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Contempt In the Face of the Court in Australia: Ensuring the Due Administration of Justice and Respect for Human Rights for People with Mental Health Issues

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**Contempt In the Face of the Court in Australia:
Ensuring the Due Administration of Justice and
Respect for Human Rights for People with Mental
Health Issues**

Suzanne Frances O'Toole

A thesis submitted in partial fulfilment of the requirements of the Doctor of
Legal Science (SJD) degree of Bond University

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ABSTRACT

This thesis reviews and critically analyses the Australian law and procedure relating to the offence of contempt in the face of the court and, in particular, its impact on people with mental health issues. The fundamental argument advanced in this thesis is that the law and procedure of contempt in the face of the court should be reformed in order to take into account the mental health of people accused of contempt. The thesis proposes reforms to the legal principles and procedures governing contempt in the face of the court that are designed to achieve that objective. The thesis also examines judicial administration, particularly the dynamic between judge and alleged contemnor. It recommends continuing improvement in mental health literacy among members of the judiciary, along with new policies and programs to build and reinforce referral pathways from the courts to mental health services for contemnors. It also examines the issue of judicial stress and, in some instances, mental ill-health among members of the judiciary, to highlight that the power to commit for contempt can be abused by judicial officers experiencing work-related stress and/or mental ill-health. It is then demonstrated that the reforms proposed in the thesis are not only consistent with Australia's human rights obligations, but also will help to ensure the due administration of justice.

The law in this thesis is stated as at 10 April 2016.

DECLARATION

This thesis is submitted to Bond University in partial fulfilment of the requirements of the degree of Doctor of Juridical Science. This thesis represents my own original work towards this research degree and contains no material that has been previously submitted for a degree or diploma at this University or any other institution, except where due acknowledgement is made.

Signed _____

Suzanne F O'Toole

Date _____

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Table of Contents

ABSTRACT

ACKNOWLEDGMENTS

Introduction		1
Chapter One	The Law of Contempt In the Face of the Court in Australia: Swift Justice or an Instrument of Oppression?	
I	INTRODUCTION	11
II	WHAT IS CONTEMPT IN THE FACE OF THE COURT?	11
	A <i>Contempt In the Face of the Court Distinguished from Other Varieties of Contempt</i>	11
	B <i>Rationale and Historical Origins of Contempt In the Face of the Court</i>	13
	C <i>The Varieties of Contempt In the Face of the Court</i>	14
	D <i>Questions to Consider</i>	16
III	THE LAW GOVERNING CONTEMPT IN THE FACE OF THE COURT	18
	A <i>The Commonwealth Courts</i>	18
	B <i>The Common-Law Jurisdictions</i>	23
	1 <i>The Australian Capital Territory</i>	24
	2 <i>New South Wales</i>	26
	3 <i>South Australia</i>	27
	4 <i>Victoria</i>	30
	5 <i>Summary of the Common-Law States</i>	31

C	<i>The Code Jurisdictions</i>	33
	1 <i>The Northern Territory</i>	33
	2 <i>Queensland</i>	34
	3 <i>Tasmania</i>	37
	4 <i>Western Australia</i>	38
	5 <i>Summary of the Code jurisdictions</i>	40
IV	A CONSTITUTIONAL WRINKLE — THE STATUS OF THE INHERENT JURISDICTION TO COMMIT FOR CONTEMPT IN THE FACE OF THE COURT	41
V	A CRITIQUE OF THE SUMMARY PROCEDURE FOR CONTEMPT IN THE FACE OF THE COURT	46
VI	THE ISSUE OF ‘WILFULNESS’ AS A REQUIREMENT OF THE OFFENCE OF CONTEMPT IN THE FACE OF THE COURT	52
VII	EXPULSION FROM THE COURT	60
VIII	CONCLUSION	62
Chapter Two	Reforming Contempt Law and Procedure by Reference to Human Rights Principles	
I	INTRODUCTION	63
II	EQUALITY BEFORE THE COURTS AND THE RIGHT TO A FAIR HEARING BY AN IMPARTIAL TRIBUNAL (ARTICLE 14.1)	65
III	THE PRESUMPTION OF INNOCENCE (ARTICLE 14.2)	69
IV	THE RIGHT TO BE INFORMED PROMPTLY AND IN DETAIL REGARDING THE NATURE AND CAUSE OF THE CHARGE AGAINST HIM OR HER (ARTICLE 14.3(A))	72
V	THE RIGHT TO HAVE ADEQUATE TIME AND FACILITIES FOR THE PREPARATION OF A DEFENCE AND TO COMMUNICATE WITH COUNSEL OF ONE’S OWN CHOOSING (ARTICLE 14.3(B))	80
VI	THE RIGHT TO DEFEND ONESELF IN PERSON OR THROUGH LEGAL ASSISTANCE (ARTICLE 14.3(D))	82

VII	THE RIGHT TO EXAMINE, OR HAVE EXAMINED, THE WITNESSES AGAINST ONESELF (ARTICLE 14.3(E))	82
VIII	CONCLUSIONS	83
Chapter Three	Cases Studies of People with Mental Health Issues Who Commit Contempt In the Face of the Court	
I	INTRODUCTION	89
II	CASE STUDY ONE: THE MOORE-MCQUILLAN SAGA	90
III	CASE STUDY TWO: THE COLEIRO CASE	101
IV	CASE STUDY THREE: <i>WILSON V PROTHONOTARY</i>	107
V	CASE STUDY FOUR: MEGUMI OGAWA	115
VI	ANALYSIS	127
	A <i>A Failure to Give Due Weight to Mental Ill-health and the Need For Better Mental Health Literacy Among Judges</i>	127
	B <i>The Need For Nuanced Consideration of the Impact of Mental Ill-health on the Conduct of the Contemnor</i>	128
	C <i>Judicial Stress and the Need For Mental Health Supports for the Judiciary</i>	130
	D <i>How Much Is Enough? Querulous Litigants and Vexatious Litigant Declarations</i>	131
VII	CONCLUSIONS	134
Chapter Four	Policy Reforms: Improved Mental Health Literacy, Access To Mental Health Court Liaison Clinicians, and Mental Health Supports for The Judiciary	
I	INTRODUCTION	137
II	THE NEED FOR MENTAL HEALTH LITERACY AND ACCESS TO COURT-BASED MENTAL HEALTH PROFESSIONALS TO SUPPORT LITIGANTS AND ENSURE INFORMED JUDICIAL DECISION-MAKING	139
III	IMPROVING THE MENTAL HEALTH OF JUDGES	148

IV	CONCLUSIONS	167
	BIBLIOGRAPHY	173
A	<i>Articles/Books/Reports</i>	173
B	<i>Cases</i>	188
C	<i>Legislation</i>	199
D	<i>Treaties</i>	201
E	<i>Other</i>	202

Introduction

This thesis critically analyses the Australian law and procedure governing contempt in the face of the court, and in particular its impact on people with mental health issues. (In this thesis, the expressions ‘mental health issues’ and ‘mental ill-health’ are used to capture any mental abnormalities, disorders, syndromes or illnesses that might contribute to a person behaving contemptuously in court. The expression has been adopted because it is employed in the Council of Australian Governments *Roadmap for National Mental Health Reform 2012–2022*). The fundamental arguments advanced in this thesis are that the law and procedure in this area should be reformed in order to take account of the mental health of people accused of contempt. Their mental health should be taken into account in making an assessment as to whether they are criminally liable and should also be given weight in sentencing. Human rights principles that aim to guarantee fairness in criminal trials should apply when a person is tried for contempt in the face of the court to ensure that they have a fair hearing. Reforms should be made to the law and practice of contempt to develop referral pathways for people to mental health services and treatment where this is appropriate, to enhance the prospect of recovery and decrease disruptions in court.

(In passing, it should be noted that while it is recognised that people with mental health issues may also have cognitive disability caused by acquired brain injury, intellectual disability or other conditions, this thesis focuses narrowly on those experiencing mental health issues. While it is recognised that people with mental health issues who also live with disability may be able to invoke legal and human rights protections that are not available to those who merely have mental health issues (such as under the *United Nations Convention on the Rights of People with Disability*), this

thesis will not address these co-morbidities or any specialist legal or human rights provisions available to people in dual or multiple categories).

Chapter One of this thesis examines how Australian courts currently deal with people with mental health issues who are accused of committing contempt in the face of the court. It is demonstrated that Australia's complicated, federally-organised justice system has produced diverse approaches to contempt in the face of the court that, in most jurisdictions, provide few protections for contemnors or alleged contemnors with mental health issues. In most Australian jurisdictions, only rudimentary common-law safeguards are available. In some jurisdictions protections of the accused have scarcely advanced since the late Middle Ages.

