hold him or her in contempt (or establish liability for the statutory offence that we have recommended). We think an express acknowledgement by oath or affirmation sufficiently puts the juror on notice and a further written declaration to this effect is not required.

### More comprehensive and consistent judicial directions

- 4.46 Courts routinely direct juries that they must decide the case on the evidence presented to them in court and not to discuss the case outside the courtroom or seek information on the case. Judges receive good practice examples from which they develop their own approach to instructing jurors. Guidance to judges on such matters refers to advising jurors they are not to:

<sup>330</sup> Jury Rules 1990, sch 1, form 2.

<sup>331</sup> *Attorney-General v Fraill*, above n 296, at [27].

<sup>332</sup> Law Commission of England and Wales, *Contempt of Court (1): Juror Misconduct and Internet Publications* (LC340, 2013) at [5.27]–[5.31]. Specifically the Commission recommended amending the wording of the juror oath to include a promise to base the verdict on the evidence presented in court and not to seek or disclose information on the case. It also recommended that jurors be asked to sign a written declaration on their first day of jury service, acknowledging they have been warned not to research. Note these recommendations have not been implemented.

- make their own inquiries into what happened;
  - make site investigations;
  - engage in internet searches; or
  - refer to the case on social media such as Facebook or Twitter.
- 4.47 The form the instructions may take falls to the discretion of the trial judge. The approach adopted is therefore not necessarily consistent.
- 4.48 Some submitters said that directions given to jurors should convey not just the fact of prohibition, but also explain fully the reasons jurors must not do this. Specifically, the directions should clearly explain the need for a fair trial and that a juror who undertakes his or her own research puts the trial at risk of being abandoned.
- 4.49 Some submitters went further and said the effects of an abandoned trial, namely that it is time consuming and costly, should also be explained. As noted in chapter 2 at [2.7], the average cost of a District Court trial in New Zealand is \$26,144, and the overall cost of a trial in the High Court is likely to be higher.<sup>333</sup> An abandoned trial also affects complainants and other witnesses who will have to give evidence and endure the stress and inconvenience of a trial all over again.
- 4.50 Submitters agreed that courts should reinforce these messages throughout the trial because a juror has a lot of new information to assimilate at the outset. One submitter suggested the temptation to research information may grow as the trial progresses, and jurors may feel more justified in conducting research towards the end of the trial as pressure mounts to reach a verdict.
- 4.51 Jurors will be less likely to engage in undertaking their own research if they understand the implications of such action:<sup>334</sup>
- “Googling” has become one of the simplest and most natural ways of filling any information void. The reasons why such behaviour cannot be permitted might be obvious to lawyers, but unless the potential for damage to the criminal justice process is explained by way of background to jurors, they cannot reasonably be expected to follow a judicial direction whose significance is neither apparent nor, at least in the early days of the internet, explained by the judge at the outset of the trial.
- 4.52 We therefore recommend that jurors should be reminded during the trial that undertaking their own research is contempt (or an offence if our recommended statutory offence is adopted) and punishable by fine or imprisonment. Jurors should receive these directions when they take their oath or affirmation and should be reminded of them throughout the trial. We recommend more comprehensive and consistent directions that provide jurors with a clear explanation of why their decision must be based only on the evidence presented in court and the risks if they undertake their own research. This recommendation, together with our other recommendations, if implemented, should reduce the prospect of jurors being discharged, trials abandoned and prosecutions for the new offence. These outcomes would also avoid significant costs for the state and the parties involved, including the jurors.

<sup>333</sup> See chapter 2 at [2.7]. Also recently in the United Kingdom a trial had to be abandoned after a juror deliberately researched information about a defendant on his mobile phone and then disclosed the results to other members of the jury. The abandoned trial resulted in the waste of approximately £80,000 of costs to the Court Service and Court Prosecution Service: Attorney General’s Office (UK) “Two jurors found guilty of contempt of court” (press release, 9 June 2016).

<sup>334</sup> ATH Smith “Repositioning the law of contempt: the Criminal Justice and Courts Act 2015” (2015) 11 Crim LR 845 at 846.



### More consistency of approach when informing jurors about their ability to ask questions

- 4.53 Although it is relatively uncommon for jurors to do so, they may ask questions during the trial.<sup>335</sup> The current process is formal: jurors must write questions down and pass them to the court attendant who will then pass them on to the trial judge.
- 4.54 We understand the guidance that judges conducting jury trials use covers how judges should inform and direct juries around how they may ask questions. The form of any direction given, however, falls to the discretion of the trial judge so the approach adopted is not necessarily consistent. In the Issues Paper the Commission proposed providing jurors with more consistent and clearer instructions about their ability to ask questions. This was because if jurors are more actively engaged in the court they may be less susceptible to conducting their own inquiries.
- 4.55 Very few submitters commented on this proposal, but our discussions with judges have been informative. Some judges are understandably reluctant to encourage questions because of the potential for jurors to disrupt proceedings with irrelevant or inadmissible questions thereby lengthening trials. Jurors asking questions can also be seen as contrary to the adversarial process. A defendant is entitled to the presumption of innocence until proven guilty and it is for the prosecution to make its case. It is not for the jury to fill in any gaps that the prosecution may have failed to address.
- 4.56 On the other hand, if jurors are not able to have their questions answered in court they may take matters into their own hands. We were told, for example, of one case where jurors wanted to ask a question, but the judge refused permission so one of the jury then went online looking for an answer.
- 4.57 We accept that the use of questions by jurors must be controlled and only used where necessary and appropriate. We are satisfied the current practice for trial judges advising jurors on their ability to ask questions is appropriate. We would, however, encourage trial judges to consider whether it might be desirable to give juries comprehensive directions regarding asking questions in order to dissuade jurors from conducting their own inquiries. Raising questions with the judge is preferable.

### DISCLOSING INFORMATION

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- 4.58 As already explained in the introduction to this chapter, jury deliberations should be confidential. Jurors should not answer questions or give out information about their deliberations to anyone during or after a trial. The Full Court of the High Court in *Solicitor-General v Radio New Zealand Ltd* identified three reasons for the confidentiality of jury deliberations.<sup>336</sup>
- 4.59 First, confidentiality promotes free and frank discussion between jurors, who may otherwise feel inhibited if their views could later be aired publicly and subjected to public scrutiny and attack. The very nature of a jury trial requires juries, who represent a snapshot of society, to express their views confidently to each other during deliberations. Jurors should not be afraid their views will subsequently be exposed in public, or the jury system would not work.
- 4.60 Second, confidentiality protects the finality of verdicts. Exposing jury deliberations may wrongly open verdicts up to public challenge. A verdict does not get its legitimacy from the reasoning or deliberation process taken by individual jurors, but because it is supported by a

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335 Evidence Act 2006, s 101.

336 *Solicitor-General v Radio New Zealand Ltd*, above n 291, at 53; see also *Smith v R*, above n 299, at [25]–[28].



substantial majority of the jurors, irrespective of the different routes by which individual jurors came to agree on that verdict. The Court of Appeal has commented that:<sup>337</sup>

The prospect of one or more jurors being cross-examined on their affidavits and possibly being the subject of evidence in rebuttal is extremely unattractive [and] would, potentially at least, have a very detrimental effect on the jury system.

- 4.61 Third, confidentiality of deliberations protects the privacy of jurors. Jurors should be able to serve knowing their privacy will be respected and their identity will not be disclosed. They will not be interviewed about their deliberations or called upon to explain or justify their verdict.
- 4.62 Where a juror discusses any aspects of the trial, including juror deliberations, outside the jury room, he or she may be in contempt. Since the courts in New Zealand have not addressed this issue, the scope of juror contempt in this context is not clear. During the trial, where a juror discusses the case in breach of a direction given by the judge, the juror may be in contempt of court under section 165 of the Senior Courts Act 2016 or section 212 of the District Court Act 2016.<sup>338</sup> It seems unlikely that these sections continue to apply after the trial is completed and the jury released.
- 4.63 The position at common law is unclear, but applying the general principles of contempt it is likely that a juror will be in contempt if he or she discloses information or communicates with external parties after being directed not to do so.<sup>339</sup>
- 4.64 It also seems that both a journalist who approaches a juror to elicit comment about a decision and a person who publishes information about a jury's deliberations elicited from an interview with a juror are likely to be in contempt.<sup>340</sup> In *Solicitor-General v Radio New Zealand Ltd*,<sup>341</sup> a journalist approached some people who had been jurors in the trial of David Tamihere for the murder of two Swedish tourists when new evidence was discovered years later. Radio New Zealand broadcast the comments of one juror who spoke at length to the reporter. Radio New Zealand was found to be in contempt and fined \$30,000. Interestingly, the juror was not charged.
- 4.65 Section 76 of the Evidence Act 2006 provides that a person must not give evidence about the deliberations of a jury. This rule does not prevent a person from giving evidence relating to the competency or capacity of a juror, or matters that are believed to disqualify that juror.<sup>342</sup> A judge may allow evidence relating to jury deliberations to be given in exceptional circumstances, after weighing the public interest in protecting the confidentiality of jury deliberations generally against the public interest in ensuring that justice is done in those proceedings.<sup>343</sup>
- 4.66 This issue was considered by the High Court of Australia in *Smith v Western Australia*.<sup>344</sup> Mr Smith was found guilty after a jury trial. The trial judge noted that one of the jurors was visibly upset and that the foreman was slow to confirm that the verdict was that of all jurors. After

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337 *Tuia v R* [1994] 3 NZLR 553 (CA) at 557.

338 As discussed earlier in this chapter, these sections come into play whenever a juror deliberately disobeys without lawful excuse an order or direction of the court. The contempt arises from the deliberate disobeying of a judicial direction, not from the action of disclosing the jury deliberations.

339 *Laws of New Zealand Contempt of Court* (online ed) at [47].

340 Ursula Cheer *Burrows and Cheer: Media Law in New Zealand* (7th ed, LexisNexis, Wellington, 2015) at 617. In an earlier edition, the authors also suggested that it would still be contempt to publish the results of an interview even if the juror had approached the media voluntarily instead of the other way round.

341 *Solicitor-General v Radio New Zealand Ltd*, above n 291.

342 Evidence Act 2006, s 76(2).

343 Evidence Act 2006, s 76(3) and (4). See also: *R v Tainui* [2008] NZCA 119; *Neale v R* [2010] NZCA 167; *Worrell v R* [2011] NZCA 63; and *Smith v R*, above n 299, at [25]–[28].

344 *Smith v Western Australia* [2014] HCA 3, (2014) 250 CLR 473.

the jury was discharged, an envelope was found addressed to the judge, with the following anonymous message:<sup>345</sup>

I have been physically coerced by a fellow juror to change my plea to be aligned with the majority vote. This has made my ability to perform my duty as a juror on this panel [sic].

- 4.67 As the verdict had already been entered, Mr Smith was convicted and sentenced to imprisonment. In Mr Smith's appeal against conviction, the Court of Appeal of Western Australia held that the exclusionary rule prevented evidence concerning the jury deliberations from being considered.<sup>346</sup> The High Court of Australia, however, allowed Mr Smith's appeal against that decision, holding:<sup>347</sup>

... free and frank deliberation by jurors would not be encouraged or protected by applying the exclusionary rule to a case where the very conduct which a juror seeks to bring to the attention of the court is unlawful harassment by a fellow juror calculated to prevent the conscientious discharge of the juror's duty... Indeed, to insist on the application of the exclusionary rule in such a case would tend to defeat, rather than to advance, the purpose of the rule.

- 4.68 In the Issues Paper the Commission highlighted cases in the United Kingdom and United States where jurors used social media inappropriately. In one case, a juror was dismissed from the jury after she asked her Facebook friends to help her decide, with the following post: "I don't know which way to go, so I'm holding a poll".<sup>348</sup>
- 4.69 In New Zealand there have only been a few cases where mainstream media have published or broadcast interviews with jurors, the most significant being *Solicitor-General v Radio New Zealand Ltd.*<sup>349</sup> There have also been a few instances where jurors voluntarily approached the media; for example, following the retrial of David Bain, there were several interviews with jurors.<sup>350</sup> To date, however, contempt proceedings have not been taken in New Zealand against jurors for post-verdict disclosures of this nature.
- 4.70 In the United Kingdom, confidentiality of jury deliberations is protected by statute. It is an offence for a person intentionally to disclose information about statements made, opinions expressed, arguments advanced or votes cast by members of a jury in the court of their deliberations in proceedings before a court or to solicit or obtain such information.<sup>351</sup> A number of states in Australia also have statutory offences for the disclosure of deliberations.<sup>352</sup>
- 4.71 Social media platforms such as Facebook and Twitter provide means to effect wide-reaching communications quickly and often with little thought given to the consequences. Given the ease of sharing information, the Commission considered legislation would usefully clarify the law concerning disclosure of jury deliberations in New Zealand. The Commission proposed a statutory offence for anyone, including a person who is, or has served, on a jury, to disclose or publish details of a jury's deliberations, or for anyone to solicit such information.

345 *Smith v Western Australia*, above n 344, at [5].

346 *Smith v The State of Western Australia* [2013] WASCA 7, (2013) 226 A Crim R 541.

347 *Smith v Western Australia*, above n 344, at [34]–[35].

348 Urme Khan "Juror dismissed from trial after using Facebook to help make a decision" *The Telegraph* (online ed, United Kingdom, 24 November 2008).

349 *Solicitor-General v Radio New Zealand Ltd.*, above n 291.

350 In an article in *The New Zealand Herald*, a juror shared her experience of serving on the jury and the trauma she suffered as a result: see David Fisher "Bain juror: we were hounded" *Herald on Sunday* (online ed, Auckland, 7 June 2009). While the article did not touch on the deliberations of the jurors, it probably disclosed more information than has ever been published previously: Cheer, above n 340, at 619.

351 Initially, the protection was in the Contempt of Court Act 1981 (UK), but the section was repealed for England and Wales (but not Scotland) by s 74 of the Criminal Justice and Courts Act 2015 and a strict liability rule imposed in section 20D of the Juries Act 1974.

352 Juries Act 1967 (ACT), s 42C; Jury Act 1977 (NSW), ss 68A–68B; Juries Act 2000 (Vic), s 78; Jury Act 1995 (Qld), s 70; Juries Act (NT), s 49A; Juries Act 2003 (Tas), s 58; Juries Act 1957 (WA), pt IXA.

## Statutory offence?

- 4.72 As with the other proposals relating to jurors, only a few submitters commented on this proposal. Of those who responded, most agreed that a statutory offence should replace the common law in this area, primarily to provide clarity of the current law and ensure free and frank deliberations and the privacy of jurors would not be compromised.
- 4.73 TVNZ, however, questioned whether the current law and the Commission's proposal to clarify it in statute was too protective of jurors. TVNZ felt the restrictions were historical and, in an age where freedom of information and expression is at the fore, the Commission should consider a more open approach. APN News and Media Ltd agreed it should be an offence for anyone, including a person who is serving or who has served on a jury, to disclose or publish details of a jury's deliberation, but did not agree there is any need to render attempts to privately solicit information from jurors an offence.
- 4.74 After considering these views we recommend the enactment of a statutory offence for any person, including a person who is serving or has served on a jury, intentionally to disclose, solicit or publish details of a jury's deliberations. This is consistent with the approach that has been taken in England and Wales.<sup>353</sup> Keeping juror deliberations confidential is paramount to the administration of justice and clarifying this offence in statute would make the importance of this clear. If disclosing juror information is an offence, we also think soliciting that information should be an offence. This sets a clearer line than the common law and provides better guidance to the media and others who are likely to publish material relating to a trial.
- 4.75 We think, however, that there should be some exceptions so that disclosure would be permitted in some circumstances.

### *Exception – disclosure of juror misconduct*

- 4.76 In the Issues Paper the Commission proposed an exception for, or defence enabling, disclosure of jury deliberations where the court was concerned that there had been juror misconduct. The Commission suggested either providing for a specific and relatively narrow avenue of complaint to one or more official persons and bodies, as is the approach in the United Kingdom,<sup>354</sup> or taking a broader approach and providing for a general public interest defence.
- 4.77 Submitters agreed that where a juror believes there has been juror misconduct the juror should be allowed to disclose information. Submitters were split, however, on whether there should be a relatively narrow avenue of complaint or a broad public interest defence. Under a narrow avenue of complaint, the juror would be protected where the information was disclosed during the trial to the trial judge. After the trial was completed and the juror discharged, the narrow avenue approach would allow the juror to disclose the information to specified persons such as the Police or the Solicitor-General. Disclosure to defence counsel or to the Crown prosecutor might also be appropriate. Under the other option of a public interest defence, the juror would have a defence that there had been something in the jury's deliberation that might undermine the administration of justice and the integrity of the jury system, which would clearly make it in the public interest to disclose.
- 4.78 We recommend enacting a narrow exception to the non-disclosure of jury deliberations offence. We recommend this option, rather than the alternative of a public interest defence, because it

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<sup>353</sup> Juries Act 1974 (UK), s 20D. As at publication, this provision is in force but has not been inserted into the publicly available version of the Act on [legislation.gov.uk](http://legislation.gov.uk). The text of the provision can be found in the Criminal Justice and Courts Act 2015 (UK), s 74.

<sup>354</sup> Juries Act 1974 (UK), s 20F.

provides an avenue that continues to protect the information and also provides a safe harbour for jurors or others so they can, where it is necessary, make a disclosure.

- 4.79 During the course of the trial, jurors should only disclose information to, and raise concerns about misconduct with, the trial judge. The exception should allow the trial judge to disclose information as necessary for the purposes of dealing with the case, and for the purposes of an investigation by the Police into whether an offence has been committed.
- 4.80 After the proceedings have been completed or the jury has been discharged, any person should be able to make an excepted disclosure on a confidential basis to one or more specifically listed official persons or bodies where the person has reason to believe that an offence may have been committed or that the conduct of a juror may provide grounds for a mistrial or an appeal. The specific persons or bodies would be restricted to the Police, the Solicitor-General, counsel who acted for the Crown, or defence counsel. The exception would then allow those receiving the information to use it for the purposes of any investigation by the Police into whether an offence has been committed or for the purposes of assessing whether there may have been a mistrial or grounds for an appeal. The exception recognises that those receiving disclosures under the exemption may need to share the information between themselves in order to assess, evaluate and act on it.

#### *Exception – research into juries*

- 4.81 In the Issues Paper the Commission also asked whether there should be an exception to the statutory offence of non-disclosure of juror deliberations for authorised academic research into juries. Submitters supported this exception, but some qualified that support, saying that strict criteria should be prescribed to ensure research is approved by the relevant court and jurors' privacy is protected.
- 4.82 The judiciary is supportive of genuine research relating to the courts. A Judicial Research Committee has been established to consider all research requests for judicial involvement in research involving the Supreme Court, Court of Appeal, High Court and District Court (including the Family Court and Youth Court).<sup>355</sup> The Committee comprises judges from the Court of Appeal, High Court and District Court. Researchers must apply through the Office of the Chief Justice and generally require the following details:<sup>356</sup>
- Copy of the research proposal or an outline of the proposed research. The proposal should have a detailed account of the methodology (including sample sizes) that will be used in conducting the research.
  - Who is undertaking the research and the background and qualifications of those undertaking the research, plus copies of any previous research undertaken by them or if that is not practicable reference to such research.
  - Where applicable, the supervisor of the research.
  - What (if any) ethical approval has been, or will be, obtained for the conduct of the research.
  - How issues of privacy will be dealt with in terms of the publication of the research.
  - The utility of the research.

<sup>355</sup> Courts of New Zealand “Judicial Research Committee Guidelines: Judicial Participation in Research Projects” < [www.courtsofnz.govt.nz](http://www.courtsofnz.govt.nz) > at 1.

<sup>356</sup> At 1–2.

- What involvement is required from the judiciary. If for instance it is requested that judges be interviewed as part of the research, the questions to be asked of the judges should be provided as part of the application. Similarly, if a questionnaire is to be sent to judges as part of the research then a copy of this would also be required.
- Whether any other approach has been made to the Ministry of Justice or any other person or body relating to the research proposal.

4.83 Genuine research is important to assist society in understanding juries and to improve the administration of justice. We therefore recommend an exception to the statutory offence of non-disclosure of jury deliberations for authorised academic research into juries. The existing Judicial Research Committee should be responsible for authorising the research.

#### *Exception – disclosure to health practitioner*

4.84 Although not discussed in the Issues Paper, we also think it would be necessary to have an exception that allows a juror or former juror to disclose deliberations to a health professional (including a registered counsellor) treating him or her. We think this exception is appropriate to ensure that where jurors have been personally affected in some way by the evidence they heard or any aspect of the case they are able to seek appropriate help without committing an offence. We consider that the exception should be confined to counsellors and other health professionals who are governed by a code of ethics and rules of confidentiality registered under the Health Practitioners Competence Assurance Act 2003.

#### *Penalty for offence*

4.85 We recommend a maximum penalty of a term of imprisonment not exceeding three months or a fine not exceeding \$10,000. The discussion around how we have set penalty levels is found in chapter 7.<sup>357</sup>

### **Other measures to prevent disclosure**

4.86 In the Issues Paper the Commission also asked whether the proactive measures proposed to prevent jurors undertaking research should be taken to reduce the risk jurors will disclose details of deliberations. Specifically the Commission proposed:

- (a) Jury service educational information provided to those called for jury service and given to jurors before the trial could clearly state that jurors must not disclose information or use social media to discuss the case, and provide the reasons for the restriction on freedom.
- (b) The juror oath could be amended to include a promise not to disclose information about jury deliberations.
- (c) Jurors could receive more explicit directions before and during the trial that they must not disclose information or use social media to discuss the case. They could also be given the reasons for this confidentiality.

4.87 Submitters made very few substantive comments on this area. Those who commented favoured preventive measures to mitigate juror disclosure.

4.88 Jury service information provided to potential jurors when summoned states that jurors must not talk about the trial to anyone who is not on the jury.<sup>358</sup> The video presentation made to the jury panel prior to empanelling repeats this statement. There is, however, no further

<sup>357</sup> See chapter 7 at [7.59]–[7.66].

<sup>358</sup> Ministry of Justice *Jury Service: Information about jury service and being a juror* (Ministry of Justice, Wellington, 2015) at 6.



elaboration on this topic. We recommend the juror service educational information should educate potential jurors and jurors of the reasons for the restrictions and the consequences. In addition, because much of the juror publication in recent times has been on blogs and through Facebook discussions, there needs to be an increased focus on educating jurors that this is not acceptable.

- 4.89 As we have already discussed, jurors must take an oath or affirmation before serving as a juror. In the Issues Paper the Commission proposed changing the wording of the oath or affirmation to include a juror promise not to disclose information about jury deliberations. The problem with this proposal is that the oath or affirmation would become overly long. We prefer not to add this to the oath and affirmation, but instead to ensure the judges' directions and jury service educational material provide sufficient coverage.
- 4.90 The content of judicial directions relating to juror disclosure is currently a matter for the individual trial judge to determine. We understand that guidance to judges refers to advising jurors not to talk to anyone about the trial and not to refer to the case on social media such as Facebook and Twitter. We think directions should put jurors on notice that disclosing information is an offence potentially punishable by fine or imprisonment. Directions should also explain clearly why the restrictions exist, for example, to promote free and frank discussions between jurors. Best practice would be to give these directions at the start of the trial and reinforce them during the trial.

#### RECOMMENDATIONS

- R18 It should be an offence for a member of the jury constituted for a trial intentionally to investigate or research information when he or she knows or ought reasonably to know that it is or may be information relevant to the case.
- R19 The maximum penalty for the offence in R18 should be a term of imprisonment not exceeding 3 months or a fine not exceeding \$10,000.
- R20 The Ministry of Justice should be invited to review educational information provided to those called for jury service and to jurors to ensure it provides adequate guidance on the problems, risks and consequences if jurors undertake their own investigations or research.
- R21 It should be standard practice in cases that have attracted public attention for the trial judge to clarify whether potential jurors have already been exposed to information about the case to a degree that means they may not be able to try the case fairly on the evidence presented in court. The judiciary should be invited to consider how to promote more standard practices amongst jury warranted judges in this area.
- R22 The juror oath and affirmation should be changed to ensure the juror expressly agrees to decide the case according to the evidence presented in court, and not to undertake their own investigations or research.
- R23 The judiciary should be invited to review guidelines to ensure jurors are put on notice that undertaking their own investigations or research will be an offence punishable by fine or imprisonment. More comprehensive and consistent directions that provide jurors with a clear explanation of why their decision must be based only on the evidence presented in court and the risks if they undertake their own investigations or research should be developed and should become standard practice.
- R24 It should be an offence for any person, including a person who is or has served on a jury, intentionally to disclose, solicit or publish details of a jury's deliberations.



- R25 The offence in R24 should be punishable:
- (a) in the case of an individual, by a term of imprisonment not exceeding 3 months or a fine not exceeding \$10,000; or
  - (b) in the case of a body corporate, by a fine not exceeding \$40,000.
- R26 It should not be an offence under R24:
- (a) for a juror to disclose information and to raise concerns about misconduct with the trial judge during the proceedings; or
  - (b) for any person after the proceedings have been completed or the jury has been discharged, to disclose information to one or more **listed agencies** if that person has reason to believe that an offence may have been committed or that the conduct of a juror may provide grounds for a mistrial or an appeal. The **listed agencies** to which a disclosure may be made are the Police, the Solicitor-General, counsel who acted for the Crown or counsel who acted for the defence.
- R27 It should not be an offence under R24 for a juror or former juror to disclose any information to any researcher who has an authorisation from the Judicial Research Committee for the conduct of research about juries or jury service or for any researcher working under such an authorisation to solicit such information.
- R28 It should not be an offence under R24 for a juror or former juror to disclose any information to a health practitioner (including a counsellor) registered under the Health Practitioners Competence Assurance Act 2003.
- R29 The Ministry of Justice should be invited to review educational information provided to those called for jury service and to jurors to ensure it provides adequate and clear guidance on the problems, risks and consequences if jurors disclose information about the case.
- R30 The judiciary should be invited to review guidelines to promote standard practice among jury warranted judges regarding giving directions to jurors about the problems, risks and consequences if jurors disclose information about the case.
- R31 Appeals in respect of the offences in R18 and R24 should be under subpart 3 (Appeals against conviction) and subpart 4 (Appeals against sentence) of Part 6 of the Criminal Procedure Act 2011 because the offences in R18 and R24 are ordinary offences and not contempt of court.

# Chapter 5

## Non-compliance with court orders

### INTRODUCTION

- 5.1 It is fundamental to the administration of justice and the rule of law that court judgments and orders will be enforced against anyone who fails or refuses to comply with them. The absence of an effective and efficient enforcement regime would ultimately lead to anarchy, with unsuccessful parties simply disregarding a judgment or order against them.
- 5.2 As Elias CJ and McGrath J put it in the first *Siemer* case:<sup>359</sup>
- Effective administration of justice under our constitution requires that the orders of the courts are obeyed unless properly challenged or set aside. Public confidence in the administration of the law, also necessary for its effective administration, requires that there is a strong expectation that those who ignore court orders are quickly brought to account.
- 5.3 This chapter concerns the contempt of failing or refusing to comply with a court order. In civil proceedings contempt applications remain an important enforcement mechanism available to litigants where court orders made in their favour are not complied with. In criminal proceedings there are already comprehensive statutory regimes in place for the enforcement of most court orders made during criminal proceedings, with contempt still playing a role as a mechanism for addressing breaches of some suppression orders.<sup>360</sup>
- 5.4 In this chapter we consider whether a new statutory regime should be enacted to respond to non-compliance with court orders.

### THE CONTEMPT OF NON-COMPLIANCE

- 5.5 A person will be in contempt of court if he or she fails or refuses to comply with a lawfully made court order.<sup>361</sup> One exception to this general position, however, is that an order requiring the payment of money cannot be enforced by contempt proceedings.<sup>362</sup> The power to commit a person to prison for non-payment of a debt was abolished in New Zealand in 1990.<sup>363</sup>
- 5.6 Breaching an undertaking given to the court is also contempt of court if, on the faith of the undertaking, the court has sanctioned a particular course of action.<sup>364</sup>

### Jurisdiction of the High Court

- 5.7 This form of contempt comes within the High Court's authority under its common law inherent jurisdiction. At the same time, the High Court Rules prescribe the practice and procedure for

<sup>359</sup> *Siemer v Solicitor-General* [2010] NZSC 54, [2010] 3 NZLR 767 at [26].

<sup>360</sup> See below at [5.40]–[5.41].

<sup>361</sup> *Laws of New Zealand Contempt of Court* (online ed) at [54]; *Siemer v Solicitor-General* [2010], above n 359; *Siemer v Solicitor-General* [2013] NZSC 68, [2013] 3 NZLR 441.

<sup>362</sup> District Court Act 2016, s 133 provides alternative mechanisms excluding contempt to enforce judgments or orders for the payment of money. High Court Rules 2016, r 17.84(1) provides for the issue of an arrest order to enforce a court order excluding an order to pay a sum of money.

<sup>363</sup> Section 2 of the Imprisonment for Debt Limitation Amendment Act 1989 repealed s 2 and ss 4–17 of the Imprisonment for Debt Limitation Act 1908.

<sup>364</sup> See *Malevez v Knox* [1977] 1 NZLR 463 (SC) at 467; *Blomfield v Slater* [2015] NZHC 2239 at [9].

- issuing an order of arrest and committing a person for contempt of court. The Court will not exercise its authority under its inherent jurisdiction in a manner that is contrary to legislative requirements.<sup>365</sup>
- 5.8 Briefly, in this area of contempt, the High Court Rules provide that the Court may issue an arrest order<sup>366</sup> and commit a person to prison for contempt of court<sup>367</sup> where a court order has been breached or where an undertaking has been breached.<sup>368</sup> The Rules provide that the term of imprisonment that the Court may impose is such period as the Court thinks necessary and is allowed by law.<sup>369</sup> Alternatively, the High Court may impose a fine for contempt, an order for costs or, if appropriate, strike out a proceeding.
- 5.9 Consistent with the legislative abolition in 1990 of the power to commit a person to prison for debt, the High Court Rules expressly exclude committal for breach of an order to pay a sum of money.<sup>370</sup>
- 5.10 The Court may also issue a sequestration order against the property of a person held in contempt of court.<sup>371</sup> A sequestration order authorises a person appointed by the Court as the sequestrator to take possession of all the real and personal property of the party against whom it is directed.<sup>372</sup> Sequestration is an ancient remedy originating in the Courts of Chancery in Elizabethan times.<sup>373</sup> It is available only as a last resort<sup>374</sup> and only where the person has wilfully disobeyed the court order.<sup>375</sup> It has been mostly used in cases where an order has been disobeyed by a corporate body, where committal would not be available.<sup>376</sup>
- 5.11 The Rules provide a power for the Court to commit a party to prison for wilfully failing to comply with an interlocutory order<sup>377</sup> or for wilfully failing to comply with an order for discovery or for the production or inspection of documents.<sup>378</sup> The Rules also address circumstances in which a person who is not a party to the proceedings may be committed for contempt of court for wilfully failing to comply with an order for discovery.<sup>379</sup>
- 5.12 The High Court's authority under its inherent jurisdiction is considered wider than the powers contained in the High Court Rules. As pointed out in *McGechan on Procedure*, "[t]he very

365 *Zaoui v Attorney-General* [2005] 1 NZLR 577 (SC) at [36]; and *R v Moke* [1996] 1 NZLR 263, (1995) 13 CRNZ 386 (CA) at 391. See also *McGechan on Procedure* (online looseleaf ed, Thomson Reuters) at [SC12.02].

366 Rule 17.84.

367 Rule 17.85.

368 Rules are made under s 148 of the Senior Courts Act 2016 for the purposes specified in ss 145–146; s 147 of the Act continued in force the High Court Rules set out in Schedule 2 of the Judicature Act 1908; the relevant rules are in pt 17, subpt 7 of the High Court Rules 2016 – “Arrest orders and sequestration orders”, r 7.48, dealing with the enforcement of interlocutory orders by committal, and r 17.6, dealing with enforcement against non-parties.

369 The Supreme Court has determined that the court could imprison a person for contempt for no more than three months and/or fine them: *Siemer v Solicitor-General* [2010], above n 359, at [66]–[68].

370 Rule 17.84(1). Further, no writ of arrest may be issued in respect of non-compliance with an order that amounts in substance to the payment of a sum of money such as a decree for specific performance of a contract where performance involves payment of money; see *Summer & Winter Fuels Ltd v Pickens* (1990) 4 PRNZ 621 at 623.

371 Rule 17.87, which replaced r 610 (as from 1 February 2009).

372 Rule 17.86.

373 *Quality Pizzas Ltd v Canterbury Hotel Employees Industrial Union* [1983] NZLR 612 (CA) at 615.

374 *Morris v Douglas* (1996) 10 PRNZ 363 at 366.

375 *Quality Pizzas Ltd v Canterbury Hotel Employees Industrial Union*, above n 373, at 615.

376 David Eady and ATH Smith *Arlidge, Eady and Smith on Contempt* (4th ed, Sweet & Maxwell, London, 2011) at [14-129]. As the authors also note this sanction has been used against trade unions in the course of industrial disputes; see also [14-132]. The leading New Zealand case, *Quality Pizzas Ltd v Canterbury Hotel Employees Industrial Union*, above n 373, concerned an application against a trade union.

377 Rule 7.48, which provides that, if a party fails to comply with an interlocutory order, a judge can, subject to any express provision in the Rules, make any order thought just, including an order that the party be committed. The rule provides that an order may not be enforced by committing the person in default to prison unless he or she has been served personally or he or she had knowledge or notice of the order and sufficient time to comply with it.

378 Rule 8.33.

379 See rr 8.21 and 8.33.

character of the inherent jurisdiction defies defining its scope.”<sup>380</sup> The inherent jurisdiction can be invoked, for example, in response to the actions of persons who are not themselves actual litigants in the matter before the Court.<sup>381</sup>

- 5.13 The Court may exercise its powers under the High Court Rules to enforce an order on the application of the party entitled to the benefit of the order.<sup>382</sup> The Rules also provide for enforcement by a non-party where the non-party obtains an order.<sup>383</sup> In addition the Solicitor-General may bring an application in the same way as in respect of other forms of contempt.<sup>384</sup> When bringing an application, the Solicitor-General is not acting on behalf of the party in the civil proceeding or on behalf of the government, but is acting as a Law Officer of the Crown in the performance of his or her duty to safeguard the administration of justice.<sup>385</sup>

### Jurisdiction of the District Court, Family Court and Environment Court

- 5.14 The District Court Act 2016, which came into force on 1 March 2017, replaced the District Courts Act 1947. It confers on the District Court and also on the Family and Environment Courts, which both partly source their jurisdiction from the new Act, statutory jurisdiction to enforce some court orders by detention for contempt.<sup>386</sup> Section 134 of the District Court Act provides that:<sup>387</sup>

#### 134 Judgment or order in nature of injunction, etc

- (1) This section—
  - (a) applies to a judgment or an order in the nature of an injunction; and
  - (b) applies to a judgment or an order within the competence of the court that, if it were given or made in the High Court, could be enforced in the High Court by a writ of arrest; but
  - (c) does not apply to an order for the recovery of land.
- (2) A judgment or an order to which this section applies may be enforced, by order or warrant of a Judge, by detention for a term not exceeding 3 months.

- 5.15 The Act also provides for the enforcement of any order for discovery (including one for particular disclosure of a document against a non-party) by detention for contempt.<sup>388</sup> The maximum penalty is again a term not exceeding three months or a fine not exceeding \$1,000.<sup>389</sup>
- 5.16 There was uncertainty over the scope of the contempt jurisdiction conferred by the earlier 1947 Act, particularly as it applied to orders made by the Family Court. The High Court in the 2009 decision *KLP v RSF [Contempt of court]* determined that the general ancillary jurisdiction conferred on District Courts under section 41 of the earlier District Courts Act 1947 was broad

380 *McGechan on Procedure* (online looseleaf ed, Thomson Reuters) at [SC12.02].

381 *McGechan on Procedure* (online looseleaf ed, Thomson Reuters) at [SC12.02].

382 See rr 17.84 and 17.87 for the rules governing applications by the parties. An originating application is brought by the Solicitor-General in the same way as it is in other contempt proceedings.

383 Rule 17.6(1).

384 *Siemer v Solicitor-General* [2010], above n 359, at [6] and [41].

385 This well-established position was expressly noted by the High Court in *Solicitor-General v Siemer* HC Auckland CIV-2008-404-472, 8 July 2008 at [47].

386 District Court Act 2016, s 134. Section 16 of the Family Court Act 1989 applies the District Court Act 2016, with some exceptions, to the Family Court and Family Court Judges in the same manner and to the same extent as it applies to the District Court and District Court Judges. Section 278 of the Resource Management Act 1991 provides that the Environment Court and Environment Court Judges have the same powers that the District Court has in the exercise of its civil jurisdiction.

387 Section 136 of the Act makes alternative provision for an order for the recovery of land. It provides that a judgment or an order for the recovery of land may be enforced under a warrant for the recovery of land.

