LEGAL RESEARCH FOUNDATION

MEDIA LAW SEMINAR – THE NEW CONTEMPT LEGISLATION

WEDNESDAY 15 MAY 2019,

PULLMAN HOTEL, PRINCES STREET, AUCKLAND

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INTRODUCTION

1. Mr President, Justice Simon Moore, Mr Director, Andrew Brown QC, and members. Thank you for the opportunity to participate in this Legal Research Foundation Media Law Seminar.

2. My specific topic is the new contempt legislation.

3. The seminar is timely because the Justice Committee of Parliament reported back to Parliament on 5 April 2019 recommending that the Administration of Justice (Reform of Contempt of Court) Bill be passed with the amendments shown in the Bill attached to the Committee's Report.[1]

4. The next step in the legislative process will be the second reading of the Bill. No date for the second reading has been fixed yet. Once the Bill has been given its second reading it will be referred to the Committee of the whole House when further changes may be made before being given its third reading.

[1] Administration of Justice (Reform of Contempt of Court) Bill 2018 (39-2) (select committee report) at 1.

5. The Bill, which is to be renamed the Contempt of Court Bill, codifies in statute significant parts of the common law of contempt. In particular, it covers:

    a. publication contempt;

    b. disruptive behaviour in the courtroom;

    c. juror contempt;

    d. enforcement of court orders; and

    e. allegations or accusations about Judges or courts.

6. The Bill follows the Law Commission's 2017 Report – *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*.[2] The Report included a Bill drafted by Parliamentary Counsel. The Commission's overarching recommendation was that the existing law of contempt, much of which is common law or in different statutes, be brought together in one modern statute drafted in language as understandable and as accessible to the public as possible.[3]

7. At the same time the Commission recognised that the Bill would not codify the law completely and that aspects of contempt would remain part of the common law.[4]

8. For the purposes of this seminar on media law I have necessarily been selective and provide only an overview of the amended Bill which I hope will highlight the need to follow its passage through the legislative process. I propose to focus on three aspects of the amended Bill attached to the Justice Committee's Report, namely:

[2] Law Commission *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* (NZLC R140, 2017) at [1.86]–[1.94] [*Contempt Report*].

[3] At [1.86]–[1.94].

[4] At [1.91].

a. publication contempt in criminal proceedings;[5]

b. juror interference; and

c. publication of false allegations or accusations about Judges or courts undermining public confidence in the judiciary.

9. Before turning to these specific aspects of the Bill, I mention briefly the background to the Bill and the Law Commission's involvement with the law reform project which led to the Bill.

10. You will be familiar with the Law Commission and its role and responsibilities under the Law Commission Act 1985.[6] In particular you will know that the Commission receives most of its projects from the Minister responsible for the Commission by way of annual work programmes and, following an established process of legal and policy research, wide consultation and publication of an issues paper, the Commission presents a final report to the Minister. In carrying out these tasks the Commission is required to act independently.[7]

11. In the case of contempt of court, the Commission received a request for a first principles review of the law from the then Minister Hon Judith Collins in 2013.[8] An issues paper was published in 2014.[9] Due to the Government prioritising other Commission work, the reference was put on hold at the end of 2014 and was not reactivated until February 2016.

12. During 2016 and early 2017, a draft report was prepared and referred to a group of independent reviewers, the Heads of Bench, Crown Law, the defence bar and the Police. The independent reviewers included my fellow

[5] Publication contempt in civil proceedings will remain subject to the common law: Law Commission *Contempt Report*, above n 2, at [2.97].

[6] Douglas White "The Future of Class Actions Symposium, Thursday 15 March 2018, The University of Auckland Business School: Setting the Scene: The Law Reform Project and the Current Review of Class Actions and Litigation Funding" (2018) 24 NZBLQ 95 at 96–98.

[7] Law Commission Act 1985, s 5(3)(a).

[8] Law Commission *Contempt Report*, above n 2, at [1.76].

[9] Law Commission *Contempt in Modern New Zealand* (NZLC IP36, 2014).

speakers this afternoon Bruce Gray QC and Professor Ursula Cheer. The Commission is very grateful to them and the other reviewers for their assistance.