The description of the legal frameworks developed in Chapter One highlights significant substantive and procedural differences across Australian jurisdictions. One important issue that emerges from this description, and which is explored in Chapter One, is the question whether the offence of contempt in the face of the court incorporates *mens rea*, a traditional common law element of criminal offences. The different position adopted in the various jurisdictions in relation to *mens rea*, typically whether or not the charge requires the contempt to have been committed *wilfully*, is explored. It is argued that the absence of a *mens rea* requirement in many jurisdictions may result in unfairness to an accused person as the opportunity to argue that their actions were not committed wilfully but were perhaps instead propelled by their mental ill-health, is lost.

Having mapped the complex common law and statutory frameworks governing contempt in the face of the court, the question of whether there remains inherent power and/or a constitutional power to commit for contempt that lies outside of statute – and cannot be removed by statute – is then considered. In this thesis it is demonstrated that Australian courts have a power to commit for contempt in the face of the court that arises from their status as independent courts under the Constitution. However, as the High Court of Australia has not provided guidance as to the ambit of

this power, it is possible that any certainty that might come from the legislative reform recommended in this thesis may yield, in some future case or cases, to this constitutional jurisdiction; that is, notwithstanding any legislative reform, the High Court might decide that the power of courts to commit for contempt of court has a different shape and quality to the legislative reforms promoted herein. This constitutional ‘wrinkle’ complicates the certainty of any reforms.

As a matter of legal history, the law governing contempt in the face of the court has been the subject of two long and searching reviews by the Australian Law Reform Commission and the Western Australian Law Reform Commission, respectively. The national review recommended reforms grounded in the principles enshrined in the *International Covenant on Civil and Political Rights*. However the recommendations of those Commissions have not been implemented, except in the Family Court of Australia. Neither of the law reform commission reports dealt with the question of how the courts should manage people with mental ill-health, which is the gist of this thesis.

The fundamental tension that must be addressed in any reform proposal is the tension that exists between the interests of a judge in maintaining order in a court, on the one hand, and the interests of a person charged with contempt of court, on the other. A judge who charges, tries and punishes a person for contempt in the face of the court will often be motivated to act swiftly to protect the dignity of the judicial system. However in doing so, she or he may well be adopting procedures that are inconsistent with human rights. The speed of summary procedure in particular, and the very broad, indeed unique, powers available to judges who adopt that procedure, create significant risks for people who are dealt with for contempt. Indeed all of this was recognised in the reports of the Australian Law Reform Commission and the Western Australian Law Reform Commission. However these reviews failed to address the position

of defendants, particularly unrepresented litigants, who may additionally suffer mental ill-health.

At present the majority of Australian jurisdictions make no special provision to ensure that a person accused of contempt in the face of the court has an opportunity to have his or her mental health taken into account in determinations of culpability or in sentencing. The result is that their mental ill-health may be completely ignored. For the reasons developed in this thesis, it is recommended that the law governing contempt in the face of the court should be reformed to incorporate a *wilfulness* requirement in order to address this defect. While many contemporary statutory offences remove the traditional *mens rea* requirement of a crime in the contempt context, it is particularly important for a person with mental health issues, as the presence of such a requirement can yield an opportunity for the court to consider issues relating to mental health.

In this thesis it is recommended that the human rights principles set out in Chapter Two should apply when people are charged with contempt in the face of the court. Summary procedure has traditionally been justified on the basis that contempt in the face of the court requires immediate discipline and the avoidance of the delay associated with an adjournment and a trial, but not all situations require immediate action. There will continue to be rare instances where a judge feels compelled to act swiftly — for example, to protect people in the court from physical harm — however it is argued that expulsion from the court will often suffice in these situations. Summary procedure should be abandoned. Not only can the use of summary procedure in these circumstances be an affront to human rights, the power to punish for contempt can be used as an instrument of oppression: this is apparent from one of the case studies set out in Chapter Three, in which a judge experiencing mental health problems terrorised a litigant with dementia.

In this thesis it is demonstrated that current approaches in dealing with contempt in the face of the court are incompatible with Australia's

human rights obligations. In Chapter Two, the relevant human rights principles are identified and Australian law is assessed for compliance. It is demonstrated that the law in virtually every jurisdiction falls well short of what is required to ensure justice for people with mental health issues who are accused of contempt. This is particularly the case when the action of the alleged contemnor is perceived by the judge to be insulting or challenging his or her authority. It is here that the exercise of the summary power of the court to commit for contempt is likely to conflict with the safeguards associated with the traditional criminal trial, i.e., the requirement that there be a clearly defined charge, the presumption of innocence, the right to legal representation and the right to a tribunal that is free from bias. The human rights of access to justice and to the highest attainable standard of mental health require that more be done to manage and assist litigants who may be suffering mental ill-health.

The Australian Capital Territory and the State of Victoria, which have charters of human rights, already have such protections in place. Having said this, a self-represented litigant suffering mental ill-health will not be best placed to know of their charter rights, let alone assert those right, while being dealt (often very hastily) for contempt. For these reasons, the approach taken by the Family Court is again endorsed. The Family Court's approach generates a number of opportunities for the court to consider the mental health of the accused. Requiring a formal plea raises the issue of fitness to plead. Requiring that a person *understand* the charge also focuses attention on their mental state. Procedures that provide an opportunity for a plea and a formal defence may open the door for the involvement of counsel, who can raise mental health issues if appropriate. It is noteworthy that the Family Court is able to extend these procedural safeguards to court users charged with contempt while still maintaining order in the court, particularly noteworthy given the often contentious and high stakes caseload of that court.

Chapter Three of the thesis considers a number of detailed case studies against the backdrop provided by the human rights principles discussed in Chapter Two. People with mental health issues were denied procedural fairness in a variety of ways, such as being deprived of the opportunity to plead to a specified charge, or of an opportunity to raise fitness to plead as a distinct issue. In all of the trials where summary procedure was adopted, judges failed to give proper consideration to the mental health issues of the accused and justice was only achieved on appeal. All of the case studies raised the question of whether substantial resources could have been saved if appropriate diversions to mental health services were in place. In each case, it is arguable that early diversion might have prevented the deteriorating mental health of the accused, and more swiftly provided a pathway to recovery. In this thesis it is argued that a system that is compliant with human rights obligations would authorise courts to adjourn proceedings and direct the psychological assessment of the person; that comprehensive mental health liaison services should be available to assist this; and that mental health issues should be relevant in sentencing for contempt.

The approach outlined above and set out in detail in Chapters One and Two raises a number of important issues, set out briefly here, and developed further in Chapter Three.

First, in order for evidence of mental ill-health to exculpate an accused, there needs to be a connection established between the person's mental ill-health and the contumacious behaviour. For example, if a schizophrenic who was not medicated was experiencing a florid, paranoid episode at the relevant time, and told a judge to 'get fucked' in an aggressive tone of voice, then it might be arguable, even strongly arguable, that they lacked *mens rea* to commit the offence in that they did not *wilfully* commit the contempt. On the other hand, if a person who is schizophrenic, but medicated, tells a judge to 'get fucked' in an aggressive tone of voice, and the judge charges the person with contempt, then it may be arguable, even

strongly arguable, that their schizophrenia did not affect the wilfulness of their conduct at the relevant time, and that they should be punished for their contempt.

While a requirement for contempt to have been committed wilfully provides *some* protection for an accused person suffering mental ill-health, it provides a low threshold of *mens rea* and one that is easy for the prosecution to satisfy. For this reason it is likely that it will only be in a small subset of cases that a person's mental ill-health will negate a finding that they wilfully committed contempt. It is argued that wilfulness is an appropriate standard to apply in this context, because wilfulness requires advertence to consequences. This standard is necessary to ensure that a diagnosis of mental ill-health is not invoked inappropriately by people to blame their mental ill-health for contumacious behaviour over which they had control. (This recommendation of the thesis would not limit the power of courts to have regard to mental ill-health in sentencing).

So, for example, in a number of the cases analysed in Chapter Three, expert evidence indicated that the contemnor or alleged contemnor suffered from a personality disorder, and not a condition that affected their will at the relevant time. These disorders, such as obsessive compulsive disorder, are not classified as psychiatric conditions, *per se*, and are not, typically, readily treatable. Since some contemnors with personality disorders continue to appear in the courts and commit contempt after contempt, appearing not to respond to judicial attempts to manage their contumacious behaviour, even under pain of imprisonment, a real question can be raised whether any recommendations made by a court for treatment would be followed. Indeed, this phenomenon demonstrates a significant practical limit that would apply to any reform proposal that recommends referral pathways to mental health services: these services may not be effective, or referrals may be resisted entirely. Recovery may not be possible. In such cases, it is argued that rules governing abuse of process or vexatious litigation, should be applied to minimise the likelihood of further

disruptions to court processes. In such cases, the invocation of a rule requiring the leave of the court before proceedings are issued might be the only way possible to balance the human right of access to justice, on the one hand, and the need for a court to control order, on the other.