388 District Court Act 2016, s 135.

389 District Court Act 2016, s 135.

enough to encompass the ability to punish a party to proceedings for contempt if that party refused to comply with a lawful order of the court.<sup>390</sup> Section 41 provided:

#### 41. General ancillary jurisdiction

Every Court, as regards any cause of action for the time being within its jurisdiction, shall (subject to the provisions of section 59) in any proceedings before it —

- (a) grant such relief, redress, or remedy, or combination of remedies, either absolute or conditional; and
- (b) give such and the like effect to every ground of defence or counterclaim equitable or legal—

as ought to be granted or given in the like case by the [High Court] and in as full and as ample a manner.

- 5.17 The High Court adopted a broad interpretation of this provision and said its effect was that the District Court had the same power as the High Court to grant relief, redress or remedy in the manner sought.
- 5.18 The Family Court applied *KLP v RSF* on a number of occasions.<sup>391</sup> The decision gave the Family Court confidence that it could enforce most orders by contempt, whereas before the decision the position was considered uncertain.<sup>392</sup> Following the *KLP v RSF* decision in 2009, the Family Court relied on section 41 and occasionally imprisoned a litigant for contempt of court for wilful disobedience of a court order.<sup>393</sup> In one case a parent was sentenced to 14 days in prison for breaching a parenting order and then a further six weeks for subsequent wilful breaches.<sup>394</sup> More often, however, the Family Court simply warned parties that it had the potential to hold them in contempt unless they complied with the court's orders.<sup>395</sup>
- 5.19 We had reservations about founding jurisdiction to commit for contempt on section 41. In our view it was at least doubtful whether the provision was a sufficiently clear platform on which to base a punitive power of this type. This matter had not been before the senior appellate courts. Where loss of liberty was at stake the law should clearly state a court's power.<sup>396</sup>
- 5.20 The new District Court Act 2016 has replaced section 41 with a provision that might be interpreted more narrowly by the courts. The new provision (section 84) is entitled "Remedies" and provides that, in a proceeding, a Judge may:
  - ... in the same way as a Judge of the High Court in the same or a similar proceeding –
  - (a) grant any remedies, redress, or relief:
  - (b) dispose of the proceeding:
  - (c) give effect to every ground of defence or counterclaim, whether legal or equitable.
- 5.21 The District Court's powers under section 84 are not as clear as they could be. It is not obvious whether the language of this provision can or will be interpreted widely enough to allow for the

390 *KLP v RSF [Contempt of court]* [2009] NZFLR 833 (HC) at [49]–[50].

391 Examples are *JMC v AHB* FC Dunedin FAM-2008-012-000055, 10 June 2010; *TAL v BKL* FC Tauranga FAM-2010-070-000207, 5 October 2011; *JMC v AJH-B* [2012] NZFC 2711; *Chief Executive of Ministry of Social Development v ETM* [2012] NZFC 434.

392 See for example the earlier case *Y v Y* (1994) 12 FRNZ 176 (FC) at 190 where Judge Boshier considered that the position was simply too unclear to hold a parent who had deliberately obstructed the enforcement of an access order in contempt of court.

393 See for example, *JMC v AHB*, above n 391; *JMC v AJH-B*, above n 391; *Chief Executive of Ministry of Social Development v ETM*, above n 391.

394 *JMC v AJH-B*, above n 391, at [51]–[52].

395 For example, *MAM v HLL* [2012] NZFC 4511 at [13].

396 *Y v Y*, above n 392.



punishment of contempt of court. It is also unclear whether the District Court, the Family Court or the Environment Court, which source some aspects of their jurisdictions from the District Court Act 2016, can make sequestration orders. This issue has not been tested in the courts, although a line of United Kingdom cases on equivalent provisions suggests that the District Court may possibly be able to make sequestration orders under section 84.<sup>397</sup>

- 5.22 The extent of the District Court's powers, and those of other courts sourcing jurisdiction through the District Court Act, in respect of non-compliance with court orders could helpfully be clarified by legislation.

### Proving contempt

- 5.23 Any applicant seeking to enforce a civil judgment by contempt proceedings must prove to the criminal standard of beyond reasonable doubt that:<sup>398</sup>
- (a) the terms of the court order were clear and unambiguous and binding on the defendant;
  - (b) the defendant had knowledge or proper notice of the terms of the order, normally as the result of personal service;<sup>399</sup>
  - (c) the defendant acted in breach of the terms of the order; and
  - (d) the defendant's conduct was deliberate.

It is unnecessary to establish whether a defendant knew he or she was breaching a court order. It is sufficient to show the relevant actions were deliberate.<sup>400</sup> The fact a person's liberty may be affected means the standard of proof is the criminal standard.<sup>401</sup>

- 5.24 The courts have established the above elements in case law, but they are not in statute or in the High Court Rules.

### Collateral challenges to validity of original order not permitted

- 5.25 It is not open to a defendant in contempt proceedings to challenge the validity of the order said to have been breached. The courts have been clear that people are not free to ignore court orders simply because they believe they lack foundation and should not have been made. The defendant must comply with the order while it is in force, and unless and until it is set aside. It is no answer to an allegation of contempt to assert that the underlying order was wrongly granted.<sup>402</sup> The law is clear. As the majority of the Supreme Court stated in the second *Siemer* case:<sup>403</sup>

<sup>397</sup> The question was discussed in *B v T* [1990] NZFLR 373, (1990) 5 FRNZ 328 (FC) at 332 per Judge Inglis QC.

<sup>398</sup> These four elements are identified in most recent cases. See for example *Zhang v King David Investments Ltd* [2016] NZHC 3018 at [39]; *Shawyer v Thow* HC Invercargill CIV-2010-425-000116, 20 October 2011 at [28]; and *Lockwood Group Ltd v Small* HC Auckland CIV-2009-404-1019, 21 April 2010 at [65]. In *Solicitor-General for New Zealand v Krieger* [2014] NZHC 172 at [24]–[26], Panckhurst J combines the first two requirements so identifies only three elements that must be proved. In *Zhang v King David Investments Ltd* at [39], Palmer J referred to the Law Commission's Issues Paper to summarise the law on this point.

<sup>399</sup> The court will not hold a person in contempt unless satisfied that the person had proper notice of the order. In one case, the Judge declined to issue a committal warrant because the applicant had waited too long before seeking to enforce an order requiring the defendant to vacate premises. The order in question required the defendant to vacate by 31 December 1991, but the defendant was not served with the "Notice as to Consequences of Disobedience of Order of Court" until two months after the date, by which time it was impossible for him to heed the warning and obey the order. See *Wellington City Council v Ivanoff* [1992] DCR 727.

<sup>400</sup> This position was confirmed by the Court of Appeal in *Siemer v Stiassny* [2007] NZCA 117, [2008] 1 NZLR 150 at [10]. The Court acknowledged that there was some authority that seemed to go the other way, but that the weight of authority favoured the view they had taken. The Court said that a bona fide breach of an order, which resulted from erroneous legal advice as to the scope of the order, is nonetheless a contempt of court. If there is anything unclear about the scope of an order, it is open to the party to ask the court for clarification. A party should do this rather than take the risk.

<sup>401</sup> *Siemer v Solicitor-General* [2010], above n 359, at [33]; *Siemer v Stiassny*, above n 400, at [11].

<sup>402</sup> *Siemer v Solicitor-General* [2013], above n 361, at [188]–[226].

<sup>403</sup> *Siemer v Solicitor-General* [2013], above n 361, at [191].



Provided the court had power to make an order of its kind, a court order is binding and conclusive unless and until it is set aside on appeal or is for some other reason lawfully quashed. Collateral attacks on such orders are not permitted. Neither the parties, nor other persons subject to an order, are permitted to arrange their affairs in accordance with their perceptions of its flaws, including any individual views they may have concerning the validity of the order. The position is the same whether the order has been made in the High Court or in the District Court.

### Civil and criminal contempt no longer distinguished

5.26 The law has traditionally classified contempt as either a civil or a criminal contempt. The distinction is not dependent on whether the underlying order was made in criminal or civil proceedings, but on the nature of the breach or non-compliance. Failures to comply with court orders or undertakings are normally classified as civil contempts, although some breaches of court orders are considered criminal contempt.<sup>404</sup>

5.27 The conceptual distinction between civil and criminal contempt is not clear because it turns on whether the contempt involves conduct that so threatens the administration of justice it requires punishment from the public point of view. If it does, it is a criminal contempt, even when the contempt itself takes the form of a breach of a court order made in civil proceedings.<sup>405</sup> McLachlin J in the Supreme Court of Canada explained the distinction:<sup>406</sup>

A person who simply breaches a court order, for example by failing to abide by visiting hours stipulated in a child custody order, is viewed as having committed civil contempt. However, when the element of public defiance of the court's process in a way calculated to lesson societal respect for the courts is added to the breach, it becomes criminal.

5.28 Under the traditional dichotomy, the law conceptualises criminal contempt as punitive and concerned with punishing actions or words that obstruct or interfere with the public interest in the administration of justice. Meanwhile it views civil contempt as primarily remedial or coercive in nature because it is concerned with compelling compliance with the court's order through the threat of punitive sanctions.<sup>407</sup> The courts, however, have said on numerous occasions that the validity of the traditional distinction is highly questionable. In 2014, in *Solicitor-General for New Zealand v Krieger*, Panckhurst J summarised the illusory nature of the traditional distinction:<sup>408</sup>

[T]he validity of this distinction has been doubted in many jurisdictions. A true dichotomy does not exist. Civil contempt, in common with criminal contempt, is similarly focused upon the due administration of justice. The remedial punishment for a civil contempt will benefit a litigant, but the Court intervenes in direct response to the disobedience of its order. Hence, civil contempt vindicates both the right of the successful litigant and equally the authority of the Court. As Salmon LJ put it, the two objects are inextricably intermixed.

5.29 The traditional distinction overlooks the underlying rationale behind every exercise of the contempt power, namely that of upholding and protecting the administration of justice. Even if civil contempt is coercive, it is also punitive and shares the attributes normally associated with criminal contempt.<sup>409</sup> It is only because the disobedience of the courts' orders interferes with the

404 Eady and Smith, above n 376, at [3-4]–[3-11].

405 Eady and Smith, above n 376, at [3-1]. See also the discussion of the difference between civil and criminal contempt in the Supreme Court of Canada's decision in *Poje v British Columbia (Attorney-General)* [1953] 1 SCR 516 at 522.

406 *United Nurses of Alberta v Alberta (Attorney-General)* [1992] 1 SCR 901 at 931.

407 Julie Maxton "Contempt of Court in New Zealand" (PhD Thesis, University of Auckland, 1990) at 435.

408 *Solicitor-General for New Zealand v Krieger*, above n 398, at [23]. See *Jennison v Barker* [1972] 2 QB 52 at 62G for Salmon LJ's decision.

409 Maxton, above n 407, at 437.

fair administration of justice that it is contempt and punishable by imprisonment in the same way as criminal contempt.<sup>410</sup>

### *Procedural protections applied in the first Siemer case*

- 5.30 As already mentioned in chapter 1,<sup>411</sup> the Supreme Court decided in the first *Siemer* case that the fair trial rights under section 24 of the New Zealand Bill of Rights Act 1990 (NZBORA) apply to all defendants facing allegations of contempt, whether civil or criminal, because they are potentially at risk of imprisonment.<sup>412</sup> Although the Court did not directly address whether there was still a distinction between criminal and civil contempt, the consequence of the Court recognising these criminal law protections apply in all contempt cases is that the distinction is no longer a helpful one.<sup>413</sup>
- 5.31 In New Zealand law civil and criminal contempt are therefore now almost indistinguishable. In both:
- the criminal standard of proof applies;
  - the right to be released on bail, on reasonable terms and conditions, applies;
  - the maximum sentence of imprisonment is the same;
  - the same rights to legal representation apply under section 24(f) of NZBORA, including the right to receive legal assistance without cost if the interests of justice so require and the person does not have sufficient means;
  - rights to natural justice and a fair trial apply, including the right against self-incrimination and the right to be heard properly;
  - the defendant must be given proper and adequate notice of the particulars of the allegations; and
  - equivalent rights of appeal apply.<sup>414</sup>

### *Purging the contempt*

- 5.32 One remaining difference between civil and criminal contempt, however, is that civil contempt can be purged or made good by the person complying with the original court order. If the person does this, he or she may apply to the relevant court to have a committal or sequestration order discharged.<sup>415</sup> The person can comply with the original order and end the penalty. This is because civil contempt is primarily remedial or coercive and has successfully compelled compliance with the court's order.<sup>416</sup> Criminal contempt cannot be purged in the same way, although compliance with the order, where it occurs before sentencing will mitigate the penalty.<sup>417</sup> The punishment must therefore be completed.

410 *Laws of New Zealand Contempt of Court* (online ed) at [5].

411 See [1.6].

412 *Siemer v Solicitor-General* [2010], above n 359, at [57].

413 In his paper, Professor ATH Smith concluded, following his analysis of the Supreme Court's decision, that "[i]t is not entirely straightforward to say, after the decision in *Siemer*, what remains of the traditional distinction between civil and criminal contempts": ATH Smith *Reforming the New Zealand Law of Contempt: An Issues/Discussion Paper* (Crown Law Office, April 2011) at [6.22].

414 Although the statutory basis for appeals differs, appeal rights do not differ in substance. Civil contempt rulings are currently subject to appeal under the Senior Courts Act 2016, s 56 and the District Court Act, s 124, while criminal contempt rulings are subject to appeal under pt 6, subpt 5 of the Criminal Procedure Act 2011.

415 Section 193 of the District Court Act 2016 expressly provides for the discharge of a person, if at any time it appears to the satisfaction of a judge of the court that a person detained for contempt ought to be discharged for any reason. The judge may order discharge upon such terms as he or she thinks fit.

416 See *Queen Elizabeth the Second National Trust v Netherland Holdings Ltd* [2014] NZHC 1094, [2015] NZAR 1815 at [23]–[24].

417 *Forest v R* [2016] NZHC 3198 at [14].

## Penalties available to the courts

- 5.33 The usual penalty for civil contempt is the imposition of a fine. Courts exercise the power to imprison for civil contempt with great care and caution. They will not impose an order of committal to prison where the non-compliance has been accidental or unintentional or is of a minor or technical nature.<sup>418</sup> Courts do not order imprisonment unless the contempt involves fault or misconduct.<sup>419</sup> The maximum term of imprisonment that the District Court, Family Court or Environment Court can impose for breach of an order is three months and the maximum fine is \$1,000, while the maximum term of imprisonment that can be imposed by the High Court is two years and there is no limit on the maximum fine.<sup>420</sup>
- 5.34 In the first *Siemer* case the Supreme Court decided that, because common law contempt must be tried summarily, section 24(e) of NZBORA restricted the maximum sentence that could be applied to under the level set at which a person was guaranteed the right to a jury trial.<sup>421</sup> At the time of the Supreme Court decision that maximum was three months' of imprisonment. This was the same maximum applying in the District Courts at the time. In 2013, however, section 24(e) was amended and the maximum period was increased to two years. As a consequence, the maximum penalty for contempt at common law also increased to two years, raising issues of parity with penalties available for breaches of District Court orders. The difference in maximum penalties between the courts is now an anomaly which we address below at [5.73]–[5.74].

### Application of sentencing principles

- 5.35 When determining an appropriate penalty, courts generally have a discretion. The court must consider the extent of the contempt, the defendant's motive, and the prejudice suffered by the innocent party.<sup>422</sup> A Full Court of the High Court has stated that a penalty ought to be assessed applying a methodology akin to that used for sentencing a criminal offender.<sup>423</sup>
- 5.36 We consider below at [5.68] and [5.69] whether legislation should expressly apply the methodology and principles in the Sentencing Act 2002 to sentencing for contempt.

## RELATED ENFORCEMENT REGIMES

- 5.37 Before discussing the issues with the current law, it is convenient to note the existing statutory enforcement regimes related to contempt. In respect of orders made in criminal proceedings, statutory enforcement regimes have almost completely replaced contempt as a means of enforcement.

### Sentencing decisions

- 5.38 The enforcement of all sentencing decisions is now statutory. Custodial and community-based sentences are enforced under the Sentencing Act. Fines and reparation orders are made under the Sentencing Act and enforced under Part 3 of the Summary Proceedings Act 1957.<sup>424</sup> Under Part 3 a registrar or judge of the District Court may issue an attachment order or order seizing property where a person defaults and does not pay a fine or comply with an order

418 *Soljan v Spencer* [1984] 1 NZLR 618 (CA); *Morris v Douglas*, above n 374, at 366.

419 In a number of cases, the courts have determined that the elements of contempt are made out, but that sanctions, particularly committal or sequestration, are not appropriate. See for example *Lockwood Group Ltd v Small* HC Auckland CIV-2009-404-1019, 21 April 2010, at [68].

420 *Siemer v Solicitor-General* [2010], above n 359, at [66]–[68].

421 *Siemer v Solicitor-General* [2010], above n 359, at [67]; and New Zealand Bill of Rights Act 1990, s 24(e).

422 *Lockwood Group Ltd v Small*, above n 419, at [68].

423 *Solicitor-General v Miss Alice* [2007] 2 NZLR 783 (HC) at [88]; also see *Grant v Grewal and others* [2016] NZHC 1564 at [17].

424 Section 19 of the Crimes Act 1961 applies pt 3 to orders made in the High Court.

for reparation.<sup>425</sup> If those mechanisms do not prove effective at enforcing compliance with the original order, the registrar or judge may have the non-complying person arrested and brought before the court.<sup>426</sup> A judge may then make an order imposing a substituted sentence of community work, home detention or imprisonment.<sup>427</sup> Once the person has completed the new sentence, the original fine (or reparation order) is remitted.<sup>428</sup>

- 5.39 Common law contempt of court therefore has no part to play in enforcing sentencing decisions.

### Suppression orders

- 5.40 Suppression orders made in criminal proceedings under the Criminal Procedure Act are enforced under that Act. Although non-compliance with a suppression order made under the Act may technically be a contempt of court (because it involves a breach of a court order), the Criminal Procedure Act makes breach of a suppression order made under the Act an offence.<sup>429</sup> The appropriate remedy is therefore prosecution under the Act, rather than contempt proceedings.<sup>430</sup>
- 5.41 Where the courts have made suppression orders using their inherent authority or implied powers rather than statutory powers, contempt provides the only enforcement mechanism. As discussed earlier in chapter 2,<sup>431</sup> the Supreme Court has confirmed that breaches of such orders constitute contempt.<sup>432</sup> The current position is that enforcing suppression orders made under a court's inherent authority or implied power is a matter for the common law of contempt, while suppression orders made under the Criminal Procedure Act are enforced by a prosecution under that Act.

### Other offence provisions for non-compliance with court orders

- 5.42 For completeness, we mention there are several statutory regimes that have made it an offence for a person to fail to comply with court orders made under the regime. There are approximately 38 such offences and we have listed these in Appendix 1 to this Report. Non-compliance with a court order made under these statutory regimes may also technically be contempt of court as it involves a breach of a court order. We consider where an Act contains specific offence and enforcement provisions these should be used to enforce court orders made under the Act and contempt should not be used. Parliament enacted these statutory provisions specifically for that purpose, whereas contempt is a broad general remedy.

425 Summary Proceedings Act 1957, s 87(2).

426 Summary Proceedings Act 1957, s 88. See also *R v Slavich* HC Hamilton CRI-2006-419-000089, 6 August 2010 and 10 September 2010 and *Slavich v R* [2011] NZCA 457 (leave to appeal refused: *Slavich v R* [2011] NZSC 139). Although the operative provisions have since been changed, the case illustrates that the ultimate sanction remains one of imprisonment.

427 Summary Proceedings Act 1957, s 88AE. A person can be imprisoned under the enforcement provisions even if the original offence was not one for which they could be imprisoned. The maximum period of imprisonment will depend on the original offence for which the person was convicted. If the original offence was not punishable by more than three months imprisonment, the maximum substituted sentence is three months. If it was punishable by more than three months the maximum is one year: see s 90.

428 Summary Proceedings Act 1957, s 91.

429 Criminal Procedure Act 2011, s 211. The Bail Act 2000 imposes publication restrictions on publication of matters relating to bail and matters dealt with at any bail hearing and it is an offence under that Act for any person to publish details of a bail hearing in breach of any specific prohibition ordered by the court: Bail Act 2000, s 19.

430 *Solicitor-General v Fairfax New Zealand Ltd* HC Wellington CIV-2008-485-000705, 10 October 2008 at [135]–[138], though a different view has been taken in the United Kingdom: *Solicitor-General v Cox* [2016] EWHC 1241 (QB), [2016] 2 Cr App R 15. See discussion at [1.44] and [5.43]–[5.44].

431 See chapter 2 at [2.36]–[2.38].

432 The majority of the Supreme Court have confirmed that where there is no statutory power available, the courts can use inherent powers to make any suppression order necessary to protect or uphold the administration of justice and protect the fair trial rights of an accused; *Siemer v Solicitor-General* [2013], above n 361, at [114] and [188].

- 5.43 As already noted, there is some uncertainty whether these different statutory offence provisions have fully replaced contempt.<sup>433</sup> In *Solicitor-General v Fairfax New Zealand Ltd* a Full Court of the High Court took the view that the breaches of suppression orders should have resulted in criminal charges under the relevant statutory offence provisions rather than common law contempt proceedings.<sup>434</sup>
- 5.44 Contempt may, however, remain available where it is not clear that statutory offences are explicitly or implicitly enacted in substitution for common law contempt. In a 2016 case in England, the High Court found two defendants who covertly took photographs in court and published those photographs guilty of contempt<sup>435</sup> even though it was a statutory offence for any person to take pictures in court and publish them.<sup>436</sup> The court in that case held that the conduct could still be prosecuted as contempt even though the statutory offence had been created to cover this conduct.<sup>437</sup>
- 5.45 We return in chapter 7 to this issue whether the new offences should replace the common law of contempt.<sup>438</sup>

## ISSUES PAPER

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- 5.46 In the Issues Paper the Law Commission considered whether the traditional distinction between civil and criminal contempt should be abolished. As already noted, following the Supreme Court decision in the first *Siemer* case,<sup>439</sup> the distinction now has minimal significance in New Zealand.<sup>440</sup> Civil contempt, because of the risk of imprisonment, is treated by the courts as criminal contempt.
- 5.47 The Issues Paper noted that there had been calls in several jurisdictions for the abolition of civil contempt. In 1974, the Phillimore Committee in the United Kingdom concluded that the distinction was complex and artificial and recommended that all distinctions between civil and criminal contempt in England and Wales should be abolished.<sup>441</sup> In its 1987 report, the Australian Law Reform Commission recommended abolishing the common law of civil contempt. The Commission recommended replacing it with statutory forms of proceedings for civil enforcement of court orders and a separate offence of disobedience contempt that would cover defiant breaches of both civil and criminal court orders.<sup>442</sup> In a more recent 2003 report reviewing the law of contempt, the Law Reform Commission of Western Australia concluded that civil contempt should be abolished and replaced by an offence.<sup>443</sup> None of these recommendations has, however, been adopted.<sup>444</sup>

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433 See chapter 1 at [1.44].

434 *Solicitor-General v Fairfax New Zealand Ltd*, above n 430, at [135]–[138].

435 *Solicitor-General v Cox*, above n 430.

436 Criminal Justice Act 1925 (UK), s 41.

437 *Solicitor-General v Cox*, above n 430, at [31].

438 See chapter 7 at [7.19].

439 *Siemer v Solicitor-General* [2010], above n 359.

440 See [5.32] for discussion on the remaining differences between civil and criminal contempt.

441 Lord Phillimore *Report of the Committee on Contempt of Court* (House of Commons, Cmnd 5794, December 1974) at 73.

442 Australian Law Reform Commission *Contempt* (ALRC Report 35, 1987) Summary of recommendations at [64] and Appendix A cl 46.

443 Law Reform Commission of Western Australia *Report on Review of the Law of Contempt* (LRWA, PN 93 III, 2003) at 92–95 and recommendation 46.

444 In response to the Australian Law Reform Commission a government position paper was prepared and circulated, outlining the Federal Government's position on the Commission's recommendations in 1992. Although four jurisdictions initially agreed 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; ALRC "Contempt" (12 July 2010) < [www.alrc.gov.au](http://www.alrc.gov.au) >; The Law Reform Commission of Western Australia's Report was tabled in the State Parliament on 9 September 2003. The Commission has advised that there has been no government feedback on this aspect of the report and the recommendation has not been implemented.



5.48 The Issues Paper also identified a number of other issues requiring resolution:

- (a) Whether Parliament should enact a more comprehensive statutory regime for enforcing court orders and undertakings to clarify and simplify the law. The contempt of non-compliance with court orders is only partially codified. Legislative reform would address the uncertainty discussed in [5.16] to [5.21] above over the extent of the jurisdiction of the District Court, Family Court and Environment Court.
- (b) Whether the maximum penalty levels that can be imposed should be rationalised. As discussed above at [5.33] to [5.34], the High Court can impose a penalty of up to two years' imprisonment for breach of a court order, while other courts can impose no more than three months' imprisonment. Fines are also limited to \$1,000 in other courts. The significant difference in penalties available for breaches of High Court orders and orders made by other courts is an inadvertent consequence of the 2013 amendment to section 24(e) of NZBORA.
- (c) Whether reform should clarify that the methodology in the Sentencing Act applies when determining the appropriate penalty for contempt.
- (d) Whether sequestration orders should be retained. The Issues Paper suggested that sequestration could be considered draconian because it prevents a person from using or disposing of their property until the contempt is purged or the order is lifted by the Court.<sup>445</sup> There are now modern alternatives to sequestration available in the enforcement arsenal and the Issues Paper asked for feedback on whether the remedy should be abolished.

### Proposals included in the Issues Paper

5.49 In the Issues Paper the Commission suggested it might be time to abolish contempt as a civil enforcement mechanism to remedy private wrongs. Imprisonment is the most punitive sanction, and the Commission suggested it should only be available under the criminal law, and not used for civil enforcement. The Commission put forward a proposal to abolish contempt and replace it with a new offence (option 1). As an alternative, the Commission proposed retaining contempt but in a statutory form (option 2).

#### *Option 1: Abolish civil contempt and have a new statutory offence*

5.50 The Commission proposed removing contempt proceedings from the civil enforcement measures available to litigants. A new statutory offence would be created in its place.<sup>446</sup> The offence would be prosecuted in the usual way and would be available to punish the types of serious breach of court orders currently considered criminal contempt (being breaches that have an element of public defiance of the court's process in a way that is calculated to undermine the administration of justice).

5.51 Civil enforcement mechanisms would otherwise remain as they are, with the enforcement of orders in the hands of the parties affected. Contempt proceedings for non-compliance would,

<sup>445</sup> *Morris v Douglas*, above n 374, at 366.

<sup>446</sup> Contempt is the sole remaining common law offence still recognised in Canadian law, however, Part IV of the Canadian Criminal Code (covering offences against the administration of law and justice) does include an offence of disobeying a court order. Section 127(1) of the Code provides that:

Everyone who, without lawful excuse, disobeys a lawful order made by a court of justice or by a person or body of persons authorized by any Act to make or give the order, other than an order for the payment of money, is, unless a punishment or other mode of proceeding is expressly provided by law, guilty of

- (a) an indictable offence and liable to imprisonment for a term not exceeding two years; or
- (b) an offence punishable on summary conviction.

This was the type of provision the Commission envisaged, although the Commission did not intend it would be an indictable offence.

however, be abolished and the courts would not be able to commit a person to prison for failing to comply with a court order unless the person was being convicted of the new offence.

- 5.52 The Commission also proposed abolishing the remedy of sequestration because there were now sufficient modern enforcement remedies available.

#### *Option 2: Codify use of contempt for enforcing court order*

- 5.53 The alternative option proposed was to retain contempt where it involved a breach of a court order, but to codify it more fully in statute. If retained in statutory form, Parliament could specify in the statute a clearer framework, including expressly applying NZBORA protections to criminal charges. Under this option contempt would remain a hybrid between criminal and civil procedure, but with clear statutory limits on its use.
- 5.54 Option 2 was included as an alternative because Commissioners had reservations about whether an ordinary statutory offence (option 1) would leave litigants with sufficient civil remedies. The Issues Paper suggested that although parties would no longer be able to seek committal to prison or a fine, they would still have available to them all the other existing civil enforcement tools.

#### **Submissions and feedback**

- 5.55 Submitters were divided on whether we should have a new statutory offence and whether this offence should replace the contempt of non-compliance with court orders. Some favoured a specifically designed offence to deal with breaches of court orders, saying failure to comply with a court order is as much an offence against the state as a wrong against the other party. They were not comfortable using contempt as a mechanism of civil enforcement and supported an end to contempt in this context. They supported introducing the independent prosecutorial scrutiny that would occur with an offence.
- 5.56 On the other hand, some submitters were not supportive of contempt of breaching a court order becoming an offence. The Police were concerned Police prosecutors would become responsible for receiving complaints regarding civil disputes and effectively, although not legally, Police would be prosecuting for a civil party rather than the state. Others were concerned an offence would not be an effective mechanism for enforcing an order, and without contempt, there would be nothing else adequate in the civil enforcement options. They were concerned that because of the penalty level involved the offence would be prosecuted in the District Court, even where the order being breached was a High Court order.
- 5.57 Most submitters, whether they supported the proposal for an offence or not, considered it still necessary for the courts to retain the power to imprison a litigant to force compliance with a court order in civil proceedings. Many questioned how a court could adequately enforce an order in a case like *Jones v Skelton*, where a child had been abducted and the party refused to disclose the child's whereabouts, without being able to imprison the person.<sup>447</sup> The New Zealand Law Society said this was necessary as a last resort provided all the appropriate NZBORA protections applied.
- 5.58 The District Court judges, in their comments on the Issues Paper, argued it was important to have an effective way of ensuring people complied with court orders. Even if rarely used, the threat of imprisonment was in their experience effective in achieving compliance. They saw no disadvantage in retaining contempt as a last resort, while abolishing it risked creating a class of litigant with no mechanism available to enforce court orders.

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<sup>447</sup> *Jones v Skelton* [2006] NZSC 113, [2007] 2 NZLR 178; Ms Skelton spent 79 days in prison for contempt of court and was released after her father, the child's grandfather, returned the child to the Hamilton Police station.

- 5.59 In relation to sequestration orders, most submitters considered that the remedy, while rarely used, was vital as a remedy of last resort.

## THE COMMISSION'S RECOMMENDED REFORMS

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- 5.60 We have reconsidered the options put forward in the Issues Paper in light of the matters raised by submitters. We have decided not to proceed with the offence in option 1 and recommend instead a variant of option 2.
- 5.61 We agree that the party in whose favour the court makes an order should retain the ability to enforce that order through the ultimate sanction of contempt, because without contempt the party would not have adequate civil enforcement remedies. We agree with submitters that prosecuting an offence does not give the party an effective remedy. Currently, the beneficiary of the original court order can bring an action for contempt and we consider this should remain the case. We therefore recommend enacting a statutory form of contempt for responding to breaches of court orders, rather than a criminal offence. The opportunity should also be taken to replace the anachronistic language of contempt in the new Act. The proposed clauses in subpart 5 of Part 2 of the draft Bill deliberately avoid the language of contempt.
- 5.62 We recommend that the new statutory provisions should replace the common law entirely in respect of contempt involving a breach of, or failure to comply with, a court order. Under the new clauses, the litigant who obtained the court order may apply to the relevant court for an order that a person who has not complied with the court order be punished for non-compliance. The Solicitor-General should also be able to bring proceedings, as is the current practice. We would expect this would only occur, as now, in exceptional cases and the parties would normally take steps to enforce compliance with their own court orders. In cases involving high-impact, deliberate, widely publicised and repeated breaches, such as occurred in the first *Siemer* case,<sup>448</sup> the Solicitor-General, in her capacity as a Law Officer of the Crown, should retain the ability to make an application. We have discussed this approach with the Solicitor-General who agrees with it. We are not recommending the courts should be able to initiate this form of contempt. As it is not contempt in the courtroom, we consider some independent assessment and an application to the court are necessary preliminary steps.
- 5.63 We recommend the new enforcement procedure should not be available to enforce breaches of orders requiring the payment of a sum of money under a court judgment or relating to the recovery of land. In this respect, the new provision would enact the current law under which contempt is not available to enforce a money judgment. We are not suggesting any return to debtor prisons.<sup>449</sup> The District Court Act, District Court Rules and High Court Rules provide other enforcement mechanisms for recovery of land or for obtaining money owed under a court order.<sup>450</sup>
- 5.64 We do, however, recommend the new enforcement procedure should apply to suppression orders made in criminal proceedings under the inherent authority or implied powers of the courts.<sup>451</sup> This would create consistency between the enforcement of court orders in civil and criminal proceedings.

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448 *Siemer v Solicitor-General* [2010], above n 359.

449 The Imprisonment for Debt Limitation Amendment Act 1989 repealed provisions in the Imprisonment for Debt Limitation Act 1908 that had allowed committal for non-payment of debt.

450 See District Court Act 2016, pt 10; District Court Rules 2014, pt 19; and High Court Rules 2016, pt 17.

451 See above at [5.40]–[5.41].

- 5.65 Clause 22(1) of the draft Bill identifies court orders for the purposes of the new provision. It covers any court order that requires a person to do, or abstain from doing, something that does not involve paying a sum of money under a judgment. Orders for the recovery of land are also excluded. The definition includes any undertaking given to the court where, in reliance on the undertaking, the court has sanctioned a particular course of action or inaction. The relevant court in which the proceedings would be brought would be defined as the court in which the applicable court order was made or any court to which the proceedings have been transferred for enforcement or any court of appeal hearing an appeal in respect of the proceedings. The new provision would clarify that the District Court, and those other courts that take jurisdiction under the District Court Act, have full jurisdiction under the provisions.
- 5.66 Clause 22(4) of the Bill specifies the elements that must be proved to the standard of beyond reasonable doubt before the court will make an enforcement order, which are:
- the applicable court order was made in clear and unambiguous terms and is binding on the person;
  - the person was given proper notice of the terms of the court order; and
  - the person has, without reasonable excuse, intentionally failed to comply with the applicable court order.
- 5.67 The maximum penalty should be set at an appropriate level, consistent with other forms of contempt. The maximum penalty should be the same irrespective of which court's order has been breached, and irrespective of whether enforcement is being undertaken in the District Court or the High Court. We recommend a maximum penalty of six months' imprisonment and a maximum fine of \$25,000. The discussion around how we have set penalty levels is found in chapter 7.<sup>452</sup>
- 5.68 The Sentencing Act should apply in respect of any sentence the court imposes under the new provision, as if the person had been convicted of an offence. We consider that the methodology and principles in the Sentencing Act should apply when the courts determine the penalty under the new provision, and the community-based sentences provided for in the Act should also be available to the court.
- 5.69 In determining the appropriate penalty, the court should consider the nature and gravity of the non-compliance or breach and should consider any relevant mitigating or aggravating factors relating to the person. In *Blomfield v Slater*, Asher J, when considering the appropriate punishment for a contempt involving a breach of an undertaking, noted:<sup>453</sup>

[A]s with all sentencing exercises the objective seriousness of the relevant conduct and the defendant's personal culpability for the conduct must be assessed. In accordance with ordinary sentencing principles a defendant's means and any personal aggravating or mitigating factors will be taken into account.

Where breach of a court order involves an element of public defiance of the court's process in a way calculated to lessen respect for the court, the court may well consider imprisonment to be appropriate. Nothing in the new provision should limit the court's ability to make any other order it has jurisdiction to make either under any Act, the rules of Court or its inherent authority or implied powers.

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452 See chapter 7 at [7.59]–[7.66].

453 *Blomfield v Slater*, above n 364, at [48].

- 5.70 Appeals against any finding that a person is in contempt under the new provision or against the sentence imposed could be heard under Part 6, subpart 5 (sections 260 to 269) of the Criminal Procedure Act 2011. Parliament enacted these provisions to provide for appeals where a court finds a person guilty of a criminal contempt of court, whether at common law or under statute.
- 5.71 We have also concluded that the remedy of sequestration should remain because, while rarely used, it is still necessary as a remedy of last resort. Sequestration orders against the property of a person who has failed to comply with a court order should continue to be available as a remedy in proceedings under the new provisions in the High Court.

*Corporate defendants: personal liability on directors?*

- 5.72 Rather than having a higher level of fine for corporate defendants, the Issues Paper suggested courts could impose liability directly on the directors. This was because currently when a court makes a judgment or order against a corporate body, it can be enforced by an order of committal for contempt against the directors or other officers of the corporate body.<sup>454</sup> We recommend the new provisions reflect this approach, and where a company or incorporated society has failed to comply with an applicable court order, the relevant court may make an order finding its directors or officers in breach and sentence them under the provision. As noted earlier, sequestration orders can also be used in cases where a corporate body has disobeyed an order.<sup>455</sup>

*Greater consistency between penalties when enforcing suppression orders*

- 5.73 Finally, our recommended reforms will improve consistency between breaches of suppression orders that are offences under the Criminal Procedure Act and suppression orders made under inherent authority or implied powers. As discussed earlier in [5.40] to [5.41], the current position is that suppression orders in criminal proceedings are enforced by a mixture of offence provisions<sup>456</sup> and the law of contempt, and in civil proceedings suppression orders are enforced by the law of contempt. The maximum penalty for a breach of an order made under the Criminal Procedure Act is six months' imprisonment, while the maximum sentence for a breach of a suppression order made in the High Court under inherent powers is up to two years' imprisonment.<sup>457</sup>
- 5.74 Our recommendations will bring these maximum penalties into line. The new statutory enforcement provisions we have recommended will replace the common law of contempt and will be available to enforce suppression orders.