13. The Commission's final report was presented to the then Minister Hon Amy Adams in May 2017. For those interested in reading the full report, it is available on the Commission's website. The formal role of the Commission was completed with the presentation of the final report.

14. Following the 2017 election, the Administration of Justice (Reform of Contempt) Bill 2018, which was included in the Commission's report, was drawn as a private member's Bill by Hon Christopher Finlayson QC and introduced by him. It was then adopted by the Government in the name of the new Minister Hon Andrew Little and, after its first reading where it received cross party support,[10] was referred to the Justice Committee.

15. In conducting its first principles review of the law, the Commission was required by its terms of reference to take into account:[11]

    a. the rights and freedoms recognised in the New Zealand Bill of Rights Act 1990 [NZBORA];

    b. the development of the internet and new media; and

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

16. NZBORA contains a number of fundamental rights relevant in this context, including in particular:

    a. freedom of expression;[12] and

    b. the right to a fair trial,[13] which has been described as "an absolute right".[14]

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[10] (2 May 2018) 729 NZPD Administration of Justice (Reform of Contempt of Court) Bill — First Reading, Chris Finlayson and Andrew Little).

[11] Law Commission *Contempt Report*, above n 2, at [1.78].

[12] Section 14.

17. The Commission addressed these rights in its report,[15] noting the leading cases which have decided that freedom of expression may need to give way to fair trial rights[16] and other justifiable limitations.[17] As pointed out by Professor Cheer in *Burrows and Cheer Media Law in New Zealand*:[18]

> No rights in the Bill of Rights are absolute. It could not rationally be argued that s 14 gives one the right to publish anything one pleases whatever harm it may cause to others. This is recognised in s 5 of the Bill of Rights Act.

This is a topical issue in other contexts today which Professor Cheer will address in her paper.

18. The Commission also took into account the development of the internet and new media.[19] In doing so, the Commission built on its earlier work in these areas.[20]

19. I turn now to the three aspects of the amended Bill relevant to media law.

PUBLICATION CONTEMPT IN CRIMINAL PROCEEDINGS

20. Publication contempt arises when a publication crosses the line between fair and accurate reporting and interferes with the administration of justice. The contempt may take the form of interference with a particular case before the courts or with action that may more generally prejudice the course of justice by eroding access to justice or public confidence in the justice system.[21]

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13 Section 24(e).
14 *Siemer v Solicitor-General* [2013] NZSC 68, [2013] 3 NZLR 441 at [19] per Elias CJ.
15 Law Commission *Contempt Report*, above n 2, at [1.78] and [6.3]–[6.7].
16 At [2.4]–[2.9].
17 At [6.32].
18 Ursula Cheer *Burrows and Cheer Media Law in New Zealand* (7th ed, LexisNexis, Wellington, 2015) at [16.1].
19 Law Commission *Contempt Report*, above n 2, at [1.67]–[1.68], [4.12]–[4.15] and [6.11].
20 Law Commission *The News Media Meets 'New Media': Rights, Responsibilities and Regulation in the Digital Age* (NZLC R128, 2013); *Law Commission Harmful Digital Communications: The adequacy of the current sanctions and remedies* (NZLC MP3, 2012); and Harmful Digital Communications Act 2015.
21 Law Commission *Contempt Report* Law Commission *Contempt Report*, above n 2, at [2.1].

Publication contempt in criminal proceedings

21. Under the law of contempt, a trial court has authority to control information in the lead up to, during and after a criminal trial – the powers come from contempt law generally and are critically important for ensuring fair trial rights.[22]

22. Throughout the protected fair trial period, which is generally the period between arrest and the completion of the trial, the law of contempt together with statutory and implied suppression powers serve the function of:[23]

    a. 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;

    b. ensuring the court's authority to determine what evidence will be admitted at trial is not pre-empted by the publication of information; and

    c. preserving the integrity of evidence including, for example, the reliability of witness statements about matters such as identity.