Finally, managing people with mental ill-health is a difficult job and more needs to be done to support judges in their work. The final chapter of the thesis argues that judges need to be provided with ongoing training to improve and maintain high standards of mental health literacy. This would help ensure that they are able to detect people with mental ill-health in their courtrooms and then make informed decision about how best to manage those court users. Further, in some cases, judges may need to be provided with mental health services themselves. Judges are not immune from mental health problems and they obviously have a pivotal role in contempt trials. Formal but confidential supports should be available to assist judges experiencing mental health challenges themselves, to assist them to remain calm and dispassionate in their dealings with difficult court-users. Again, given the lack of safeguards associated with the use of summary procedure – a procedure commonly employed in contempt trials – and the gravity of the consequences of such trials, some focus on the mental health of judges is warranted in this context.

The Council of Australian Governments, in its Roadmap for Mental Health Reform 2012-2022, said:

The Council of Australian Governments (COAG) is committed to mental health reform as an ongoing national priority. We are determined to keep working toward creating real improvement in the lives of people with mental illness, their families, carers and communities.

Our long term aspiration is for a society that: values and promotes the importance of good mental health and wellbeing; maximises opportunities to prevent and reduce the impact of mental health issues and mental illness; and supports people with mental health

issues and mental illness, their families and carers to live contributing lives.

The reforms recommended in this thesis, specifically substantive and procedural law reforms that accord with human rights principles, advance this objective. In the conclusion of this thesis, it is demonstrated that only the Family Court, which has adopted the recommendations in the 1987 Australian Law Reform Commission report, has an acceptable approach to contempt in the face of the court at present. The Family Court's approach provides two opportunities for the accused to lead evidence that his or her contempt in the face of the court was influenced by mental ill-health. The requirements that the accused *understand* the charge and that the contempt be *wilful* increases the likelihood that a person's mental ill-health will be considered, consistent with human rights principles. It is recommended that this approach should be accepted and implemented via a national, co-operative law reform initiative, to ensure uniformity across all Australian jurisdictions.

Chapter One

The Law of Contempt In the Face of the Court in Australia: Swift Justice or an Instrument of Oppression?

I INTRODUCTION

Chapter One of this thesis examines the law governing contempt in the face of the court. The first part of the chapter examines contempt in the face of the court, as distinct from other varieties of contempt, in both a historic and contemporary context. The bulk of the chapter then examines the law applicable in each Australian jurisdiction. Particular attention is paid to the issue of wilfulness as a component of a contempt charge. The chapter identifies how the law creates an undesirable culpability hazard for people experiencing mental health issues, and demonstrates why there is a need for reform.

II WHAT IS CONTEMPT IN THE FACE OF THE COURT?

A *Contempt In the Face of the Court Distinguished from Other Varieties of Contempt*

‘Contempt of court’ has been described as ‘the Proteus of the legal world, assuming an almost infinite diversity of forms’.¹ Generally, it is a collection of legal principles and procedures intended to protect the authority of courts and ensure the due administration of justice.² Broadly, two varieties exist: criminal contempt and civil contempt.

¹ Joseph Moskovitz, ‘Contempt of injunctions: civil and criminal’ (1943) 43 *Columbia Law Review* 780, 780.

² *Bell v Stewart* (1920) 28 CLR 419, 425, 426; *The King v Dunbabin; Ex parte Williams* (1935) 53 CLR 434, 446; *A-G v Newspaper Publishing Plc* [1988] Ch 333, 368.

There are, in turn, two types of criminal contempt. *Contempt in the face of the court* is conduct that takes place in or near a court,³ typically during court proceedings, that interferes with, or has the tendency to interfere with, the due administration of justice.⁴ Contempt in the face of the court can be distinguished from ‘scandalising the judges’, a variety of criminal contempt that is adjudged to occur when a person has made a statement that has the tendency to impair the authority of the courts, such as comments reflecting negatively on the impartiality of a judge.⁵ Scandalising the judges is said to impair confidence in the judiciary or detract from the influence of judicial decisions.⁶

Contempt in the face of the court and scandalising the judges can in turn be distinguished from civil contempts, which include ‘contempt by

³ The summary power of a court of record to punish contempt is not limited to conduct witnessed by the presiding judge. For example, a solicitor’s clerk was found on the roof of an English court-house in 1974 attempting to introduce laughing-gas into the air conditioning system of the courts and was charged with contempt (*Balogh v The Crown Court at St Albans* [1975] QB 73; (1974) 3 All ER 283). In *Mansell v Mignacca-Randazzo* [2013] WASCA 262 (20 November 2013) the Western Australian Court of Appeal held that a contempt had been committed by a prisoner who failed to appear by video-link from a prison to a court when he was directed to do so by a Magistrate on a charge of stealing.

⁴ *In Re Special Reference from the Bahama Islands* [1893] AC 138, 148; *McLeod v St Aubyn* [1899] AC 549; *R v O’Dogherty* (1848) 5 Cox CC 348; *R v Davies* [1906] 1 KB 32, 40; *R v Gray* [1900] 2 QB 36, 40; *In re Sashi Bhushan Sarbadhicary* (1906) 28 TLR 202; *Lewis v Ogden* (1984) 153 CLR 682, 688; *MacGroarty v Clauson* (1989) 167 CLR 251, 255 *sub nom MacGroarty v A-G (Qld)* (1989) 86 ALR 513, 515; *Parashuram Detaram Shamdasani v King-Emperor* [1945] AC 264, 268; *Re Bellanto; Ex parte Prior* [1963] SR (NSW) 190, 202; *Porter v The King; Ex parte Yee* (1926) 37 CLR 432, 433 (Isaacs J), 447 (Higgins J); *Gallagher v Durack* (1983) 152 CLR 238; *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 32.

⁵ *Bell v Stewart* (1920) 28 CLR 419; *R v Fletcher; Ex parte Kisch* (1935) 52 CLR 248; *R v Dunbabin; Ex parte Williams* (1935) 53 CLR 447; *Gallagher v Durack* (1983) 152 CLR 238, and also Henry Burmester, ‘Scandalising the Judges’ (1985) 15 *Melbourne University Law Review* 313; Oyiela Litaba, ‘Does the “Offence” of Contempt by Scandalising the Court have a valid place in the law of Modern Day Australia?’ (2003) *Deakin Law Review* 113; Michael Addo, *Freedom of Expression and the Criticism of Judges: A Comparative Study of European Legal Standards* (Ashgate, 2000).

⁶ *Parashuram Detaram Shamdasani v The King Emperor* [1945] AC 264, 268. Contempt in the face of the court typically takes place in the court during proceedings. Theoretically, there is no reason why it could not occur anywhere, so long as the contumelious nature of the conduct is felt within the court during proceedings (Cf *McKeown v The King* [1971] 16 DLR 390, 408). However proceedings need to be in train for contempt to take place; there is no contempt where the relevant proceedings are complete. It is not necessary that contempt in the face of the court involve actual physical disruption of a hearing or an impediment to its progress. Typically, though, contempt in the face of the court involves litigants interrupting legal proceedings and showing disrespect for the court in the court.

publication’ or ‘*sub judice* contempt’,⁷ disobedience to court orders,⁸ and contempt of Parliament.⁹

This thesis is particularly concerned with contempt in the face of the court.

B *Rationale and Historical Origins of Contempt In the Face of the Court*

The rules governing contempt in the face of the court are intended to ensure orderly judicial proceedings. They are intended to ensure that people who have business in the courts can participate in court proceedings without fear that they will be abused or assaulted. Recently, Logan J of the Federal Court observed:¹⁰

All contempts are serious. ... The reason ... is that they strike at the very heart of a feature of our society and our heritage in British justice. That is, they strike at a system of justice according to law, a system in which disputes between citizens, be they corporate citizens or individuals, are adjudicated where necessary by judges who enjoy independence, and who make decisions according to the laws of our country. Those decisions, when reflected in a court order, must, unless there is a reasonable excuse, be obeyed. ... The alternative to justice, according to law, is a system whereby the strong can prey upon the weak and where vigilantes supplant civilised behaviour.