**RECOMMENDATIONS**

- R32 New statutory provisions should be enacted to replace the common law in respect of contempt involving a breach of or failure to comply with an applicable court order.
- R33 Under the new provisions, a person who has obtained an applicable court order may apply to the court for an order that the other party has failed to comply with the order.
- R34 Under the new provisions, the Solicitor-General should have discretion to apply to the courts for an order that a person has failed to comply with an applicable court order.

<sup>454</sup> *Laws of New Zealand Contempt of Court* (online ed) at [54]. See: *Grant (as liquidators of Ranolf Company Ltd (in liq)) v Bhana* [2016] NZHC 2755; *Zhang v King David Investments Ltd (in liq)*, above n 398.

<sup>455</sup> Eady and Smith, above n 376, at [14-129].

<sup>456</sup> It is an offence under section 211 of the Criminal Procedure Act 2011 for anyone to publish information in breach of a suppression order made under that Act. Where a person intentionally or recklessly breaches a suppression order made under the Criminal Procedure Act they face a maximum penalty of up to six months' imprisonment.

<sup>457</sup> See [5.33]–[5.34] above.



- R35 For the purposes of the new provisions, an **applicable court order** means, whether or not the order is in a judgment, a court order to do or abstain from doing something that is not paying a sum of money or any undertaking given to the court where, on the faith of that undertaking, the court has sanctioned a particular course of action or inaction. Orders for the recovery of land should also be excluded. The relevant court would be the court in which the applicable court order was made or any court to which the proceedings have been transferred for enforcement, or any court of appeal hearing an appeal in respect of the proceedings.
- R36 The court may make an order finding the person has failed to comply with an applicable court order if satisfied beyond reasonable doubt that:
- (a) the applicable court order has been made in clear and unambiguous terms and is binding on the person;
  - (b) the person has knowledge or proper notice of the terms of the court order being enforced; and
  - (c) the person has, without reasonable excuse, intentionally failed to comply with the applicable court order.
- R37 Where the person who has failed to comply with the applicable court order is a company or incorporated society the court may make an order finding any director or officer of the company or incorporated society has failed to comply with an applicable court order under R36.
- R38 On making a finding that a person has failed to comply with an applicable court order, the court may sentence the person to:
- (a) a term of imprisonment not exceeding 6 months; or
  - (b) a fine not exceeding \$25,000.
- R39 On making a finding that a person has failed to comply with an applicable court order, the High Court may issue a sequestration order against the property of the non-complying party.
- R40 The Sentencing Act 2002 should apply in respect of any sentence imposed by the court under the new provision as if the person had been convicted of an offence.
- R41 Appeals against any finding that a person has failed to comply with an applicable court order under the new provision should be heard under subpart 5 of Part 6 (sections 260 to 269) of the Criminal Procedure Act 2011.

# Chapter 6

## Abusive allegations and false accusations against judges and courts

### INTRODUCTION

- 6.1 This chapter deals with abusive allegations and false accusations made against judges and courts that are published and have a real risk of undermining public confidence in the judiciary as an institution.<sup>458</sup> As already noted,<sup>459</sup> public confidence in the independence, integrity and impartiality of the judiciary needs to be maintained because the general acceptance of judicial decisions, by citizens and governments, is essential for the peace, welfare and good government of the country.<sup>460</sup> In this context, courts may invoke contempt of court in the public interest to punish those whose actions constitute false and egregious attacks on the integrity and impartiality of members of the judiciary, thereby impugning the integrity of the judiciary and adversely affecting the rule of law.
- 6.2 It is important to emphasise at the outset that the purpose of this contempt of court is to uphold public confidence in the independence, integrity and impartiality of the judiciary as an institution, not to vindicate the judge as a person or to protect the feelings of individual judges.<sup>461</sup> As Laddie J said in *Re Swaptronics Ltd*: “It is all too easy for a court to be impressed by its own status”.<sup>462</sup>
- 6.3 It is also important to emphasise that this contempt is not designed to prevent or deter legitimate criticism of court decisions or the views of judges expressed in those decisions or in papers or speeches. The right to freedom of expression, now affirmed by the New Zealand Bill of Rights Act 1990 (NZBORA), extends to criticism of judges and courts. The New Zealand Court of Appeal has always recognised the right of the media and the public to criticise courts and their work. In *Re Wiseman* North P said:<sup>463</sup>

... we wish to make it perfectly clear that Judges and Courts are alike open to criticism and if reasonable argument or expostulation is offered against any judicial act as contrary to law or the public good, no Court could or would treat that as contempt of Court. No wrong is committed by any member of the public who exercises the ordinary right of criticising, in good faith, in private or public, public acts done in the seat of justice.

Similarly, in *Solicitor-General v Radio Avon Ltd*, Richmond P said:<sup>464</sup>

458 *Solicitor-General v Radio Avon Ltd* [1978] 1 NZLR 225 (CA) at 231; *Gallagher v Durack* [1983] 152 CLR 238 (HCA) at 243.

459 Above at [1.34].

460 Murray Gleeson “Public Confidence in the Judiciary” (2002) ALJ 558 at 560; James Plunkett “The role of the Attorney-General in defending the judiciary” (2010) 19(3) JJA 160 at 162.

461 *Solicitor-General v Radio Avon Ltd*, above n 458, at 229.

462 *Re Swaptronics Ltd* [1998] All ER (D) 407 (Ch) at [20] when deciding there was no need for an additional power to prohibit a party who is obdurately in contempt, by reason of his contempt, from enforcing his civil rights or from defending himself against civil claims made against him.

463 *Re Wiseman* [1969] NZLR 55 (CA) at 58.

464 *Solicitor-General v Radio Avon Ltd*, above n 458, at 230.

The Courts of New Zealand, as in the United Kingdom, completely recognise the importance of freedom of speech in relation to their work provided that criticism is put forward fairly and honestly for a legitimate purpose and not for the purpose of injuring our system of justice.

- 6.4 Criticism of the judiciary and its work is important in a democratic society and can play a significant part in increasing public confidence in the justice system rather than undermining it. No one can object to criticism of this nature. Modern judges generally accept that, as public figures responsible for upholding the rule of law and determining criminal and civil cases, which are often contentious and where invariably there is an unsuccessful party, they need to be robust and resilient in the face of criticism. Respect, like reputation, is earned by the timeliness and quality of their work and not conferred by any status attached to their office.
- 6.5 There is also growing recognition that many criticisms are best ignored, especially perhaps those that are so extreme as to be simply unbelievable. As two of the Judges of the Ontario Court of Appeal put it in *R v Kopyto*, the criticisms there were “so preposterous that no right thinking member of society would take [them] seriously.”<sup>465</sup> Put another way, if there were any substance in criticisms of this nature, the public would be entitled to expect steps to have been taken to remove the judge concerned from office. Inaction in this regard may serve to confirm that such criticisms have not been taken seriously by those responsible for taking such steps.
- 6.6 At the same time, when criticism becomes abusive or contains false allegations or accusations that undermine public confidence in the independence, integrity and impartiality of the judiciary as an institution, action may be required. As the Hon Paul East, when Attorney-General, put it:<sup>466</sup>

Constitutionally, the Judges can speak only through their judgments and cannot, by convention, publicly answer any criticism. The Attorney-General assumes responsibility over criminal contempts of court, whether arising in respect of criminal or civil proceedings, which undermine public confidence in the administration of justice. The Judge can deal with matters of contempt that occur in the face of the Court, but once it occurs outside the Court then it is a function of the Attorney-General to bring proceedings for contempt.

The convention that judges are not able to answer criticism publicly distinguishes the judiciary from other arms of government and explains why the Attorney-General, as the senior Law Officer of the Crown, has constitutional responsibility for upholding the rule of law and answering any unwarranted criticism of the judiciary.

- 6.7 Mr East also pointed out that protecting freedom of speech needs to be balanced with the independence of the judiciary so that:<sup>467</sup>

Often a public statement by the Attorney-General is all that will be necessary to remind the news media that unfounded attacks on the judiciary can undermine the stability of our Constitution which it is in all our interests to protect.

465 *R v Kopyto* (1987) 62 OR (2d) 449 (ONCA); 47 DLR (4<sup>th</sup>) 213 (ONCA) at [85] per Dubin and Brooke JA. See also Ursula Cheer *Burrows and Cheer: Media Law in New Zealand* (7th ed, LexisNexis, Wellington, 2015) at 561.

466 The Honourable Paul East Attorney-General “The Role of the Attorney-General” in Philip A Joseph (ed) *Essays on the Constitution* (Brooker’s, Wellington, 1995) 184 at 200; John McGrath QC “Principles for Sharing Law Officer Power: The Role of the New Zealand Solicitor-General” (1998) 18 NZULR 197 at 213. The position may not be the same in Australia: See James Plunkett, above n 460.

467 At 201.

- 6.8 This approach is reflected in the Cabinet Manual, which currently states that the Attorney-General:<sup>468</sup>
- ... has an important role in defending the judiciary by answering improper and unfair public criticism, and discouraging ministerial colleagues from criticising judges and their decisions.
- 6.9 As Mr East's statements and the Cabinet Manual recognise, a public statement by the Attorney-General answering an unwarranted criticism of the judiciary may be sufficient to produce a retraction or apology, thereby avoiding any need for proceedings for contempt.
- 6.10 Another alternative to contempt proceedings may be a formal written request by the Solicitor-General, as the junior Law Officer of the Crown, for a withdrawal of the unwarranted criticism and an apology to the particular judge involved. This alternative proved particularly effective in 1984 when the Solicitor-General on his own initiative wrote to the National Secretary of the New Zealand Police Association seeking and obtaining an apology for remarks attributed to him by the *Sunday News*, which included a statement impugning the impartiality of a Judge.
- 6.11 In another example, in 2003, a website listed 14 judges and claimed to be investigating them. The website accused them of "corruption, incompetence and suspect character" and stated that evidence would be progressively published on the website to prove it. After the Solicitor-General sent a letter, the offending material was removed from the website.<sup>469</sup>
- 6.12 Responsibility for upholding the rule of law, including defending the independence, integrity and impartiality of the judiciary, does not rest solely with the Law Officers of the Crown. Under the Lawyers and Conveyancers Act 2006 all lawyers and the New Zealand Law Society (NZLS) are obliged to uphold the rule of law.<sup>470</sup> Similar responsibilities are reflected in the Rules of the Auckland District Law Society Incorporated and the New Zealand Bar Association.
- 6.13 The NZLS will, in appropriate cases, make public statements answering attacks on members of the judiciary. Recent examples have included:
- a response from the President of the NZLS to criticism of a High Court Judge's decision not to impose a sentence of preventive detention on an offender who subsequently committed murder;<sup>471</sup>
  - a similar response to criticism of the sentencing of a young man who received a discharge without conviction for assault;<sup>472</sup>
  - comments regarding the need for criticism of court decisions to be measured and made in appropriate forums following extensive coverage of the extrajudicial comments of a retired judge on a high-profile case;<sup>473</sup> and
  - a video published by the NZLS in which a leading criminal barrister explains how the sentencing process works.<sup>474</sup>

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468 Cabinet Office *Cabinet Manual* 2008 at [4.8].

469 This incident is discussed in Cheer, above n 465, at 558.

470 Lawyers and Conveyancers Act 2006, ss 4(a) and 65(b).

471 New Zealand Law Society "Criticism of Judge unfair" (27 August 2015) < [www.lawsociety.org.nz](http://www.lawsociety.org.nz) > .

472 New Zealand Law Society "Sentence criticism ill-informed" (15 September 2016) < [www.lawsociety.org.nz](http://www.lawsociety.org.nz) > .

473 New Zealand Law Society "Discussion of judgments should be in appropriate forums, says Law Society" (8 November 2013) < [www.lawsociety.org.nz](http://www.lawsociety.org.nz) > .

474 New Zealand Law Society "Law Society provides guidance on sentencing considerations" (6 October 2016) < [www.lawsociety.org.nz](http://www.lawsociety.org.nz) > .

- 6.14 An example from the independent bar is found in the response by Robert Lithgow QC and retired Judge Dr David Harvey, among others, to criticism of the discharge without conviction of a young sports player guilty of assault.<sup>475</sup>
- 6.15 When the criticism of a judge is made by a lawyer, the NZLS may also invoke disciplinary procedures. In a recent case the New Zealand Lawyers and Conveyancers Disciplinary Tribunal found allegations by a lawyer of racism and corruption against two High Court Judges to be “baseless”,<sup>476</sup> “without cause” and supported by “not one shred of evidence”,<sup>477</sup> and imposed a sentence of 15 months’ suspension of practice, together with costs of over \$250,000.<sup>478</sup> The Tribunal’s decision, delivered some seven years after the allegations were first made, led to belated apologies by the lawyer concerned to both of the Judges.
- 6.16 The result in that case was perhaps not surprising as the lawyer had made the allegations in complaints against the Judges to the independent Judicial Conduct Commissioner who had investigated and rejected them prior to the Tribunal’s decision.<sup>479</sup> It is reasonable to assume, if there had been any truth in the allegations, steps would have been taken to remove the Judges from office long before the Tribunal’s decision in 2016. Instead the Judges remained in office with the unfounded allegations hanging over them. A more efficient and effective method for dealing with allegations of this nature is needed.
- 6.17 Under the Constitution Act 1986 and the Senior Courts Act 2016 High Court Judges may not be removed from office except by the Sovereign or Governor-General acting upon an address of the House of Representatives.<sup>480</sup> That address “may be moved only on the grounds of that Judge’s misbehaviour or of that Judge’s incapacity to discharge the functions of that Judge’s office.”<sup>481</sup>
- 6.18 Judges of the Senior Courts therefore have security of tenure until they reach the age of 70, when they must retire.<sup>482</sup> District Court Judges must also retire at the age of 70, and may be removed from office by the Governor-General on the advice of the Attorney-General on the grounds of “inability or misbehaviour”.<sup>483</sup>
- 6.19 Members of the public who are concerned about the conduct of a judge may complain to the Judicial Conduct Commissioner under the Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004, which was enacted to “enhance public confidence in, and to protect the impartiality and integrity of, the judicial system”.<sup>484</sup> As the High Court recognised in *Muir v Judicial Conduct Commissioner*, the Act confirmed New Zealand’s commitment to the United Nations’ Basic Principles on the Independence of the Judiciary.<sup>485</sup>

475 Stuff “Leading defence lawyers defend Losi Filipo’s discharge without conviction” (29 September 2016) < [www.stuff.co.nz](http://www.stuff.co.nz) >; Vaimoana Tapaleao and Lynley Bilby “Losi Filipo case: How the judges judge” *The New Zealand Herald* (online ed, Auckland, 29 September 2016) < [www.nzherald.co.nz](http://www.nzherald.co.nz) >.

476 *National Standards Committee No 1 v Deliu* [2016] NZLCDT 26 [Judges charges] at [215].

477 At [185].

478 *National Standards Committee No 1 v Deliu* [2016] NZLCDT 41 [Penalty decision]. This penalty decision reflected nine charges proved against Mr Deliu across three decisions: *National Standards Committee No 1 v Deliu* [2016] NZLCDT 25 [Interruption of meeting charge], *National Standards Committee No 1 v Deliu* [2016] NZLCDT 26 [Judges charges], and *National Standards Committee No 1 v Deliu* [2016] NZLCDT 27 [Incompetence charges]. Of these nine charges, six related to the allegations of racism made by Mr Deliu. Mr Deliu has filed an appeal: “Auckland barrister suspended” *LawTalk* 904 (New Zealand, March 2017) at 41.

479 Complaints were made about one judge in 2008 and 2009 and about the other judge in 2010, all of which were dismissed: *National Standards Committee No 1 v Deliu* [2016] NZLCDT 26 [Judges charges] at [10], [184] and [209].

480 Constitution Act 1986, s 23; Senior Courts Act 2016, s 134.

481 Constitution Act 1986, s 23.

482 Senior Courts Act 2016, s 133.

483 District Court Act 2016, ss 28-29.

484 Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004, s 4; *Wilson v Attorney-General* [2011] 1 NZLR 399 (HC) at [25]–[52].

485 *Muir v Judicial Conduct Commissioner* [2013] NZHC 989 at [41].



- 6.20 Under the Act the Judicial Conduct Commissioner has statutory responsibility for examining complaints in private and, in appropriate cases, recommending the appointment of a Judicial Conduct Panel to investigate allegations of judicial misconduct.<sup>486</sup> The Panel then has statutory responsibility for investigating, hearing in public and reporting on complaints.<sup>487</sup> Subject to a right of appeal to the Court of Appeal,<sup>488</sup> an adverse report by the Panel against a judge may lead to action by the Attorney-General<sup>489</sup> and, ultimately, the House of Representatives may remove the Judge from office under section 23 of the Constitution Act 1986. Decisions of the Judicial Conduct Commissioner are also open to challenge by judicial review.<sup>490</sup>
- 6.21 While the Law Officers of the Crown and the NZLS have responsibility for defending the independence, integrity and impartiality of the judiciary by answering unwarranted criticism of judges and while there is a formal statutory regime in place for dealing with complaints by members of the public against judges, the question is whether there is any need to retain in any form the common law contempt of scandalising the court.
- 6.22 The Solicitor-General has not brought a case alleging scandalising the court since 2004 when Dr Nick Smith MP, was found by a Full Court of the High Court to have been guilty of this contempt when making statements designed to lessen public acceptance of a Family Court custody decision.<sup>491</sup>
- 6.23 The absence of any cases since *Smith* does not mean, however, there have been no abusive allegations or false accusations against the judiciary over the last 13 years that have tended to undermine public confidence in the independence, integrity and impartiality of the judiciary. Recent examples include:
- websites with false and egregious criticisms of several judges;<sup>492</sup>
  - picketing by the Union of Fathers outside two Family Court Judges' homes in Hamilton and Auckland in 2006;<sup>493</sup>
  - demonstrations outside the private homes of senior judges, upsetting their neighbours and families;
  - website blogs and social media entries making derogatory statements against a Family Court Judge and her family and disclosing personal information about them (including photographs of her children and the name and address of their school); and
  - unfounded accusations by a lawyer of racism and corruption against two High Court Judges in complaints to the Judicial Conduct Commissioner.<sup>494</sup>
- 6.24 None of the criticisms or allegations in the above examples was true. All of the targeted judges remained in office. Yet in none of these cases did the Law Officers of the Crown or the Police

486 Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004, ss 15 and 18.

487 Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004, s 24.

488 Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004, s 31.

489 Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004, ss 32 and 33.

490 *Wilson v Attorney-General*, above n 484, at [50]; *Siemer v Judicial Conduct Commissioner* [2013] NZHC 1655 and [2014] NZHC 2878; *Muir v Judicial Conduct Commissioner*, above n 485.

491 *Solicitor-General v Smith* [2004] 2 NZLR 540 at [86]–[94]. Discussed above at [2.41]–[2.43].

492 See [6.11] above. More recently, a New Zealand businessman used a website to advance his case and allege bias and corruption by a judge. The Court of Appeal rebuked his allegations in *Siemer v Ferrier Hodgson* [2007] NZCA 581, [2008] 3 NZLR 22 at [31]. See also *Cheer*, above n 465, at 558.

493 Derek Chang "Fathers' vendetta angers top judge" *The New Zealand Herald* (online ed, New Zealand, 9 May 2006).

494 *National Standards Committee No 1 v Deliu* [Judges charges], above n 478. See [6.15]–[6.16] above.

take any steps to answer or respond to the allegations.<sup>495</sup> The reasons for taking no steps include uncertainty over the scope and effectiveness of the law in this area and concerns about drawing further attention to the allegations.

- 6.25 The lawyer who made the unfounded allegations of racism and corruption faced professional disciplinary proceedings, but due to numerous interlocutory applications and other delays the proceedings took some seven years to be heard and determined.<sup>496</sup>
- 6.26 There is, therefore, a serious question whether the law of scandalising the court is currently workable in practice. If the law is to be retained, there are further questions as to the nature and gravity of the conduct covered by the offence, and where the line should be drawn between freedom of expression and conduct interfering with the administration of justice. If the law is retained, what is its appropriate form?

## HISTORICAL BACKGROUND

- 6.27 The common law contempt of court, known by the antiquated description “scandalising the court”, covers “scurrilous abuse” of a judge or attacks on the integrity or impartiality of a judge or court.<sup>497</sup>
- 6.28 Some of the early scurrilous abuse cases in this category make quaint reading today:
- A newspaper article describing a judge as “an impudent little man in horse hair” and “a microcosm of conceit and empty headedness”.<sup>498</sup>
  - Placards outside the Royal Courts of Justice alleging a judge had “defrauded the course of justice”.<sup>499</sup>
  - Letters to a judge accusing him of being “a liar, a coward, a perjurer”.<sup>500</sup>
  - A newspaper article describing a judge as “the bewigged puppet and former Tory Member of Parliament chosen to put Communist leaders away”.<sup>501</sup>
- 6.29 During the twentieth century, this contempt fell into disuse in England largely because courts preferred to ignore attacks on themselves or leave them to be pursued by individual judges through civil remedies, such as damages for defamation.<sup>502</sup> Indeed, for many years, scandalising the court was considered “virtually obsolescent” in England.<sup>503</sup> In 1974, the Phillimore Committee recommended that scandalising the court should cease to be part of the law of contempt, but it should be an offence to defame a judge in such a way as to bring the

495 Principal Family Court Judge Peter Boshier defended the Family Court in respect of the 2006 picket at the homes of judges. He said that the picketing went beyond acceptable democratic protest and “[i]t has all the hallmarks of personal vendetta by individuals who do not respect the legitimacy of the court.”; see Derek Chang “Fathers’ vendetta angers top judge” *The New Zealand Herald* (online ed, New Zealand, 9 May 2006).

496 *National Standards Committee No 1 v Deliu* [Incompetence charges], above n 478, at [29]. The Tribunal said “the primary contributing reasons for delay were the multiple challenges to the process taken by the practitioner and their, some-times slow progression, and his opposition to the Committee’s application to access evidence from the Court files”. A range of interlocutory and judicial review proceedings, as well as appeals, were filed in relation to both preliminary and substantive decisions. The Court of Appeal in one decision recorded that his objective was to prevent the Tribunal ever hearing the disciplinary charges: *Deliu v New Zealand Law Society* [2015] NZCA 12, [2016] NZAR 1062 at [19] and [32]. See also *National Standards Committee No 1 v Deliu* [Penalty decision], above n 478.

497 David Eady and ATH Smith *Arlidge, Eady and Smith on Contempt* (4th ed, Sweet & Maxwell, London, 2011) at [5-204], *Laws of New Zealand Contempt of Court* (online ed) at [30]; Julie Maxton “Contempt of Court in New Zealand” (PhD Thesis, University of Auckland, 1990) at 366.

498 *R v Gray* [1900] 2 QB 36; see Maxton, above n 497, at 368, for full story.

499 *R v Vidal*, *The Times* October 14, 1922; see Maxton, above n 497, at 369, for full story.

500 *R v Freeman*, *The Times*, November 18, 1925.

501 *R v Wilkinson*, *The Times*, July 16, 1930.

502 Eady and Smith, above n 497, at [5-207]–[5-208].

503 *McLeod v St Aubyn* [1899] AC 549 (PC) at 561 per Lord Morris; *Secretary of State for Defence v Guardian Newspapers Ltd* [1985] AC 339 (HC) at 347A per Lord Diplock.

administration of justice into disrepute.<sup>504</sup> While recommendations for its replacement by statutory provisions were not initially implemented,<sup>505</sup> scandalising the court was finally abolished in 2013.<sup>506</sup>

- 6.30 This brought the position in England into line with the United States and Canada where scandalising the court has been held to breach rights of freedom of speech and expression.<sup>507</sup>
- 6.31 In New Zealand, however, the Court of Appeal in the 1978 *Radio Avon* case rejected a submission that contempt proceedings for scandalising the court had become obsolete.<sup>508</sup> The Court emphasised the need for caution, but did not accept that the jurisdiction was one that should no longer be exercised under any circumstances. The position in Australia is similar. Despite the Australian Law Reform Commission recommending in 1987 that scandalising the court be abolished,<sup>509</sup> it remains part of the common law in Australia.<sup>510</sup>
- 6.32 The enactment of NZBORA in 1990 has not undermined this contempt. In *Solicitor-General v Smith* a Full Court of the High Court considered the contempt of scandalising the court survived the enactment of NZBORA because it was a reasonable limit on freedom of expression that could demonstrably be justified in the free and democratic society that exists in New Zealand today.<sup>511</sup> Wild and MacKenzie JJ said:<sup>512</sup>

We do not accept that the offence of scandalising the Court cannot be justified as a reasonable limitation upon freedom of expression... The rights guaranteed by the [NZ]BORA depend upon the rule of law, the upholding of which is the function of Courts. Courts can only effectively discharge that function if they command the authority and respect of the public. A limit upon conduct which undermines that authority and respect is thus not only commensurate with the rights and freedoms contained in the [NZ]BORA, but is ultimately necessary to ensure that they are upheld.

- 6.33 The High Court's view that a common law contempt of court may constitute a justifiable limit on the right to freedom of expression prescribed by law is consistent with the approach of the Supreme Court in the two *Siemer* cases.<sup>513</sup>

## ISSUES WITH COMMON LAW

### Summary process

- 6.34 Like all common law contempt, scandalising the court is punishable in New Zealand by way of summary process for committal.<sup>514</sup> Responsibility for initiating the process rests with the judge concerned (but only where the offending conduct occurs during proceedings before one of the higher courts) or with the Solicitor-General, who commences the proceeding by way of

504 Lord Phillimore *Report of the Committee on Contempt of Court* (House of Commons, Cmnd 5794, December 1974) at 94.

505 Eady and Smith, above n 497, at [5-210]–[5-215].

506 Crime and Courts Act 2013 (UK), s 33.

507 *Bridges v California* 314 US 252 (1941) at 287; *R v Kopyto*, above n 465.

508 *Solicitor-General v Radio Avon Ltd*, above n 458, at 237–238.

509 Australian Law Reform Commission *Contempt* (ALRC Report 35, 1987). Initially, in response to the Australian Law Reform Commission, a Government position paper was prepared and circulated, outlining the federal government's position on the Commission's recommendations in 1992. Although four jurisdictions initially agreed 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; ALRC, "Contempt" (12 July 2010) < [www.alrc.gov.au](http://www.alrc.gov.au) >.

510 *Gallagher v Durack*, above n 458.

511 *Solicitor-General v Smith*, above n 491, at [133] and [136]. We discuss this case in some detail at [2.41]–[2.43].

512 At [133].

513 *Siemer v Solicitor-General* [2010] NZSC 54, [2010] 3 NZLR 767 at [24]–[25]; *Siemer v Solicitor-General* [2013] NZSC 68, [2013] 3 NZLR 441 at [229]. See also discussion at [1.75], [2.36] and [5.30].

514 *Solicitor-General v Radio Avon Ltd*, above n 458, at 235.

originating application in accordance with the High Court Rules.<sup>515</sup> The District Courts and other courts or tribunals that source their jurisdiction from statute do not have jurisdiction in respect of this contempt. Instead, the High Court's inherent jurisdiction extends to upholding the authority of the lower courts and tribunals.<sup>516</sup>

### Proof of intention

- 6.35 A successful case does not require proof of an intention to lower the authority of the judge or court.<sup>517</sup> The Court of Appeal has said there must be a real risk, as opposed to a remote possibility, that the criticism involved would undermine public confidence in the administration of justice.<sup>518</sup> This is the same real risk test we outlined and discussed in detail in chapter 2.<sup>519</sup>

### Defence of truth

- 6.36 It is unclear whether defences of fair comment, truth or justification (public benefit) are available.<sup>520</sup> In *Attorney-General v Blomfield*, the majority of the Full Court of the then Supreme Court considered that the summary procedure in a contempt case was not suitable for inquiries of this nature.<sup>521</sup> It is arguable that to allow truth as a defence would open up the possibility of the conduct of judges (both past and present) being subject to investigation and judgment. On the other hand, how could truth not be a defence?
- 6.37 In the United Kingdom, the Phillimore Committee,<sup>522</sup> which in 1974 reviewed and made recommendations relating to contempt, suggested that truth could be a defence if there was an additional element of public benefit.<sup>523</sup> Professor ATH Smith has noted, however, there is likewise authority to suggest that fair criticism of judges that is true itself has a public benefit, implying that there is no additional element of public benefit required.<sup>524</sup>

## OTHER REMEDIES

- 6.38 When considering the future of the contempt of scandalising the court, it is important to take into account other remedies that are available for the Police to prosecute, and for judges to pursue, in the same way as anyone else. These other remedies include a range of criminal offences and civil actions. It is also relevant to note in this context the existence of the Ministry of Justice National Security Operations Section which has responsibility for judicial security. Judges are able to refer all types of attack, including online abuse, to the Section for investigation and, if necessary, further action.
- 6.39 Serious attacks or threats of attacks against judges may constitute criminal offences under the Crimes Act 1961:
- threatening to kill or do grievous bodily harm: section 306;
  - threatening to destroy property: section 307;

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515 *McGechan on Procedure* (online looseleaf ed, Thomson Reuters) at [HR19.3.01].

516 *Quality Pizzas Ltd v Canterbury Hotel Employees Industrial Union* [1983] NZLR 612 (CA) at 616.

517 *Solicitor-General v Radio Avon Ltd*, above n 458, at 232.

518 At 229 and 232–233.

519 At [2.69]–[2.72].

520 Eady and Smith, above n 497 at [5-204]; *Attorney-General v Blomfield* (1913) 33 NZLR 545 (SC); and *Solicitor-General v Radio Avon*, above n 458, at 231.

521 *Attorney-General v Blomfield*, above n 520, per Stout CJ at 559, Williams J at 563, and Denniston J at 570. See also *Solicitor-General v Radio Avon Ltd*, above n 458, at 231.

522 Phillimore, above n 504.

523 This approach was taken by the High Court in Australia in *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 39.

524 ATH Smith *Reforming the New Zealand Law of Contempt: An Issues/Discussion Paper* (Crown Law Office, April 2011) at [3.52]–[3.56].

- threats of harm to people or property: section 307A; and
  - threatening acts: section 308.
- 6.40 Less serious conduct may constitute criminal offences under the following legislation:
- section 4 of the Summary Offences Act 1981 (offensive behaviour);
  - section 8 of the Harassment Act 1997 (criminal harassment);
  - sections 21 and 22 of the Postal Services Act 1998 (posting noxious substances, noxious things or indecent articles);
  - section 112 of the Telecommunications Act 2001 (misuse of telephone device); and
  - sections 21 and 22 of the Harmful Digital Communications Act 2015 (failing to comply with a take down order and posting a digital communication with intention to cause harm).
- 6.41 Civil remedies available to judges who are the subject of attacks, threats, abusive allegations or false accusations include:
- civil claims for defamation;
  - actions for trespass;
  - actions for harassment under the Harassment Act (civil harassment); and
  - complaints under the Harmful Digital Communications Act.
- 6.42 The Harmful Digital Communications Act was enacted following the Law Commission’s review of “Regulatory Gaps and the New Media”.<sup>525</sup> The purpose of the Act is to:<sup>526</sup>
- (a) deter, prevent, and mitigate harm caused to individuals by digital communications; and
  - (b) provide victims of harmful digital communications with a quick and efficient means of redress.
- Under the Act digital communication is defined as “any form of electronic communication [including] any text message, writing, photograph, picture, recording, or other matter that is communicated electronically”.<sup>527</sup>
- 6.43 The Act creates a new civil enforcement regime that enables specified persons to make initial complaints<sup>528</sup> about harmful digital communications to the Approved Agency.<sup>529</sup> The Approved Agency may then investigate the complaint and attempt to resolve it using advice, negotiation, mediation and persuasion as appropriate.<sup>530</sup> A specified person may apply to the District Court for a number of civil orders, but only once a complaint has been made and the Approved Agency has had a reasonable opportunity to assess it and determine a course of action.<sup>531</sup> Where a

525 Law Commission *Harmful Digital Communications: The adequacy of the current sanctions and remedies* (NZLC MB3, 2012); Law Commission *The News Media Meets ‘New Media’: Rights and Responsibilities in the Digital Age* (NZLC R128, 2013). See also New Zealand Law Society “IT & Online Law Conference” May 2015, New Zealand Law Society Webinar “Cyber Bullying” September 2015, New Zealand Law Society “Cyber Law Conference” (May 2016), New Zealand Law Society Seminar “Media Law” (February 2017).

526 Harmful Digital Communications Act 2015, s 3.

527 Harmful Digital Communications Act 2015, s 4.

528 Harmful Digital Communications Act 2015, s 11.

529 Section 7 of the new Act came into force on 20 May 2016: Harmful Digital Communications Act Commencement Order 2016. Netsafe was appointed as the Approved Agency in November 2016. It has already received over 600 requests for assistance: Hon Amy Adams, Minister of Justice “Cyberbullying law holding offenders to account” (press release, 5 April 2017).

530 Harmful Digital Communications Act 2015, s 8(1)(c). The use of “as appropriate” in this section suggests that the Agency has discretion to use all, some or none of the listed techniques, depending on the circumstances. This is consistent with the advice of the Approved Agency, Netsafe, which says that the Agency will never contact the person harassing the complainant without first obtaining the complainant’s consent: Netsafe “Get Help With Online Bullying, Abuse and Harassment” (22 February 2017) < [www.netsafe.org.nz/hdc](http://www.netsafe.org.nz/hdc) > .

531 Harmful Digital Communications Act 2015, s 12(1).



communication constitutes a threat to the safety of an individual, the Police may apply directly to the court without having to first make a complaint to the Approved Agency. These orders may include those requiring harmful digital communications to be taken down and requiring the defendant to cease the harmful conduct.<sup>532</sup> It is also a criminal offence under the new Act for a person to post a digital communication with the intention that it causes harm<sup>533</sup> or to fail to comply with an order made under the Act.<sup>534</sup>

- 6.44 In the Act's first year, there have been 132 charges filed and 50 convictions.<sup>535</sup> It appears many of the prosecutions have related to harmful communications after the breakdown of intimate relationships.<sup>536</sup>

## POSITION TODAY

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- 6.45 There are still many ways today in which members of the New Zealand judiciary may face unwarranted attacks, threats, abusive allegations and false accusations or personal ridicule or threats that compromise or may compromise their ability to adjudicate without "fear or favour".<sup>537</sup>
- 6.46 In addition to statements published in the traditional media, unwarranted attacks include, as we have already noted, statements on websites, blogs or social media platforms such as Facebook and Twitter, and demonstrations outside judges' private homes.
- 6.47 While attacks and threats constituting criminal offences should be left to the Police to prosecute in the normal way, the advent of digital media has highlighted the need for the retention of some form of action for contempt of court in respect of published allegations and accusations which are false but appear credible and carry with them a real risk of undermining public confidence in the judiciary as an institution. With the internet being a permanent repository of information and with the potential for posts to go viral, we can no longer dismiss attacks on judges on the ground that today's newspaper is tomorrow's fire lighter.<sup>538</sup>
- 6.48 As already noted above at [6.11], in 2003 a website appeared on the internet which listed 14 judges who it said it was investigating, accusing them of "corruption, incompetence and suspect character" and that evidence would be progressively published on the website to prove it.<sup>539</sup> A letter from the Solicitor-General followed, and the material was removed from the website. Also in recent years, Mr Siemer, who was involved in protracted litigation against another businessman and against some higher court judges, has made statements in court documents filed in those proceedings, and also on his Kiwis First website that are similar. In one set of proceedings he stated that: "Many of [the judge's] actions are sufficient to cause an impartial observer to wonder whether he is paid counsel for the respondents rather than an impartial arbiter".<sup>540</sup> Although these comments drew a firm rebuke from the Court of Appeal,<sup>541</sup> such attacks and possible scandalising comments have otherwise been publicly ignored.

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532 Harmful Digital Communications Act 2015, ss 11, 12 and 19.

533 Harmful Digital Communications Act 2015, s 22.

534 Harmful Digital Communications Act 2015, s 21.

535 Hon Amy Adams, Minister of Justice, above n 529.

536 Judge David Harvey "Prosecutions under the HDC Act" (2016) 29 Law News 8. See also *R v Iyer* [2016] NZDC 23957, reversed on appeal: *New Zealand Police v B* [2017] NZHC 526.

537 Oath and Declarations Act 1957, s 18. See also above at [3.42].

538 Eady and Smith, above n 497, at [5-207].

539 Cheer, above n 465, at 558.

540 *Siemer v Ferrier Hodgson*, above n 492, at [32].