23. Statutory and implied powers of suppression are other key mechanisms used to protect the integrity of a fair trial.[24] Under the Criminal Procedure Act 2011 a trial court may suppress the name and identity of the defendant, the identity of witnesses, victims and people connected with the trial (such as relatives and children) and evidence and submissions.[25] The Act also provides for the automatic suppression of the identity of defendants and the identity of complainants in specified sexual cases, and the identity of

[22] At [2.4].
[23] At [2.5].
[24] At [2.35].
[25] See ss 200–205.

child complainants and witnesses in any case. In addition, the Bail Act 2000 imposes restrictions on the publication of matters dealt with at any bail hearing.[26]

Law Commission Recommendations for publication contempt in criminal trials

24. **Suppression orders – The Commission made recommendations for new statutory provisions:**

R1: prohibiting publication or reporting of an arrested person's previous convictions and any concurrent charges. The proposed provision would 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 would 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).[27]

R2: authorising a court to make an order postponing publication of other information if the court was satisfied that this appeared 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 was arrested and before the trial had been completed and it must be for a limited period, not extending beyond the completion of the proceedings.[28]

R3: authorising 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.[29]

[26] Section 19.
[27] Law Commission *Contempt Report* Law Commission *Contempt Report*, above n 2, at [2.74]–[2.81] and R1.
[28] At [2.82]–[2.85] and R2.
[29] At [2.89]–[2.91] and R3.

R4: enabling members of accredited media or any other person reporting on the proceedings with the permission of the court to have standing to initiate or be heard on any application relating to the above suppression orders.[30]

R6: making it an offence to knowingly or recklessly breach one of the above suppression orders.[31]

25. **Statutory offences – the Commission made recommendations for:**

R7: a new statutory offence (replacing the common law offence) for intentionally publishing information that interfered with a fair trial where there was a real risk that the publication prejudiced the arrested person's right to a fair trial.[32]

R8 & R9: The Commission also recommended the following defences be available where they could be proved on the balance of probabilities:[33]

i. after taking all reasonable care the person was unaware and had no reason to be aware of the possibility or existence of the trial;

ii. 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;

iii. the publication was a good faith contribution to a discussion of public affairs; or

[30] At [2.83] and R4.
[31] At [2.85] and R6.
[32] At [2.92] and R7.
[33] At [2.93]–[2.96], R8 and R9.

iv. the publication was a fair and accurate report of court proceedings held in public and published at the time and in good faith.

Justice Committee Changes

26. The Justice Committee has recommended a number of significant changes to the Law Commission's recommendations–

a. Publication definition in the Criminal Procedure Act 2011 (s 195). The Committee recommends changing this so suppression of material relating to the person's criminal history and other offences they are charged with only applies to information published after the order is made (unless the court makes an order for specific historic publications).[34]

b. Suppression period – with regard to suppression of information related to criminal history or concurrent charges, the Committee recommends that automatic suppression begins at the time the charge is filed rather than on arrest because this is an easier date for the media to determine. The Committee moved the suppression clauses into the Criminal Procedure Act 2011. New sections 199A-199D and an amended section 211 make it an offence knowingly or recklessly or otherwise to publish the prescribed information. Also, the default position is that orders remain in place for the duration of the trial unless lifted by a judge rather than having to be reviewed at the beginning of a trial.[35] With regard to the statutory offence in Recommendation 7, the Committee retains it in the amended Bill subject to clarifying and other amendments discussed below. In

[34] Administration of Justice (Reform of Contempt of Court) Bill (39-2) (select committee report) at 3. Schedule 2 of the Draft Bill inserts new sections 199A-199D into the Criminal Procedure Act 2011.

[35] At 3.

contrast to automatic suppression however, the Committee maintains that the offence 'applies from the time of the arrest or charge (whichever happens first)'.[36]

c. A defence be added for breaching a suppression order where it is done unintentionally and the member of the media could not have reasonably known they had published suppressed information provided they remove the material as soon as practicable after learning of the suppression.[37]

d. A provision be added giving the High Court power to order a person, who has been convicted of intentionally publishing information relevant to a jury trial if there is a real risk that the publication could prejudice the arrested person's right to a fair trial (cl 14(2)), to take down the relevant information.[38]

e. The defences to the offence of intentionally publishing information relevant to a jury trial be narrowed if there is a real risk that the publication could prejudice the arrested person's right to a fair trial. The Committee recommends replacing the defences of:

    i. 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 (cl 14(4)(c)); and

    ii. the publication was a fair and accurate report of court proceedings held in public and published contemporaneously and in good faith (cl 14(4)(d))