Henry de Bracton, the distinguished thirteenth-century cleric and jurist, observed in *De Legibus et Consuetudinibus Anglae* that there ‘is no greater Contempt and Disobedience, for all persons within the Realm ought to be obedient to the King and within his Peace’.¹¹ The law of contempt originated from the medieval notion that the monarch ruled by divine right, and that any affront to the authority of the monarch ought to attract an

⁷ As to which, see New South Wales Law Reform Commission, *Contempt By Publication*, Report No 100 (2003) [1.10], and Australian Law Reform Commission, *Contempt*, Report No 35, (1987) ch 5.

⁸ As to which, see *Witham v Holloway* (1995) 183 CLR 525, 534; C J Miller, *Contempt of Court* (Clarendon, 3rd ed, 2000) 2–11.

⁹ *R v Richards; Ex parte Fitzpatrick and Browne* (1954) 92 CLR 157 and, further, John Waugh, ‘Contempt of parliament’ (2005) 26 *Adelaide Law Review* 29.

¹⁰ *Plastec Australia Pty Ltd v Plumbing Solutions and Services Pty Ltd (No 4)* [2012] FCA 657 [4].

¹¹ Quoted on the title page of John C Fox, *The History of Contempt of Court: The Form of Trial and the Mode of Punishment* (Clarendon, 1927; reprinted by Professional Books Limited, 1972).

immediate rebuke.¹² Resistance or affronts to the authority of the Crown and its emanations, including the courts, was considered contemptuous of royal authority and therefore warranted punishment.¹³ From its medieval inception in the twelfth century, *contemptus curiae* evolved into the crime of contempt, and by the fourteenth century, prosecutions for contempt of court were an established process for the restraint of disobedience to courts.¹⁴

The power to commit a person for contempt in the face of the court was later received into Australian colonial law along with the rest of the common law.¹⁵ The first reported exercise of the power to commit for contempt in New South Wales was in *R v Foley* on 4 November 1831.¹⁶ The prosecutrix in a rape trial was held to be in contempt for declining to give evidence and refusing a judicial direction that she should do so. In *Re Bunn*, on 1 March 1832, Dowling J, in a case in which a magistrate failed to attend the Court to participate as an assessor in a case, explained that ‘this is the king’s Supreme Court. It is a necessary incident of a Supreme Court of Record that it should have power to punish for contempts.’¹⁷ In what may be the first example of contempt in the face of the court in Australia, New South Wales Chief Justice Stephen committed two barristers (Richard Windeyer, ancestor of Justice Windeyer of the High Court of Australia, and also J B Darvall) for contempt in the face of the court on 23 December 1846 for coming to blows in court during a hearing.

C *The Varieties of Contempt In the Face of the Court*

The Privy Council once observed that ‘it is not possible to particularise the acts which can or cannot constitute contempt in the face of the court’,¹⁸ and

¹² Australian Law Reform Commission, above n 7, 16.

¹³ Fox, above n 11, 1. See also A H Pekelis, ‘Legal Techniques and Political Ideologies: A Comparative Study’ (1943) 41 *Michigan Law Review* 665.

¹⁴ Fox, above n 11, 1.

¹⁵ For further discussion see William Morison, *The System of Law and Courts Governing New South Wales* (Butterworths, 1994) [1.10]–[1.14].

¹⁶ [1831] NSWSupC 75. The principle that a court of the common law has an inherent jurisdiction to punish for contempt is discussed further later in this chapter.

¹⁷ [1832] NSWSupC 13.

¹⁸ *Izuora v The Queen* [1953] AC 327, 336.

the diverse examples to be found in Australian cases reinforce this observation. People have been convicted of contempt in the face of the court for threatening people in court,¹⁹ threatening reprisals against people when they leave the court,²⁰ abusing judges,²¹ refusing to answer questions or prevaricating,²² calling a judge racist,²³ being disrespectful,²⁴ taking off their clothes in court,²⁵ making a clenched-fist salute in court as a gesture of solidarity with people being tried for a crime,²⁶ tossing a coin to decide a

¹⁹ *Anon* (1631) 2 Dyer 1886n; 73 ER 416 (assaulting a judge); *R v Herring* (Unreported, NSWSC, No 70140 of 1990, 3 October 1991) (the defendant was given two years' imprisonment for escaping from the dock and climbing over the bench with the intention of assaulting the judge (Slattery AJ) before he was restrained); *Purdin v Roberts* (1910) 74 JP Jo 88; *Runting* [1989] Cr App R 243 (assaulting a witness); *R v Wigley* (1835) 7 C&P 4; 175 ER 3 (assaulting the accused); *Brown v Putman* (1975) 6 ALR 307 (assaulting counsel); *Re Perry; Ex parte Griffith* (1931) 34 WALR 66 (threatening a law clerk); *R v Rustom* [2005] NSWSC 61 (threatening the jury); *Mitchell v Smythe* [1894] 2 IR 351 (assaulting someone in the public gallery); *Principal Registrar, Supreme Court of New South Wales v Katelaris* [2001] NSWSC 724 (punching a barrister); *R v Phelps* [2009] EWCA 2308 [2010] 2 Cr App R (S) 1 (spitting on a court officer); *R v Huggins* [2007] EWCA Crim 732; [2007] 2 Cr App R 107 (shouting at the jury in a threatening fashion).

²⁰ *Sharples v DPP* [2011] QCA 249 ('Oh, he'll die — he'll die for that one'); special leave to appeal refused (*Sharples v DPP* [2012] HCASL 138, Gummow and Kiefel JJ).

²¹ *Moore-McQuillan v Registrar of the Supreme Court* [2009] SASC 265 [12] ('thank you for being a cunt'); *Allbeury v Corruption and Crime Commission* [2012] WASCA 84 [32] (repeatedly saying 'get fucked' or 'fuck off' but also refusing to answer questions in a Corruption Commission inquiry into organised crime).

²² *Nicholls v DPP (SA)* (1993) 66 A Crim R 517 (journalist refused to disclose source in criminal trial); *Australian Securities and Investment Commission v Albarran (No 2)* [2008] FCA 386; *Allbeury v Corruption and Crime Commission* [2012] WASCA 84 [33]–[34] (refusing to answer questions in a Corruption Commission inquiry into organised crime); *Registrar of the Court of Appeal v Gilby* [1991] NSWCA 235, 1; *Smith v R* (1991) 25 NSWLR 1, 9; *Registrar, Supreme Court of South Australia v Zappia* [2003] 86 SASR 388, 399–400; *R v Phillips* (1983) 78 Cr App R 88, 94; *Allen v The Queen* [2013] VSCA 44; *R v Allan Dennis Pena*; *R v RY* [2007] NSWDC 190; *Registrar, Criminal Division, Supreme Court of New South Wales v Glasby* [1999] NSWSC 846 (contemnor refused to answer questions in her husband's murder trial and was sentenced to six months — the judge took into account the fact that her husband was a vicious, brutal man, that the contemnor had a history of substance abuse and had attempted suicide twice). See also *Allbeury v Corruption and Crime Commission* [2012] WASCA 84 [232]; *Registrar of the Supreme Court of South Australia v Zappia* [2003] SASC 276.

²³ *R v Hill* [1986] Crim LR 457.

²⁴ *Prothonotary of the Supreme Court of NSW v Katelaris* [2008] NSWSC 389 (calling a judge ignorant in the presence of the jury; comparing the jury to sheep, notably, in an interview with a television reporter *outside* the court).

²⁵ *R v Ogawa* [2009] QCA 307; see also Amelia Bentley, 'Stalker's howls of anguish at verdict', *Brisbane Times*, 27 March 2009.

²⁶ *Ex parte Tuckerman; Re Nash* [1970] 3 NSW 23, discussed by Danielle Tyson in *Sex, Culpability, and the Defence of Provocation* (Routledge, 2013) 72 and Michael Chesterman, 'Disorder in the Court: The Judge's Response' (1987) 10 *University of New South Wales Law Journal* 32.

verdict,²⁷ drawing lots to decide a verdict,²⁸ throwing bags of paint at a judge²⁹ and attempting to release laughing gas in court.³⁰ In one memorable case, a person who was dissatisfied with a verdict threw a dead cat at an exceedingly tolerant judge, who then said, ‘if you do that again, I shall commit you for contempt’.³¹

D Questions to Consider

The bizarreness of some of these examples compels a number of questions. Is it possible that some or even many of these people were experiencing mental health issues that caused them to behave in such a way? If so, should their mental health have been taken into account when they were tried, to determine whether they were culpable? If a person was found guilty of wilful contempt even though they were animated by mental illness, should their mental health have been taken into account when they were sentenced?³² Should steps have been taken to refer these contemnors to mental health services, where that was appropriate? Could more have been done at an earlier stage of proceedings to divert people to mental health services?