541 At [31].

- 6.49 For various reasons none of the other available remedies has proved adequate to deal with these actions. The demonstrators outside the judges' homes have not been prosecuted.<sup>542</sup> Solicitors-General have also been reluctant in recent years to bring contempt proceedings. Matters touching on this ground of contempt are referred to Crown Law regularly, but few result in action. The threshold for contempt is very high and the credibility of the attack is central to whether a contempt action on this ground could ever be successful. If extreme and vitriolic language is used, people are less likely to regard it as credible, making it difficult to demonstrate a real risk to the administration of justice.
- 6.50 As noted above at [6.3], a balanced approach is also required because of the right to freedom of expression. Fair and honest criticism of judgments and courts is legitimate and needed in a democratic society.<sup>543</sup>
- 6.51 The recent press activity in England following the first judicial decision that Brexit could not be triggered without a vote by Parliament illustrates how the balance has shifted towards freedom of expression following the abolition of the contempt of scandalising. As a result of this judicial decision, three newspapers published photos of the three judges involved, with headings such as "enemies of the people" and "the judges versus the people" and, within the articles, making allegations that the judiciary was biased: "infested with Europhiles", as well as making attacks on each of the judges on a personal level. There were calls for the Lord Chancellor to defend the judges. The Lord Chancellor, however, in essence made it clear that while the rule of law is important so too is freedom of the press and she was not prepared to criticise the newspapers because they had not broken the law. This did not quiet criticism however, and Sir Geoffrey Palmer QC subsequently wrote:<sup>544</sup>
- It took an embarrassingly long time for the Lord Chancellor to issue a statement defending the Judges and upholding the basic constitutional principle of English law, the independence of the judiciary.
- 6.52 In 2013, as we have noted earlier, England abolished the common law contempt of scandalising so, while some of the coverage was quite distasteful and misleading, there could be no suggestion that the newspapers were breaking the law in this respect.

## ISSUES PAPER

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- 6.53 In our Issues Paper we identified the following issues requiring resolution:
- (a) Whether the common law contempt of scandalising the court should be abolished in New Zealand because it was now virtually obsolete here, no cases having been brought since *Solicitor-General v Smith*.
  - (b) Whether the anachronistic term "scandalising" was unsatisfactory.
  - (c) Whether the uncertain scope of this form of contempt, particularly the guilty intention requirement and whether truth or justification was a defence, called for reform.
  - (d) Whether the use of a summary procedure when there was no need to protect a particular trial was appropriate.
  - (e) Where to draw the line, if at all, between legitimate criticism of the judicial system and criticism that undermined confidence in the administration of justice.

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542 Possibly because of the decisions in *Brooker v Police* [2007] NZSC 30, [2007] 3 NZLR 91 and *Morse v Police* [2011] NZSC 45, [2012] 2 NZLR 1.

543 *Solicitor-General v Radio Avon Ltd*, above n 458, at 231; *Gallagher v Durack*, above n 458, at 243. See also [6.3]–[6.4]; and Cheer, above n 465, at [16.1].

544 Geoffrey Palmer "Do the British understand their own unwritten Constitution?" [2017] NZLJ 27 at 27.

- 6.54 We outlined one main proposal and two consequential options. The main proposal was to abolish the common law contempt of scandalising the court. The two consequential options then were to:
- (a) rely on other existing avenues and sanctions for remedies in situations where judges or courts were unfairly subject to vitriolic criticism (such as existing statutory offences and civil defamation); or
  - (b) replace the common law contempt of scandalising with a new statutory offence. For example, an offence of publication of material imputing improper or corrupt judicial conduct, which, having regard to the nature of the published statement, the status of the person making the statement and the likely audience, created a real risk of impairing confidence in the administration of justice.
- 6.55 The Commission expressed preliminary support in the Issues Paper for the first option.
- 6.56 In proposing as the second option the replacement of the common law contempt of scandalising with a new statutory offence of some kind, the Issues Paper suggested there could be a defence to such an offence if the allegations were true or publication was for the public benefit. The law would also need an exception to allow allegations of judicial misconduct to be made to the Judicial Conduct Commissioner.
- 6.57 The Commission suggested the defence of truth or public interest might ensure the offence was compliant with NZBORA. One problem with enacting an offence with a defence of truth and public interest would be that it would effectively put the judge on trial and subject the judge's conduct to scrutiny outside the statutory process for dealing with complaints against the judiciary.

## SUBMISSIONS ON THE ISSUES PAPER

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- 6.58 APN News and Media Ltd,<sup>545</sup> the Police and the Auckland District Law Society Incorporated all supported the introduction of a new statutory offence along the lines set out in the Issues Paper. They considered that while the offence was not used often, the objective of the contempt of scandalising was important and remained valid.
- 6.59 Although most other submitters considered scandalising obsolete for the reasons we set out in the Issues Paper, others we consulted suggested the contempt of scandalising offered something of a symbolic standard for the law. While there were likely to be few (if any) prosecutions, it was beneficial to have a clear statement of what was not acceptable in terms of attacks on the courts and judiciary. Some submitters considered there was scope to consider a statutory offence relating to the administration of justice, or bringing the judiciary and courts into disrepute. Some suggested reliance on defamation as a remedy was problematic, and it was appropriate to have a standard set out in law.
- 6.60 Submitters who were in favour of abolition included TVNZ which considered defamation laws and the framework under the Harmful Digital Communications Act would be sufficient. The NZLS also supported abolition and considered "to the extent that criticism or threatening behaviour is not captured by existing criminal offences, civil defamation or the Harassment Act, it may be accepted as a normal incident of a society that respects free speech and liberty

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<sup>545</sup> APN publishes almost 20 daily newspapers (including the *New Zealand Herald*) and more than 80 non-daily newspapers in New Zealand. It has over 50 websites, mobile sites and apps across Australia and New Zealand, and owns three national radio networks: *NewsTalk ZB*, *The Hits* and *Coast* as well as four other major networks.

of opinion”. Some of the judges we consulted also considered that, even where scandalising penalised only the worst conduct, it had no place in our society any more.

- 6.61 Crown Law did not offer opinions on the policy options outlined in our Issues Paper. It did note, however, that if a catch-all offence was recommended, this might provide an ideal opportunity to abandon scandalising. If there were to be an offence relating to scandalous conduct, Crown Law raised the issue whether any person charged would have the right to bring evidence placing judges in the position of being called as a witness and challenged accordingly.
- 6.62 During consultation Crown Law advised that a key factor when it was exercising its prosecutorial discretion was considering how the public would view the action. Ultimately, contempt was concerned with public confidence in the administration of justice and, accordingly, sometimes contempt actions would not advance this goal. An example of this would be when the public would likely view a prosecution as heavy handed. Crown Law noted that where the material or conduct in question was extreme the public tended to view it with scepticism. In other words, it was not considered credible so it did not undermine public confidence.

### *Harmful Digital Communications Act 2015*

- 6.63 Some submitters did not consider the Harmful Digital Communications Bill (as it was at the time) and other existing remedies could cover the space occupied by the contempt of scandalising. Crown Law submitted it did not consider the Bill provided a suitable mechanism to deal with complaints about judicial harassment. It also did not support the suggestion that Crown Solicitors, in the name of the Solicitor-General, could make complaints under the legislation on behalf of individual judges. The Police noted the Bill was limited to digital communication; it would not cover attacks on the court that were not digital, and it did not address the risk to public confidence in the administration of justice.
- 6.64 The comments made on behalf of District Court judges were critical of resolving problems through the Bill’s process because the regime under the Bill required people to follow a mediation resolution process through the Approved Agency before seeking a court order.<sup>546</sup> Such a process might not be suitable where the harassing party had a personal vendetta against the judge and the court system. Putting the judge and this party face to face might simply be an opportunity for further abuse.

## **OUR ASSESSMENT**

- 6.65 After careful consideration of all these submissions, we have reached the following principal conclusions:
- (a) It remains in the public interest to have an offence which is designed to deter and, if necessary, punish persons responsible for publishing allegations and accusations against judges and courts which appear credible but are not in fact true and which carry with them a real risk of undermining public confidence in the judiciary as an institution.
  - (b) The offence should be a statutory one and replace the common law offence of scandalising the court, which should be abolished.
  - (c) The Solicitor-General should be responsible for investigating and bringing prosecutions for the new offence.

<sup>546</sup> Harmful Digital Communications Act 2015, s 12. As noted above at n 529, Netsafe has been appointed as the Approved Agency under the Act.

- (d) The Solicitor-General should prosecute the new offence in the High Court following the filing of charges under the Criminal Procedure Act.
- (e) The High Court should also have power to make orders, both interim and final, for the retraction or take down of the allegation or accusation.

### Reasons for our conclusions

6.66 Our reasons for concluding there should still be an offence are:

- (a) It is in the public interest we maintain confidence in the independence, integrity and impartiality of the justice system. False allegations, which are published without justification and which carry a real risk of undermining public confidence in the judiciary as an institution, should not go unanswered. Maintaining public confidence in the judiciary as an institution is essential for upholding the rule of law in New Zealand.
- (b) As we have noted, since the *Smith* case in 2004 there have in fact been several serious false allegations made against judges which have gone unanswered.<sup>547</sup>
- (c) The general remedies (defamation, trespass, harassment, and harmful digital communications) do not address the public interest in maintaining confidence in the judiciary as an institution. Instead, they focus on the interests of the individual judge. They also require the judge to initiate proceedings, which almost inevitably involves further personal publicity, time and cost for the judge.

6.67 Our reasons for concluding there should be a new statutory offence replacing the common law offence of scandalising the court are:

- (a) The common law contempt of scandalising is outdated. Its antiquated language is no longer appropriate in a modern world. We need to address its summary process and the uncertainties surrounding proof of intention and the availability of defences.
- (b) The new offence would define the proscribed conduct with precision, settle the issue of whether there should be a defence of truth, and prescribe appropriate penalties. It would be clear that it does not prevent legitimate criticism of judgments and courts by anyone exercising their rights to freedom of expression.
- (c) Although the statutory offence would be a new one, it would replace and clarify an existing common law offence.
- (d) The principal purpose of the offence would be to act as a deterrent. As we explain below, we anticipate other remedial steps being taken first and prosecution being a last resort.

6.68 Our reasons for concluding the Solicitor-General should have responsibility for prosecuting the new offence are discussed below at [6.87]–[6.89].

6.69 Our reasons for concluding courts should also have power to make orders, both interim and final, for the retraction or take down of allegations or accusations are:

- (a) While the powers to take down or suppress material exist at common law in other contexts,<sup>548</sup> it is preferable to prescribe them by statute so that breach of the orders may be made a separate criminal offence and capable of relatively straightforward enforcement in New Zealand.

<sup>547</sup> See [6.23].

<sup>548</sup> *L v R* [2015] NZCA 279, [2016] 2 NZLR 21. See also David Harvey *internet.law.nz* (4th ed, LexisNexis, Wellington, 2016).



- (b) A retraction or take down order is likely to be the most effective way of dealing with allegations in this context, especially with online publications. The orders may be made against the owners of servers (responsible ones are likely to comply) and New Zealand residents responsible for the websites and blogs.

### The recommended offence

- 6.70 Our recommendation is that it should be an offence for any person to (i) publish an untrue allegation or accusation against a judge or a court where (ii) there is a real risk that the publication could undermine public confidence in the independence, integrity or impartiality of the judiciary as an institution. The recommended offence would cover statements of opinion, which are not capable of proof, as well as allegations of fact that are untrue. This is because opinions can be equally damaging. After considering the options, we determined the offence should also cover attacks on the court system as a whole or a particular court as well as those against a judge. The scope of the offence should make it clear that the underlying policy behind the offence is an attack on the administration of justice and not the protection of the feelings of individual judges.
- 6.71 In this context “publish” will require knowledge of the publication by the person involved. In the context of liability for third party publications, such as comments on one’s social media account, for example, we have considered analogous cases from defamation law. We agree with the Court of Appeal in *Murray v Wishart* that actual knowledge of the third party publication should be required.<sup>549</sup> A lower standard of “ought to know” is challenging to apply consistently in the context of social media, potentially widens the scope of liability quite dramatically and is difficult to justify as a reasonable limitation on freedom of expression.
- 6.72 We consider people should be liable for third party publications where there is (i) actual knowledge of the publication, (ii) a deliberate act (including inaction in the face of actual knowledge) and (iii) power and control over the offending material.<sup>550</sup> This test was described by the Supreme Court of British Columbia in *Pritchard v Van Nes* as representing the position in Canada, although the court in that case departed from the requirement of actual knowledge. This test is broadly similar to that in *Murray v Wishart*. It differs, however, in that it makes express the requirement of power and control, and removes the “inference that [the defendant] was taking responsibility” for the publication from the elements of the test itself.<sup>551</sup> Some people have raised concerns this limb of the test could potentially permit a host to avoid liability by expressly disclaiming responsibility while continuing to host the offending material. As far as the Court in *Pritchard* disagreed with *Murray* on the subject of actual knowledge,<sup>552</sup> however, we consider the Court of Appeal in *Murray* was correct for the reasons outlined above. Where *Murray v Wishart* required actual knowledge, the Court in *Pritchard v Van Nes* was willing to find liability for defamatory comments by third parties where the defendant “ought to have anticipated” that such comments would be made.<sup>553</sup> In *Pritchard*, the defendant had responded to various comments on her original post and actively encouraged discussion, but had not responded specifically to the comment at issue. On such facts, however, it arguably would be open to the court to infer actual knowledge circumstantially without having to remove the requirement altogether.

549 *Murray v Wishart* [2014] NZCA 461, [2014] 3 NZLR 722 at [137]–[143].

550 *Pritchard v Van Nes* [2016] BCSC 686 at [108].

551 *Murray v Wishart*, above n 549, at [148].

552 *Pritchard v Van Nes*, above n 550, at [117].

553 At [110] and [117].

## Freedom of expression

6.73 The requirement that there must be a real risk that the publication could undermine public confidence in the judiciary would make it clear that the right to express legitimate criticism is not proscribed. Consistent with the decision of the Full Court of the High Court in *Solicitor-General v Smith*,<sup>554</sup> the offence remains, in our view, a reasonable and necessary limitation upon the right to freedom of expression guaranteed by section 14 of NZBORA. The rights guaranteed by NZBORA depend upon the rule of law. The function of courts is to uphold the rule of law, and the courts can only effectively discharge that function if they command the authority and respect of the public.<sup>555</sup>

6.74 The position is similar under Article 10 of the European Convention on Human Rights.<sup>556</sup> Article 10 protects the right to freedom of expression, and further provides:

The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society ... for maintaining the authority and impartiality of the judiciary.

The European Court of Human Rights has accordingly recognised reasonable limitations on the right to freedom of expression in pursuit of the legitimate aim of maintaining the authority and impartiality of the judiciary. Factors that the Court has taken into account in determining the reasonableness and proportionality of such limitations include whether or not the expression was made in the conduct of proceedings or by a lawyer in the context of defending or pursuing a client's interests;<sup>557</sup> whether the expression is properly characterised as criticism, insult or even gratuitous;<sup>558</sup> whether the subject of the expression was a matter of public interest;<sup>559</sup> the chilling effect that the limitation may have on legitimate criticism, including upon lawyers advocating for their clients;<sup>560</sup> and whether there was a factual basis for criticism.<sup>561</sup>

6.75 For example, in *Peruzzi v Italy* the Court determined that there was no breach of Article 10 where a lawyer was convicted and fined for defaming a judge after sending a letter to the Judge and the Judge's colleagues alleging that the Judge had wilfully disregarded his or her ethical obligations and possibly committed a criminal offence.<sup>562</sup> In *Ravelo v Spain*, on the other hand, the Court held a lawyer's conviction for libel for attributing similar blameworthy conduct to a judge in a written application in civil proceedings to be a violation of Article 10. While the Court considered the lawyer could legitimately have been punished for his conduct, it was influenced by the communication having been made solely in writing and only to the court in the context of defending a client's interests, and the severity of the penalty.<sup>563</sup>

## Defence of truth

6.76 We consider that a defence of truth should be available in cases involving allegations of fact if the person who has published the allegations or accusations is able to prove, on the balance of probabilities, that the allegation or accusation was in fact true or not materially different from

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554 *Solicitor-General v Smith*, above n 491. See above at [6.32]–[6.33].

555 *Solicitor-General v Smith*, above n 491, at [133] and [136].

556 European Convention for the Protection of Human Rights and Fundamental Freedoms, ETS 5 (opened for signature 4 September 1950, entered into force 3 September 1953), art 10.

557 *Morice v France* (2016) 62 EHRR 1 (Grand Chamber, ECHR); *Nikula v Finland* (2004) 38 EHRR 45 (Section IV, ECHR).

558 *Erdogan v Turkey* (346/04 and 39779/04) Section II, ECHR 27 May 2014.

559 *Erdogan v Turkey*, above n 558.

560 *Ravelo v Spain* (48074/10) Section III, ECHR 12 January 2016.

561 *Peruzzi v Italy* (39294/09) Section IV, ECHR 30 June 2015.

562 *Peruzzi v Italy*, above n 561.

563 *Ravelo v Spain*, above n 560.

the truth. As we have already noted, it is currently unclear whether the defence of truth is available at common law. With the enactment of NZBORA, it would perhaps now be difficult to justify the approach taken in *Attorney-General v Blomfield* over 100 years ago.<sup>564</sup> Truth should now be a defence.

- 6.77 Consistent with the requirements of NZBORA, defendants should be able to raise the defence of truth as of right. Also relevant to this consideration is the compellability of a judge to give evidence. We are concerned to avoid the situation of a judge having to give evidence in court. If the allegations are in respect of the judge's conduct as a judge, the judge cannot be compelled to give evidence: section 74(d) of the Evidence Act 2006.<sup>565</sup> If, however, the allegations relate to conduct outside the scope of section 74(d), then a judge might be compelled to give evidence, unless the court decides the evidence the judge is being asked to give is inadmissible, irrelevant or oppressive, or it would be an abuse of process for the judge to be required to give evidence.<sup>566</sup> These are factors which the Solicitor-General would be able to take into account when deciding whether it would be in the public interest to prosecute the new offence.
- 6.78 We consider the defence should largely be the same as the defence of truth in section 8 of the Defamation Act 1992 and clause 24(3) in the draft Bill reflects this approach. While defamation is a civil proceeding and the new proposed offence is criminal, the same underlying rationale applies. The defence of truth exists in defamation law because an individual cannot claim damage to a reputation that he or she does not have. Similarly, a defendant cannot be said to be responsible for undermining public confidence in the judiciary where the allegations made are in fact true. Section 8 reads as follows:

### 8 Truth

- (1) In proceedings for defamation, the defence known before the commencement of this Act as the defence of justification shall, after the commencement of this Act, be known as the defence of truth.
  - (2) In proceedings for defamation based on only some of the matter contained in a publication, the defendant may allege and prove any facts contained in the whole of the publication.
  - (3) In proceedings for defamation, a defence of truth shall succeed if—
    - (a) the defendant proves that the imputations contained in the matter that is the subject of the proceedings were true, or not materially different from the truth; or
    - (b) where the proceedings are based on all or any of the matter contained in a publication, the defendant proves that the publication taken as a whole was in substance true, or was in substance not materially different from the truth.
- 6.79 Section 8(2) provides that where a claim is based on only part of a statement, it is open to the defendant to plead and prove the defence of truth in relation to the statement as a whole. Accordingly, where the truth of part of the statement cannot be proved, the defence may succeed if that part is immaterial in the context of the whole. Consistent with our approach to adopting section 8, we consider that the same rule should apply for the proposed new offence. This is a factor the Solicitor-General would be able to take into account when considering whether a prosecution is in the public interest, as it will not be possible to limit a prosecution to

<sup>564</sup> *Attorney-General v Blomfield*, above n 520. See above at [6.36].

<sup>565</sup> *Warren v Warren* [1997] QB 488 (CA). See also *Deliu v New Zealand District Court* [2016] NZHC 2806, [2017] NZAR 120 at [16]–[33].

<sup>566</sup> Note there is no statutory provision in New Zealand relating to the setting aside of either a witness summons issued under s 159 of the Summary Proceedings Act or a subpoena under r 9.52(1) of the High Court Rules, but it is accepted in both situations the Court has jurisdiction to do so: *Re Golightly* [1974] 2 NZLR 297 (SC), *Senior v Holdsworth* [1976] 1 QB 23 (CA), and *Tuck v Registrar of District Court* (1991) 3 PRNZ 459 (HC) at 462–463. See also T Jenns “Subpoena of Judges” (2000) NZLJ 198.

only those allegations that are incontrovertibly false and the defendant may be entitled to plead the truth of other parts of a statement which cannot be responded to without calling members of the judiciary to give evidence.

- 6.80 We have considered whether there should be some restrictions on a defendant raising a defence of truth. In particular, whether there should be some link between being able to raise the defence and the outcome of a complaint under the Judicial Conduct Commissioner and Judicial Conduct Panel Act. As we have already explained, that Act provides a formal regime for dealing with complaints against judges. In the absence of a complaint or an adverse recommendation, it would be reasonable to take the position that the allegation is without foundation. One option we therefore explored was whether a defence of truth should only be available where the defendant had made the allegation or accusation the subject of a complaint under the Judicial Conduct Commissioner and Judicial Conduct Panel Act and then only if the allegation or accusation was consistent with the ultimate outcome of the complaint under that Act.
- 6.81 We concluded, however, that this option was too complicated and likely to result in undue delay. It would require the prosecution to be adjourned pending determination of any complaint by the Judicial Conduct Commissioner. Also, the Judicial Conduct Commissioner and Judicial Conduct Panel Act processes, while designed to assess complaints, do not necessarily make legal determinations about the truth or otherwise of specific factual allegations. We have concluded that the Judicial Conduct Commissioner and Judicial Conduct Panel Act processes should remain separate from the criminal offence, especially as there would be potential for significant delay in the prosecution process. At the same time, however, we have also concluded that the existence of an unresolved complaint to the Judicial Conduct Commissioner might be a factor the court could take into account when deciding whether to make an interim take down order. The rejection or absence of a complaint under the Judicial Conduct Commissioner and Judicial Conduct Panel Act is also a factor the Solicitor-General might take into account in considering whether a prosecution for the new offence was in the public interest.

#### *No defence of honest opinion*

- 6.82 For completeness, we note we do not consider that there should be a further defence of honest opinion such as that available in an action for defamation under section 9 of the Defamation Act. This defence has never been a part of the law of contempt, and it is not consistent with the overall purpose of this part of the law of contempt, which is to protect the independence, integrity and impartiality of the judiciary as an institution. Further, the likely effect of a defence of honest opinion would be to confine the proposed offence to a very small selection of exceptional cases.

#### *Take down orders*

- 6.83 The High Court should have statutory powers to make both interim and final orders for the retraction or take down of the allegation or accusation. The Court should be able to exercise the power to make a take down order in any case where a person has been charged with the new offence and the Court is satisfied there is an arguable case that the person has committed the offence. The Court should also be able to make an interim order pending the filing of a charge.
- 6.84 The High Court's powers here would be discretionary. The Court would have to be satisfied that the risk of undermining public confidence was sufficient to justify interfering with the person's rights to freedom of expression. Under the provision, the Court would not remove statements of legitimate criticism by anyone exercising their rights to freedom of expression. Non-compliance with any order to retract or take down the allegation or accusation would also be a separate criminal offence.



- 6.85 In addition we recommend that the High Court be able to make orders requiring the publication of a correction or an apology. Clause 26(1) of the draft Bill gives effect to this recommendation.
- 6.86 In the same way as we have provided for this in relation to take down orders made to preserve a fair trial,<sup>567</sup> we recommend that the accredited media should have standing to be heard in relation to, any application for a take down order.

### *Investigation and prosecution*

- 6.87 We have considered whether the Solicitor-General or the Police should be responsible for investigating and bringing prosecutions for the new offence. We have discussed the different options with the Solicitor-General and the Police Prosecutions Service and have reached the view that the Solicitor-General should retain responsibility in this area. The Solicitor-General agrees.
- 6.88 We discuss prosecution issues in more detail in chapter 7 at [7.47] to [7.54] of the Report, but there are five reasons why responsibility for investigating and, where appropriate, bringing proceedings for the new offence should be with the Solicitor-General:
- (a) This is the current position in respect of the common law contempt of scandalising the court.<sup>568</sup> This reflects the constitutional role of the Law Officers of the Crown in upholding the rule of law by responding to unwarranted attacks on the independence, integrity and impartiality of the judiciary.<sup>569</sup>
  - (b) The fact that the other new offences are to be prosecuted by the Police in the normal way does not mean that the new offence replacing scandalising the court, which has always been in a special category of its own, should now be prosecuted by the Police. Statutory codification is not a reason for altering the classification of this offence.
  - (c) The Solicitor-General should assess the public interest element in bringing proceedings for the new offence, taking into account wider public interest considerations (such as the risk of further adverse publicity), the defendant's privilege against self-incrimination and whether the judge involved is likely to need to give evidence (refer above to separate discussion at [6.77]), the absence or outcome of any complaint to the Police (in the case of an allegation of bribery or corruption) or the Judicial Conduct Commissioner (in the case of alleged misconduct) and the adequacy of any explanation.
  - (d) The evidence for such contempts (a public statement in the media or online) will usually be in the public domain and it should usually be a relatively straightforward matter to seek an explanation from the potential defendant. The fact that Crown Law is not set up to conduct first instance investigations, obtain search warrants or seize evidence, is therefore not the barrier it could be for other types of offences. If such steps are required, there is no reason why Crown Law should not be able to obtain appropriate assistance from the Police. When necessary Crown Law should be able to request the Police to exercise the enforcement powers the Police have to investigate an alleged offence.
  - (e) We are also concerned that there would be practical difficulties in changing the prosecutorial responsibility for these particular contempt offences. The Police have made it clear to us that administration of justice offences of this nature do not receive investigation or prosecution priority. This means that our proposals, if implemented, would be unlikely

<sup>567</sup> See above at [2.83].

<sup>568</sup> See *Re Wiseman*, above n 463; *Solicitor General v Radio Avon*, above n 458; and *Solicitor-General v Smith*, above n 491.

<sup>569</sup> See McGrath, above n 466, at 203 and 213–214.



to lead to charges in cases where they are currently needed if the Police were to have prosecutorial responsibility.

- 6.89 We therefore recommend that the Solicitor-General should be responsible for filtering prosecutions by investigating and deciding whether there is a sufficient evidential base to bring a prosecution and whether the prosecution is in the public interest. Only the Solicitor-General would then also be able to apply to the High Court for a take down order. Our recommendations concerning take down orders are reflected in clauses 26 to 27 of the draft Bill.

#### *Approach in practice*

- 6.90 With our recommendations we envisage there would be a number of steps that would normally occur before a prosecution was brought by the Solicitor-General. Prosecuting the replacement scandalising offence would normally be the last resort. We see the following steps being available:
- (a) A public statement by the Attorney-General or Solicitor-General, following a complaint or acting on his or her own initiative, responding to the unwarranted attack on the judiciary and seeking a retraction or an apology.
  - (b) A letter from the Solicitor-General, following a complaint or acting on her own initiative, to the alleged offender asking for a retraction and a voluntary take down of the offending publication and/or an apology.
  - (c) An application by the Solicitor-General for an interim take down order to have the offending publication removed where there is an arguable case an offence has been committed. Non-compliance with that order would be a separate offence.
  - (d) A prosecution by the Solicitor-General for the replacement scandalising offence. The High Court could make interim orders for the removal of the offending publication pending the hearing of the prosecution. The Court could also make permanent orders where appropriate.
- 6.91 Prosecution of the new offence would be transferred to the High Court. We discuss the reasons for this later in the section on prosecutions in chapter 7, but essentially it is to reflect the more serious nature of the offence, to ensure that a consistent approach is taken, and, to the extent this is possible, to ensure cases are seen to be dealt with in a disinterested court.
- 6.92 The public interest test to be applied in deciding whether to bring proceedings would be applicable as it is required in the Prosecution Guidelines for all public prosecutions.
- 6.93 The existence of the new offence as the ultimate sanction should act as a cost effective deterrent. The existence of other effective remedial steps before a prosecution is brought should also ensure that prosecution for the new offence is the last resort.

#### *Penalty levels*

- 6.94 The more serious nature of the offence warrants a penalty that is greater than the six months' imprisonment proposed for publishing information that poses a real risk of prejudicing a fair trial. We note that a term of imprisonment not exceeding two years is imposed for the offence of causing harm by posting digital communications under section 22 of the Harmful Digital Communications Act 2015. We consider this new offence to be just as serious and recommend that the maximum penalty for the offence should be a term of imprisonment up to but not including two years or a fine not exceeding \$50,000, or a fine not exceeding \$100,000 for a

corporate defendant. A maximum penalty at this level would ensure the prosecution would be heard by a judge alone sitting without a jury.

- 6.95 Further discussion around how we have set penalty levels across the Report is found in chapter 7.<sup>570</sup>

### An extended offence?

- 6.96 During the course of our review, members of the judiciary, the Solicitor-General and members of the legal profession have raised concerns about whether the scope of any new offence should extend to cover more subtle ways of subjecting the courts and judges to pressure, including conduct such as the deliberate publication of private information about judges (their private addresses and facts about their family members) and the sending of offensive material in documentary form or online to courts, judges and court staff. We share the concerns expressed about the publication of private information and communications of this nature, as well as other more covert attempts to influence judges, especially in the age of the internet and social media. We consider these to be serious forms of abuse which are becoming real issues inimical to the due administration of justice and potentially to judicial and court staff recruitment.
- 6.97 In the United Kingdom a recent survey found “strong levels of disenchantment” among the judiciary, with many judges reportedly intending to leave their jobs early in the next five years. Over a third of the judges surveyed were concerned for their safety outside court, and 15 per cent were worried specifically because of social media, fearing threats and personal abuse or being identified and targeted.<sup>571</sup> The survey also pointed to, among other concerns, low judicial morale and a loss of judicial independence.
- 6.98 While we share these concerns, we do not consider it would be appropriate to extend our proposed new offence to cover conduct of this nature. The publication of private information which is true would not be caught by our proposed new offence. Private communications which are not published would not be capable of undermining public confidence in the independence, integrity and impartiality of the judiciary as an institution. In our view, an extended offence of this nature would therefore be outside the scope of this reference.
- 6.99 At the same time, however, these concerns do warrant further consideration. In our view they may ultimately need to be addressed by separate legislation, possibly by the addition of new specific judicial harassment provisions in the Harmful Digital Communications Act or the Harassment Act or the enactment of a specific new offence akin to abuse of a public office holder. In our view, the following factors would be relevant to such further consideration.
- 6.100 First, the Harmful Digital Communications Act is still new. It may be able to address some of these concerns. We have already described this legislation<sup>572</sup> and the view of some submitters that it is unlikely to prove effective in its present form to deal with judicial harassment, particularly because they consider that it may require attempts at mediation before seeking court orders.<sup>573</sup> We think, however, that this may be too literal a reading of the new Act. As discussed above at [6.43], the Act provides that mediation and negotiation along with other methods are to be used “as appropriate”.<sup>574</sup>

570 See chapter 7 at [7.59]–[7.66].

571 Frances Gibb “Dejected judges look to the exit as pay falls and personal danger grows” *The Times* (online ed, United Kingdom, 10 February 2017).

572 See above at [6.42]–[6.44].

573 See above at [6.63]–[6.64].

574 Harmful Digital Communications Act 2015, s 8(1)(c).

- 6.101 The Approved Agency, Netsafe, may decide to take no action and the complainant may seek an order from the court after Netsafe has had a reasonable opportunity to consider the complaint.<sup>575</sup> Further, the Police may proceed directly to seek an order from the court where a threat to the safety of an individual is at issue. The policy of Netsafe investigating complaints is not to contact alleged perpetrators without the consent of the complainant. We consider that, while the issue has yet to be considered other than hypothetically, it is unlikely Netsafe would request or require that judges attend mediation with those making allegations against them. The response of Netsafe is likely to be to take no further action and instead permit the complainant to proceed to court to seek an order.<sup>576</sup>
- 6.102 Second, the issue of deliberate publication of personal information specifically targeted at judges may begin to affect the due administration of justice. With the digital age, people have an almost unrestrained ability to communicate their views and share any information they wish by way of the internet and social media. This lack of constraint has resulted in damaging and unwarranted targeting of many people in public life. In some situations, the material published is sufficiently objectionable to be defamatory, but other times it is not. It is simply the public exposure of factual information about the person that causes distress.
- 6.103 Third, some of the offensive material sent to courts and members of the judiciary is grossly abusive. There is little doubt that those responsible ought to be held accountable for their conduct.

## RECOMMENDATIONS

- R42 The common law of contempt of scandalising the court should be abolished.
- R43 It should be an offence for any person (i) to publish an untrue allegation or accusation against a judge or a court (ii) when there is a real risk that the publication could undermine public confidence in the independence, integrity or impartiality of the judiciary or a court.
- R44 The maximum penalty for the offence in R43 should be a term of imprisonment up to but not including two years or a fine not exceeding \$50,000 or, in the case of a body corporate, a fine not exceeding \$100,000.
- R45 It should be a defence for a person prosecuted for the offence in R43 to prove on the balance of probabilities that:
- (a) the allegation or accusation was true (i.e. a defence of truth should be available to the person publishing the material); or
  - (b) the person was the online host or distributor of the publication and was unaware it contained the allegation or accusation.
- R46 The Solicitor-General should be responsible for receiving complaints and filtering potential prosecutions by investigating and deciding whether there is a sufficient evidential base to bring a prosecution and whether prosecution is in the public interest. In deciding whether there is sufficient evidence, the Solicitor-General would be able to take account of the absence of any complaint about the judge's conduct to the Police or the Judicial Conduct Commissioner and the adequacy of any explanation.

<sup>575</sup> See above at n 530.

<sup>576</sup> In a recent case, a person was able to complain directly to the Police of an alleged offence under s 22 of the Harmful Digital Communications Act 2015, and the matter was dealt with as a standard criminal prosecution without resorting to alternative resolution processes: *New Zealand Police v B*, above n 536, at [6].

- R47 If the Solicitor-General has reason to believe that a person may have committed an offence against R43, the Solicitor-General may, but is not obliged to, take any of the following action:
- (a) request the alleged offender to retract the allegation or accusation or apologise for it, or both;
  - (b) request the alleged offender to retract the allegation or accusation pending the hearing of the charge;
  - (c) request an online content host to take down or disable public access to any specified information relating to the allegation or accusation that the host has made accessible to members of the public: or
  - (d) apply to the High Court for an order under R48.
- R48 If the Solicitor-General makes an application under R47(d), the High Court may, if satisfied that there is an arguable case that a person has committed an offence against R43, order the person to:
- (a) take down or disable public access to material;
  - (b) retract the allegation or accusation;
  - (c) not encourage any other persons to engage in similar communications;
  - (d) publish a correction; or
  - (e) publish an apology.
- R49 The Court may:
- (a) make any order under R48 on an interim basis, pending the filing of a charge;
  - (b) vary or discharge any interim order; or
  - (c) make an interim order permanent, but only if the interim order is accepted or a person is convicted of the charge.
- R50 In addition to any of the orders the Court may make under R48, the Court should have power to order that an online content host take down or disable public access to any material related to the suspected offence that the host has made accessible to members of the public.
- R51 When making an order that a correction or apology be published under R48, the Court should, subject to the New Zealand Bill of Rights Act 1990, be able to include requirements relating to:
- (a) the content of the correction or apology;
  - (b) the time of publication of the correction or apology; and
  - (c) the prominence to be given to the correction in the particular medium in which it is published.
- R52 A provision modelled on section 210 of the Criminal Procedure Act 2011 should give members of accredited media, and any other person reporting on the proceedings with the permission of the court, standing to be heard on any application for a take down order under R48(a) or any application to renew, vary or revoke any order.

- R53 Subpart 7 of Part 6 of the Criminal Procedure Act 2011 should be amended to give a right of appeal against any decision to make or refuse to make any order under R48 or R50 or to renew, vary, or revoke an order made under R48 or R50.
- R54 It should be an offence for a person knowingly or recklessly to breach any order made under R48 or R50.
- R55 The offence in R54 should be punishable:
- (a) in the case of an individual, by a term of imprisonment not exceeding 6 months or a fine not exceeding \$25,000; or
  - (b) in the case of a body corporate, by a fine not exceeding \$100,000.
- R56 It should be a strict liability offence to fail to comply with an order made under R48 or R50.
- R57 The offence in R56 should be punishable:
- (a) in the case of an individual, by a fine not exceeding \$10,000; or
  - (b) in the case of a body corporate, by a fine not exceeding \$40,000.
- R58 Appeals in respect of the offences in R43, R54, and R56 should be under subpart 3 (Appeals against conviction) and subpart 4 (Appeals against sentence) of Part 6 of the Criminal Procedure Act 2011 because the offences in R43, R54, and R56 are ordinary offences and not contempt of court.



# Chapter 7

## Inherent jurisdiction, prosecutions and penalties

### INTRODUCTION

- 7.1 This chapter is divided into three sections addressing the remaining issues considered as part of our review. Here we report on:
- whether the High Court should retain its common law inherent jurisdiction to punish contempt;
  - the prosecution procedure that should apply in respect of the new offences; and
  - the maximum penalty levels that should apply for the recommended new offences.