[36] Administration of Justice (Reform of Contempt of Court) Bill (39-2), cl 14(1)(a)
[37] At 5.
[38] At 5.

with a defence that the offence does not apply "to good faith publications that are a fair and accurate report of court proceedings."[39]

f. Clause 15(1) of the Bill, which sets out guidance to assist the court in determining whether a publication creates a real risk of prejudice to the right of a fair jury trial, be amended by making:[40]

> it clear that the court must consider whether it is likely that a publication will be available to jurors or potential jurors … clarify[ing] that the primary purpose of clause 15(1) is to prevent prejudicial material from influencing the jury.

JUROR INTERFERENCE

27. For the media it is important to note that jury deliberations are confidential – jurors should not answer questions or give out information about their deliberations to anyone during or after a trial.[41]

Background

28. Trial by jury is a fundamental and important part of the New Zealand criminal justice system. Persons charged with serious criminal offences must be tried by jury.[42] 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.[43]

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39 At 5.

40 At 5-6.

41 Law Commission *Contempt Report* Law Commission *Contempt Report*, above n 2, at [4.8].

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

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

29. As the right to trial by jury is affirmed by section 24(e) of NZBORA, the Commission noted that the concept is to be maintained as the lynchpin of the criminal justice system.[44]

Disclosing information

30. A Full Court of the High Court in *Solicitor-General v Radio New Zealand Ltd* identified three reasons for the confidentiality of jury deliberations:[45]

   a. 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.

   b. 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 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:[46]

      > The prospect of one or more jurors being cross-examined on their affidavits and possibly being the subject of evidence in rebuttal is

[44] Law Commission *Contempt Report* Law Commission *Contempt Report*, above n 2, at [4.1]–[4.10].

[45] *Solicitor-General v Radio New Zealand Ltd* [1994] 1 NZLR 48 (HC). These are outlined in Law Commission *Contempt Report* Law Commission *Contempt Report*, above n 2, at [4.59]–[4.61].

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

extremely unattractive [and] … would, potentially at least, have a very detrimental effect on the jury system.

c. 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.

31. 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. It seems unlikely that these sections continue to apply after the trial is completed and the jury released.[47]

32. At common law it is not entirely clear but appears likely that a juror will be in contempt if they disclose information or communicate with external parties after being directed not to do so.[48]

33. Section 76 of the Evidence Act provides that a person must not give evidence about deliberations of a jury although the rule does not prevent a person from giving evidence relating to the competency or capacity of a juror.[49]

34. Notably, 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 deliberations elicited from an interview with a juror are likely

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47 Law Commission *Contempt Report*, above n 2, at [4.62].

48 At [4.63].

49 At [4.65].

to be in contempt. 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*.[50] In that case a journalist approached some of the jurors in the trial of David Tamihere for the murder of two Swedish tourists when new evidence was discovered some 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.

35. 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. 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. While the article did not touch on the deliberations of the jurors, it probably disclosed more information than has ever been published previously.[51] To date, however, contempt proceedings have not been taken in New Zealand against jurors for post-verdict disclosures of this nature.

Law Commission Recommendations

36. The Law Commission recommended 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.[52]

37. The Commission noted that this is consistent with the approach that had been taken in England and Wales, and keeping juror deliberations confidential is paramount to the administration of justice. Clarifying this offence in statute would make the importance of this clear. As disclosing

50 *Solicitor-General v Radio New Zealand Ltd* [1994] 1 NZLR 48.
51 Law Commission *Contempt Report*, above n 2, at n 350.
52 At [4.72]–[4.75] and R24

juror information is an offence, the Commission also recommended that soliciting that information should be an offence. This would set a clearer line than the common law and provide better guidance to the media and others who are likely to publish material relating to a trial.[53]

38. At the same time the Commission recommended exceptions where disclosure of jury deliberations should be permitted:

    a. Misconduct: Jurors should be able to disclose information to, and raise concerns about juror misconduct with the trial judge: this would allow the trial judge to disclose the information as necessary for the purpose of dealing with the case, and for the purposes of an investigation by the Police as to whether an offence has been committed.[54] Additionally, any person should be able to make an excepted disclosure on a confidential basis to the Police, Solicitor-General, or trial counsel.[55]

    b. Authorised academic research into juries. The existing Judicial Research Committee should be responsible for authorising the research.[56]

    c. Disclosure to health practitioner: allowing a juror or former juror to disclose deliberations 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.[57]