A number of significant reasons exist as to why a more sophisticated procedure is warranted to take into account the possible mental health issues of people who may be involved in contempt in the face of the court. A contempt prosecution, particularly one conducted by way of summary procedure, can unfold very quickly, leaving even people with *sound* mental health floundering. Summary procedure conducted after an oral charge could present very considerable difficulties, perhaps even insuperable difficulties, for people with many types of mental health issues. For

²⁷ *Foster v Hawden* (1676) 2 Levinz’s King’s Bench and Common Pleas Reports 205; 83 ER 520.

²⁸ *Langdell v Sutton* (1736) Barnes 32; 94 ER 791.

²⁹ *Wilson v Prothonotary* [2000] NSWCA 23.

³⁰ *Balogh v Crown Court at St Alban’s* [1974] 3 All ER 283.

³¹ Sir Victor Windeyer, ‘Contempt of Court’ in Richard Blackburn (ed) *Judicial Essays: Being a Selection from the papers read in the Conference of Australian Supreme Court Judges held in 1972, 1973 and 1974* (Victoria Law Foundation, 1975) 17–34, 18–19.

³² *R v Verdins* [2007] VSCA 102.

example, some mental health conditions are characterised by auditory processing disorders. Wernicke's Aphasia leaves some people unable to understand language in its spoken form (such as by a judge in a trial), and the sufferers cannot express themselves meaningfully using language (for example, when speaking to a judge). A person with Wernicke's Aphasia is typically unaware of his or her language deficits. He or she can swear at you but have no control over it, and may not even understand his or her own profanity.³³

Likewise, a person with Obsessive Compulsive Disorder may present in the same way, committing contempt in the face of the court while apparently failing to understand how damaging this is to his or her cause. Tourette Syndrome is an inherited neuropsychiatric disorder, characterised by motor or vocal tics. It is estimated that 10 per cent of people who have Tourette Syndrome experience coprolalia, or involuntary swearing. A person with this mental disorder may swear at a judge and not really understand why he or she is doing it. Similarly, a person experiencing paranoia caused by schizophrenia and/or drug use may lack the capacity to control his or her tongue. A person with Foetal Alcohol Spectrum Disorder may present with a range of challenging behaviours such as reduced impulse control and violent outbursts, and can be so cognitively impaired that they lack fitness to plead. There is every reason for judges to be informed by evidence relating to the mental state of a person who is alleged to have committed a criminal offence.

It is difficult to overestimate the capacity for tolerance of a judge who forgives a litigant for declining to throw a dead cat at them. Plainly, the response of the judge to contemptuous behaviour is pivotal in a contempt prosecution. Is there a case for anger-management training for judges? Is there a case for further judicial education about the management of difficult litigants?

³³ Maria Nystrom, 'Aphasia — A study on the loss of the world of symbols' (2006) 1 *International Journal on Qualitative Studies on Health and Well-being* 38.

These questions animate this thesis. The first step in the analysis is to consider how Australian law operates at present and to identify the tensions that underpin it. The next step is to consider how these tensions can be resolved in a way that ensures that courts retain the power to ensure order in the courtroom, but in a manner that is mindful of the mental health of the participants.

III THE LAW GOVERNING CONTEMPT IN THE FACE OF THE COURT

When the common-law principles of contempt were received in colonial Australia, only one jurisdiction existed: New South Wales. But the birth of separately administered colonies, then Federation, then territory self-government, together with the development of intermediate courts in many of these jurisdictions, necessitates analysis of a more complicated web of principle: the law of contempt in the four Commonwealth jurisdictions (the High Court, Federal Court, Family Court and Federal Circuit Court) and each of the eight states and territories. To reduce the complexity and enable more efficient analysis, the Commonwealth jurisdictions will be considered first, and the states and territories will be divided into the common-law criminal jurisdictions (the Australian Capital Territory, New South Wales, South Australia and Victoria) and the code criminal law jurisdictions (the Northern Territory, Queensland, Tasmania and Western Australia). The specialist mental health courts will not be considered as a predicate to their operation is recognition of the mental ill-health of the relevant person. The analysis will include consideration of the substantive law relating to the offence of contempt in the face of the court, as well as the procedural law governing prosecution. Sentencing options will also be considered.

A *The Commonwealth Courts*

Commencing at the apex of the federal judicature, the High Court's power to commit for contempt is expressed in the following terms in s 24 of the *Judiciary Act 1903* (Cth):

The High Court shall have the same power to punish contempts of its power and authority as is possessed at the commencement of this Act by the Supreme Court of Judicature in England.

This provision has been interpreted as referring to the common law in 1903.³⁴ Certainly, when the *Judiciary Act* commenced, the Supreme Court of Judicature in England had power to punish for contempt, including contempt in the face of the court.³⁵

Federal statutes confirm that the Federal Court,³⁶ Family Court³⁷ and Federal Circuit Court of Australia³⁸ each enjoy the same power to commit for contempt as the High Court. As the offence of contempt in Commonwealth courts is not defined under statute, the common law applies. (The elements of the offence of contempt in the face of the court at common law are considered further shortly.)

Part 11 of the *High Court Rules* deals with the topic of contempt. Rule 11.01 deals with procedure for contempt in the face of the court:

³⁴ *Australian Competition & Consumer Commission v World Netsafe Pty Ltd* [2003] FCA 159 [31] (Spender J); *Pattison (Trustee), in the matter of Bell (Bankrupt) v Bell* [2007] FCA 137 [43]–[44]; *Australian Competition and Consumer Commission v Hercules Iron Pty Ltd* [2008] FCA 1182 (8 August 2008) [3]; *Ali v Collection Point Pty Ltd, in the matter of Collection Point Pty Ltd* [2010] FCA 1066 (28 September 2010) [7]. 1903 was selected as a reference point because it was in that year that the *Judiciary Act* was enacted, and the High Court of Australia, as envisaged by the *Constitution* (Cth), established: *Australian Competition & Consumer Commission v Jones (No 3)* [2010] FCA 908 (17 August 2010) [29].

³⁵ *Australasian Meat Industry Employees' Union v Mudginberri Station Pty Ltd* (1986) 161 CLR 98, 105–6; *Alfred v Construction, Forestry, Mining and Energy Union (No 2)* [2011] FCA 557 [12].

³⁶ The *Federal Court of Australia Act 1976* (Cth) gives that court the same power and authority to control contempt as the High Court of Australia: see *Australian Competition & Consumer Commission v INFO4PC.com Pty Ltd* [2002] FCA 949 [2]; *Australian Competition & Consumer Commission v World Netsafe Pty Ltd* [2003] FCA 159 [31] (Spender J); *Pattison (Trustee), in the matter of Bell (Bankrupt) v Bell* [2007] FCA 137 [43]–[44]; *Australian Competition and Consumer Commission v Hercules Iron Pty Ltd* [2008] FCA 1182 (8 August 2008) [3]; *Ali v Collection Point Pty Ltd, in the matter of Collection Point Pty Ltd* [2010] FCA 1066 (28 September 2010) [7]. French J (as his Honour then was) also said in *Mercator Property Consultants Pty Ltd v Christmas Island Resort Pty Ltd* [1999] FCA 1572 (11 November 1999) [21] that a power to commit for contempt would properly be regarded to be incidental to the vesting of original jurisdiction in the Federal Court under a Commonwealth law.

³⁷ *Family Law Act 1975* (Cth) ss 35 and 112AP, and *Rules of Court*. These provisions are discussed in *A Bank v Coleiro* [2011] FamFCAFC 157 [4]–[56] (Bryant CJ).

³⁸ *Federal Circuit Court of Australia Act 1999* (Cth) s 17.

11.01.1 When it is alleged, or it appears to the Court, that a person (*the alleged contemnor*) has been guilty of contempt of Court, committed in the face of the Court or in the hearing of the Court, the presiding Justice may, by oral order, direct that the alleged contemnor be arrested and brought before the Court forthwith or may issue a warrant under the Justice's hand for the arrest of the alleged contemnor.

11.01.2 When the alleged contemnor is brought before the Court, the Court shall:

- (a) orally inform the alleged contemnor of the contempt charged;
- (b) require the alleged contemnor to make his or her defence to that charge;
- (c) after hearing the alleged contemnor proceed then or after adjournment to determine the charge; and
- (d) make whatever order for the punishment or discharge of the alleged contemnor as is just.

11.01.3 Unless the Court admits the alleged contemnor to bail he or she shall be detained in custody as directed by the Court or a Justice until the charge is heard and determined.