### SHOULD THE HIGH COURT RETAIN ITS INHERENT JURISDICTION TO HOLD A PERSON IN CONTEMPT?

- 7.2 Common law authority to punish contempt falls within the inherent jurisdiction of the High Court.<sup>577</sup> Relevant also are the implied powers that all courts of record have to do what is necessary to enable them to exercise their jurisdiction and perform their functions.<sup>578</sup>

#### Inherent jurisdiction and implied powers

- 7.3 As already mentioned, the High Court has authority under its inherent jurisdiction to deal with every aspect of contempt not otherwise addressed in statute.<sup>579</sup> The Court has authority under its inherent jurisdiction to find conduct unlawful for interfering with the due administration of justice.<sup>580</sup> The High Court's authority under its jurisdiction extends to upholding the authority of statutory courts and tribunals. It can punish a person for contempt of a statutory court's or tribunal's processes where the relevant court or tribunal lacks jurisdiction to do this.<sup>581</sup>
- 7.4 Again, as we have also discussed, courts with substantive jurisdiction conferred solely by statute, such as the District Court, do not have an inherent jurisdiction. Instead they have the implied powers that are necessary for the exercise of their statutory functions and duties.<sup>582</sup> The power of the District Court, for example, to commit for contempt is incidental or ancillary to its substantive statutory jurisdiction either because statute confers the power expressly,<sup>583</sup>

<sup>577</sup> Discussed in chapter 1 at [1.8]–[1.17].

<sup>578</sup> A court of record is “[a] court that is required to keep a record of its proceedings”: Bryan A Garner (ed) *Black’s Law Dictionary* (9th ed, Thomson Reuters, St Paul, 2009) at 407.

<sup>579</sup> Discussed in chapter 1 at [1.8]–[1.16]; see Senior Courts Act, s 12(b); *McGechan on Procedure* (online looseleaf ed, Thomson Reuters) at [SC12.02]; Sir Jack Jacob “The Inherent Jurisdiction of the Court” (1970) CLP 23; R Joseph “Inherent Jurisdiction and Inherent Powers in New Zealand” (2005) 11 *Canta LR* 220; and MR Ferrere “The Inherent Jurisdiction and its Limits” (2013) 13 *Otago LR* 107.

<sup>580</sup> *Siemer v Solicitor-General* [2013] NZSC 68, [2013] 3 NZLR 441 at [113]–[114].

<sup>581</sup> Discussed in chapter 1 at [1.15]; see *Quality Pizzas Ltd v Canterbury Hotel Employees Industrial Union* [1983] NZLR 612 (CA) at 616.

<sup>582</sup> *McMenamin v Attorney-General* [1985] 2 NZLR 274 (CA) at 276.

<sup>583</sup> See for example District Court Act 2016, s 212.

or because it is necessarily implied to enable the Court to discharge its statutory jurisdiction effectively.<sup>584</sup>

- 7.5 There has sometimes been confusion over the extent to which the powers of the District Court and other courts that do not have inherent jurisdiction enable those courts to address interferences with the administration of justice that happen outside the court itself.<sup>585</sup> To avoid confusion between the authority of the High Court under its inherent jurisdiction and the “inherent and implied” powers of statutory courts under their statutory jurisdictions,<sup>586</sup> we have throughout the Report described the contempt authority of the High Court as inherent and the powers of the District Court as express or implied. As already noted, in our view this reflects the differences between the authority and power of the two Courts and recognises the more limited nature of the implied powers under the statutory jurisdiction of the District Court.<sup>587</sup>
- 7.6 The correct position seems to be that implied powers do not extend to the power to punish contempt outside and away from the court. Only the High Court, under its inherent jurisdiction, has the authority necessary to punish contempt by third parties that occurs outside and away from the court.

### **Inherent jurisdiction may be circumscribed by statute**

- 7.7 To the extent that conduct is exclusively regulated by statutory provisions, the High Court may not exercise its authority under its inherent jurisdiction in a manner that is contrary to those provisions.<sup>588</sup>
- 7.8 The High Court’s contempt jurisdiction is therefore circumscribed by statutory provisions which replace its authority under the inherent jurisdiction so far as they extend. The Court’s authority under its inherent jurisdiction may supply any deficiency and fill any gap in the statute.<sup>589</sup> In chapter 1 we noted that over the years there have been numerous statutory inroads into the common law of contempt and as a result the source of jurisdiction for contempt is now significantly statutory. As a result the law of contempt of court is a mix of court decisions based on the common law inherent jurisdiction and legislation, including powers implied under that legislation. There are relatively few areas where the legal authority to punish for contempt still falls within the High Court’s authority under the inherent jurisdiction. These are:
- publishing material that may interfere with a defendant’s right to receive a fair trial (discussed in chapter 2);
  - placing improper pressure on litigants in civil proceedings and restricting access to the courts (discussed in chapter 2);
  - actions by jurors that may impact on a defendant’s right to a fair trial or erode confidence in the jury system (discussed in chapter 4); and

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584 As to the meaning of “necessary implication” see *R (Morgan Grenfell & Co Ltd) v Special Commissioners of Income Tax* [2003] 1 AC 563 (HL) at [45], *B v Auckland District Law Society* [2003] UKPC 38, [2004] 1 NZLR 326 at [58], and *Cropp v Judicial Committee* [2008] NZSC 46, [2008] 3 NZLR 774 at [26].

585 This issue is discussed in *R Joseph*, above n 579; and *Ferrere*, above n 579.

586 See for example, *KLP v RSF* [2009] NZFLR 833 (HC); *McMenamin v Attorney-General*, above n 582; *Transport Accident Investigation Commission v District Court* [2008] NZAR 595 (HC) at [20].

587 For example, see above at [2.2] and [6.34].

588 *Siemer v Solicitor-General* [2013], above n 580, at [126]. *McGechan on Procedure* says that, where a matter before the court is already the subject of precise legislation, the court will rarely choose to exercise any inherent powers. The inherent jurisdiction should be developed and exercised in harmony with the relevant legislation. See *McGechan on Procedure*, above n 579, at [SC12.02] citing *R v Moke and Lawrence* [1996] 1 NZLR 263 (CA) as authority. See also below at [7.20].

589 *McGechan on Procedure*, above n 579, at [SC12.02].

- publishing material that undermines public confidence in the judiciary and the courts themselves (discussed in chapter 6).
- 7.9 We have recommended in previous chapters replacing the inherent jurisdiction and the use of the High Court's common law authority in these areas with statutory jurisdiction and new offences. In particular, we recommend:
- A new offence to replace the current strict liability contempt of publishing information that interferes with a fair trial (chapter 2 at [2.92] and R7);
  - A new offence to replace the common law contempt where a member of a jury intentionally investigates or researches information knowing that it may be relevant to the case he or she is trying (chapter 4 at [4.24] and R18);
  - A new offence to replace the common law contempt where any person, including a person serving on a jury, intentionally discloses, solicits or publishes details of a jury's deliberations (chapter 4 at [4.74] and R24); and
  - A new offence to replace the common law contempt of scandalising the court (also referred to as scandalising the judiciary or scandalising judges) (chapter 6 at [6.65] and R43).
- 7.10 The enactment of these recommended new statutory offences would significantly circumscribe the ability of the High Court to use its inherent jurisdiction to punish contempt.

### Proposal in the Issues Paper

- 7.11 In the Issues Paper the Law Commission asked whether all forms of contempt currently falling within the High Court's inherent jurisdiction should be replaced by statutory offences, and whether Parliament should abolish contempt of court at common law because it would no longer be necessary.
- 7.12 The Commission also invited feedback on whether the current exception for contempt of court in section 9 of the Crimes Act 1961 was still appropriate in modern New Zealand.<sup>590</sup> The Issues Paper noted the punitive nature of contempt and suggested Parliament should bring all contempt offences into line with every other criminal offence in New Zealand and make them statutory. The Issues Paper said it was difficult to see why contempt laws should not be in a statute which would also improve clarity and accessibility.
- 7.13 The Commission expressed the preliminary view that Parliament should extinguish all powers and authority of the courts to punish any person for contempt of court at common law and make the various forms of contempt statutory.

### *The arguments for contempt being statutory*

- 7.14 The Issues Paper outlined a number of arguments in favour of replacing common law contempt with a statute:
- It would complete the codification of contempt and mean all offences relating to the administration of justice would be statutory and consequently clearer and more accessible to the New Zealand public. The law relating to interference with the administration of justice (contempt) would be in one place: the statute book.
  - The serious nature of contempt and the severity of potential punishment for it, including substantial fines and up to two years' imprisonment, meant it was important that those

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<sup>590</sup> See discussion in chapter 1 at [1.57]–[1.63].

affected were able to discern what behaviour was unlawful and what the consequences of such behaviour might be.

- The law would have greater democratic legitimacy and certainty if it were made by Parliament.
- Replacing common law contempt with statutory provisions would enable the public to have its say on the shape of contempt laws and the values the laws embody, rather than leaving the judiciary to determine the scope and nature of the offending conduct without consultation or public discussion as to what the appropriate boundaries should be.
- Parliament could address gaps in the jurisdiction of the District Court and other statutory courts in a statute.

### *The arguments against codification*

- 7.15 The Commission acknowledged in the Issues Paper there were also arguments against attempting to address contempt in a statute completely and against extinguishing the High Court's inherent authority to punish contempt:
- The breadth of matters that may potentially qualify as interfering with the administration of justice makes it difficult to draft a sufficiently comprehensive statute.
  - The scope of conduct that the law of contempt may cover means there is the potential for the drafters of statutes to miss some conduct.
  - We could only overcome concern about gaps in a statute by retaining a residual role for the inherent jurisdiction, or by having a general broad catch-all statutory provision covering other conduct that might interfere with the administration of justice. A statutory catch-all provision would simply replicate the residual role of the inherent jurisdiction and would not make the law any clearer.

### **The views of submitters and feedback from consultation**

- 7.16 Submitters expressed a range of views. There was no consensus. There was extensive support for greater codification to make the law clearer and more accessible, although many who favoured further codification also supported retaining the High Court's inherent jurisdiction to deal with situations not addressed in the statutory provisions. The New Zealand Law Society (NZLS) said that, because it was so difficult to predict all the possible forms which contempt may take, it would prefer to retain a residual contempt power. A majority of those consulted were concerned that full codification in statute was not possible and attempting this risked missing some conduct. Most agreed that a statutory catch-all offence would be necessary to address this risk if we abrogated the inherent jurisdiction. Some submitters were concerned that we would need to construct the elements of such a catch-all offence broadly and the provision would consequently be no clearer than the common law.
- 7.17 The Police in its submissions supported codifying common law contempt in statute, but did not favour complete codification and abolition of the High Court's inherent jurisdiction because of the risk that some conduct might be missed. It also suggested it should be responsible for laying charges in the same way as for other offences.

### **Recommended approach**

- 7.18 In view of the concerns raised by a number of submitters and by senior judges we consulted, we have decided not to recommend the complete abolition of the authority of the High Court under its inherent jurisdiction to punish for contempt. Our reasons for reaching this conclusion are:

- (a) The High Court's general inherent jurisdiction is crucial in enabling the Court to exercise powers in the public interest for the purpose of ensuring the fair, transparent, expeditious and efficient administration of justice in New Zealand and maintaining public confidence in the justice system. It is an invaluable jurisdiction which no-one has seriously suggested should be abolished. The existence of the general inherent jurisdiction is not at issue in this review of the law.<sup>591</sup>
- (b) The common law authority of the High Court to punish for contempt is an important aspect of the Court's general inherent jurisdiction as recognised by section 9(a) of the Crimes Act 1961. We should therefore adopt a cautious approach before recommending abolition of any aspect of this important jurisdiction. Before doing so, we would need to be confident that the proposed replacement legislation covered the whole ground. In view of the prospect of unforeseen circumstances, especially with the advent of the digital age, we are not satisfied this test could be met.<sup>592</sup>
- (c) Our recommendations for enacting a range of new statutory provisions to replace a large part of the ground should go a long way to achieving greater accessibility and clearer understanding of the law of contempt. At least to that extent, the new provisions will replace the uncertainties of the common law.<sup>593</sup> But retaining the common law authority under the inherent jurisdiction will ensure the High Court keeps a residual authority to cover matters not addressed by the legislation, for example a publication that might affect a civil case.
- (d) Repealing section 9(a) of the Crimes Act 1961 would also be likely to raise constitutional issues because the existing provision currently preserves not only the authority of the High Court to punish for contempt but also the authority of the House of Representatives to do so.<sup>594</sup> The latter authority is not at issue in this review. Section 9(a) could, however, be amended so that only the authority of the High Court, and not the House, to punish for contempt is repealed or amended.

7.19 The new statutory provisions recommended in this Report, and included in the draft Administration of Justice (Reform of Contempt of Court) Bill, expressly state that the new provisions substitute the existing common law of contempt and replace contempt entirely in the areas they cover (see clause 29). They replace all other authority to punish conduct falling within those provisions. To the extent that any matter is regulated by those provisions, the High Court would not be able to exercise its inherent jurisdiction in a manner that is contrary to them.<sup>595</sup>

7.20 In order for Parliament to restrict the Court's jurisdiction or limit its authority, a statute needs clear and unambiguous language.<sup>596</sup> The general constitutional principles that apply mean the courts will not allow "by implication drafting" in a statute to restrict their jurisdiction.<sup>597</sup> Ultimately, it is for the Court to determine as a matter of interpretation whether any statutory provision covers any situation before the courts. An express statement in the legislation should,

591 See chapter 1 at [1.37].

592 See chapter 1 at [1.49].

593 See for example above at [1.41]–[1.43], [2.50], and [5.16]–[5.21]; and *Siemer v Solicitor-General* [2013], above n 580, at [126].

594 See chapter 1 at [1.9(b)].

595 See above at [7.7]–[7.8].

596 The principle espoused by Lord Atkinson in *Attorney-General v De Keyser's Royal Hotel Ltd* [1920] AC 508 (HL) at 539. See also the more recent New Zealand Supreme Court decisions: *Siemer v Solicitor-General* [2013], above n 580, at [142] and [148]–[149]; and *Erceg v Erceg* [2016] NZSC 135 at [3].

597 For a general discussion see; John Burrows "Common Law Among the Statutes: The Lord Cooke Lecture 2007" (2008) 39 VUWLR 401; and Reed Dickerson "Statutes and Constitutions in an Age of Common Law" (1987) 48 U Pitt L Rev 773 at 783.



however, make it clear that the common law jurisdiction of the Court to punish the contempt is replaced. As the author of *Burrows and Carter Statute Law in New Zealand* notes:<sup>598</sup>

The courts are particularly reluctant to find that statute has abrogated the inherent jurisdiction of the court in any matter, although of course that jurisdiction cannot stand if it is totally inconsistent with the provisions of legislation.

- 7.21 We also recommend the legislation expressly preserve the High Court's common law authority (forming part of the High Court's inherent jurisdiction) to deal with any matter falling outside the scope of the legislation (see clause 29). Nothing in the new Act should limit or affect any authority or power of the courts to punish any person for contempt of court in any case to which the Act does not apply.
- 7.22 As discussed in chapter 1, the contempt jurisdiction of the Supreme Court and the Court of Appeal is limited to any relevant statutory powers such as those conferred by section 165 of the Senior Courts Act and, possibly, in their individual capacities as judges of the High Court, to exercising the powers of High Court Judges.<sup>599</sup> With the repeal of section 35(4) of the Supreme Court Act 2003, which provided that the Supreme Court had the same power and authority as the High Court to punish for contempt, the Supreme Court itself no longer has that express power and authority. We recommend that any doubt about the contempt powers of the Supreme Court and the Court of Appeal should be avoided by enacting a provision that makes it clear that, in respect of contempt of court, both appellate courts have the same authority as the High Court under its inherent jurisdiction. This recommendation is implemented by clause 29(3) included in the draft Administration of Justice (Reform of Contempt of Court) Bill.

## **"PROSECUTION" PROCEDURE**

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- 7.23 In this section of the chapter we discuss the prosecution procedure applying to the new statutory offences and whether we need any special arrangements for prosecuting these new offences.
- 7.24 As discussed in chapter 1, contempt is currently not a true offence and there is no resulting conviction or criminal record, although contempt may result in a court imposing a criminal penalty. With the exception of disruptive conduct in the face of the court,<sup>600</sup> contempt proceedings begin with an originating application, so are procedurally more akin to civil proceedings. They receive a civil file number in the court system and the rules of evidence that apply are the civil ones, although the standard of proof is the criminal one.
- 7.25 The procedure used for contempt proceedings is characterised by the use of written rather than oral evidence, limited cross-examination and matters being proved to the judge's satisfaction based on their own judicial knowledge and by taking judicial notice in light of their experience. Proceedings, except those for civil contempt, are generally brought in the name of the Solicitor-General, rather than by the Police Prosecution Service. As discussed in chapter 5, contempt applications can be made in civil proceedings by any party to those proceedings where a court order made in that party's favour is not complied with.
- 7.26 In situations where there is disruptive conduct in the face of the court courts can, as we discussed in chapter 3, act on their own motion and deal with the contempt in the context of the proceedings already before the court.

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598 Ross Carter *Burrows and Carter Statute Law in New Zealand* (5th ed, LexisNexis, Wellington, 2015) at 577.

599 See chapter 1 at [1.11].

600 The procedure used by the court where a judge has to deal with disruptive conduct in the face of the court or during the course of any proceedings before the court is discussed in chapter 2.

- 7.27 We have recommended in the previous chapters (chapter 2 – Publication contempt, chapter 4 – Juror contempt, and chapter 6 – Abusive allegations and false accusations against judges and courts) the introduction of new offences to replace contempt. This will result in the ordinary criminal prosecution procedure replacing current contempt procedure. If no special arrangements are made, the new offences would be prosecuted in the usual way by the Police under the Criminal Procedure Act 2011. The new offences are all category 1 and 2 offences so would be prosecuted in the District Court. The defendant charged with a category 1 or 2 offence has no right to elect to be tried by a jury.<sup>601</sup>

### Proposals in Issues Paper

- 7.28 The Issues Paper outlined two options for prosecuting the new statutory offences. These were:
- (a) The new offences should be prosecuted in the usual way in the District Court under the Criminal Procedure Act; or
  - (b) A special procedure should be developed for them that continued to require an application by the Solicitor-General.
- 7.29 The Commission suggested it might also be appropriate for a different process to apply to different statutory contempt offences, depending on the nature of the offence. For example, contempt in the courtroom would need to have a special procedure to enable the court to respond immediately, while the ordinary prosecution procedure might be appropriate for the new offences that replace other forms of contempt, such as the contempt of prejudicing a fair trial.

### *The option of applying the ordinary procedure*

- 7.30 If the new offences are prosecuted in the same way as other criminal offences, the Police would file a charging document in the District Court. The procedural protections specified in the Criminal Procedure Act would apply in the usual way and so would the criminal rules of evidence. Under this option, a conviction would result in a person having a criminal record.
- 7.31 The Commission suggested the Solicitor-General or a Crown Solicitor could prosecute offences related to business in the higher courts in the High Court, with all other offences being referred by the Police to the District Court. Offences relating to business in the higher courts could be included in the Protocol established by the Chief High Court Judge and the Chief District Court Judge identifying cases that must always be considered for transfer to the High Court.<sup>602</sup>
- 7.32 Replacing contempt with ordinary offences is consistent with earlier codifications of contempt in the provisions in Part 6 of the Crimes Act (Crimes affecting the administration of law and justice).
- 7.33 To be effective, however, these new offences would need to receive greater priority by prosecution authorities than they currently give to offences in Part 6 of the Crimes Act 1961. The new offences, like those currently in Part 6 of the Crimes Act, are constitutionally important because they uphold the fair administration of justice and the rule of law.

601 Criminal Procedure Act 2011, s 6 states that:

**category 1 offence** means—

(a) an offence that is not punishable by a term of imprisonment

**category 2 offence** means—

(a) an offence punishable by a term of imprisonment of less than 2 years; or

(b) an offence that, if committed by a body corporate, is punishable by only a fine, but that would be punishable by a term of imprisonment of less than 2 years if committed by an individual; or

(c) an offence punishable by a community-based sentence and not punishable by a term of imprisonment.

602 This would be in accordance with the protocol established under s 66 of the Criminal Procedure Act 2011.

### *The option of a special procedure*

- 7.34 The other option, which the Commission noted but did not fully develop in the Issues Paper, would be to provide for a special procedure for contempt that enabled a judge-alone hearing brought on application by either the Solicitor-General or Crown Counsel. The special procedure could be similar to the current approach to contempt, where proceedings are commenced with an originating application. The Court would need to consider whether a finding of contempt would result in a conviction that would be recorded on the offender's criminal record. Under this option Parliament would also need to consider whether the full range of sentencing options under the Sentencing Act 2002 should be available. It would need to resolve the question whether the court should be able to act of its own motion.

### **The views of submitters and feedback from consultation**

- 7.35 On the question of prosecution process, the NZLS favoured placing responsibility for prosecutions in the hands of Crown Solicitors, rather than the Police, because this appropriately recognised the importance of the offence of contempt. The NZLS did not think it should be necessary to require the approval of the Solicitor-General for a prosecution. The Auckland District Law Society Incorporated also favoured the Crown Solicitors prosecuting rather than the Police.
- 7.36 The Police submission did not consider a special procedure was needed for contempt on the basis that it was better to be consistent and have a predictable process. It proposed that the Crown prosecutor should prosecute in the High Court and the Police in the District Court.
- 7.37 Some submitters saw the application of the criminal justice protections that would result from a shift to prosecution as a positive outcome for those facing charges. An accused person would receive proper details of the offence he or she was charged with and have an opportunity to seek legal advice and be represented in court. Some submitters were concerned, however, about the potential effect a conviction would have on a person.
- 7.38 Finally, submitters noted there were practical and resourcing implications in applying the criminal prosecution process and sentencing process to contempt. Submitters said the Crown or the Police would need to be properly resourced if they were to prosecute. The District Court judges commented that proceedings would be prolonged by applying the criminal prosecution and sentencing processes and would, as a result, involve greater application of judicial resources.

### **Recommended approach**

- 7.39 We have decided not to recommend that all contempt be replaced by ordinary statutory offences. In particular, and as discussed in more detail in chapter 3 and chapter 5, we are recommending, for the reasons set out in those chapters,<sup>603</sup> that disruptive behaviour in the courtroom and non-compliance with a court order should continue to be subject to a special quasi-criminal procedure rather than be an ordinary criminal offence prosecuted under the Criminal Procedure Act.
- 7.40 The approach we recommend in relation to disrupting the courtroom addresses concerns raised by submitters and recognises the unique context surrounding this type of contempt. The criminal justice protections outlined in that chapter would be applied as part of that process to ensure that the disruptive person should have proper details of the offence he or she is charged with, and an opportunity to seek legal advice and be represented in court.

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603 See chapter 3 at [3.45]–[3.48] and chapter 5 at [5.60]–[5.62].

- 7.41 In respect of contempt involving non-compliance with a court order, we recommend in chapter 5 retaining a special quasi-criminal procedure (largely reflecting the current position). Under that procedure the party in whose favour the order was made, or the Solicitor-General exercising Law Officer functions, may apply to the courts for an order that the person who has breached the order be found to be in contempt of court for failing to comply with the applicable court order. Again, criminal justice protections would apply as part of that process to ensure that the person has proper details and an opportunity to seek legal advice and be represented in court.
- 7.42 With the exception of those two special cases, we recommend the other forms of contempt covered by this Report be replaced with new criminal offences. Within this broad recommendation, a number of more detailed issues have needed to be considered and resolved:
- (a) Whether these new offences, when they involve behaviour directed at the senior courts, should be removed from the District Court to the High Court. For example, where a publication interferes with a fair trial in the High Court the prosecution of the alleged offender would be heard in the High Court not the District Court.
  - (b) Whether the Solicitor-General, rather than the Police, should be responsible for receiving complaints and determining whether there is sufficient evidence for laying a charge in respect of any of the new offences. The alternative would be for the Police to receive complaints, undertake its usual investigative role, assess the evidence and then lay charges in the usual way.
  - (c) Whether prosecution of the new offences should always be undertaken as Crown prosecutions handled by the Crown prosecutors. Alternatively, the Police would undertake some prosecutions of some of the new offences.

*Should the new offences, when they involve behaviour directed at the Senior Courts, be heard by the High Court?*

- 7.43 Currently the District Court does not have power to deal with certain contempts, such as disclosure of juror deliberations, publication contempt or scandalising the judiciary because it has no inherent jurisdiction. Consequently, when these contempts arise, even when they relate to proceedings in the District Court, the High Court deals with them. If a special case is not made for the recommended new offences this situation would effectively reverse and the District Court would not only deal with contempt in the District Court, but would also hear and determine cases relating to contempt in the High Court, Court of Appeal and Supreme Court, as well as other specialist courts.
- 7.44 We are concerned that this role reversal might create the perception that the High Court does not retain control over its own processes during a trial. We consider it essential that the High Court retains control over, and is able to enforce compliance with its own processes. We therefore recommend that when the new offence of publishing information poses a real risk of prejudice to a fair trial in the High Court and also when the juror offences relate to a High Court jury trial, the prosecution should be removed (transferred) to the High Court. The District Court should determine charges in respect of offences where they relate to jury trials in the District Court.
- 7.45 In relation to the new offence of publishing false allegations or accusations against a judge or the courts that risk undermining confidence in the judiciary, we recommend prosecutions should be transferred to and heard in the High Court. As already discussed, only the High Court currently has authority under its jurisdiction to punish the contempt of scandalising, which this offence is to replace. The High Court's authority also extends to upholding the authority

of lower courts and tribunals. Subject to any qualification by statute or statutory rule, the High Court has authority to punish for contempt of another court's processes in order to enable that court to act effectively as a court.<sup>604</sup> We consider it important for the High Court to retain this role in respect of protecting the independence, integrity and impartiality of the courts and court processes, and the rule of law.

- 7.46 We have included an express provision in schedule 2 to the draft Administration of Justice (Reform of Contempt of Court) Bill to address the transfer of proceedings to the High Court.<sup>605</sup> The amendment provides that a new section (section 74A) will be inserted into the Criminal Procedure Act covering transfer of cases to the High Court.

*Should the Solicitor-General be responsible for deciding whether to prosecute?*

- 7.47 If Parliament accepts our proposals to enact these various new offences, it will also be necessary to determine whether the Solicitor-General, Crown Prosecutors or the Police (or a combination of them) should have responsibility for investigating and prosecuting the offences.
- 7.48 The Solicitor-General currently has responsibility for deciding whether to prosecute and commence proceedings for all the forms of contempt we have recommended should be replaced by new offences. Crown Law receives and assesses complaints, makes inquiries and then determines whether there is sufficient evidence for commencing contempt proceedings at common law. The issue is whether the change to having criminal offences is more one of form than of substance.
- 7.49 After discussing the issue with the Solicitor-General and the Police, we have formed the view the Solicitor-General should be responsible for receiving and investigating complaints and laying charges for the new offence of publishing false accusations undermining confidence in the judiciary. The Police, however, should investigate and charge in the usual way the new offence in chapter 2 of publishing information that poses a real risk of prejudice to a fair trial, and the two new offences recommended in chapter 4 relating to juror conduct. The Police should also prosecute breaches of the new suppression and take down order offences recommended in chapters 2 and 6.
- 7.50 We have considered the extent to which the Crown Law Office and the Crown Solicitors on behalf of the Solicitor-General are able to undertake the investigative inquiries necessary to gather evidence for a criminal prosecution. While the Solicitor-General does not, for example, have any compulsory powers of search, we believe that the Solicitor-General does have sufficient powers to undertake any necessary investigation to assess the sufficiency of the evidence in respect of the new offences of publishing false accusations undermining confidence in the judiciary. The nature of the offending conduct means the evidential material will mainly be in the public domain. The Police will also be available to assist where compulsory powers of search are needed.<sup>606</sup>
- 7.51 More importantly, the Attorney-General and Solicitor-General have constitutional responsibility for upholding the rule of law. This responsibility includes protecting the judiciary from unfounded public attacks. See also chapter 6 at [6.87] to [6.89] where we discuss the

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<sup>604</sup> See discussion in chapter 1 at [1.15].

<sup>605</sup> The alternative would be for the Protocols authorised under s 66 of the Criminal Procedure Act 2011 to cover the transfer. Section 66 provides that the Chief High Court Judge and the Chief District Court Judge must establish a protocol covering the level of trial court for certain offences. They may also specify other specific offences to be covered by the protocol. There is a process in ss 67 and 68 for deciding what level of court should apply in respect of those offences. Ultimately a High Court Judge must determine whether the trial of a protocol offence is to be held in the District Court or the High Court and make an order accordingly.

<sup>606</sup> Clause 25(6) of the attached draft Administration of Justice (Reform of Contempt of Court) Bill.



reasons why the offence of publishing allegations undermining confidence in the judiciary should be prosecuted by the Solicitor-General.

- 7.52 The Solicitor-General currently has responsibility for prosecuting the common law contempt of scandalising. Maintaining the status quo should impose no additional burdens (staffing or budgeting) on Crown Law. On the other hand, shifting responsibility for investigating and prosecuting offences to the Police does impose burdens (both staff training and budgetary) on it.
- 7.53 We have therefore recommended the Solicitor-General should be responsible for investigating any complaint and laying charges for the new offence of publishing allegations undermining confidence in the judiciary. The Solicitor-General has agreed that this is appropriate.
- 7.54 In respect of the new publication offence, the new juror offences and also the new breach of suppression order offences, we accept that the Solicitor-General and the Crown Law Office is not well placed to investigate these. The lack of any compulsory powers of search that the Police have for gathering evidence by obtaining production orders, search warrants or seizing material would hinder their work. The better option is to refer complaints to the Police for investigation in the ordinary way. The Police currently investigate and prosecute breaches of suppression orders. We recommend that the Police investigate and charge these new offences (as the Police proposed in its submissions to us). We note that shifting responsibility for investigating and prosecuting in this area to the Police does impose burdens (both staff training and budgetary) on the Police.

#### *Should prosecutions be Crown prosecutions?*

- 7.55 The Commission has considered whether prosecutions in respect of all of the new offences should be undertaken as Crown prosecutions handled by the Crown Prosecutors rather than the Police Prosecution Service.
- 7.56 The Crown Prosecution Regulations 2013 provide that certain proceedings will automatically be Crown prosecutions for the purposes of the Criminal Procedure Act.<sup>607</sup> The regulations also provide the Solicitor-General may direct that, having regard to the particular features of the proceedings, a prosecution should be conducted as a Crown prosecution.<sup>608</sup> Under the regulations once a proceeding becomes a Crown prosecution, the Solicitor-General assumes responsibility and a Crown Prosecutor takes over the case.<sup>609</sup>
- 7.57 Given our earlier recommendations that the Solicitor-General should be responsible for initiating prosecutions and laying charges for the new offence of publishing false accusations undermining confidence in the judiciary, we recommend that this offence be listed in the Schedule to the regulations so prosecution is undertaken as a Crown prosecution.<sup>610</sup> We recommend that the offence of publishing information that poses a real risk of prejudice to a fair trial should also be listed in the regulations and prosecutions undertaken as a Crown prosecution. We do not consider it necessary to list the new juror offences or the breach of suppression or take down order offences. In relation to these offences, the Solicitor-General could direct under the regulations that the prosecution be a Crown prosecution if, having regard

<sup>607</sup> Regulation 4(1)(a)–(d).

<sup>608</sup> Regulation 4(1)(e).

<sup>609</sup> Regulation 5.

<sup>610</sup> Under the regulations a proceeding that is transferred to the High Court, even if not listed in the Schedule, is also a Crown proceeding; see Crown Prosecution Regulations 2013, reg 4(1)(d).

to the particular features of the proceeding, it is appropriate that it be conducted as a Crown prosecution.<sup>611</sup>

- 7.58 The Commission has consulted with both the Solicitor-General and the Police before settling these recommendations.

## SETTING PENALTIES

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- 7.59 There is no agreed method for setting maximum penalties of offences in New Zealand. *The Legislation Advisory Committee Guidelines on Process and Content of Legislation*,<sup>612</sup> which are a guide to making good legislation, state that maximum penalties should not be disproportionately severe, but should reflect the worst case of offending covered by the offence.<sup>613</sup> The maximum penalty will also impact upon the procedure that the courts will adopt, including whether the High Court can hear the case and whether the defendant has the right to elect trial by jury.
- 7.60 In setting maximum penalty levels for the proposed new offences in this Report, we note that the Supreme Court in the first *Siemer* case decided the maximum penalty allowed by the common law for contempt must be less than that specified in section 24(e) of the New Zealand Bill of Rights Act 1990 (NZBORA), which guarantees a person charged with an offence the right to a jury trial.<sup>614</sup> As we have already noted,<sup>615</sup> at the time of the Court's decision the right to a jury trial was guaranteed when the penalty for an offence was a maximum of more than three months' imprisonment, so the maximum sentence that could be imposed for contempt was three months. In 2013, section 24(e) of NZBORA was amended to increase the penalty maximum after which a person is guaranteed the right to a jury trial to two years or more. A consequence of that change has been the increase in the maximum term of imprisonment for contempt to two years. We have taken this into account in determining penalty levels for the proposed new offences.
- 7.61 In Tables 1 and 2, we set out the new offences<sup>616</sup> and quasi-offences<sup>617</sup> we have recommended. We also set out our proposed maximum penalties and provide the rationale for these levels in our discussion below.
- 7.62 To assist in setting maximum penalty levels for the proposed new offences, we considered some examples of the maximum penalties for similar current offences (Table 3) and quasi-offences (Table 4).
- 7.63 In doing so, we are conscious of the *Legislation Advisory Committee Guidelines on Process and Content of Legislation* which state that references to similar offences must be done with care. New Zealand has not adopted the inflation-adjusted penalty unit system found in many other jurisdictions and therefore when comparing offences in different statutes, the penalties may be unduly low simply because of the age of the statute, and therefore not necessarily provide an accurate guide.<sup>618</sup>

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611 Any juror offence transferred to the High Court will also be a Crown prosecution under reg 4(1)(d) of the Crown Prosecution Regulations 2013.

612 Since the disestablishment of the Legislation Advisory Committee, the Legislation Design and Advisory Committee is responsible for the LAC Guidelines on Process and Content of Legislation.

613 Legislation Advisory Committee "Legislation Advisory Committee Guidelines" (October 2014) < [www.ldac.org.nz](http://www.ldac.org.nz) > at [21.6].

614 *Siemer v Solicitor-General* [2010] NZSC 54, [2010] 3 NZLR 767.

615 See chapter 5 at [5.30].

616 An offence is one prosecuted by the filing of a charging document in the District Court under s 14 of the Criminal Procedure Act 2011.

617 A "quasi-offence" as we have referred to it, is the continuation of the current hybrid offence used for contempt.

618 Legislation Advisory Committee, above n 613, at [21.6].

- 7.64 In the examples of similar current offences and their penalties it is difficult to find consistency of penalty. Given the underlying policy rationale for each of our recommended offences is to protect the administration of justice and maintain public confidence in the justice system, we have started with the approach that there should be similar penalties for each offence. We have then, however, considered whether any are more or less serious. In setting maximum penalties we have been particularly influenced by the penalty levels recently set for the newly created offences in the Harmful Digital Communications Act 2015 and also those that apply for breaches of suppression orders in section 211 of the Criminal Procedure Act.
- 7.65 We consider the offence of publishing a false allegation or accusation against the judiciary where there is a real risk the publication could undermine public confidence in the independence, integrity or impartiality of the judiciary is more serious than the other new offences. We consider the seriousness of the offence is similar to the new offence of causing harm by posting digital communications under section 22 of the Harmful Digital Communications Act, which carries a similar penalty as that recommended here. In view of the more serious nature of this offence we have recommended the maximum penalty for the offence should be a term of imprisonment up to but not including two years or a fine not exceeding \$50,000, or a fine not exceeding \$100,000 for a corporate defendant.
- 7.66 For the other new offences, for individuals, we have set a maximum term of imprisonment not exceeding three or six months and maximum fines not exceeding \$10,000 or \$25,000, depending on the gravity of the offence. For the strict liability offences, breaching suppression and take down orders, the maximum penalty is limited to a fine. For corporate defendants we have set a fine not exceeding \$100,000 and reduced this to \$40,000 for strict liability offences.

## RECOMMENDATIONS

- R59 The new Administration of Justice (Reform of Contempt of Court) Act should not limit or affect any authority or power of the High Court to punish any person for contempt of court in any case to which the provisions in the new Act do not apply. Section 9(a) of the Crimes Act 1961 should be amended so that the inherent jurisdiction of the High Court to punish for contempt is subject to the Administration of Justice (Reform of Contempt of Court) Act.
- R60 In any case to which the provisions in the new Administration of Justice (Reform of Contempt of Court) Act applies the jurisdiction of a court to punish any person for contempt of court is replaced fully by the jurisdiction of the courts under the Act.
- R61 The new Administration of Justice (Reform of Contempt of Court) Act should abolish as part of the common law of New Zealand the following forms of contempt:
- (a) contempt in the face of the court;
  - (b) publishing information that interferes with a fair trial;
  - (c) contempt by jurors;
  - (d) contempt by disobeying court orders; and
  - (e) scandalising the court.
- R62 To address any doubt over the contempt powers of the Supreme Court and the Court of Appeal a new provision should be enacted to make it clear that both appellate courts have the same authority over contempt as the High Court has under its inherent jurisdiction.