53 At [4.74].
54 At [4.79] and R26
55 At [4.80] and R26.
56 At [4.81]–[4.83] and R27
57 At [4.84] and R28.

Justice Committee Changes

39. The Justice Committee recommends adding a further exception permitting a person to disclose jury deliberations if they are directed to do so by a court.[58]

40. The Committee also notes that the new offence applies to disclosure of jury deliberations but not to disclosure of other information about a trial. The Justice Committee commented that at common law it is also contempt to disclose information about a trial.[59] To maintain this position the Justice Committee amended cl 29(4)(c) so that instead of abolishing "contempt by jurors", it abolishes "jurors researching information relevant to the trial".[60] Accordingly, a juror disclosing other information about a trial may still be liable for contempt at common law.

PUBLICATION OF FALSE ALLEGATIONS OR ACCUSATIONS ABOUT JUDGES OR COURTS UNDERMINING PUBLIC CONFIDENCE IN THE JUDICIARY

Background

41. 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.[61]

42. The Courts may invoke this 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. It is

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[58] Administration of Justice (Reform of Contempt of Court) Bill (39-2) (select committee report) at 7.

[59] At 7.

[60] At 7.

[61] Law Commission *Contempt Report*, above n 2, at [6.27]–[6.33].

important to emphasise that the purpose of this contempt 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.[62] In particular, it is not concerned with protecting "Judges' sensibilities".[63]

43. 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 section 14 in NZBORA, extends to criticism of judges and courts.[64] The New Zealand Court of Appeal has always recognised the right of the media and the public to criticise courts and their work.[65] In *Re Wiseman* North P said:[66]

> ….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.

44. 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,

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62 At [6.2].

63 "Reform of Contempt of Court" (9 April 2019) 42 TCL 12

64 Law Commission *Contempt Report*, above n 2, at [6.3].

65 See *Re Wiseman* [1969] NZLR 55 (CA) at 58; and *Solicitor-General v Radio Avon Ltd* [1978] 1 NZLR 225 (CA) at 230.

66 *Re Wiseman*, above n 64, at 58. (For a recent example of a similar case involving untrue and improper allegations against a judge in court documents, see *O'Neill v Attorney-General* [2018] NZHC 1917.)

like reputation, is earned by the timeliness and quality of their work and not conferred by any status attached to their office.[67]

45. 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.[68] Again it is important to emphasise the focus is on false or untrue allegations, including examples alleging partiality, corruption, incompetence, and racism.[69] The focus is not on facts or opinions which are protected by freedom of expression.

46. As Hon Paul East, when Attorney General, put it:[70]

> 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.

47. A similar approach has been expressed by the current Attorney-General, Hon David Parker, in a recent interview:[71]

> A lot of the roles of the Attorney-General are just to be there as a guardian of our conventions. I see one of my most important roles as to make sure the conventions, the separation of powers, the protection of judges, from criticism from, especially the Executive, but more generally Parliament, is maintained. They can't defend themselves.

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67 Law Commission *Contempt Report*, above n 2, at [6.4].

68 At [6.6].

69 At [6.10]-[6.11], [6.15], [6.23]-[6.25] and [6.48].

70 Paul East "The Role of the Attorney-General" in Philip A Joseph (ed) *Essays on the Constitution* (Brookers, Wellington, 1995) 184 at 200.

71 Craig Stephen "The Government's lawman: David Parker, Attorney-General" (2019) 972 *LawTalk* 35 at 36.

48. 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.[72]

49. This approach is reflected in the Cabinet Manual, which states that the Attorney General:[73]

> … 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 …

50. In *Solicitor-General v Smith* a Full Court of the High Court considered that 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. Wild and MacKenzie JJ said:[74]

> 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.