Part 42 of the *Federal Court Rules* and part 19 of the *Federal Circuit Court Rules* also deal with contempt in the face of the court and outline the procedure to be adopted. The provisions are drafted in substantially the same terms as those set out under the *High Court Rules* detailed above.

The *High Court Rules*, which are developed by the High Court Rules Committee but have the status of regulation and therefore condition the common law, reflect the common law's traditional preference for summary procedure, with wide discretion available to the court to act swiftly in the face of contempt. The court can proceed by way of an oral charge (which can be issued in the heat of the moment). The judge can then conduct a hearing, convict and punish the accused. Neither the *High Court Rules* nor the *Federal Court Rules* provide a right to a written charge. There is no *requirement* for the judge to consider whether the matter is one that needs to be heard immediately or whether it must instead be adjourned for hearing on a later date. As the court can proceed without an adjournment, the litigant may not have the opportunity to use an adjournment to seek legal advice. There is no requirement that the matter be assigned to a different adjudicator. There is no opportunity for the accused to formally

plead to the charge (which would enliven the associated safeguard of an inquiry to determine whether the accused is fit to plead to the charge). As will be demonstrated in this chapter and the next, many of the common-law procedural safeguards associated with the criminal trial are not available to a person accused of contempt in the face of the court. This thesis will advocate reform to ameliorate these defects in contemporary practice.

The *Family Law Act 1975* (Cth), which applies to both the Family Court and the Federal Circuit Court exercising jurisdiction under that Act, adopts the procedure of the High Court,³⁹ but also makes provision in the *Family Law Rules* requiring the court to:⁴⁰

- (a) inform the respondent of the allegation;
- (b) ask the respondent whether the respondent wishes to admit or deny the allegation;
- (c) hear any evidence supporting the allegation;
- (d) ask the respondent to state the response to the allegation;
- (e) hear any evidence for the respondent; and
- (f) determine the case.

The Family Court has held that the following principles apply when the relevant provisions of the *Family Law Act* and *Family Law Rules* are invoked to try a person for contempt in the face of the court in that jurisdiction.⁴¹ First, while the charge can be laid orally or in writing, it is essential that the alleged contemnor understand the charge that is being laid.⁴² Second, the decision to proceed to hear the charge immediately is to be regarded as an exceptional step to take; it must be necessary in all the circumstances. Summary procedure should only be adopted in serious cases because that procedure, which involves the court acting as both prosecutor and judge, conflicts with fundamental principles of justice and could be seen

³⁹ *Family Law Act 1975* s 35.

⁴⁰ Ibid s 112AP and r 21.08 of the *Family Law Rules 2004* (Cth).

⁴¹ *A Bank & Coleiro* [2011] FamCAFC 157 [19].

⁴² Ibid [17]; *Bienstein v Bienstein* [2001] FamCA 349; *Coward v Stapleton* (1953) 90 CLR 373.

as diminishing the authority of the court.⁴³ This rule is informed by common-law principle: in many cases it has been stated that the power to punish for contempt is an exceptional and significant power that should be exercised sparingly and with great caution.⁴⁴ In the Family Court, ordering an adjournment so that another judicial officer can hear the matter is regarded as typical. Third, the alleged contemnor should be given the opportunity to consider the charge, and the court should adjourn for that purpose if necessary.⁴⁵ Fourth, the court should determine whether the charge requires the alleged contemnor to be held in custody, and hear submissions on the issue. Fifth, in the event the alleged contemnor pleads not guilty, the court must give him or her the opportunity to present evidence and make submissions relevant to the defence and determination of the charge.⁴⁶ Sixth, having heard the defence, the judge can determine the charge beyond reasonable doubt and, if established, convict the alleged contemnor.⁴⁷ Notably, the contempt must be *wilful*.⁴⁸ Seventh, the judge can make an order for punishment if the person is convicted, or discharge if not. If sentencing, the judge must have regard to relevant sentencing principles.⁴⁹ Finally, the court must give reasons for the decision to convict and sentence the contemnor.

⁴³ *A Bank & Coleiro* [2011] FamCAFC 157 [16]; *Clampett v A-G (Cth)* [2009] FCAFC 151; (2009) 260 ALR 462; *AGF & LLS* [2005] FamCA 13; (2005) FLC 93-210 [23]; *Fraser v The Queen* (1984) 3 NSWLR 212, 213, 224-5 (Kirby P and McHugh JA); *Rich v A-G (Vic)* [1999] VSCA 14. The Full Family Court has also held that because s 112AP of the *Family Law Act* refers to 'punishment' and not 'sentencing', the general law criminal relating to sentencing does not apply: *Rand v Rand* [2008] FamCA 281 [27]-[30].

⁴⁴ *Kift v R* [1993] VicRp 51; [1993] 1 VR 703, 707-8; *Balogh v St Albans Crown Court* [1975] QB 73, 85 (Denning MR), 89-91 (Stephenson LJ); *Keeley v Brooking* (1979) 143 CLR 162, 170-1, 186; *Fraser v the Queen* (1984) 3 NSWLR 212, 224-5; *Clampett v A-G (Cth)* (2009) 260 ALR 462 [158] (Greenwood J); *Zukanovic v Magistrates Court of Victoria at Moorabbin* [2011] VSC 141 [32].

⁴⁵ *Ibid.*

⁴⁶ *Ibid.*

⁴⁷ *A Bank & Coleiro* [2011] FamCAFC 157 [13]; *Witham v Holloway* (1995) 183 CLR 525; *Tate & Tate* [2002] FamCA 356; (2002) FLC 93-107.

⁴⁸ *A Bank & Coleiro* [2011] FamCAFC 157 [15]; *Bande & Cade* [2011] FamCAFC 93.

⁴⁹ *A Bank & Coleiro* [2011] FamCAFC 157 [18]; *LGM v CAM (Contempt)* [1008] FamCAFC 1; (2008) FLC 93-355; *Kendling & Kendling (Contempt)* (2008) FLC 93-384.

Under the *High Court Rules*, the only orders contemplated apart from discharge are fines or imprisonment.⁵⁰ The *Federal Court Rules* do not specifically mention the power to impose a fine, but rather speak more generally of the power to make an order for the person's discharge or punishment.⁵¹ Both pieces of legislation allow the court to discharge the contemnor before the end of the prison term.⁵² The *Family Court Rules* make no mention of penalty. However, the *Family Law Act* allows a court to commit a person to prison, or fine the contemnor, or both,⁵³ along with the option of discharge prior to the expiration of the term.⁵⁴ The Act also allows for the suspension of punishment or the giving of security for good behaviour.⁵⁵

The Family Court's approach, by requiring that the accused *understand* the charge, and by requiring wilfulness on the part of the accused, provides more protection to the accused than the approaches taken in the other Commonwealth jurisdictions. The Family Court's approach provides two opportunities for the accused to lead evidence that his or her contempt in the face of the court was influenced by mental ill-health. The requirements that the accused *understand* the charge and that the contempt be *wilful* therefore increases the likelihood that a person will be found not guilty, or have his or her punishment reduced on the ground of mental ill-health.⁵⁶

B *The Common-Law Jurisdictions*

For convenience, and also to reflect a distinction that is relevant to Australian criminal lawyers, the treatment of contempt principles below will be divided into the common-law jurisdictions and the code jurisdictions.

⁵⁰ *High Court Rules 2004* (Cth) reg 11.04.1(a).

⁵¹ *Federal Court Rules 2011* (Cth) reg 42.02(d).

⁵² *High Court Rules 2004* (Cth) reg 11.04.4, *Federal Court Rules 2011* (Cth) reg 42.22.

⁵³ *Family Law Act 1975* (Cth) s 112AP(4).

⁵⁴ *Ibid* s 112AP(7).

⁵⁵ *Ibid* s 112AP(6).

⁵⁶ *R v Verdins* [2007] VSCA 102.

1 *The Australian Capital Territory*

Starting in the smallest jurisdiction but at the beginning of the alphabet, the Australian Capital Territory ('ACT') Supreme Court has been vested with original jurisdiction necessary to administer justice in the Territory.⁵⁷ As a superior court of record, it has an inherent jurisdiction to punish for contempt in the face of the court.⁵⁸ As Menzies J explained in *R v Forbes; Ex parte Bevan*:⁵⁹

'Inherent jurisdiction' is the power which a court has simply because it is a court of a particular description. Thus the Courts of Common Law without the aid of any authorizing provision had inherent jurisdiction to prevent abuse of their process and to punish for contempt.

The ACT *Court Procedures Rules 2006* apply to both the Supreme and Magistrates Courts (there is no intermediate court in the ACT). The ACT Magistrates Court has the same power to deal with contempt of court as the Supreme Court.⁶⁰

Since the offence of contempt is not defined, the common law applies in both courts to define the offence and regulate the applicable procedure.