- R63 The new offences recommended in chapter 2 (R7), chapter 4 (R18) and (R24) and chapter 6 (R43) should, subject to the recommendations in (R64) to (R68) below, be prosecuted in the usual way in the District Court.
- R64 Where charges in respect of the following new offences relate to a trial in the High Court, the prosecution should be transferred to the High Court for trial:
- (a) publication of information that poses a real risk of prejudice to a fair trial (R7),
  - (b) intentional investigation or research by a juror into the case they are hearing (R18); and
  - (c) disclosure of jury deliberations (R24).
- R65 All prosecutions for the new offence of publishing an untrue allegation or accusation against a judge or a court where there is a real risk that the publication could undermine public confidence in the independence, integrity or impartiality of the judiciary or a court (R43) should be transferred to the High Court for trial.
- R66 The Solicitor-General should be responsible for receiving and investigating complaints and filing a charging document for the new offence of publishing an untrue allegation or accusation against a judge or a court where there is a real risk that the publication could undermine public confidence in the independence, integrity or impartiality of the judiciary or a court (R43).
- R67 The Police should be responsible for receiving and investigating complaints and laying charges for all the other new offences recommended in this Report for inclusion in the new Administration of Justice (Reform of Contempt of Court) Act.
- R68 The Crown Prosecution Regulations 2013 should be amended to include the following offences in the Schedule:
- (a) publication of information that poses a real risk of prejudice to a fair trial (R7); and
  - (b) publication of an untrue allegation or accusation against a judge or a court where there is a real risk that the publication could undermine public confidence in the independence, integrity or impartiality of the judiciary or a court (R43).

**TABLE 1: NEW OFFENCES RECOMMENDED IN REPORT**

Chapter	Offence	Proposed maximum individual penalty	Proposed maximum corporate penalty
Chapter 2	It would be an offence to intentionally publish information that is relevant to any trial where there is a real risk that the publication of that information prejudices a fair trial.	A term of imprisonment not exceeding 6 months or a fine not exceeding \$25,000.	Fine not exceeding \$100,000.
Chapter 2	It would be an offence to knowingly or recklessly publish material in breach of the statutory prohibition, a suppression order or a take down order.	A term of imprisonment not exceeding 6 months or a fine not exceeding \$25,000.	Fine not exceeding \$100,000.
Chapter 2	It would be an offence to publish material in breach of the statutory prohibition, a suppression order or a take down order. [strict liability]	Fine not exceeding \$10,000.	Fine not exceeding \$40,000.
Chapter 4	It would be an offence for a member of the jury constituted for a trial to intentionally investigate or research information when he or she knows or ought reasonably to know that it is or may be information relevant to the case.	A term of imprisonment not exceeding 3 months or a fine not exceeding \$10,000.	N/A
Chapter 4	It would be an offence for any person, including a person who is serving or has served on a jury, to intentionally disclose, solicit or publish details of a jury's deliberations.	A term of imprisonment not exceeding 3 months or a fine not exceeding \$10,000.	Fine not exceeding \$40,000.
Chapter 6	It would be an offence to publish an untrue allegation or accusation against a judge or the court where there is a real risk that the publication could undermine public confidence in the independence, integrity or impartiality of the judiciary or a court.	A term of imprisonment of up to 2 years or a fine not exceeding \$50,000.	Fine not exceeding \$100,000.
Chapter 6	It would be an offence to knowingly or recklessly breach a take down order or other order made under R48.	A term of imprisonment not exceeding 6 months or a fine not exceeding \$25,000.	Fine not exceeding \$100,000.
Chapter 6	It would be an offence to breach a take down order or other order made under R48. [strict liability]	Fine not exceeding \$10,000.	Fine not exceeding \$40,000.



**TABLE 2: NEW QUASI-OFFENCES RECOMMENDED IN REPORT**

Chapter	Quasi-offence	Maximum individual penalty	Maximum corporate penalty
Chapter 3	Disruptive behaviour in the courtroom, including disrupting proceedings or disobeying a court order in the course of proceedings.	Imprisonment not exceeding 3 months or a fine not exceeding \$10,000.	N/A
Chapter 5	Breach of or failure to comply with an applicable court order.	Imprisonment not exceeding 6 months or a fine not exceeding \$25,000.	Imprisonment not exceeding 6 months or a fine not exceeding \$25,000 may be imposed on director or officer.

**TABLE 3: SOME EXAMPLES OF SIMILAR CURRENT OFFENCES AND THEIR PENALTIES**

Section	Offence	Maximum individual penalty	Maximum corporate penalty
s 211(1) Criminal Procedure Act 2011	The offence covers knowingly or recklessly publishing material in breach of a suppression order.	A term of imprisonment not exceeding 6 months.	Fine not exceeding \$100,000.
s 211(2) Criminal Procedure Act 2011	The strict liability offence covers the publishing of material in breach of a suppression order without lawful excuse.	A fine not exceeding \$25,000.	Fine not exceeding \$50,000.
s 32 Juries Act 1981	The offence covers failure to attend for service or serve when called upon.	Fine not exceeding \$1,000.	N/A
s 32A Juries Act 1981	The offence covers employers who dismiss a person on jury service.	Fine not exceeding \$10,000.	Fine not exceeding \$10,000.
s 32B Juries Act 1981	The offence covers publication of information that identifies a juror.	Term of imprisonment not exceeding 3 months and/or fine not exceeding \$10,000.	Fine not exceeding \$10,000.
s 21 Harmful Digital Communications Act 2015	The offence covers failure to comply with an order made under the Act.	Term of imprisonment not exceeding 6 months or a fine not exceeding \$5,000.	Fine not exceeding \$20,000.
s 22 Harmful Digital Communications Act 2015	The offence covers causing harm by posting digital communications.	Term of imprisonment not exceeding 2 years or a fine not exceeding \$50,000.	Fine not exceeding \$200,000.

**TABLE 4: SOME EXAMPLES OF QUASI-OFFENCES AND THEIR PENALTIES**

Section	Quasi-offence	Maximum individual penalty	Maximum corporate penalty
s 212 District Court Act 2016	Disruptive behaviour in the courtroom, including disrupting proceedings or disobeying a court order in the course of proceedings.	A term of imprisonment not exceeding 3 months or a fine not exceeding \$1,000.	N/A
s 165 Senior Courts Act 2016	Disruptive behaviour in the courtroom, including disrupting proceedings or disobeying a court order in the course of proceedings.	A term of imprisonment not exceeding 3 months or a fine not exceeding \$1,000.	N/A
s 134 District Court Act 2016	Breach of or failure to comply with a relevant court order.	A term of imprisonment not exceeding 3 months or a fine not exceeding \$1,000.	N/A

## Part 2

# THE BILL AND COMMENTARY



# Administration of Justice (Reform of Contempt of Court) Bill and commentary

## INTRODUCTION

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- 8.1 This part of the Report contains a commentary on the individual clauses of the draft Administration of Justice (Reform of Contempt of Court) Bill. The Bill is divided into the following parts:
- Title and Commencement
  - Part 1 – Preliminary provisions
  - Part 2 – Provisions to promote and facilitate administration of justice
  - Subpart 1 – Limiting publication of trial-related information
  - Subpart 2 – Prohibiting publication of certain criminal trial information
  - Subpart 3 – Dealing with disruptive behaviour relating to court proceedings
  - Subpart 4 – Provisions relating to juries
  - Subpart 5 – Enforcement of certain court orders
  - Subpart 6 – Prohibiting publication of untrue allegations or accusations against Judges or courts
  - Part 3 – General provisions and consequential amendments
  - Schedule 1 – Transitional, savings, and related provisions
  - Schedule 2 – Consequential amendments to other enactments
- 8.2 The major policy decisions that underlie the provisions in this Bill and the analysis of feedback received during the consultation process are discussed in the previous chapters of the Report and are not repeated in this commentary. Where relevant, the commentary includes a chapter and paragraph reference back to the text of the Report.
- 8.3 A complete copy of the draft Administration of Justice (Reform of Contempt of Court) Bill is included as Appendix 2 of this Report.

## TITLE AND COMMENCEMENT

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### Clause 1 – Title

#### 1 Title

This Act is the Administration of Justice (Reform of Contempt of Court) Act **2017**.

##### Commentary

The title identifies the scope of the Bill, which is to reform the law of contempt of court with a focus on maintaining and promoting the administration of justice.

### Clause 2 – Commencement

#### 2 Commencement

This Act comes into force on the day after the date on which it receives the Royal assent.

## PART 1 – PRELIMINARY PROVISIONS

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### Clause 3 – Purposes and objectives

#### 3 Purposes and objectives

- (1) The principal purposes of this Act are to—
  - (a) promote and facilitate the administration of justice and uphold the rule of law; and
  - (b) maintain public confidence in the judicial system; and
  - (c) reform the law of contempt of court.
- (2) To those ends, this Act enables courts to make certain orders and impose certain sanctions in order to achieve the following objectives:
  - (a) civil and criminal court proceedings are heard and determined fairly by independent and impartial Judges:
  - (b) jury verdicts are based only on facts admitted or proved by properly adduced evidence after free, frank, and confidential jury discussions, and the finality of verdicts will be protected:
  - (c) individual cases are heard and determined in a manner that is expeditious, efficient, and consistent with the principles of justice:
  - (d) except in unusual circumstances, proceedings will be open to the public and news media:
  - (e) the independence, integrity, and impartiality of the judiciary will be protected.
- (3) In reforming the law of contempt of court in New Zealand, this Act abolishes the common law contempts of contempt in the face of the court, publishing information that interferes with a fair trial, contempt by jurors, disobeying court orders, and scandalising the court, while preserving the inherent jurisdiction of the High Court to punish for contempt of court in circumstances where this Act does not apply.

##### Commentary

Clause 3 identifies the principal purposes and objectives of the Bill. It confirms our intention to reform the law of contempt of court for the purposes of promoting and facilitating the administration of justice, upholding the rule of law and maintaining public confidence in the judicial system. It also confirms our intention to abolish common law contempt in circumstances where the Bill applies, while



preserving the inherent jurisdiction of the High Court to punish contempt of court in circumstances where the Bill does not apply.

Clause 3(2)(d) recognises that the starting point for considering restrictions on publication is a presumption of open justice. Existing restrictions, which constitute unusual circumstances, include the suppression provision in s 204 of the Criminal Procedure Act 2011 protecting the identity of child complainants and witnesses in criminal cases and s 438 of the Children, Young Persons, and Their Families Act 1989 prohibiting publication of Youth Court proceedings.

## Clause 4 – Interpretation

### 4 Interpretation

In this Act, unless the context otherwise requires,—

**bailiff** has the same meaning as in section 4 of the District Court Act 2016

**category**, in relation to an offence, has the same meaning as in section 5 of the Criminal Procedure Act 2011

**charged**, in relation to an offence, means charged with the offence by a charging document filed under the Criminal Procedure Act 2011

**constable** has the same meaning as in section 4 of the Policing Act 2008

**court** means any of the following courts:

- (a) the District Court:
- (b) the High Court:
- (c) the Court of Appeal:
- (d) the Supreme Court

**judicial officer** means a High Court Judge, a District Court Judge, a Community Magistrate, or a Justice of the Peace

**officer of the court** means—

- (a) a person who holds an office referred to in section 33 of the Senior Courts Act 2016:
- (b) a person who is an officer of the court as defined in section 4 of the District Court Act 2016:
- (c) a person who is an officer of any other court to which this Act is applied, if the person is an officer of the court within the meaning of the Act that constitutes that court

**online content host**, in relation to any information, means the person who has control over the part of the electronic retrieval system, such as an Internet site or an online application, on which the information is posted and accessible by the user

**person**, in relation to a defendant or other party in any proceedings, includes a body corporate

**Police employee** has the same meaning as in section 4 of the Policing Act 2008

**public prosecution** has the same meaning as in section 5 of the Criminal Procedure Act 2011

**publish**, except in **subpart 1 of Part 2**, includes—

- (a) insert in any newspaper or other periodical publication printed, published, or distributed in New Zealand; or
- (b) send to any person, by post or otherwise; or
- (c) deliver to any person or leave upon premises occupied by any person; or
- (d) broadcast within the meaning of the Broadcasting Act 1989; or
- (e) include in any film or video recording; or
- (f) disseminate by means of the Internet or any other electronic, digital, or similar medium; or
- (g) display by way of a sign, a notice, a poster, or other means

**triable by a jury** means—

- (a) tried by a jury in accordance with sections 50 and 73 of the Criminal Procedure Act 2011; or
- (b) tried by a jury in accordance with section 74 of that Act if no order is made under section 102 or 103 of that Act that the person be tried before a Judge without a jury.

#### **Commentary**

The definition of **online content host** is that used in section 4 of the Harmful Digital Communications Act 2015. The definition is most relevant to subparts 2 and 6 of Part 2 of the Bill.

The general definition of **publish** in clause 4 applies to all provisions of the Bill except those in subpart 1 of Part 2. The definition is most relevant to subparts 2 and 6 of Part 2. The definition is broad and includes all dissemination or display of information to any person. The intention is to minimise the potential for legal argument over whether something has been published.

Clause 7 of the Bill (below) provides that for the purposes of subpart 1 of Part 2 of the Bill (which deals with limiting the publication of trial-related information) **publication** is to be interpreted as having the same meaning as in section 195 of the Criminal Procedure Act 2011. The definition of **publish** here in clause 4 does not apply to subpart 1 of Part 2 for the reasons explained in the commentary on clause 7.

## **Clause 5 – Act binds the Crown**

### **5 Act binds the Crown**

This Act binds the Crown.

#### **Commentary**

Clause 5 confirms that all of the provisions in the Bill will bind the Crown. It has been included to address the presumption in section 27 of the Interpretation Act 1999 that an Act binds the Crown only if it expressly provides the Crown is bound.

## **Clause 6 – Transitional, savings, and related provisions**

### **6 Transitional, savings, and related provisions**

The transitional, savings, and related provisions set out in **Schedule 1** have effect according to their terms.

## PART 2 – PROVISIONS TO PROMOTE AND FACILITATE ADMINISTRATION OF JUSTICE

### *Subpart 1 – Limiting publication of trial-related information*

#### Clause 7 – Interpretation

##### 7 Interpretation

In this subpart, unless the context otherwise requires, **publication** has the same meaning as in section 195 of the Criminal Procedure Act 2011.

##### Commentary

Clause 7 provides that for the purposes of subpart 1 of Part 2 of the Bill (which deals with limiting the publication of trial-related information) **publication** is to be interpreted as having the same meaning as in section 195 of the Criminal Procedure Act 2011. Section 195 describes the context in which **publication** will breach a suppression provision or suppression order made under subpart 3 of Part 5 of the Criminal Procedure Act. It provides that **publication** means publication in the context of any report or account relating to the proceeding in respect of which the suppression provision or order applies. The explanatory note to the Criminal Procedure (Reform and Modernisation) Bill<sup>619</sup> noted that the provision, adopting a Law Commission recommendation,<sup>620</sup> was not intended to be a definition of the terms **publication** or **publish**, as it was considered preferable that the meaning of these terms continue to be developed at common law rather than specified in the legislation. Instead section 195 is designed to clarify that publication is not prohibited in any context that is unrelated to a report or account of the proceedings. In its report *Suppressing Names and Evidence* the Commission said it was preferable to avoid a statutory definition of “publication” and to leave it to the courts to make decisions on a case by case basis, taking a robust approach to the meaning of publication in situations which are clearly not intended to be captured by the Act.<sup>621</sup> For consistency, **publication** in subpart 1 of Part 2 of the Bill ought to be interpreted in the same way.

#### Clause 8 – Automatic suppression of details of previous convictions and concurrent charges

##### 8 Automatic suppression of details of previous convictions and concurrent charges

- (1) If a person (the **arrested person**) is arrested for an offence and may be triable by a jury if charged with that offence (**offence A**), no person may publish details of the following except as permitted by or under this section:
  - (a) any of the arrested person’s previous convictions for any offence;
  - (b) any other offence that is a category 3 or 4 offence, if the arrested person is—
    - (i) already charged with that other offence when arrested for offence A; or
    - (ii) charged with that other offence at the same time as the person is charged with offence A; or
    - (iii) charged with that other offence at any subsequent time while the person remains charged with offence A.
- (2) A prohibition imposed by **subsection (1)** applies until the start of the trial for offence A, unless a different period applies under **subsection (3)(b)**.

619 Criminal Procedure (Reform and Modernisation) Bill 2010 (243-1) (explanatory note) at 56.

620 Law Commission *Suppressing Names and Evidence* (NZLC R109, 2009) at [7.17].

621 At [7.18].

- (3) If the arrested person is charged with offence A, the pre-trial court or trial court (as the case may be)—
- (a) must keep the prohibition under review:
  - (b) may, by order made on application or on its own initiative,—
    - (i) lift the prohibition before the trial:
    - (ii) extend the prohibition for a period that ends after the start of the trial:
    - (iii) vary the effect of the prohibition by permitting the publication of any details as specified in the order.
- (4) In addition, the court may order that an online content host take down, or disable public access to, any specific details referred to in **subsection (1)** that the host has made accessible to members of the public.
- (5) The prohibition ceases to apply if—
- (a) the court makes an order to that effect under **subsection (3)(b)(i)**; or
  - (b) the arrested person ceases to be subject to arrest for offence A; or
  - (c) the charge against the arrested person for offence A is withdrawn, dismissed, stayed, or otherwise disposed of; or
  - (d) the arrested person does not elect trial by jury or the court orders that the trial for offence A is to be a Judge-alone trial.
- (6) The prohibition does not prevent the disclosure of any details referred to in **subsection (1)** if the disclosure is made to or by any of the following persons for the purpose of any proposed proceedings against the arrested person for offence A:
- (a) the Solicitor-General:
  - (b) a Police employee:
  - (c) any person who is conducting or proposing to conduct a public prosecution against the arrested person for offence A:
  - (d) a lawyer acting for the arrested person.

### Commentary

Clause 8 enacts a prohibition on the publication or reporting of an accused person's previous convictions and any serious concurrent charges during the specified period. The automatic suppression on publication of this information will begin when the accused person is arrested and continue, unless varied by a court, until the beginning of the trial. At that point the trial court must review the position and may by order lift, extend or vary the prohibition. Automatic suppression under clause 8 applies only where the accused person is arrested for an offence for which he or she is liable to be tried by a jury. Although the provision is new, under existing law it is normally contempt of court for anyone to publish previous convictions in these circumstances. Further, the courts, using their inherent powers, are currently able to make suppression orders prohibiting publication of this information where they consider the information prejudicial to any subsequent trial.

Under Clause 8(5)(d) the prohibition ceases if the arrested person does not elect trial by jury. The arrested person would usually make his or her election at the same time as he or she enters a plea (around the time of his or her second appearance), although section 51 of the Criminal Procedure Act 2011 allows the person to elect a jury trial up until a judge-alone trial commences in certain

circumstances. The pre-trial court could, in such cases, use its powers under clause 8(3)(b) to ensure the application of the prohibition is clear.

As with clause 9 below, **publish** is used in a forward-looking sense and, in the absence of a take down order made under clause 9(2) of the Bill, earlier or historical material that was lawful at the time of publication would not breach this provision. Hyperlinking to historical material containing the information specified in clause 8(1) would, however, breach this provision.

## Clause 9 – Court may suppress specific trial-related information temporarily

### 9 Court may suppress specific trial-related information temporarily

- (1) If a court is satisfied that it appears to be necessary for avoiding a real risk of prejudice to the administration of justice in any criminal trial, or any part of the trial, the court may order that the publication of any of the following information be postponed for any period that the court thinks necessary for that purpose:
  - (a) any specific information relating to matters of character of any person who is accused of or charged with an offence:
  - (b) any specific information relating to the previous convictions or matters of character of any person who—
    - (i) may be called as a witness; or
    - (ii) may be a victim of the offence; or
    - (iii) is connected with the person who is accused of or charged with the offence:
  - (c) any other specific information relating to any trial.
- (2) In addition, the court may order that an online content host take down, or disable public access to, any specific information referred to in **subsection (1)** that the host has made accessible to members of the public.
- (3) Despite **subsection (1)**, the court may make an interim order of any kind described in **subsection (1) or (2)** if the person arrested for the offence advances an arguable case that publication would be likely to create a real risk of prejudice to a fair trial.
- (4) An interim order under **subsection (3)** may be made or renewed only in the absence of an order under **subsection (1) or (2)** and expires at the person's next court appearance for the offence, and may be renewed only if the court is satisfied that publication would be likely to create a real risk of prejudice to a fair trial.
- (5) The court may make an order under this section at any time after the person is arrested for an offence and before the completion of all proceedings relating to the offence.
- (6) If the District Court is presided over by 1 or more Justices, or 1 or more Community Magistrates, the court has the same power to make orders under this section as it has under section 362 of the Criminal Procedure Act 2011 to make suppression orders under subpart 3 of Part 5 of that Act.

### Commentary

Clause 9 provides for temporary suppression orders to protect fair trial rights. Sub-clause (1) is intended to be forward-looking, allowing the court to prohibit all future publication of certain information for a temporary period. Sub-clause (1) is limited to material published contemporaneously with the present proceeding. Material published prior to the present proceedings, which was lawfully published at the time, would not be affected unless a take down order was made under sub-



clause (2). An order under sub-clause (1) would however prohibit deliberate hyperlinking to earlier or historical reports that contained information of the type specified in that section. Sub-clause (2) is broader, and allows the court to order an online content host to remove information published before proceedings where that information remains publicly available. As discussed in our Report, the advent of digital media allows potentially prejudicial material to remain accessible to an unprecedented degree. The same risks are not posed by, for example, archived print newspapers.

Although the provision is new, under existing law the courts, using their inherent authority and implied powers, are able to make suppression orders prohibiting publication of this information where they consider the information prejudicial to any subsequent trial. A consequence of the power to make suppression orders being statutory is that it will be an offence to breach such an order.

## **Clause 10 – Duration of suppression order and right of review**

### **10 Duration of suppression order and right of review**

- (1) An order under **section 9(1)**—
  - (a) may be made for a limited period ending on a date specified in the order; and
  - (b) may be renewed for a further period or periods by the court; and
  - (c) expires at the completion of all proceedings relating to the offence, unless it expires at an earlier time in accordance with an order of the court or by operation of law.
- (2) The order may be reviewed and varied by the court at any time.

#### **Commentary**

Clause 10(1)(a) provides that orders made under clause 9 are temporary and will last for only a short and clearly defined term. Suppression orders are a justified limitation on the right to freedom of expression and the principle of open justice because they are necessary to protect the fair trial rights of a defendant. It is accepted that the right to a fair trial may in some cases override the right to freedom of expression and the principle of open justice, but any such limitation must be no more than reasonably necessary. Clear rules, setting out the duration of orders, protect the right to freedom of expression, and provide clarity for the media. Sub-clauses (1)(b) and (2) provide flexibility to the courts and allow for the adjustment of orders, whether to extend, vary or remove them as appropriate. Sub-clause (1)(c) clarifies that all orders, unless they expire earlier, will expire at the completion of all proceedings relating to the offence. Upon the completion of all proceedings there is no longer any justification for continued suppression on the grounds of protecting the right to a fair trial. The court may decide that there are legitimate grounds for permanently suppressing some information covered by one of these temporary suppression orders, but would have no jurisdiction to make such an order under the Bill. The court may have jurisdiction to make permanent suppression orders under other statutory provisions (such as those in the Criminal Procedure Act 2011) or under inherent authority or implied powers.

## **Clause 11 – Publication by or at request of Police, etc**

### **11 Publication by or at request of Police, etc**

- (1) Nothing in this subpart prevents publication by or at the request of any Police employee of the name, address, or occupation of any person who has escaped from lawful custody or has failed to attend any court when lawfully required to do so if that publication is made for the purpose of facilitating that person's recapture or arrest.
- (2) Nothing in this subpart prevents publication of the name, address, or occupation of any person, or any details of the offences charged, to—

- (a) any person assisting with the administration of the sentence imposed on the person or with the rehabilitation of the person; or
- (b) any Police employee, or any officer or employee of the Department of Corrections or of the Ministry of Justice, who requires the information for the purposes of his or her official duties; or
- (c) any person who is conducting or proposing to conduct a public prosecution against the person for an offence, and who requires the information for the purposes of—
  - (i) deciding whether to commence proceedings; or
  - (ii) conducting that public prosecution.

#### **Commentary**

Clause 11 addresses concerns that automatic suppression orders may hinder the conduct of Police business, for example when seeking information from the public in relation to offending or when seeking to apprehend a suspect at large. This clause clarifies that the suppression regime established in this subpart is not intended to interfere with Police business. The clause is similar to section 209 of the Criminal Procedure Act 2011 so maintains consistency with that regime.

### **Clause 12 – Standing of members of media**

#### **12 Standing of members of media**

- (1) This section applies to—
  - (a) a person who is reporting on the proceedings and who is either subject to or employed by an organisation that is subject to—
    - (i) a code of ethics; and
    - (ii) the complaints procedures of the Broadcasting Standards Authority or the Press Council; and
  - (b) any other person reporting on the proceedings with the permission of the court.
- (2) A person to whom this section applies has standing to initiate, and be heard in relation to, any application for an order under **section 8 or 9**, and any application to renew, vary, or revoke the order.

#### **Commentary**

Clause 12 reflects and affirms the status quo in relation to the media's standing to challenge or be heard in relation to suppression or take down orders (see: Criminal Procedure Act 2011, section 283(2)(c)). The media are a special case and have a special interest in being heard on such matters. This interest arises from their role as surrogates for the public, providing information and commentary in furtherance of the public interest. While the power to make suppression orders is a justified limitation on the right to freedom of expression and an exception to the principle that the work of the courts is to take place in public, it is essential that the media have standing to challenge or be heard in relation to such orders. This approach also maintains consistency with the regime set out in the Criminal Procedure Act 2011.

Clause 12(1)(a)(ii) lists two existing complaint bodies. The Online Media Standards Authority (OMSA), which was set up in 2013 to consider complaints about news and current affairs content of broadcasters' websites, has been disbanded. The OMSA's jurisdiction over online publications was transferred to the New Zealand Press Council on 1 January 2017.

## Clause 13 – Offences relating to breach of this subpart

### 13 Offences relating to breach of this subpart

- (1) A person commits an offence if the person knowingly or recklessly—
  - (a) fails to comply with **section 8(1)**; or
  - (b) fails to comply with an order made under **section 8 or 9**.
- (2) A person commits an offence if the person—
  - (a) fails to comply with **section 8(1)**; or
  - (b) fails to comply with an order made under **section 8 or 9**.
- (3) **Subsection (2)** does not apply to a person who hosts material on Internet sites or other electronic retrieval systems that can be accessed by a user unless the specific information has been placed or entered on the site or system by that person.
- (4) A person who commits an offence against **subsection (1)** is liable on conviction,—
  - (a) in the case of an individual, to a term of imprisonment not exceeding 6 months or a fine not exceeding \$25,000;
  - (b) in the case of a body corporate, to a fine not exceeding \$100,000.
- (5) A person who commits an offence against **subsection (2)** is liable on conviction,—
  - (a) in the case of an individual, to a fine not exceeding \$10,000;
  - (b) in the case of a body corporate, to a fine not exceeding \$40,000.
- (6) In a prosecution for an offence against **subsection (2)**, it is not necessary for the prosecution to prove that the defendant intended to commit an offence.

#### Commentary

Clause 13 creates an offence of failing to comply with automatic suppression under clause 8 or a suppression or take down order under clause 9. The clause, modelled on section 211 of the Criminal Procedure Act 2011, provides that it is a more serious offence to commit a breach knowingly or recklessly. Sub-clause (2) further provides a strict liability offence where there is an absence of the mental element of intention. The penalty levels for the offence are also consistent with those under the Criminal Procedure Act. The defence in sub-clause (3) applies only in respect of the offence in sub-clause (2). A person who hosts material on internet sites or other electronic retrieval systems and who has knowledge of the presence of the offending material and fails to remove it could be charged with the offence in sub-clause (1). The defence in sub-clause (3) would not be available.

### *Subpart 2 – Prohibiting publication of certain criminal trial information*

## Clause 14 – Offence to publish certain criminal trial information

### 14 Offence to publish certain criminal trial information

- (1) This section applies if a person (the **arrested person**) is arrested for an offence and may be triable by a jury if charged with that offence, and—
  - (a) applies until the completion of all proceedings relating to the jury trial (including pre-trial proceedings); and
  - (b) ceases to apply if the charge is dealt with or disposed of otherwise than by a jury trial.

- (2) A person commits an offence if—
  - (a) the person at any time intentionally publishes any information that is relevant to any trial to which this section applies; and
  - (b) there is a real risk that the publication could prejudice the arrested person's right to a fair trial.
- (3) A person who commits an offence against **subsection (2)** is liable on conviction,—
  - (a) in the case of an individual, to imprisonment for a term not exceeding 6 months or a fine not exceeding \$25,000; or
  - (b) in the case of a body corporate, to a fine not exceeding \$100,000.
- (4) A person has a defence in a prosecution for an offence against **subsection (2)** if the person proves that,—
  - (a) at the time of the publication of the information and after taking all reasonable care, the person was unaware of, and had no reason to be aware of, the arrested person's arrest, any pre-trial proceedings, or the possibility or existence of the trial; or
  - (b) as the online host or distributor of the publication, after taking all reasonable care, the person did not know and had no reason to suspect that it contained information that created a real risk of prejudicing the arrested person's right to a fair trial; or
  - (c) the publication was in good faith made as a contribution to, or part of, a discussion of public affairs or matters of general public interest; or
  - (d) the publication was a fair and accurate report of court proceedings held in public and published contemporaneously and in good faith.

### Commentary

Clause 14 creates a new offence as a statutory replacement for the current strict liability publication contempt as it applies to a fair jury trial. Clause 29(4)(b) of the Bill abolishes the common law contempt. Clause 14(2) contains the current "real risk" strict liability test that applies at common law. As is currently the case, the mental element of intention applies only to the action of publication and there is no requirement for the prosecution to prove any intention to prejudice the trial. Clause 15 provides for how the court determines whether a publication creates a real risk of prejudice to a trial.

Sub-clause (1) identifies the scope of the offence provision and limits its application to situations where an accused person is liable to be tried by a jury. The scope of clause 14 has intentionally been restricted to criminal jury trials for the reasons discussed in chapter 2 of the Report. This reflects the common law approach that the effectiveness of judicial independence means there is no "real risk" of the media influencing a judge sitting alone. The offence in clause 14 is not intended to cover publications that affect the wider justice process by interfering with access to the courts or undermining public confidence in the courts. Such cases are very rare and could continue to be addressed and determined by the High Court under its inherent jurisdiction, which is preserved by clause 29(2) of the Bill.

Any person who is involved in or contributes to the publication will be liable to prosecution under clause 14. This is currently the position at common law. In the case of a news media publication, the editor and the reporter who wrote the article as well as the media company may be prosecuted. The broad definition of publish in clause 4 and the scope of the offence are intended to catch every person who contributes to a publication and not just the media company. Whether or not any person involved in the publication should be charged and prosecuted would be assessed on a case by case basis under the Solicitor-General's prosecution guidelines. Under these guidelines the decision to

prosecute depends on the sufficiency of evidence against that person and consideration of whether in the particular circumstances of the case a prosecution would be in the public interest.

Sub-clause (4) includes a number of specific defences that will be available to the person charged with an offence under the clause. Sub-clause (4)(b) is included to cover situations where an **online content host** or distributor of information inadvertently makes public information that creates a real risk of interference with an accused person's right to a fair trial. The defence is necessary because the definition of **publish** in clause 4 is broad and catches an **online content host** or distributor.

## **Clause 15 – How court determines whether publication creates real risk of prejudice to right to fair trial**

### **15 How court determines whether publication creates real risk of prejudice to right to fair trial**

- (1) In determining whether, for the purpose of **section 14(2)(b)**, a publication creates a real risk of prejudice to an arrested person's right to a fair trial, the court must consider the following:
  - (a) the likely effect of the publication as a whole:
  - (b) the persons or groups of persons to whom the publication is likely to be made available:
  - (c) the medium in which the publication is presented and its potential accessibility and durability:
  - (d) the character of the publication, including the language and tone used in it:
  - (e) any other relevant circumstances relating to the likely effect of the publication.
- (2) The court may (without limitation) treat the inclusion in a publication of any of the following information as creating a real risk of prejudicing the arrested person's right to a fair trial:
  - (a) information indicating that the arrested person is of bad character, including previous misconduct, criminal or gang affiliations, or criticism of the arrested person's personality or previous charges or acquittals:
  - (b) information indicating that the arrested person has confessed to the charge, or any component of it, or to conduct that may result in charges being laid against the person:
  - (c) information commenting on the credibility of the arrested person or any witnesses:
  - (d) information given at trial in the jury's absence or information that has been ruled inadmissible at trial:
  - (e) photographs, pictorial information, or other information that reveals the identity of the arrested person where the identity of the person is, or is likely to be, in issue at trial.

#### **Commentary**

Clause 15 provides direction on how the court will determine whether a publication creates a real risk of prejudice to a right to a fair jury trial. Drawing on case law the clause requires the court to consider the nature of the information that has been published and its potential impact when determining whether a real risk of prejudice was created. Sub-clause (1) addresses the circumstances and impact of publication. Sub-clause (2) contains an indicative (but not exhaustive) list of information that when included in a publication may be considered by the court to pose a real risk of interference with the right to a fair trial. Sub-clause (2) is intended also to assist the public and the media when trying to assess whether there is likely to be a risk if they were to publish certain types of information.



*Subpart 3 – Dealing with disruptive behaviour relating to court proceedings***Clause 16 – Judicial officer may cite person for disruptive behaviour****16 Judicial officer may cite person for disruptive behaviour**

- (1) This section applies if a judicial officer believes that any person is—
  - (a) wilfully disrupting the proceedings of a court; or
  - (b) wilfully and without lawful excuse disobeying any order or direction of the court in the course of the hearing of any proceedings.
- (2) The judicial officer may cite the person for disruptive behaviour and order that the person be taken into custody and detained until the court rises for the day.
- (3) Any constable or officer of the court, with or without the assistance of any other person, may take the person into custody in accordance with the order.
- (4) Any person taken into custody under this section must be dealt with in accordance with the procedure in **section 17**, which applies for the purpose of this subpart.

**Commentary**

Clause 16 provides for the court to respond immediately to disruptive behaviour by removing and detaining for the remainder of the day the person responsible. This power is essential to ensure that court business is not delayed. Sub-clause (4) ensures however that the procedure for dealing with the person considered to be disruptive is separated in time from the behaviour giving rise to the citation. The sub-clause implements the policy that disruptive behaviour should be dealt with through a three-step process, as outlined at in chapter 3 of our Report. Where a trial is ongoing and the disruptive behaviour is continuing, clause 16 is to be read alongside clause 28 to allow the court to exercise the power to remove and detain the person daily or as required.

Schedule 2 contains consequential amendments that the Bill will make to the District Court Act 2016, the Employment Relations Act 2000, the Family Court Act 1980, the Resource Management Act 1991, the Senior Courts Act 2016 and the Te Ture Whenua Māori Act 1993. The effect of these amendments is to repeal and replace the ‘contempt in the face of the court provisions’ currently governing disruptive behaviour in the Supreme Court, the Court of Appeal, the High Court, the District Court, the Employment Court and Authority, the Family Court, the Environment Court, the Māori Land Court, and the Māori Appellate Court (modified to the extent necessary) with clause 16 and the other clauses in subpart 3 of Part 2 of the Bill.

**Clause 17 – Procedure for dealing with person cited for disruptive behaviour****17 Procedure for dealing with person cited for disruptive behaviour**

- (1) While being held in custody, a person cited for disruptive behaviour must be given a reasonable opportunity to—
  - (a) obtain legal representation; and
  - (b) apologise to the court.
- (2) Before the close of the day on which the person is cited and ordered to be detained, a Judge must review the matter and, if the Judge considers that further punishment may be necessary, adjourn any hearing and set the matter down for determination on a later date within the next 7 days.
- (3) The Bail Act 2000 applies, with the necessary modifications, as if the person cited were charged with an offence that carries the penalties specified in **subsection (5)(b)**.

- (4) If the Judge sets down the matter for determination, he or she—
  - (a) must consider whether there are exceptional circumstances that warrant a different Judge hearing the matter; and
  - (b) must provide a written statement to the person cited that specifies the behaviour that he or she believes may cause the person to have committed disruptive behaviour and to be liable for further punishment; and
  - (c) may receive any explanation he or she considers helpful to ensure that the case proceeds on a reliable factual platform.
- (5) On finding a person guilty of doing anything described in **section 16(1)(a) or (b)**, a Judge—
  - (a) must not convict the person; but
  - (b) may—
    - (i) issue a warrant committing the person to imprisonment for a term not exceeding 3 months; or
    - (ii) impose on the person a fine not exceeding \$10,000.