51. 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

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72 Law Commission *Contempt Report*, above n 2, At [6.6].
73 Cabinet Office *Cabinet Manual 2017* at [4.8].
74 *Solicitor-General v Smith* [2004] 2 NZLR 540 (HC) at [133].

the two *Siemer* cases.[75] The Ministry of Justice's legal advice also affirmed the Law Commission's Bill's consistency with NZBORA.[76]

Law Commission Recommendations

52. The Law Commission reached the following conclusions on scandalising the court:[77]

    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.

    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.

53. The Law Commission concluded that there should still be an offence because:[78]

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[75] *Siemer v Solicitor-General* [2010] NZSC 54, [2010] 3 NZLR 767 at [24]–[25]; and *Siemer v Solicitor-General*, above n 14, at [229].

[76] Ministry of Justice Legal Advice – *Consistency with the New Zealand Bill of Rights Act 1990: Administration of Justice (Reform of Contempt of Court) Bill* (29 March 2018) at [7]. Compare Geoffrey Palmer "The purposes of protecting speech" [2018] NZLJ 227.

[77] Law Commission *Contempt Report*, above n 2, at [6.65] and [6.88].

[78] At [6.66].

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. Since the *Smith* case in 2004 there have in fact been several serious false allegations made against judges which have gone unanswered.

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.

54. The Commission explained why the common law offence of scandalising the court should be replaced with a new statutory offence:[79]

a. The common law contempt of scandalising the court 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.

[79] At [6.67].

c. Although the statutory offence would be a new one, it would replace and clarify an existing common law offence, with the Solicitor-General having sole responsibility for prosecuting the new offence.

d. The principal purpose of the offence would be to act as a deterrent. Other remedial steps would be taken first and prosecution would be a last resort.

55. The Commission also concluded that the courts should have power to make orders for the retraction or take down of allegations or accusations because:[80]

a. While the powers to take down or suppress material exist at common law in other contexts, 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.

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.

56. It might also be noted that the Law Commission's recommendations would ensure that our law remained broadly consistent with Australian law where the common law offence remains in existence.[81] As recently as June 2017 Victoria's Court of Appeal warned there was a prima facie case of contempt of court against three Federal Government Ministers following their criticism of the Court during an active terrorism appeal. At an initial

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80 At [6.69] and [6.83]–[6.86].

81 *Gallagher v Durack* [1983] 152 CLR 238 at 243; Law Commission *Contempt Report*, above n 2, at [6.1] and [6.31]. Compare Administration of Justice (Reform of Contempt of Court) Bill (39-2) (select committee report) at 9. On 12 October 2018 the Victorian Law Reform Commission announced Terms of Reference for a new project: Contempt of Court, Judicial Proceedings Reports Act 1958 and Enforcement Processes.

hearing the three Ministers each retracted their most egregious remarks but refused to apologise. Four days later the Ministers informed the Court of their desire to apologise. The Court ultimately accepted the apologies as sufficient to purge their contempt. The Court, however, noted:[82]

> …in the strongest terms that it is expected there will be no repetition of this type of appalling behaviour. It was fundamentally wrong. It would be a grave matter for the administration of justice if it were to reoccur. This Court will not hesitate to uphold the rights of citizens who are protected by the sub judice rule.

57. As the Law Commission noted in its Report,[83] the common law offence was abolished in England in 2013, but the press activity in the UK following the first judicial decision that Brexit could not be triggered without a vote by Parliament has demonstrated there may now be a gap in the law where scandalising the court once offered protection.[84] In this incident three newspapers[85] published photos of the three judges involved, with headings such as "enemies of the people" and made allegations that the judiciary was biased: "infested with Europhiles". As Sir Geoffrey Palmer QC subsequently wrote:[86]

> 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.

Justice Committee Changes

58. The Justice Committee agrees with the Commission's recommendation that the common law offence of scandalising the court should be

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82 Announcement of the Court of Appeal in Terrorism Matters (23 June 2017)
83 Law Commission *Contempt Report*, above n 2, at [6.29].
84 At [6.51].
85 *The Daily Mail*, *The Sun* and *The Daily Express*.
86 Geoffrey Palmer "Do the British understand their own unwritten Constitution? [2017] NZLJ 27 at 27.

abolished, but disagrees with the recommendation that a new statutory offence should replace it.[87]

59. The Committee agrees with submitters' concerns that the offence "could prevent robust, legitimate criticism of Judges and Courts" and believes the Bill should:[88]

> strike a better balance between preventing public confidence in Judges and courts from being undermined by the publication of false statements and protecting the right to freedom of expression.