In relation to the *procedure* for dealing with contempt in the face of the court, the ACT Rules require only that the court must tell the person orally of the contempt charged and ask the person to 'show cause' as to why punishment should not be imposed for contempt of court. This is consistent with the broad approach that is reflected in the common law.

In relation to punishment, the ACT Rules empower the court to make an order for the person's punishment or discharge.⁶¹ Given that the Rules specifically allow the court to punish the person under the *Crimes*

⁵⁷ *Supreme Court Act 1933* (ACT) s 20.

⁵⁸ *R v Dunbabin; Ex parte Williams* (1935) 53 CLR 434, 442. The concept of inherent jurisdiction is explained later in this chapter.

⁵⁹ (1972) 127 CLR 1, 7. See also *Grassby v The Queen* (1989) 168 CLR 1 and I H Jacob, 'The Inherent Jurisdiction of the Court' (1970) 23 *Current Legal Problems* 23, 27.

⁶⁰ *Magistrates Court Act 1930* (ACT) s 307(2).

⁶¹ *Court Procedures Rules 2006* (ACT) reg 2504(5).

(Sentencing) Act 2005 (ACT),⁶² the full range of sentencing options are available, including prison, suspended sentences, fines and community-based orders.⁶³ Without limiting the application of the general sentencing regime, the ACT Rules also contemplate that the court may make an order for punishment on conditions, including suspension of punishment during good behaviour, with or without the giving of security.⁶⁴ The court can also order the release of a person before the end of his or her prison term.⁶⁵

Before turning to consider the relevant principles in the remaining common-law jurisdictions, it is important to note the divergence of approach between the procedure adopted by the Family Court under the *Family Law Rules* detailed above, and the position reflected in the ACT Rules, which require only that the court must communicate the charge of contempt orally⁶⁶ and then ask the person to show cause why punishment should not be imposed. This constitutes a hearing, but it can be a most rudimentary one. The Family Court's approach, by requiring that the accused understand the charge, and by requiring wilfulness on the part of the accused, provides more protection to the accused than the approaches taken in the ACT or in the other Commonwealth jurisdictions. The requirements that the accused understand the charge and that the contempt be wilful provides additional exculpatory possibilities. These requirements also increase the likelihood that a convicted contemnor might have his or her punishment reduced on the ground of mental ill-health.⁶⁷

The ACT has enacted the *Human Rights Act 2004*, and, in some future case, it could be argued that relevant human rights principles that might be drawn from the *International Covenant on Civil and Political Rights* should apply to ensure that people with mental ill-health who are

⁶² Ibid reg 2506.

⁶³ *Crimes (Sentencing) Act 2005* (ACT), s 9 lists the sentencing options available.

⁶⁴ *Court Procedures Rules 2006* (ACT) reg 2506(4).

⁶⁵ Ibid reg 2506(5).

⁶⁶ *Coward v Stapleton* (1953) 90 CLR 573.

⁶⁷ *R v Verdins* [2007] VSCA 102.

charged with contempt are dealt with appropriately in that jurisdiction.⁶⁸ The human rights principles that are relevant to consider in this context are identified and reviewed extensively in Chapter Two of the thesis. To date, no person charged with contempt in the face of the court in an Australian Capital Territory court has sought to invoke the ACT *Human Rights Act* and the principles enshrined therein to argue that their mental ill-health had not been, and should have been taken into account.

2 *New South Wales*

The power of the Supreme Court to punish for contempt is found in ss 22 and 23 of the *Supreme Court Act 1970* (NSW), which provide:

22 The Supreme Court of New South Wales as formerly established as the superior court of record in New South Wales is hereby continued.

23 The Court shall have all jurisdiction which may be necessary for the administration of justice in New South Wales.

The offence of contempt in the face of the court is not expressly defined under statute in either the Supreme, District or Local Court jurisdictions, and so the common law applies.

The Supreme Court's rules relating to contempt in the face of the court set out a procedure that is essentially the same as the procedure set out in Rule 11.01 of the *High Court Rules*. Rule 55.3 of the *Supreme Court Rules* require the court to cause the 'contemnor'⁶⁹ to be informed orally of the contempt for which he or she has been charged, to require the person to make his or her defence to the charge, and, after hearing him or her, to

⁶⁸ For further details relating to the operation of the charters, see Simon Evans and Carolyn Evans, 'Legal redress under the Victorian Charter of Human Rights and Responsibilities', (2006) 17 *Public Law Review* 264.

⁶⁹ In the Supreme Court and District Court of NSW and the Supreme Court of Western Australia, the term 'contemnor' is defined to mean 'a person guilty or alleged to be guilty of contempt of court': *Supreme Court Rules 1970* (NSW) s 55.1; *District Court Act 1973* (NSW) s 199(1); *Rules of the Supreme Court 1971* (WA) O 55 r 1. The use of the term 'contemnor' to refer to both the guilty and the not guilty has been criticised for being inconsistent with the presumption of innocence: see *Keeley v Brooking* (1979) 143 CLR 162, 186.

determine the charge and make an order. Unlike the ACT, this procedure provides the opportunity for a formal (represented) defence.

The court can punish a convicted contemnor by making an order of imprisonment, issuing a fine, or both. It can order suspension of the punishment with or without security.⁷⁰ The court may also discharge the contemnor before the expiry of a prison term for the offence.⁷¹

The District Court of New South Wales ('NSW') has similar contempt powers to the Supreme Court. It adopts a similar, summary procedure for prosecutions: the court is required to inform the contemnor of the contempt orally, require the contemnor to make his or her defence, and then determine the matter.⁷² The power to punish, however, is more limited than in the Supreme Court. The court may order imprisonment for a term, and may order a suspended punishment with or without security. However, fines cannot exceed 20 penalty units and imprisonment cannot exceed 28 days.⁷³

The Local Court has exactly the same power to commit for contempt of court as the District Court.⁷⁴ The *Crimes (Sentencing Procedure) Act 1999* appears to apply in criminal contempt cases. There is no express exclusion of such cases; however, given that punishment is expressly provided for under the contempt provisions described above, the sentencing options available under that Act would presumably be unavailable on the basis of the application of the principle that penal laws are construed strictly.⁷⁵

3 *South Australia*

The Supreme Court of South Australia is a superior court of record that has general jurisdiction.⁷⁶ While conduct amounting to contempt in the face of the court is not defined (and therefore the common law applies in relation to

⁷⁰ *Supreme Court Rules 1970* (NSW) s 55.13.

⁷¹ *Ibid.*

⁷² *District Court Act 1973* s 199(3).

⁷³ *Ibid* s 199.

⁷⁴ *Local Court Act 2007* s 24.

⁷⁵ *Potter v Minahan* (1908) 7 CLR 277.

⁷⁶ *Supreme Court Act 1935* (SA) ss 6 and 17.

the offence), Chapter 14 of the *Supreme Court Civil Rules 2006* sets out a relatively detailed procedure for prosecutions.

Where it is necessary to deal with contempt in the face of the court urgently, the court must formulate a written charge containing reasonable details of the alleged contempt and have the charge served on the accused.⁷⁷ Where the matter is not urgent, the Rules set out a separate procedure requiring the Registrar to formulate a written charge and issue the person with a summons.⁷⁸ The court dealing with the charge will then hear relevant evidence for and against the charge from the prosecutor and the accused. The court may, on its own initiative, call witnesses who may be able to give relevant evidence. At the conclusion of the evidence, the court will allow the prosecutor and the accused a reasonable opportunity to address the court on the question of whether the charge has been established. If, after hearing the evidence and representations from the prosecutor and the accused, the court is satisfied beyond reasonable doubt that the charge has been established, the court will find the accused guilty of the contempt.⁷⁹

The Rules expressly require the court, if it finds the accused guilty of the contempt, to allow the prosecutor and the accused a reasonable opportunity to make submissions on penalty.⁸⁰ In relation to punishment, the court may punish contempt by way of fine, imprisonment, or both. Alternatively, the court may release a person into an undertaking to observe conditions determined by the court. The court can cancel or reduce a penalty. The penalty can be made on conditions and the penalty can be suspended on conditions.⁸¹

⁷⁷ *Supreme Court Civil Rules 2006* (SA) s 301.

⁷⁸ *Ibid* s 302.

⁷⁹ *Ibid* s 305(3).

⁸⁰ *Ibid* s 305(3)(e).

⁸¹ *Ibid* s 306.