#### **Commentary**

Clause 17 addresses steps two and three of our three-step approach to dealing with disruptive behaviour in court, as set out in chapter 3 of our Report. Sub-clauses (1)–(4) deal with the hearing to determine whether the person was guilty, and sub-clause (5) deals with punishment. The procedure set out in sub-clauses (1)–(4) separates in time the offending and the hearing. The procedure here is intended to reflect the standards set in *McAllister v Solicitor-General* and discussed at [3.30]–[3.32] in chapter 3 of our Report.

### **Clause 18 – Further provisions applying for purpose of this subpart**

#### **18 Further provisions applying for purpose of this subpart**

- (1) The Sentencing Act 2002 and subpart 5 of Part 6 of the Criminal Procedure Act 2011 (appeals against finding of or sentence for contempt of court) apply to any action taken under **section 17(5)** as if the finding were a conviction for an offence and any imprisonment or fine were a sentence.
- (2) A warrant for the committal of any person to prison under **section 17(5)** must be directed to a bailiff or constable, who may take the person into custody, and every constable has a duty to assist in the execution of the orders or warrants issued under that provision.
- (3) Any person committed to prison by any court under **section 17(5)** must be committed to a prison established under or deemed to be established under the Corrections Act 2004, and the prison manager of the prison mentioned in the order or warrant is bound to receive and keep the person until the person is lawfully discharged.

#### **Commentary**

Clause 18 provides that disruptive behaviour in the courtroom should be treated similarly to other offending, notwithstanding that a finding of disruptive behaviour does not result in a conviction. The same rights and procedures in relation to appeals, sentencing and detention should apply to those found guilty.

*Subpart 4 – Provisions relating to juries***Clause 19 – Offence for jury member to investigate or research case****19 Offence for jury member to investigate or research case**

- (1) A person commits an offence if the person is a member of a jury constituted for a case and—
  - (a) during the trial period the person intentionally investigates or researches information relevant to the case; and
  - (b) does so when the person knows or ought reasonably to know it is or may be information relevant to the case.
- (2) It is not an offence against **subsection (1)** if the investigation or research is undertaken with the permission, or at the direction, of the trial Judge.
- (3) A person who commits an offence against **subsection (1)** is liable on conviction to imprisonment for a term not exceeding 3 months or a fine not exceeding \$10,000.
- (4) In this section,—

**information relevant to the case** means information about any of the following:

- (a) the defendant;
- (b) any other person involved in the events which are the subject of the case;
- (c) any person involved in the trial, including a witness;
- (d) the events that are the subject of the case;
- (e) the law relating to the case;
- (f) the law of evidence

**investigate or research** includes—

- (a) ask a question or have a discussion (by any means) with a person who is not a jury member or the trial Judge;
- (b) search any information source, including the Internet;
- (c) visit or inspect a place or an object;
- (d) conduct an experiment;
- (e) ask another person to perform any of the actions listed above

**trial period** means the period that—

- (a) begins when a jury has been constituted under section 19 of the Juries Act 1981; and
- (b) ends when the jury is discharged or, in the case of an individual jury member who is discharged during the trial, the member is discharged.

**Commentary**

Clause 19 is intended to assist judges and juries by clarifying the law of juror contempt. It provides clear guidance to jurors regarding what conduct is or is not appropriate. As noted in our Report, this clause also reflects similar offences enacted in other jurisdictions.

## Clause 20 – Offence to disclose jury deliberations

### 20 Offence to disclose jury deliberations

- (1) A person commits an offence if the person intentionally discloses, solicits, or obtains information about statements made, opinions expressed, arguments advanced, or votes cast by members of a jury in the course of their deliberations in proceedings before a court.
- (2) It is not an offence against **subsection (1)** if, during a trial, the information—
  - (a) is sought by, or disclosed to, the court in the course of the performance of the jury's functions; or
  - (b) is disclosed to the trial Judge in a complaint or allegation of misconduct by a juror or is disclosed for the purpose of investigating whether an offence has been committed.
- (3) It is not an offence against **subsection (1)** if the information is sought or disclosed—
  - (a) by a current or former jury member in discussions with a health practitioner who is treating him or her in relation to issues arising out of his or her jury service; or
  - (b) during or after the trial with the permission of the presiding Judge or the relevant head of bench, including for the purpose of conducting research about juries or jury service.
- (4) A person who commits an offence against **subsection (1)** is liable on conviction to,—
  - (a) in the case of an individual, imprisonment for a term not exceeding 3 months or a fine not exceeding \$10,000;
  - (b) in the case of a body corporate, a fine not exceeding \$40,000.
- (5) In this section, **health practitioner** has the same meaning as in section 5 of the Health Practitioners Competence Assurance Act 2003.

#### Commentary

As with clause 19, this clause is intended to provide clarity and guidance to both judges and jurors. The offence is intended to safeguard the confidentiality of jurors, which is conducive to free and frank deliberation, preserves the finality of verdicts and protects an individual juror's privacy.

Sub-clause (1) provides that it is an offence to disclose jury deliberations, with exceptions in sub-clauses (2) and (3) and also below in clause 21. The policy here is that there should be certain narrow exceptions, allowing disclosure to certain people and in certain circumstances.

Sub-clause (2) ensures that during the course of a trial, jurors can disclose information to and raise concerns about misconduct with the trial judge, and disclose information to the judge in the course of the performance of the jury's functions.

Sub-clause (3)(a) ensures that both during or after a trial, a juror will be able to disclose information to a health practitioner who is treating him or her in relation to issues arising out of his or her jury service. The exception in sub-clause (3)(b) allows for disclosure, during or after a trial, of information for the purpose of authorised research into juries or jury service with the permission of the presiding Judge or the head of bench.

## Clause 21 – Limited disclosure of jury deliberations permitted after jury discharged

### 21 Limited disclosure of jury deliberations permitted after jury discharged

- (1) This section applies in relation to a jury trial if the trial has been completed and the jury discharged.

- (2) A person who has reason to believe that an offence against **section 19 or 20** may have been committed in relation to the jury trial, or that the conduct of any juror in the trial may provide grounds for a direction that a new trial be held or grounds for an appeal, may refer the matter to any person referred to in **subsection (3)**.
- (3) The persons concerned are—
  - (a) the Solicitor-General;
  - (b) a Police employee;
  - (c) the prosecutor in the completed trial or any person who is conducting or proposing to conduct a public prosecution against a person for the offence;
  - (d) a lawyer acting for the offender.
- (4) The person who refers the matter may disclose to the recipient information about statements made, opinions expressed, arguments advanced, or votes cast by members of a jury in the course of their deliberations.
- (5) A recipient of information under **subsection (4)** may disclose the information to any other person only so far as is necessary to enable the Police to investigate whether an offence has been committed and to consider whether the offender should be prosecuted.

#### Commentary

Clause 21 provides a narrow exception to the offence in clause 20, permitting jurors to disclose information in certain circumstances and to certain people after the jury has been discharged. All of the people to whom disclosure is permitted are individuals who bear a responsibility to uphold the administration of justice, and will accordingly be under a professional and ethical obligation to respond to the disclosure appropriately. This may require them in turn to report or act upon the disclosure, and sub-clause (5) confirms that they would not commit an offence by doing so. This is consistent with section 76 of the Evidence Act 2006, which envisages a departure from the general rule that evidence relating to jury deliberations is inadmissible, in exceptional circumstances and where it is in the public interest.

### *Subpart 5 – Enforcement of certain court orders*

#### **Clause 22 – Certain court orders and undertakings may be enforced**

##### **22 Certain court orders and undertakings may be enforced**

- (1) This section applies to—
  - (a) any interim or final order, decision, decree, direction, or judgment of a court (a **court order**) to do or abstain from doing something, except a court order to pay a sum of money or for the recovery of land;
  - (b) any undertaking given to the court if, on the faith of the undertaking, the court has sanctioned a particular course of action or inaction.
- (2) A court may enforce the court order or undertaking against a person by taking action provided for in **subsection (3)** on application by the party who sought the order or undertaking being enforced, or on application by the Solicitor-General.
- (3) The court may—
  - (a) either—



- (i) issue a warrant committing the person or a director or an officer of the body corporate, as the case may be, to a term of imprisonment not exceeding 6 months; or
    - (ii) impose on the person a fine not exceeding \$25,000; and
  - (b) if the court concerned is the High Court, make a sequestration order in accordance with the rules of court.
- (4) Before taking action under **subsection (3)**, the court—
- (a) must be satisfied beyond reasonable doubt that—
    - (i) the court order or undertaking being enforced has been made in clear and unambiguous terms and is clearly binding on the person; and
    - (ii) the person has knowledge or proper notice of the terms of the court order or undertaking being enforced; and
    - (iii) the person has, without reasonable excuse, intentionally failed to comply with the court order or undertaking being enforced; and
  - (b) must also be satisfied that other methods of enforcing the court order or undertaking have been considered and are inappropriate or have been tried unsuccessfully.

#### **Commentary**

It is fundamental to the administration of justice that court judgments and orders will be enforced against those who fail or refuse to comply with them.

Clause 22 is intended to provide a straightforward and efficient means for enforcing court orders. It covers orders made in criminal as well as civil proceedings. It is intended that the availability of this mechanism will be sufficient to compel compliance in the majority of cases. The Solicitor-General has the power to apply under this provision as well. This reflects the current position and is appropriate in cases where continued defiance of court orders risks undermining the administration of justice.

Schedule 2 contains consequential amendments to the Family Court Act 1980 and the Resource Management Act 1991 applying clauses 22 and 23 (subpart 5 of Part 2 of the Bill) to the Family Court and Environment Court. These amendments confer jurisdiction under clauses 22 and 23 on those courts, resolving any uncertainty over the extent of their current jurisdiction to enforce their own orders.

### **Clause 23 – Further provisions applying for purpose of section 22**

#### **23 Further provisions applying for purpose of section 22**

- (1) The Sentencing Act 2002 and subpart 5 of Part 6 of the Criminal Procedure Act 2011 apply to any committal or fine imposed under **section 22(3)** as if the sanction were a conviction for an offence to which that subpart 5 applies and any imprisonment or fine were a sentence.
- (2) A warrant for the committal of any person to prison under **section 22(3)** must be directed to a bailiff or constable, who may take the person into custody, and every constable has a duty to assist in the execution of the orders or warrants issued under that provision.
- (3) Any person committed to prison by any court under **section 22(3)** must be committed to a prison established under or deemed to be established under the Corrections Act 2004, and the prison manager of the prison mentioned in the order or warrant is bound to receive and keep the person until the person is lawfully discharged.

- (4) If at any time it appears to the satisfaction of a Judge of the court that committed the person to prison that the person ought for any reason to be discharged, the Judge may order the person's discharge from prison on any terms (including liability to rearrest if the terms are not complied with) that the Judge thinks fit.
- (5) A committal or fine imposed under **section 22(3)** does not operate to extinguish or affect the liability of the person to comply with a court order.

#### Commentary

This clause provides that non-compliance with court orders should be treated similarly to other offending, notwithstanding that a finding of non-compliance does not result in a conviction. The same rights and procedures in relation to appeals, sentencing and detention should apply to those found guilty of non-compliance. Sub-clause (4) permits a judge to release a person committed to prison under clause 22. This provides an avenue for a person committed under this subpart to secure their release by complying with the court's instructions, which aids this subpart's objective of incentivising compliance.

### *Subpart 6 – Prohibiting publication of untrue allegations or accusations against Judges or courts*

#### **Clause 24 – Offence to publish untrue allegation or accusation against Judge or court**

##### **24 Offence to publish untrue allegation or accusation against Judge or court**

- (1) A person commits an offence if the person publishes an allegation or accusation made by that person or another person against a Judge or a court, and there is a real risk that the publication could undermine public confidence in the independence, integrity, or impartiality of the judiciary or a court.
- (2) A person who commits an offence against **subsection (1)** is liable on conviction,—
  - (a) in the case of an individual, to a term of imprisonment of less than 2 years or a fine not exceeding \$50,000;
  - (b) in the case of a body corporate, to a fine not exceeding \$100,000.
- (3) A person has a defence in a prosecution for an offence against **subsection (1)** if the person proves on the balance of probabilities that—
  - (a) the allegation or accusation was true or not materially different from the truth; or
  - (b) where the prosecution is based on all or any of the contents of a publication, that the publication taken as a whole was in substance true or in substance not materially different from the truth.
- (4) A person has a defence in a prosecution for an offence against **subsection (1)** if the person proves that, as the online host or distributor of the publication, the person did not know that it contained an allegation or accusation against a Judge or a court that created a real risk of undermining public confidence in the independence, integrity, or impartiality of the judiciary or a court.

- (5) In this section,—

**court** means any court, including a court as defined in **section 4**

**Judge** means a Judge of any court.

## Commentary

Subpart 6 implements the policy set out in chapter 6 of our Report to replace and reform the common law contempt of ‘scandalising the court’. Clause 24 is intended to maintain the independence, integrity and impartiality of the judiciary and protect the judiciary as an institution, and does not serve to protect the feelings of individual judges or to stifle legitimate criticism.

Clause 24 creates a new offence as a statutory replacement for the current common law contempt of scandalising the court. Clause 29(4)(e) of the Bill abolishes the common law contempt of scandalising. Under clause 24(1) it is an offence for any person to publish an untrue allegation or accusation against a Judge or court where there is a real risk that the publication could undermine public confidence in the independence, integrity, or impartiality of the judiciary or a court. Sub-clause (1) contains the same real risk test as in clause 14(2) of the Bill. The mental element of intention applies only to the action of publication and there is no requirement for the prosecution to prove any intention to undermine public confidence in the independence, integrity and impartiality of the judiciary. The offence covers statements of opinion, which are not capable of proof, as well as allegations of fact that are untrue.

Sub-clause (3) provides that truth is a defence, and is based upon the defence of truth in section 8 of the Defamation Act 1992 and related jurisprudence.

We consider the offence to be a reasonable limitation of the right to freedom of expression affirmed in the New Zealand Bill of Rights Act 1990. Legitimate criticism is protected by the threshold of a ‘real risk’ in sub-clause (1), and the availability of the defence of truth in sub-clause (3). Similar offences are recognised as justified limitations on the right to freedom of expression in other jurisdictions.<sup>622</sup>

Sub-clause (5) defines **court** broadly for the purposes of the offence. It includes all courts, and in this way will cover allegations and accusations against a Community Magistrate or a Justice of the Peace or other judicial officer where these meet the test in sub-clause (1).

## Clause 25 – Further provisions applying for purpose of section 24

### 25 Further provisions applying for purpose of section 24

- (1) This section applies if the Solicitor-General has reason to believe that a person may have committed an offence against **section 24(1)**.
- (2) The Solicitor-General may do 1 or more of the following:
  - (a) request the alleged offender to retract the allegation or accusation or apologise for it, or both;
  - (b) request the alleged offender to retract the allegation or accusation pending the hearing of the charge;
  - (c) request an online content host to take down, or disable public access to, any specified information relating to the allegation or accusation that the host has made accessible to members of the public;
  - (d) apply to the High Court for an order under **section 26**.
- (3) Nothing in **subsection (2)** obliges the Solicitor-General to take any action described in **paragraphs (a) to (c)** of that subsection or requires that a charge for the alleged offence be filed before he or she may apply for an order under **section 26**.

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622 See [6.74] of the Report.

- (4) A charge for an offence against **section 24(1)** may be brought only by or on behalf of the Solicitor-General, and the prosecutor must be satisfied that there is a sufficient evidential foundation for the charge and that the prosecution is in the public interest.
- (5) For the purpose of deciding whether to prosecute a person for an offence against **section 24(1)**, the prosecutor may consider whether any complaint about the Judge's conduct has been made to the Police, or to the Judicial Conduct Commissioner under the Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004, and consider any explanation provided by the Judge.
- (6) Despite anything in the Criminal Procedure Act 2011 or the Search and Surveillance Act 2012,—
  - (a) the Solicitor-General may investigate whether a person has committed an offence against **section 24(1)** or may request the Police to do so:
  - (b) the Solicitor-General and the Police may exchange information for the purpose of an investigation:
  - (c) the powers that a constable or any other Police employee may exercise under any enactment in the case of an alleged offence punishable by a term of imprisonment of less than 2 years may be exercised in relation to the alleged offence against **section 24(1)** and, subject to **subsection (4)**, a charge may be filed against the alleged offender.

### Commentary

The new offence in clause 24 is intended to be a last resort. Clause 25, together with the rest of Subpart 6, provides other means to deal with untrue allegations or accusations which meet the real risk test. The four options listed in sub-clause (2) are intermediary steps, which would typically be taken in the same order as listed and which should be sufficient to resolve most cases. Prosecution is intended to be a last resort, and to serve primarily as a deterrent. All of the options are, however, at the discretion of the Solicitor-General, and his or her approach will depend on the circumstances of the particular case. The Solicitor-General has responsibility for bringing a prosecution under this provision and in accordance with the standard test for prosecution found in the Solicitor-General's Prosecution Guidelines. This approach is described further in our Report at [6.88]–[6.93].

Sub-clause (6) is an avoidance of doubt provision, clarifying that there is no legislative impediments to the Solicitor-General investigating whether an offence under clause 24(1) has been committed or requesting Police to do this. Sub-clause (6) also clarifies that the Solicitor-General and Police can exchange investigative information and the Police may exercise its enforcement powers to assist an investigation of an alleged offence.

## Clause 26 – High Court may make orders

### 26 High Court may make orders

- (1) On application under **section 25(2)(d)**, the High Court may, if satisfied that there is an arguable case that a person has committed an offence against **section 24(1)**, order the person to do 1 or more of the following:
  - (a) take down, or disable public access to, material:
  - (b) retract the allegation or accusation:
  - (c) not encourage any other persons to engage in similar communications:
  - (d) publish a correction:
  - (e) publish an apology.

- (2) The court may—
  - (a) make an order on an interim basis, pending the filing of a charging document:
  - (b) vary or discharge any interim order:
  - (c) make an interim order permanent if the interim order is accepted or a person is convicted of the charge.
- (3) In addition, the court may order that an online content host take down, or disable public access to, any material related to the suspected offence that the host has made accessible to members of the public.
- (4) In making an order that a correction or an apology be published under **subsections (1)(d) or (e)**, the court may include requirements relating to—
  - (a) the content of the correction or apology:
  - (b) the time of publication of the correction or apology:
  - (c) the prominence to be given to the correction or apology in the particular medium in which it is published.
- (5) In doing anything under this section, the court must act consistently with the rights and freedoms contained in the New Zealand Bill of Rights Act 1990.
- (6) A person to whom **section 12(1)** applies has standing to be heard in relation to, any application for an order under **subsection (1)(a)**, and any application to renew, vary, or revoke the order.
- (7) If an interim order is not made permanent, it lapses.

#### **Commentary**

Clause 26 provides for the making of interim or permanent orders to deal with material where there is an arguable case that a person has breached clause 24. This clause is largely modelled on the equivalent provisions in the Harmful Digital Communications Act 2015 and the Defamation Act 1992. Sub-clause (3) is intended to address cases where the person committing the contempt is outside the jurisdiction or unable to be identified. The Court should be able to directly order online content hosts, including internet service providers, search engines and social media, to remove material or disable access to it. Sub-clause (6) gives members of accredited media, and any other person reporting on the proceedings with the permission of the Court, standing to be heard on any application for an order under sub-clause (1)(a) or any application to renew, vary or revoke any order made under sub-clause (1)(a).

### **Clause 27 – Offence to fail to comply with order under section 26**

#### **27 Offence to fail to comply with order under section 26**

- (1) A person commits an offence if the person knowingly or recklessly fails to comply with an order made under **section 26**.
- (2) A person commits an offence if the person fails to comply with an order made under **section 26**.
- (3) A person who commits an offence against **subsection (1)** is liable on conviction,—
  - (a) in the case of an individual, to a term of imprisonment not exceeding 6 months or a fine not exceeding \$25,000:
  - (b) in the case of a body corporate, to a fine not exceeding \$100,000.



- (4) A person who commits an offence against **subsection (2)** is liable on conviction,—
- (a) in the case of an individual, to a fine not exceeding \$10,000;
  - (b) in the case of a body corporate, to a fine not exceeding \$40,000.
- (5) In a prosecution for an offence against **subsection (2)**, it is not necessary for the prosecution to prove that the defendant intended to commit an offence.

#### Commentary

Clause 27 creates a separate offence of failing to comply with an order under clause 26. This would exist independently of any charge, whether laid or not, under clause 24. It would not be permissible to defend a charge under clause 27 by launching a collateral attack relating to the alleged breach of clause 24. Sub-clause (1) creates an offence with a mental element of intention, while sub-clauses (2) and (5) create a strict liability offence with lower penalties.

### PART 3 – GENERAL PROVISIONS AND CONSEQUENTIAL AMENDMENTS

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#### Clause 28 – Judicial powers exercisable as often as necessary to control proceedings

##### 28 Judicial powers exercisable as often as necessary to control proceedings

- (1) This section applies to the following actions under this Act:
- (a) making an order under **section 8, 9, 10, or 26**;
  - (b) citing a person under **section 16**;
  - (c) issuing a warrant of committal or imposing a fine under **section 17 or 22**.
- (2) Unless the context otherwise requires, the power of a Judge or judicial officer to make any order or take any action under this Act to which this section applies is exercisable in any proceedings as often as the Judge or judicial officer considers necessary to control the proceedings.

#### Commentary

Clause 28 provides that the listed powers may be exercised by the court as often as necessary. This reflects the current position, under which an individual causing repeated or ongoing disruptions to court proceedings, for example, may be detained daily and potentially for the duration of proceedings. This is also similar to section 165 of the Criminal Procedure Act 2011, under which a witness refusing to give evidence may be detained for a period of up to seven days, which may be renewed as long as the witness continues their refusal. The ability of the judge to exercise these powers as often as necessary is essential to ensure the efficient conduct of court business.

Clause 28 is consistent with section 13 of the Interpretation Act 1999, which provides that powers and duties conferred by legislation may be exercised more than once.

#### Clause 29 – How this Act relates to other authority or power to punish for contempt of court

##### 29 How this Act relates to other authority or power to punish for contempt of court

- (1) Where this Act confers on a court or Judge any jurisdiction, authority, or power to punish a person for contravening or failing to comply with any provision of this Act, the court or Judge has no inherent jurisdiction or power to punish that conduct.
- (2) Nothing in this Act limits or affects any authority or power of a court, including the authority of the High Court under its inherent jurisdiction, to punish any person for contempt of court in any circumstances to which this Act does not apply.

- (3) The Supreme Court and the Court of Appeal have the same authority as the High Court to punish any person for contempt of court in any circumstances to which this Act does not apply.
- (4) The following contempts are abolished as part of the common law of New Zealand:
- (a) contempt in the face of the court:
  - (b) publishing information that interferes with a fair trial:
  - (c) contempt by jurors:
  - (d) disobeying court orders:
  - (e) scandalising the court.

### **Commentary**

This Bill abolishes the listed common law contempts, and in their place substitutes a new statutory offence regime. While this is intended to be largely exhaustive of the range of behaviour that may be described as contempt, it is of fundamental importance that this Bill should not inadvertently curtail the courts from dealing with conduct not otherwise covered by the Bill. Where this Bill does not apply to a form of conduct, the High Court may still have recourse to its authority under its inherent jurisdiction.

As discussed in chapter 1 at [1.11] and in chapter 7 at [7.22] the contempt jurisdiction of the Supreme Court and Court of Appeal is limited to any relevant statutory powers such as those conferred by section 165 of the Senior Courts Act 2016 and, possibly, in their individual capacities as judges of the High Court, to exercising the powers of High Court Judges. Sub-clause (3) removes any doubt about the contempt powers of the Supreme Court and the Court of Appeal by clarifying that, in respect of contempt of court, both appellate courts have the same authority as the High Court has under its inherent jurisdiction.

## **Clause 30 – Prosecution of offence against section 24**

### **30 Prosecution of offence against section 24**

Only the Solicitor-General may conduct or authorise the conduct of a prosecution against a person for an offence against **section 24** (publishing untrue allegation or accusation against Judge or court).

### **Commentary**

The requirement that the Solicitor-General conduct or authorise the conduct of prosecutions for the offence against clause 24 reflects the current position, and is consistent with the Solicitor-General's constitutional responsibility to uphold and maintain the rule of law and protect the independence of the judiciary. It also allows the Solicitor-General to consider wider issues of public interest and other matters when determining if a prosecution should be brought. This may involve consideration of factors outlined in our Report, as well as the test for prosecutions contained in the Solicitor-General's Prosecution Guidelines.

## **Clause 31 – Consequential amendments**

### **31 Consequential amendments**

Amend the enactments specified in **Schedule 2** as set out in that schedule.

### Commentary

Schedule 2 contains only the more obvious consequential amendments necessary to give effect to the proposals in the Bill. A number of other amendments will therefore need to be added to the schedule before the Bill is introduced.

## SCHEDULE 1 – TRANSITIONAL, SAVINGS, AND RELATED PROVISIONS

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### Clause 1 – Contempt of court proceedings begun before commencement of this Act to be completed under former law

#### 1 Contempt of court proceedings begun before commencement of this Act to be completed under former law

- (1) Any contempt of court proceeding at common law that was begun before the commencement of this Act must be continued and completed, or otherwise disposed of, as if this Act had not been passed.
- (2) Any contempt of court proceeding under any Act that was begun before the commencement of this Act must also be continued and completed, or otherwise disposed of, as if this Act had not been passed.

### Commentary

The provisions of this Bill should only apply to proceedings that are commenced after the enactment of the Administration of Justice (Reform of Contempt of Court) Act. Proceedings commenced prior to enactment should continue to be determined in accordance with the law that applied at the time the proceedings were commenced.

### Clause 2 – Proceedings under this Act may enforce existing court order or undertaking

#### 2 Proceedings under this Act may enforce existing court order or undertaking

**Section 22** is deemed to apply to any court order or undertaking of a kind described in that section that was made or given before the commencement of this Act and has not been complied with or satisfied.

### Commentary

Clause 2 provides for the enforcement of certain court orders and undertakings. Clause 2 of Schedule 1 provides that such orders and undertakings may be enforced under this Bill regardless of whether they were made before the commencement of this Bill.

# Appendices



# Appendix 1

## Court orders enforced by offence provisions

A number of statutory regimes include specific offences to enforce compliance with court orders.

PROVISION	OFFENCE	MAXIMUM PENALTY
<b>Accident Compensation Act 2001</b>	Section 160 enables the court to make orders forbidding publication of evidence adduced, submissions, and identifying particulars of certain persons. Section 160(4) provides that any person who breaches, evades or attempts to evade an order commits an offence.	A fine up to \$1,000, in the case of an individual, or \$5,000 for a body corporate.
<b>Agricultural Compounds and Veterinary Medicines Act 1997</b>	Section 55(1A) makes it an offence to contravene an order prohibiting a person from importing, manufacturing, selling, or using any trade name product or agricultural compound. Under s 56(1A), anyone who does so commits an offence.	A term of imprisonment up to 2 years or a fine not exceeding \$60,000 or both.
<b>Animal Welfare Act 1999</b>	Under s 152, it is an offence to contravene an enforcement order.	Imprisonment for up to 6 months or a fine not exceeding \$25,000 or both or, for a body corporate, a fine not exceeding \$125,000.
<b>Care of Children Act 2004</b>	Section 78(1)(a) makes it an offence to intentionally contravene a parenting order or certain types of guardianship orders.	Up to 3 months' imprisonment.
<b>Children, Young Persons, and Their Families Act 1989</b>	Section 89 makes it an offence to contravene a restraining order or interim restraining order.	Imprisonment for up to 3 months' or a fine not exceeding \$2,000.
<b>Commerce Act 1986</b>	Pursuant to s 80C the court may make an order that a person must not be a director, a promoter or in any way involved with the management of a body corporate for a period of up to 5 years. Contravention of such an order is an offence.	Imprisonment for up to 5 years or a fine not exceeding \$200,000.
<b>Commerce Act 1986</b>	Under s 87C(b), if the court is satisfied that goods or services are being supplied, or are likely to be supplied, in contravention of applicable price-quality requirements, the court may order the supplier to comply with the price-quality requirement. Contravention of such an order is an offence.	A fine up to \$200,000 in the case of an individual, or \$1,000,000 for a body corporate.



PROVISION	OFFENCE	MAXIMUM PENALTY
<b>Copyright Act 1994</b>	A District Court judge may order a person to produce documents for inspection by an enforcement officer in accordance with s 134Y. Failure to comply with the order, without reasonable excuse, is an offence under s 134ZA.	Imprisonment for up to 6 months or a fine not exceeding \$10,000 or, for a body corporate, a fine not exceeding \$50,000.
<b>Credit Contract and Consumer Finance Act 2003</b>	Under s 108, the District Court may order persons not to act as creditors, lessors, transferees or buy-back promoters. Every individual who acts in breach of this order commits an offence.	Imprisonment for up to 3 months or a fine not exceeding \$200,000 or both. For a body corporate, a fine not exceeding \$600,000.
<b>Criminal Proceeds (Recovery) Act 2009</b>	Under s 150, every person commits an offence who, knowing that a restraining order has been made or that a foreign restraining order has been registered in New Zealand in respect of property, disposes of or otherwise deals with that property in contravention of the order.	Imprisonment for up to 5 years or a fine not exceeding \$20,000 or both or, for a body corporate, a fine up to \$60,000.
<b>Domestic Violence Act 1995</b>	It is an offence under s 49 to breach a protection order without reasonable excuse.	Imprisonment for up to 3 years.
<b>Employment Relations Act 2000</b>	A person who breaches a banning order commits an offence under s 142R.	Imprisonment up to 3 years or a fine not exceeding \$200,000 or both.
<b>Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012</b>	Section 134F makes it an offence to breach, or permit a breach of an enforcement order. Penalties are set out in s134H.	A fine up to \$300,000 or, for a body corporate, a fine not exceeding \$10 million. For a continuing offence, the person is liable to a fine up to \$10,000 for every day the offence continues.
<b>Fair Trading Act 1986</b>	A person who breaches a management banning order made against him or her under s 46E commits an offence.	A fine not exceeding \$60,000.
<b>Financial Markets Conduct Act 2013</b>	Under s 519, an individual who contravenes a banning order under Part 8 subpart 6 commits an offence.	Imprisonment for up to 3 years or a fine not exceeding \$200,000 or both.
<b>Financial Service Providers (Registration and Dispute Resolution) Act 2008</b>	A District Court may make an order under s 49F requiring a member of an approved dispute resolution scheme to comply with the rules of the scheme or with a binding settlement. A member who knows they are subject to the order and fails to comply with it commits an offence under s 49G.	A fine not exceeding \$200,000.
<b>Food Act 2014</b>	It is an offence under s 242 to breach or fail to comply with an order made under any of ss 272 (order to withdraw material), 273 (order to restrict or prohibit trading in food), 334 (compliance order), 335 (interim compliance order), and 337(6)(a) (change or cancel compliance order).	For a body corporate, a fine up to \$300,000, and for an individual, a fine not exceeding \$75,000.

PROVISION	OFFENCE	MAXIMUM PENALTY
<b>Gas Act 1992</b>	The District Court may make an order under s 43B regarding compliance with the dispute resolution scheme. A member or former member of the dispute resolution scheme who knows they are subject to the order but nevertheless fails to comply with it, commits an offence under s 43EC.	A fine not exceeding \$100,000.
<b>Harassment Act 1997</b>	It is an offence under s 25(1) to contravene a restraining order or to fail to comply with any condition of a restraining order.	A fine not exceeding \$5,000 or a term of imprisonment up to 6 months (or up to 2 years for multiple offences).
<b>Harassment Act 1997</b>	It is an offence under s 41 to breach, evade, or attempt to evade an order made under s 39(1)(a) (order forbidding publication of certain evidence or submissions) or s 39(1)(b) (order forbidding publication of name, particulars or affairs of a person).	A fine up to \$1,000 or, for a body corporate, a fine not exceeding \$5,000.
<b>Harmful Digital Communications Act 2015</b>	Section 21 makes it an offence not to comply with a take down order, or one of the other orders the court can make under ss 18 and 19.	Imprisonment for up to 6 months or a fine not exceeding \$5,000 or, for a body corporate, a fine not exceeding \$20,000.
<b>Health Act 1956</b>	If the District Court is satisfied that a nuisance exists or is likely to recur on a premise, it may make an order under s 33(2) requiring the owner and occupier to effectively abate the nuisance, prohibit the recurrence of the nuisance or abate and prohibit recurrence of the nuisance, or an order specifying the work to be done and the timeframe. Failure to comply with the order is an offence.	A fine not exceeding \$500 and a further fine not exceeding \$50 for every day on which the offence has continued.
<b>Heritage New Zealand Pouhere Taonga Act 2014</b>	Section 90(3) makes it an offence to contravene, or permit contravention of, an order made under s 92.	A fine not exceeding \$3,750 or a fine of \$7,500 in the case of a body corporate.
<b>Insurance (Prudential Supervision) Act 2010</b>	A person commits an offence under s 228 if the person fails to comply with an order under s 22 prohibiting the person from participating in an insurance business.	Imprisonment for up to 3 months and/or a fine not exceeding \$200,000 or, for a body corporate, a fine up to \$1,000,000.
<b>Land Transport Act 1998</b>	Section 55A makes it an offence to tamper or attempt to tamper with an alcohol interlock device, or to use an alcohol interlock device in contravention of an order made under s 65A(2).	A fine not exceeding \$3,000.
<b>Local Government Act 1974</b>	If a court makes an order directing the execution of work or the doing of any act, and no punishment for disobeying the order is provided by the Act, every person disobeying the order commits an offence under s 698.	A fine not exceeding \$500 and, where the offence is a continuing one, a further fine up to \$50 for every day the offence continues.

PROVISION	OFFENCE	MAXIMUM PENALTY
<b>Resource Management Act 1991</b>	It is an offence under s 338(1)(b) for any person to contravene any enforcement order made by the Environment Court.	Imprisonment for up to 2 years or a fine not exceeding \$300,000 or, for a body corporate, a fine not exceeding \$600,000.
<b>Sale and Supply of Alcohol Act 2012</b>	Section 265 applies if a riot occurs or there are reasonable grounds to believe a riot may occur. An order can be made requiring every licensee within a specified distance of that place to close his or her premise for a specified period of time. A licensee or manager who contravenes an order commits an offence.	Licensee: A fine not exceeding \$10,000 and suspension of licence for not more than 7 days. Manager: A fine not exceeding \$10,000.
<b>Search and Surveillance Act 2012</b>	Under s 173 every person commits an offence if he or she fails to comply with an examination order without reasonable excuse. Under s 174 every person commits an offence if he or she fails to comply with a production order without reasonable excuse.	Imprisonment for up to 1 year, or for a body corporate, a fine not exceeding \$40,000.
<b>Smoke-Free Environments Act 1990</b>	Section 30AB(2) provides that certain repeat offenders may be ordered not to sell tobacco products. Failure to comply with such an order is an offence under s 36(7AA).	For an Individual a fine not exceeding \$4,000. For a body corporate, a fine not exceeding \$10,000.
<b>Takeovers Act 1993</b>	Pursuant to s 44H, an individual who acts in contravention of a management banning order commits an offence.	Imprisonment for a term not exceeding 3 years or a fine not exceeding \$100,000 or both.
<b>Takeovers Act 1993</b>	Pursuant to s 44P a person commits an offence who contravenes an order made under ss 44M (orders prohibiting payment or transfer of money, financial products or other property) or 44N (interim orders).	For an Individual imprisonment for up to 3 years and/or a fine not exceeding \$100,000. For a body corporate, a fine not exceeding \$300,000.
<b>Tax Administration Act 1994</b>	It is an offence under s 143G to fail to comply with the terms of a court order made under s 17A (Court orders for production of information or return).	Imprisonment for up to 3 months or a fine not exceeding \$1,000.
<b>Telecommunications Act 2001</b>	A member or former member of a consumer complaints system commits an offence if they know they are subject to an order under s 155L (compliance with rules and binding settlements) but fail to comply with the order.	A fine not exceeding \$100,000.
<b>Trade Marks Act 2000</b>	Section 134ZA makes it an offence to fail to comply with an order under s 134Y (judge may order documents to be produced).	Imprisonment up to 6 months or a fine not exceeding \$10,000. For a body corporate, a fine not exceeding \$50,000.
<b>Tuberculosis Act 1948</b>	If a person suffering from tuberculosis is in an infectious condition and the requirements of s 16(1) are satisfied, an order may be made to remove the patient to a suitable place to be properly attended, treated and detained for a period not exceeding 3 months. It is an offence to wilfully disobey the order.	A fine not exceeding \$40 and a further fine not exceeding \$4 for every day during which the offence continues.

PROVISION	OFFENCE	MAXIMUM PENALTY
<b>Utilities Access Act 2010</b>	A person who knows they are subject to an order made under s 7 (court may order compliance with Code) but fails to comply with the order, or fails to comply with the order within the specified time, commits an offence under s 8.	A fine not exceeding \$200,000.
<b>Victims' Orders Against Violent Offenders Act 2014</b>	Under s 24, it is an offence for an offender or associate to act in contravention of a non-contact order applying to them, without reasonable excuse.	Imprisonment for up to 2 years or a fine not exceeding \$5,000.