60. In an attempt to achieve this balance, the Justice Committee recommends retaining the provision which would give the High Court power to order the take down of untrue allegations or accusations about judges or courts.[89]

61. The Justice Committee recommends, however, that the High Court should only have the power to order a person to take-down (or disable access to) information rather than also being able to order retraction, an apology or correction as recommended by the Commission. This power could be used where there is a real risk that an online statement could undermine public confidence in the independence, integrity, impartiality, or authority of the judiciary or a court.[90]

62. Significantly, this take-down power would apply only to information published online.[91] It would not apply to information in other publications, including the mainstream media.

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87 Administration of Justice (Reform of Contempt of Court) Bill (39-2) (select committee report) at 9.

88 At 9.

89 At 9.

90 At 9.

91 Administration of Justice (Reform of Contempt of Court) Bill (39-2), cl 25. See also definition of "publish" in clause 4(f), the parallel language of s 19 in the Harmful Digital Communication Act 2015 and the decision in *Lyttelton v R* [2015] NZCA 279, [2016] 2 NZLR 21 at [9] and [13] (referred to in the Law Commission *Contempt Report*, above n 2, at [2.37]).

Conclusion

63. If the Justice Committee's changes are accepted by Parliament, there will be no replacement offence for "scandalising the court". Apart from the limited online take-down power, no laws would exist to prevent the integrity and impartiality of the judiciary from being impugned by false allegations and accusations which undermine public confidence in the institution of the judiciary and hence the rule of law.

64. In particular, the Attorney-General would then appear to have no backup power to fulfil his constitutional responsibilities for protecting the judiciary as an institution from false and egregious attacks when they appear in non-online publications, including the mainstream media (newspapers, radio and television).

65. Suggestions by officials that private remedies provide adequate alternatives are perhaps surprising.[92] As the former Chief Justice, Dame Sian Elias, put it in her submission to the Justice Committee on the Bill on behalf of the Higher Courts:[93]

> A suggestion is made in submissions that judges can respond to these accusations in the same way ordinary members of the public can: i.e. by issuing defamation proceedings. We see that as entirely unrealistic and in any event undesirable. First, it reinforces the very complaint that is also made in the same context: that judges are judging in their own cause, emphasised in this instance by judges personalising the issue by initiating the process. The advantage of the bill is that any prosecution is for the independent decision of the Solicitor-General. It may be expected only very serious matters would be prosecuted. Secondly, the accusation arises out of the performance by a judge of his or her public judicial duties. To compel judges to act privately to

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92 See Ministry of Justice *Regulatory Impact Assessment: Amendments to the Administration of Justice (Reform of Contempt of Court) Bill* (5 April 2019) at 21.

93 Sian Elias "Submission to the Justice Committee on the Administration of Justice (Reform of Contempt of Court) Bill 2018" (26 June 2018) at [16].

protect respect for the rule of law would be a regrettable diversion from the very duties they seek to protect. The Solicitor-General will seldom prosecute, but judges would almost inevitably not sue. The result will simply be to officially condone behaviour that imperils the rule of law. That does not seem a sensible course.

66. Recent English experience confirms Dame Sian's concerns. Last year in *Foskett v Ezeugo* three Judges were forced to obtain injunctive relief under the Protection from Harassment Act 1997 against Mr Ezeugo who was running a social media and email campaign against them. At a subsequent High Court hearing, in proceedings brought by the three Judges, 175 breaches of the injunction were proved to the criminal standard and Mr Ezeugo was convicted of contempt and sentenced to 12 months imprisonment.[94]

67. I conclude with a question: are New Zealand judges going to be required to take similar proceedings in their own names, in their own time and at their own expense to uphold the rule of law?

94 *Foskett v Ezeugo* [2018] EWHC 3694 (QB). See also Max Campbell "Case Law: *Foskett v Ezeugo*, Serial Abuser of Judges Committed to Prison for Contempt" (24 January 2019) Inforrm's Blog <www.inforrm.org>.