# Appendix 2

## Administration of Justice (Reform of Contempt of Court) Bill

### Administration of Justice (Reform of Contempt of Court) Bill

Government Bill

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Draft Bill

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**Administration of Justice (Reform of Contempt of  
Court) Bill**

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**The Parliament of New Zealand enacts as follows:**

**1 Title**

This Act is the Administration of Justice (Reform of Contempt of Court) Act **2017**.

**2 Commencement**

This Act comes into force on the day after the date on which it receives the Royal assent.

**Part 1**  
**Preliminary provisions**

**3 Purposes and objectives**

- (1) The principal purposes of this Act are to—
- (a) promote and facilitate the administration of justice and uphold the rule of law; and
  - (b) maintain public confidence in the judicial system; and
  - (c) reform the law of contempt of court.
- (2) To those ends, this Act enables courts to make certain orders and impose certain sanctions in order to achieve the following objectives:
- (a) civil and criminal court proceedings are heard and determined fairly by independent and impartial Judges;
  - (b) jury verdicts are based only on facts admitted or proved by properly adduced evidence after free, frank, and confidential jury discussions, and the finality of verdicts will be protected;
  - (c) individual cases are heard and determined in a manner that is expeditious, efficient, and consistent with the principles of justice;
  - (d) except in unusual circumstances, proceedings will be open to the public and news media;
  - (e) the independence, integrity, and impartiality of the judiciary will be protected.
- (3) In reforming the law of contempt of court in New Zealand, this Act abolishes the common law contempts of contempt in the face of the court, publishing information that interferes with a fair trial, contempt by jurors, disobeying court orders, and scandalising the court, while preserving the inherent jurisdiction of the High Court to punish for contempt of court in circumstances where this Act does not apply.

**4 Interpretation**

In this Act, unless the context otherwise requires,—

**bailiff** has the same meaning as in section 4 of the District Court Act 2016

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**category**, in relation to an offence, has the same meaning as in section 5 of the Criminal Procedure Act 2011

**charged**, in relation to an offence, means charged with the offence by a charging document filed under the Criminal Procedure Act 2011

**constable** has the same meaning as in section 4 of the Policing Act 2008

**court** means any of the following courts:

- (a) the District Court:
- (b) the High Court:
- (c) the Court of Appeal:
- (d) the Supreme Court

**judicial officer** means a High Court Judge, a District Court Judge, a Community Magistrate, or a Justice of the Peace

**officer of the court** means—

- (a) a person who holds an office referred to in section 33 of the Senior Courts Act 2016:
- (b) a person who is an officer of the court as defined in section 4 of the District Court Act 2016:
- (c) a person who is an officer of any other court to which this Act is applied, if the person is an officer of the court within the meaning of the Act that constitutes that court

**online content host**, in relation to any information, means the person who has control over the part of the electronic retrieval system, such as an Internet site or an online application, on which the information is posted and accessible by the user

**person**, in relation to a defendant or other party in any proceedings, includes a body corporate

**Police employee** has the same meaning as in section 4 of the Policing Act 2008

**public prosecution** has the same meaning as in section 5 of the Criminal Procedure Act 2011

**publish**, except in **subpart 1 of Part 2**, includes—

- (a) insert in any newspaper or other periodical publication printed, published, or distributed in New Zealand; or
- (b) send to any person, by post or otherwise; or
- (c) deliver to any person or leave upon premises occupied by any person; or
- (d) broadcast within the meaning of the Broadcasting Act 1989; or
- (e) include in any film or video recording; or
- (f) disseminate by means of the Internet or any other electronic, digital, or similar medium; or

(g) display by way of a sign, a notice, a poster, or other means

**triable by a jury** means—

- (a) tried by a jury in accordance with sections 50 and 73 of the Criminal Procedure Act 2011; or
- (b) tried by a jury in accordance with section 74 of that Act if no order is made under section 102 or 103 of that Act that the person be tried before a Judge without a jury.

**5 Act binds the Crown**

This Act binds the Crown.

**6 Transitional, savings, and related provisions**

The transitional, savings, and related provisions set out in **Schedule 1** have effect according to their terms.

**Part 2**

**Provisions to promote and facilitate administration of justice**

Subpart 1—Limiting publication of trial-related information

*Meaning of publication*

**7 Interpretation**

In this subpart, unless the context otherwise requires, **publication** has the same meaning as in section 195 of the Criminal Procedure Act 2011.

Compare: 2011 No 81 s 195

*Suppression orders*

**8 Automatic suppression of details of previous convictions and concurrent charges**

- (1) If a person (the **arrested person**) is arrested for an offence and may be triable by a jury if charged with that offence (**offence A**), no person may publish details of the following except as permitted by or under this section:
  - (a) any of the arrested person's previous convictions for any offence;
  - (b) any other offence that is a category 3 or 4 offence, if the arrested person is—
    - (i) already charged with that other offence when arrested for offence A; or
    - (ii) charged with that other offence at the same time as the person is charged with offence A; or

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Court) Bill**

Part 2 cl 9

- (iii) charged with that other offence at any subsequent time while the person remains charged with offence A.
- (2) A prohibition imposed by **subsection (1)** applies until the start of the trial for offence A, unless a different period applies under **subsection (3)(b)**.
- (3) If the arrested person is charged with offence A, the pre-trial court or trial court (as the case may be)—
  - (a) must keep the prohibition under review;
  - (b) may, by order made on application or on its own initiative,—
    - (i) lift the prohibition before the trial;
    - (ii) extend the prohibition for a period that ends after the start of the trial;
    - (iii) vary the effect of the prohibition by permitting the publication of any details as specified in the order.
- (4) In addition, the court may order that an online content host take down, or disable public access to, any specific details referred to in **subsection (1)** that the host has made accessible to members of the public.
- (5) The prohibition ceases to apply if—
  - (a) the court makes an order to that effect under **subsection (3)(b)(i)**; or
  - (b) the arrested person ceases to be subject to arrest for offence A; or
  - (c) the charge against the arrested person for offence A is withdrawn, dismissed, stayed, or otherwise disposed of; or
  - (d) the arrested person does not elect trial by jury or the court orders that the trial for offence A is to be a Judge-alone trial.
- (6) The prohibition does not prevent the disclosure of any details referred to in **subsection (1)** if the disclosure is made to or by any of the following persons for the purpose of any proposed proceedings against the arrested person for offence A:
  - (a) the Solicitor-General;
  - (b) a Police employee;
  - (c) any person who is conducting or proposing to conduct a public prosecution against the arrested person for offence A;
  - (d) a lawyer acting for the arrested person.

**9 Court may suppress specific trial-related information temporarily**

- (1) If a court is satisfied that it appears to be necessary for avoiding a real risk of prejudice to the administration of justice in any criminal trial, or any part of the trial, the court may order that the publication of any of the following information be postponed for any period that the court thinks necessary for that purpose:



- (a) any specific information relating to matters of character of any person who is accused of or charged with an offence;
  - (b) any specific information relating to the previous convictions or matters of character of any person who—
    - (i) may be called as a witness; or
    - (ii) may be a victim of the offence; or
    - (iii) is connected with the person who is accused of or charged with the offence;
  - (c) any other specific information relating to any trial.
- (2) In addition, the court may order that an online content host take down, or disable public access to, any specific information referred to in **subsection (1)** that the host has made accessible to members of the public.
- (3) Despite **subsection (1)**, the court may make an interim order of any kind described in **subsection (1) or (2)** if the person arrested for the offence advances an arguable case that publication would be likely to create a real risk of prejudice to a fair trial.
- (4) An interim order under **subsection (3)** may be made or renewed only in the absence of an order under **subsection (1) or (2)** and expires at the person's next court appearance for the offence, and may be renewed only if the court is satisfied that publication would be likely to create a real risk of prejudice to a fair trial.
- (5) The court may make an order under this section at any time after the person is arrested for an offence and before the completion of all proceedings relating to the offence.
- (6) If the District Court is presided over by 1 or more Justices, or 1 or more Community Magistrates, the court has the same power to make orders under this section as it has under section 362 of the Criminal Procedure Act 2011 to make suppression orders under subpart 3 of Part 5 of that Act.

Compare: 2011 No 81 s 205

## **10 Duration of suppression order and right of review**

- (1) An order under **section 9(1)**—
- (a) may be made for a limited period ending on a date specified in the order; and
  - (b) may be renewed for a further period or periods by the court; and
  - (c) expires at the completion of all proceedings relating to the offence, unless it expires at an earlier time in accordance with an order of the court or by operation of law.
- (2) The order may be reviewed and varied by the court at any time.

Compare: 2011 No 81 s 208

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**11 Publication by or at request of Police, etc**

- (1) Nothing in this subpart prevents publication by or at the request of any Police employee of the name, address, or occupation of any person who has escaped from lawful custody or has failed to attend any court when lawfully required to do so if that publication is made for the purpose of facilitating that person's re-capture or arrest.
- (2) Nothing in this subpart prevents publication of the name, address, or occupation of any person, or any details of the offences charged, to—
  - (a) any person assisting with the administration of the sentence imposed on the person or with the rehabilitation of the person; or
  - (b) any Police employee, or any officer or employee of the Department of Corrections or of the Ministry of Justice, who requires the information for the purposes of his or her official duties; or
  - (c) any person who is conducting or proposing to conduct a public prosecution against the person for an offence, and who requires the information for the purposes of—
    - (i) deciding whether to commence proceedings; or
    - (ii) conducting that public prosecution.

Compare: 2011 No 81 s 209

**12 Standing of members of media**

- (1) This section applies to—
  - (a) a person who is reporting on the proceedings and who is either subject to or employed by an organisation that is subject to—
    - (i) a code of ethics; and
    - (ii) the complaints procedures of the Broadcasting Standards Authority or the Press Council; and
  - (b) any other person reporting on the proceedings with the permission of the court.
- (2) A person to whom this section applies has standing to initiate, and be heard in relation to, any application for an order under **section 8 or 9**, and any application to renew, vary, or revoke the order.

Compare: 2011 No 81 s 210

**13 Offences relating to breach of this subpart**

- (1) A person commits an offence if the person knowingly or recklessly—
  - (a) fails to comply with **section 8(1)**; or
  - (b) fails to comply with an order made under **section 8 or 9**.
- (2) A person commits an offence if the person—
  - (a) fails to comply with **section 8(1)**; or

- (b) fails to comply with an order made under **section 8 or 9**.
- (3) **Subsection (2)** does not apply to a person who hosts material on Internet sites or other electronic retrieval systems that can be accessed by a user unless the specific information has been placed or entered on the site or system by that person.
- (4) A person who commits an offence against **subsection (1)** is liable on conviction,—
  - (a) in the case of an individual, to a term of imprisonment not exceeding 6 months or a fine not exceeding \$25,000;
  - (b) in the case of a body corporate, to a fine not exceeding \$100,000.
- (5) A person who commits an offence against **subsection (2)** is liable on conviction,—
  - (a) in the case of an individual, to a fine not exceeding \$10,000;
  - (b) in the case of a body corporate, to a fine not exceeding \$40,000.
- (6) In a prosecution for an offence against **subsection (2)**, it is not necessary for the prosecution to prove that the defendant intended to commit an offence.

Compare: 2011 No 81 s 211

## Subpart 2—Prohibiting publication of certain criminal trial information

### 14 Offence to publish certain criminal trial information

- (1) This section applies if a person (the **arrested person**) is arrested for an offence and may be triable by a jury if charged with that offence, and—
  - (a) applies until the completion of all proceedings relating to the jury trial (including pre-trial proceedings); and
  - (b) ceases to apply if the charge is dealt with or disposed of otherwise than by a jury trial.
- (2) A person commits an offence if—
  - (a) the person at any time intentionally publishes any information that is relevant to any trial to which this section applies; and
  - (b) there is a real risk that the publication could prejudice the arrested person's right to a fair trial.
- (3) A person who commits an offence against **subsection (2)** is liable on conviction,—
  - (a) in the case of an individual, to imprisonment for a term not exceeding 6 months or a fine not exceeding \$25,000; or
  - (b) in the case of a body corporate, to a fine not exceeding \$100,000.
- (4) A person has a defence in a prosecution for an offence against **subsection (2)** if the person proves that,—

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- (a) at the time of the publication of the information and after taking all reasonable care, the person was unaware of, and had no reason to be aware of, the arrested person's arrest, any pre-trial proceedings, or the possibility or existence of the trial; or
- (b) as the online host or distributor of the publication, after taking all reasonable care, the person did not know and had no reason to suspect that it contained information that created a real risk of prejudicing the arrested person's right to a fair trial; or
- (c) the publication was in good faith made as a contribution to, or part of, a discussion of public affairs or matters of general public interest; or
- (d) the publication was a fair and accurate report of court proceedings held in public and published contemporaneously and in good faith.

**15 How court determines whether publication creates real risk of prejudice to right to fair trial**

- (1) In determining whether, for the purpose of **section 14(2)(b)**, a publication creates a real risk of prejudice to an arrested person's right to a fair trial, the court must consider the following:
  - (a) the likely effect of the publication as a whole:
  - (b) the persons or groups of persons to whom the publication is likely to be made available:
  - (c) the medium in which the publication is presented and its potential accessibility and durability:
  - (d) the character of the publication, including the language and tone used in it:
  - (e) any other relevant circumstances relating to the likely effect of the publication.
- (2) The court may (without limitation) treat the inclusion in a publication of any of the following information as creating a real risk of prejudicing the arrested person's right to a fair trial:
  - (a) information indicating that the arrested person is of bad character, including previous misconduct, criminal or gang affiliations, or criticism of the arrested person's personality or previous charges or acquittals:
  - (b) information indicating that the arrested person has confessed to the charge, or any component of it, or to conduct that may result in charges being laid against the person:
  - (c) information commenting on the credibility of the arrested person or any witnesses:
  - (d) information given at trial in the jury's absence or information that has been ruled inadmissible at trial:

- (e) photographs, pictorial information, or other information that reveals the identity of the arrested person where the identity of the person is, or is likely to be, in issue at trial.

### Subpart 3—Dealing with disruptive behaviour relating to court proceedings

#### **16 Judicial officer may cite person for disruptive behaviour**

- (1) This section applies if a judicial officer believes that any person is—
  - (a) wilfully disrupting the proceedings of a court; or
  - (b) wilfully and without lawful excuse disobeying any order or direction of the court in the course of the hearing of any proceedings.
- (2) The judicial officer may cite the person for disruptive behaviour and order that the person be taken into custody and detained until the court rises for the day.
- (3) Any constable or officer of the court, with or without the assistance of any other person, may take the person into custody in accordance with the order.
- (4) Any person taken into custody under this section must be dealt with in accordance with the procedure in **section 17**, which applies for the purpose of this subpart.

Compare: 2016 No 48 s 165

#### **17 Procedure for dealing with person cited for disruptive behaviour**

- (1) While being held in custody, a person cited for disruptive behaviour must be given a reasonable opportunity to—
  - (a) obtain legal representation; and
  - (b) apologise to the court.
- (2) Before the close of the day on which the person is cited and ordered to be detained, a Judge must review the matter and, if the Judge considers that further punishment may be necessary, adjourn any hearing and set the matter down for determination on a later date within the next 7 days.
- (3) The Bail Act 2000 applies, with the necessary modifications, as if the person cited were charged with an offence that carries the penalties specified in **subsection (5)(b)**.
- (4) If the Judge sets down the matter for determination, he or she—
  - (a) must consider whether there are exceptional circumstances that warrant a different Judge hearing the matter; and
  - (b) must provide a written statement to the person cited that specifies the behaviour that he or she believes may cause the person to have committed disruptive behaviour and to be liable for further punishment; and
  - (c) may receive any explanation he or she considers helpful to ensure that the case proceeds on a reliable factual platform.



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- (5) On finding a person guilty of doing anything described in **section 16(1)(a) or (b)**, a Judge—
- (a) must not convict the person; but
  - (b) may—
    - (i) issue a warrant committing the person to imprisonment for a term not exceeding 3 months; or
    - (ii) impose on the person a fine not exceeding \$10,000.

**18 Further provisions applying for purpose of this subpart**

- (1) The Sentencing Act 2002 and subpart 5 of Part 6 of the Criminal Procedure Act 2011 (appeals against finding of or sentence for contempt of court) apply to any action taken under **section 17(5)** as if the finding were a conviction for an offence and any imprisonment or fine were a sentence.
- (2) A warrant for the committal of any person to prison under **section 17(5)** must be directed to a bailiff or constable, who may take the person into custody, and every constable has a duty to assist in the execution of the orders or warrants issued under that provision.
- (3) Any person committed to prison by any court under **section 17(5)** must be committed to a prison established under or deemed to be established under the Corrections Act 2004, and the prison manager of the prison mentioned in the order or warrant is bound to receive and keep the person until the person is lawfully discharged.

Subpart 4—Provisions relating to juries

**19 Offence for jury member to investigate or research case**

- (1) A person commits an offence if the person is a member of a jury constituted for a case and—
  - (a) during the trial period the person intentionally investigates or researches information relevant to the case; and
  - (b) does so when the person knows or ought reasonably to know it is or may be information relevant to the case.
- (2) It is not an offence against **subsection (1)** if the investigation or research is undertaken with the permission, or at the direction, of the trial Judge.
- (3) A person who commits an offence against **subsection (1)** is liable on conviction to imprisonment for a term not exceeding 3 months or a fine not exceeding \$10,000.
- (4) In this section,—
 

**information relevant to the case** means information about any of the following:

  - (a) the defendant:

- (b) any other person involved in the events which are the subject of the case:
- (c) any person involved in the trial, including a witness:
- (d) the events that are the subject of the case:
- (e) the law relating to the case:
- (f) the law of evidence

**investigate or research** includes—

- (a) ask a question or have a discussion (by any means) with a person who is not a jury member or the trial Judge:
- (b) search any information source, including the Internet:
- (c) visit or inspect a place or an object:
- (d) conduct an experiment:
- (e) ask another person to perform any of the actions listed above

**trial period** means the period that—

- (a) begins when a jury has been constituted under section 19 of the Juries Act 1981; and
- (b) ends when the jury is discharged or, in the case of an individual jury member who is discharged during the trial, the member is discharged.

Compare: Jury Act 1977 s 68C (NSW); Jury Act 1995 s 69A (Qld); Juries Act 2000 s 78A (Vic)

## **20 Offence to disclose jury deliberations**

- (1) A person commits an offence if the person intentionally discloses, solicits, or obtains information about statements made, opinions expressed, arguments advanced, or votes cast by members of a jury in the course of their deliberations in proceedings before a court.
- (2) It is not an offence against **subsection (1)** if, during a trial, the information—
  - (a) is sought by, or disclosed to, the court in the course of the performance of the jury's functions; or
  - (b) is disclosed to the trial Judge in a complaint or allegation of misconduct by a juror or is disclosed for the purpose of investigating whether an offence has been committed.
- (3) It is not an offence against **subsection (1)** if the information is sought or disclosed—
  - (a) by a current or former jury member in discussions with a health practitioner who is treating him or her in relation to issues arising out of his or her jury service; or
  - (b) during or after the trial with the permission of the presiding Judge or the relevant head of bench, including for the purpose of conducting research about juries or jury service.

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- (4) A person who commits an offence against **subsection (1)** is liable on conviction to,—
- (a) in the case of an individual, imprisonment for a term not exceeding 3 months or a fine not exceeding \$10,000;
  - (b) in the case of a body corporate, a fine not exceeding \$40,000.
- (5) In this section, **health practitioner** has the same meaning as in section 5 of the Health Practitioners Competence Assurance Act 2003.
- Compare: Jury Act 1977 ss 68A, 68B (NSW); Jury Act 1995 s 70 (Qld); Juries Act 2000 s 78 (Vic)

**21 Limited disclosure of jury deliberations permitted after jury discharged**

- (1) This section applies in relation to a jury trial if the trial has been completed and the jury discharged.
- (2) A person who has reason to believe that an offence against **section 19 or 20** may have been committed in relation to the jury trial, or that the conduct of any juror in the trial may provide grounds for a direction that a new trial be held or grounds for an appeal, may refer the matter to any person referred to in **subsection (3)**.
- (3) The persons concerned are—
- (a) the Solicitor-General;
  - (b) a Police employee;
  - (c) the prosecutor in the completed trial or any person who is conducting or proposing to conduct a public prosecution against a person for the offence;
  - (d) a lawyer acting for the offender.
- (4) The person who refers the matter may disclose to the recipient information about statements made, opinions expressed, arguments advanced, or votes cast by members of a jury in the course of their deliberations.
- (5) A recipient of information under **subsection (4)** may disclose the information to any other person only so far as is necessary to enable the Police to investigate whether an offence has been committed and to consider whether the offender should be prosecuted.

Subpart 5—Enforcement of certain court orders

**22 Certain court orders and undertakings may be enforced**

- (1) This section applies to—
- (a) any interim or final order, decision, decree, direction, or judgment of a court (a **court order**) to do or abstain from doing something, except a court order to pay a sum of money or for the recovery of land;
  - (b) any undertaking given to the court if, on the faith of the undertaking, the court has sanctioned a particular course of action or inaction.

- (2) A court may enforce the court order or undertaking against a person by taking action provided for in **subsection (3)** on application by the party who sought the order or undertaking being enforced, or on application by the Solicitor-General.
- (3) The court may—
  - (a) either—
    - (i) issue a warrant committing the person or a director or an officer of the body corporate, as the case may be, to a term of imprisonment not exceeding 6 months; or
    - (ii) impose on the person a fine not exceeding \$25,000; and
  - (b) if the court concerned is the High Court, make a sequestration order in accordance with the rules of court.
- (4) Before taking action under **subsection (3)**, the court—
  - (a) must be satisfied beyond reasonable doubt that—
    - (i) the court order or undertaking being enforced has been made in clear and unambiguous terms and is clearly binding on the person; and
    - (ii) the person has knowledge or proper notice of the terms of the court order or undertaking being enforced; and
    - (iii) the person has, without reasonable excuse, intentionally failed to comply with the court order or undertaking being enforced; and
  - (b) must also be satisfied that other methods of enforcing the court order or undertaking have been considered and are inappropriate or have been tried unsuccessfully.

### **23 Further provisions applying for purpose of section 22**

- (1) The Sentencing Act 2002 and subpart 5 of Part 6 of the Criminal Procedure Act 2011 apply to any committal or fine imposed under **section 22(3)** as if the sanction were a conviction for an offence to which that subpart 5 applies and any imprisonment or fine were a sentence.
- (2) A warrant for the committal of any person to prison under **section 22(3)** must be directed to a bailiff or constable, who may take the person into custody, and every constable has a duty to assist in the execution of the orders or warrants issued under that provision.
- (3) Any person committed to prison by any court under **section 22(3)** must be committed to a prison established under or deemed to be established under the Corrections Act 2004, and the prison manager of the prison mentioned in the order or warrant is bound to receive and keep the person until the person is lawfully discharged.

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- (4) If at any time it appears to the satisfaction of a Judge of the court that committed the person to prison that the person ought for any reason to be discharged, the Judge may order the person's discharge from prison on any terms (including liability to rearrest if the terms are not complied with) that the Judge thinks fit.
- (5) A committal or fine imposed under **section 22(3)** does not operate to extinguish or affect the liability of the person to comply with a court order.

Subpart 6—Prohibiting publication of untrue allegations or accusations  
against Judges or courts

**24 Offence to publish untrue allegation or accusation against Judge or court**

- (1) A person commits an offence if the person publishes an allegation or accusation made by that person or another person against a Judge or a court, and there is a real risk that the publication could undermine public confidence in the independence, integrity, or impartiality of the judiciary or a court.
- (2) A person who commits an offence against **subsection (1)** is liable on conviction,—
  - (a) in the case of an individual, to a term of imprisonment of less than 2 years or a fine not exceeding \$50,000;
  - (b) in the case of a body corporate, to a fine not exceeding \$100,000.
- (3) A person has a defence in a prosecution for an offence against **subsection (1)** if the person proves on the balance of probabilities that—
  - (a) the allegation or accusation was true or not materially different from the truth; or
  - (b) where the prosecution is based on all or any of the contents of a publication, that the publication taken as a whole was in substance true or in substance not materially different from the truth.
- (4) A person has a defence in a prosecution for an offence against **subsection (1)** if the person proves that, as the online host or distributor of the publication, the person did not know that it contained an allegation or accusation against a Judge or a court that created a real risk of undermining public confidence in the independence, integrity, or impartiality of the judiciary or a court.
- (5) In this section,—

**court** means any court, including a court as defined in **section 4**

**Judge** means a Judge of any court.

**25 Further provisions applying for purpose of section 24**

- (1) This section applies if the Solicitor-General has reason to believe that a person may have committed an offence against **section 24(1)**.
- (2) The Solicitor-General may do 1 or more of the following:

- (a) request the alleged offender to retract the allegation or accusation or apologise for it, or both;
  - (b) request the alleged offender to retract the allegation or accusation pending the hearing of the charge;
  - (c) request an online content host to take down, or disable public access to, any specified information relating to the allegation or accusation that the host has made accessible to members of the public;
  - (d) apply to the High Court for an order under **section 26**.
- (3) Nothing in **subsection (2)** obliges the Solicitor-General to take any action described in **paragraphs (a) to (c)** of that subsection or requires that a charge for the alleged offence be filed before he or she may apply for an order under **section 26**.
- (4) A charge for an offence against **section 24(1)** may be brought only by or on behalf of the Solicitor-General, and the prosecutor must be satisfied that there is a sufficient evidential foundation for the charge and that the prosecution is in the public interest.
- (5) For the purpose of deciding whether to prosecute a person for an offence against **section 24(1)**, the prosecutor may consider whether any complaint about the Judge's conduct has been made to the Police, or to the Judicial Conduct Commissioner under the Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004, and consider any explanation provided by the Judge.
- (6) Despite anything in the Criminal Procedure Act 2011 or the Search and Surveillance Act 2012,—
- (a) the Solicitor-General may investigate whether a person has committed an offence against **section 24(1)** or may request the Police to do so;
  - (b) the Solicitor-General and the Police may exchange information for the purpose of an investigation;
  - (c) the powers that a constable or any other Police employee may exercise under any enactment in the case of an alleged offence punishable by a term of imprisonment of less than 2 years may be exercised in relation to the alleged offence against **section 24(1)** and, subject to **subsection (4)**, a charge may be filed against the alleged offender.

## **26 High Court may make orders**

- (1) On application under **section 25(2)(d)**, the High Court may, if satisfied that there is an arguable case that a person has committed an offence against **section 24(1)**, order the person to do 1 or more of the following:
- (a) take down, or disable public access to, material;
  - (b) retract the allegation or accusation;
  - (c) not encourage any other persons to engage in similar communications;



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- (d) publish a correction:
- (e) publish an apology.
- (2) The court may—
  - (a) make an order on an interim basis, pending the filing of a charging document:
  - (b) vary or discharge any interim order:
  - (c) make an interim order permanent if the interim order is accepted or a person is convicted of the charge.
- (3) In addition, the court may order that an online content host take down, or disable public access to, any material related to the suspected offence that the host has made accessible to members of the public.
- (4) In making an order that a correction or an apology be published under **subsection (1)(d) or (e)**, the court may include requirements relating to—
  - (a) the content of the correction or apology:
  - (b) the time of publication of the correction or apology:
  - (c) the prominence to be given to the correction or apology in the particular medium in which it is published.
- (5) In doing anything under this section, the court must act consistently with the rights and freedoms contained in the New Zealand Bill of Rights Act 1990.
- (6) A person to whom **section 12(1)** applies has standing to be heard in relation to, any application for an order under **subsection (1)(a)**, and any application to renew, vary, or revoke the order.
- (7) If an interim order is not made permanent, it lapses.

**27 Offence to fail to comply with order under section 26**

- (1) A person commits an offence if the person knowingly or recklessly fails to comply with an order made under **section 26**.
- (2) A person commits an offence if the person fails to comply with an order made under **section 26**.
- (3) A person who commits an offence against **subsection (1)** is liable on conviction,—
  - (a) in the case of an individual, to a term of imprisonment not exceeding 6 months or a fine not exceeding \$25,000:
  - (b) in the case of a body corporate, to a fine not exceeding \$100,000.
- (4) A person who commits an offence against **subsection (2)** is liable on conviction,—
  - (a) in the case of an individual, to a fine not exceeding \$10,000:
  - (b) in the case of a body corporate, to a fine not exceeding \$40,000.

- (5) In a prosecution for an offence against **subsection (2)**, it is not necessary for the prosecution to prove that the defendant intended to commit an offence.

### Part 3

#### General provisions and consequential amendments

##### **28 Judicial powers exercisable as often as necessary to control proceedings**

- (1) This section applies to the following actions under this Act:
- (a) making an order under **section 8, 9, 10, or 26**:
  - (b) citing a person under **section 16**:
  - (c) issuing a warrant of committal or imposing a fine under **section 17 or 22**.
- (2) Unless the context otherwise requires, the power of a Judge or judicial officer to make any order or take any action under this Act to which this section applies is exercisable in any proceedings as often as the Judge or judicial officer considers necessary to control the proceedings.

##### **29 How this Act relates to other authority or power to punish for contempt of court**

- (1) Where this Act confers on a court or Judge any jurisdiction, authority, or power to punish a person for contravening or failing to comply with any provision of this Act, the court or Judge has no inherent jurisdiction or power to punish that conduct.
- (2) Nothing in this Act limits or affects any authority or power of a court, including the authority of the High Court under its inherent jurisdiction, to punish any person for contempt of court in any circumstances to which this Act does not apply.
- (3) The Supreme Court and the Court of Appeal have the same authority as the High Court to punish any person for contempt of court in any circumstances to which this Act does not apply.
- (4) The following contempts are abolished as part of the common law of New Zealand:
- (a) contempt in the face of the court:
  - (b) publishing information that interferes with a fair trial:
  - (c) contempt by jurors:
  - (d) disobeying court orders:
  - (e) scandalising the court.

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**30 Prosecution of offence against section 24**

Only the Solicitor-General may conduct or authorise the conduct of a prosecution against a person for an offence against **section 24** (publishing untrue allegation or accusation against Judge or court).

**31 Consequential amendments**

Amend the enactments specified in **Schedule 2** as set out in that schedule.

## Schedule 1

### Transitional, savings, and related provisions

s 6

- 1 Contempt of court proceedings begun before commencement of this Act to be completed under former law**
  - (1) Any contempt of court proceeding at common law that was begun before the commencement of this Act must be continued and completed, or otherwise disposed of, as if this Act had not been passed.
  - (2) Any contempt of court proceeding under any Act that was begun before the commencement of this Act must also be continued and completed, or otherwise disposed of, as if this Act had not been passed.
- 2 Proceedings under this Act may enforce existing court order or undertaking**

**Section 22** is deemed to apply to any court order or undertaking of a kind described in that section that was made or given before the commencement of this Act and has not been complied with or satisfied.

## Schedule 2

### Consequential amendments to other enactments

s 31

**Note**

Schedule 2 contains the main consequential amendments that the Law Commission considers necessary to give effect to its proposals in this Bill. Other amendments may need to be added to Schedule 2 before the introduction of the Bill.

**Crimes Act 1961 (1961 No 43)**

In section 9(a), delete “or of any court”.

In section 9, insert as subsection (2):

- (2) The jurisdiction, authority, or power of a court to punish for contempt is subject to the **Administration of Justice (Reform of Contempt of Court) Act 2017**.

**Criminal Procedure Act 2011 (2011 No 81)**

After section 74, insert:

**74A Application of Administration of Justice (Reform of Contempt of Court) Act 2017**

- (1) Despite sections 71 to 74, the trial court for an offence against **section 24 of the Administration of Justice (Reform of Contempt of Court) Act 2017** (publishing untrue allegation or accusation against Judge or court) is the High Court.
- (2) Despite sections 71 to 74, the trial court for an offence against any of the following provisions of the **Administration of Justice (Reform of Contempt of Court) Act 2017** is the High Court if the trial is a High Court jury trial:
- (a) **section 14** (publishing certain criminal trial information); or
  - (b) **section 19** (jury member investigating or researching case); or
  - (c) **section 20** (disclosing jury deliberations).

Replace section 165(8) with:

- (8) Nothing in this section limits or affects any authority or power of the court under the **Administration of Justice (Reform of Contempt of Court) Act 2017**.

In section 282, after “or 205”, insert “, or under **section 8 , 9, or 26(1)(a) or (3) of the Administration of Justice (Reform of Contempt of Court) Act 2017**”.

In Part 8, in the subpart 1 heading, delete “and contempt”.

**District Court Act 2016 (2016 No 49)**

In section 123, definition of **decision**, delete “, but does not include an order under section 212 (which relates to an order for contempt of court)”.

**District Court Act 2016 (2016 No 49)**—*continued*

Repeal section 131(b) and (c).

Repeal sections 134, 135, and 212 and the cross-heading above section 212.

**Employment Relations Act 2000 (2000 No 24)**

Replace section 196 with:

**196 Application of Administration of Justice (Reform of Contempt of Court) Act 2017**

**Subpart 3 of Part 2 and sections 28 and 29(1) and (2) of the Administration of Justice (Reform of Contempt of Court) Act 2017** apply in relation to the Employment Court—

- (a) as if the court were the District Court; and
- (b) as if a Judge of the court were a District Court Judge; and
- (c) as if a member of the Authority were a judicial officer; and
- (d) with the other necessary modifications.

**Family Court Act 1980 (1980 No 161)**

After section 15, insert:

**15A Application of Administration of Justice (Reform of Contempt of Court) Act 2017**

**Subparts 3 and 5 of Part 2 and sections 28 and 29(1) and (2) of the Administration of Justice (Reform of Contempt of Court) Act 2017** apply to the Family Court and Family Court Judges in the same manner and to the same extent as those subparts apply to the District Court and District Court Judges.

**Resource Management Act 1991 (1991 No 69)**

Replace section 282 with:

**282 Application of Administration of Justice (Reform of Contempt of Court) Act 2017**

**Subparts 3 and 5 of Part 2 and sections 28 and 29(1) and (2) of the Administration of Justice (Reform of Contempt of Court) Act 2017** apply in relation to the Environment Court—

- (a) as if the court were the District Court; and
- (b) as if an Environment Judge or alternate Environment Judge were a District Court Judge; and
- (c) as if an Environment Commissioner were a judicial officer; and
- (d) with the other necessary modifications.



**Senior Courts Act 2016 (2016 No 48)**

In section 20(2)(b), replace “165” with “166”.

After section 20(2)(h), insert:

- (i) **Subparts 3 and 5 of Part 2 and sections 28 and 29(1) and (2) of the Administration of Justice (Reform of Contempt of Court) Act 2017.**

In section 23, replace “Sections 42, 43, and 165 (which relate to the power to deal with witnesses and contempt)” with “Sections 42 and 43 (which relate to the power to deal with witnesses)”.

Replace section 43(4) with:

- (4) Nothing in this section limits or affects any power or authority of the High Court under the **Administration of Justice (Reform of Contempt of Court) Act 2017**.

In section 146(5)(b), delete “165,”.

Repeal section 165 and the cross-heading above section 165.

**Te Ture Whenua Maori Act 1993 (1993 No 4)**

Replace section 90 with:

- 90 Application of Administration of Justice (Reform of Contempt of Court) Act 2017**
- Subpart 3 of Part 2 and sections 28 and 29(1) and (2) of the Administration of Justice (Reform of Contempt of Court) Act 2017** apply in relation to the court—
- (a) as if the court were the District Court; and
  - (b) as if a Judge of the court were a District Court Judge; and
  - (c) with the other necessary modifications.

# Appendix 3

## List of submitters and consultees

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### LIST OF SUBMITTERS

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#### Organisations

- Auckland District Law Society Incorporated
- Crown Law Office
- Fairfax Media
- New Zealand Law Society
- New Zealand Media Entertainment
- New Zealand Police
- Royal Federation of New Zealand Justices' Associations Inc
- Television New Zealand
- Wellington Community Justice Project

#### Individuals

- Isabelle Brunton and Jess Greenheld
- Nicci Coffey
- Jamie Crosbie, Rebecca Morris and Marcus Playle
- Harry De Lacey and Hartley Spring
- Tiffany Dvorak, Jessica Seo and Tanya Young
- Dr Tony Ellis
- Michael Finucane and Conor Tinker
- John Garvitch
- Gavin Hillary
- Joshua Ioelu and Matthew Tihi
- Nevan Lancaster
- Philip Lyth
- Peter McKnight and Ali Romanos
- Anthony Morgan and Ruth Ziegler
- Associate Professor Rosemary Tobin

## CONSULTATION LIST

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The Law Commission consulted with the following persons and organisations during the course of this review:

### Organisations

- Auckland District Law Society Incorporated
- Crown Law Office
- Ministry of Justice
- New Zealand Law Society, Canterbury-Westland branch
- New Zealand Law Society, Wellington branch
- New Zealand Police
- Representatives of the Judiciary

### Individuals

- Emeritus Professor John Burrows QC
- Professor Ursula Cheer
- Professor Claudia Geiringer
- Dean Knight
- Rt Hon Sir Geoffrey Palmer QC
- Steven Price
- Josie Te Rata
- Associate Professor Rosemary Tobin

We are grateful for the valuable contributions made by all submitters and everyone we consulted during this review.

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