The District Court of South Australia has the same power to deal with contempt that the Supreme Court has in respect of contempt of the Supreme Court.⁸²

To reiterate, South Australian procedure is notable because it requires a written charge. It contemplates an adjournment and representation. The court can also call witnesses, leaving open the possibility that a properly informed judge could appraise himself or herself as to the mental health of the accused, perhaps by directing the Registrar to lead evidence or by appointing an *amicus curiae* to do so.

Unlike the common-law courts already considered, the offence of contempt in the face of a South Australian magistrate is defined under statute. A person is guilty of contempt if he or she interrupts the proceedings of the court, misbehaves before the court, insults a magistrate, Registrar or other officer of the court who is acting in the exercise of official functions, or refuses, in the face of the court, to obey a lawful direction of the court. There is no requirement that the person act 'wilfully'.⁸³

The legislation is silent on procedure; however, the articulation of the charge carries, by implication, a requirement that the gist of the accusation would need to be communicated. The Act allows the magistrate to punish a contempt by imposing a fine,⁸⁴ or the magistrate may commit a person to prison for a specified term,⁸⁵ or until the contempt is purged.⁸⁶ Section 4 of the *Criminal Law (Sentencing) Act 1988* (SA) states that the powers conferred on a court by that Act are in addition to, and do not derogate from, the powers conferred by any other Act or law to impose a penalty upon, or make any order or give any direction in relation to, a person found guilty of an offence. Section 5 states that nothing in the Act affects the powers of a

⁸² *District Court Act 1991* (SA) s 48.

⁸³ *Magistrates Court Act 1991* (SA) s 45.

⁸⁴ Not exceeding a Division 5 fine under the *Magistrates Court Act 1991* (SA).

⁸⁵ Not exceeding a Division 5 imprisonment under the *Magistrates Court Act 1991* (SA) s 46.

⁸⁶ *Magistrates Court Act 1991* (SA) s 46.

court to punish a person for contempt of that court (that is to say, common-law principles would apply).

4 *Victoria*

The Supreme Court of Victoria is a superior court of record and has general jurisdiction, including power to commit for contempt in the face of the court.⁸⁷ The procedure is described in the *Supreme Court (General Civil Procedure) Rules 2005*. As in New South Wales, the court must inform the person of the contempt with which he or she is charged, but there is no requirement to do so in writing. Thereafter the court is to adopt such procedure ‘as in the circumstances the court thinks fit’.⁸⁸ The court may punish by committal to prison, by fine, or both.⁸⁹ The court may also make an order for punishment on terms,⁹⁰ including a suspension of punishment.⁹¹

The County Court has exactly the same powers in respect of contempt in the County Court that the Supreme Court has in the Supreme Court,⁹² and exactly the same powers in relation to punishment.⁹³

A similar scheme operates at the Magistrate Court level. As in the Supreme and County Courts, if it is alleged or it appears to a Victorian magistrate that a person is guilty of contempt in the face of the court, the court may, by oral order, arrest the person and have the person brought before the court, and the magistrate may then adopt any procedure for the prosecution and trial of the contempt as he or she thinks fit.⁹⁴ Sentencing is, however, limited to a maximum of six months’ imprisonment or a fine of not more than 25 penalty units.⁹⁵ The court may order a person’s discharge

⁸⁷ *Constitution Act 1975* (Vic) s 76.

⁸⁸ *Supreme Court (General Civil Procedure) Rules 2005* (Vic) reg 75.03.

⁸⁹ *Ibid* reg 75.11.

⁹⁰ *Ibid* reg 75.11(4).

⁹¹ *Ibid* reg 75.12.

⁹² *County Court Act 1958* (Vic) s 54.

⁹³ *County Court Civil Procedure Rules 2008* (Vic) reg 75.11.

⁹⁴ *Magistrates Court Act 1989* (Vic) s 133.

⁹⁵ *Ibid* s 133(4).

before the end of his or her prison term.⁹⁶ The court may also accept an apology made by a person who has committed contempt (or, conceivably, on his or her behalf) and may remit any punishment either wholly or in part.⁹⁷

The offence of contempt in the face of the court is not expressly defined under statute in either of the Supreme, County or Magistrate Court jurisdictions, and so the common law applies.

Like the ACT, Victoria has enacted a *Charter of Human Rights and Responsibilities*, and, while no cases have been decided on this question to date, it is conceivable that these statutes could affect the exercise of the power to commit for contempt within these jurisdictions.⁹⁸ As in the Australian Capital Territory, it could be argued that relevant human rights principles that might be drawn from the *International Covenant on Civil and Political Rights* should apply to ensure that people with mental ill-health who are charged with contempt are dealt with appropriately in that jurisdiction. Again, the human rights principles that are relevant to consider in this context are identified and reviewed extensively in Chapter Two of the thesis. To date, no person charged with contempt in the face of the court in a Victorian court has sought to invoke the *Charter of Human Rights and Responsibilities* in order to challenge the way they have been dealt with by the court.

5 Summary of the Common-Law States

The common-law definition of the offence of contempt in the face of the court applies in each of the common-law jurisdictions at every level of the court system with the exception of the South Australian Magistrate Court. Procedurally, each of the superior courts of the ACT, New South Wales and Victoria retain power to commit for contempt in the face of the court after an oral charge. In South Australia, a written charge is required, along with

⁹⁶ Ibid s 133(5).

⁹⁷ Ibid s 133(6).

⁹⁸ Simon Evans and Carolyn Evans, 'Legal redress under the Victorian Charter of Human Rights and Responsibilities' (2006) 17 *Public Law Review* 264.

a 'reasonable opportunity' for the prosecution and defence to make submissions on penalty.

The South Australian approach, by requiring a written charge, practically necessitates an order of adjournment to allow for the writing of the charge, particularly where the contempt is continuing (for example, when a contemnor is shouting over the top of a judge who is preparing the charge). This might provide a person experiencing mental ill-health with an opportunity to be removed from the stressful environment of the court. It might also provide the opportunity for the person to access legal representation.

As for sentencing, the majority decision of the New South Wales Court of Appeal in *Prothonotary v Wilson*⁹⁹ (to be reviewed extensively in Chapter 3 below) confirms that courts may have regard to mental health issues when sentencing a person who has committed contempt in the face of the court. In that case, Wilson, who threw two bags of paint at a judge, was convicted of contempt in the face of the court and imprisoned for two years. He had Obsessive Compulsive Disorder and declined to appeal. Ultimately persuaded to do so, a majority of the Court concluded that Wilson's mental health issues should have been taken into account in sentencing. The case is likely to be followed in the common-law contempt jurisdictions.

In review, the South Australian approach, while providing more procedural fairness than the approach in the other common-law jurisdictions, nonetheless falls short of the approach taken in the Family Court, for the reasons detailed earlier. As noted above, the Family Court provides two opportunities for the accused to lead evidence that his or her contempt in the face of the court was the product of mental ill-health. First, the requirement that the accused understand the charge, and second, the requirement that the contempt be *wilful*, increase the likelihood that a

⁹⁹ [2000] NSWCA 23.

person will be found not guilty, or have their punishment reduced on the ground of mental ill-health.¹⁰⁰

C *The Code Jurisdictions*

1 *The Northern Territory*

The Northern Territory *Criminal Code* does not affect the authority of a Northern Territory court to punish a person summarily for contempt in the face of the court.¹⁰¹

As a superior court of record, the Northern Territory Supreme Court has an inherent power to commit for contempt.¹⁰² The Supreme Court can make an oral order that a person be arrested for contempt in the face of the court or issue a warrant for that person's arrest.¹⁰³ The offence of contempt in the face of the court is not defined, and so the common law applies. The court is required to inform the person of the contempt with which he or she is charged, but after doing so it can adopt such procedures as in the circumstances it thinks fit.¹⁰⁴ No requirement exists that the charge be in writing.

The court can impose imprisonment or a fine, or both.¹⁰⁵ It can order punishment on terms and can suspend punishment.¹⁰⁶

There is no intermediate court in the Northern Territory.

The Local Court's power to commit for contempt in the face of the court is drafted in broad terms. The offence is not defined, and so the common law applies. Like the power enjoyed by the Supreme Court, there is no requirement that the charge be reduced to writing and the court may

¹⁰⁰ *R v Verdins* [2007] VSCA 102.

¹⁰¹ *Criminal Code Act (NT)* s 8.

¹⁰² *Supreme Court Act (NT)* s 12.

¹⁰³ *Supreme Court Rules (NT)* rr 75.02–75.06.

¹⁰⁴ *Ibid* rr 75.02–75.06.

¹⁰⁵ *Ibid* rr 75.11.

¹⁰⁶ *Ibid* rr 75.11.

adopt any procedure it thinks fit.¹⁰⁷ The power of the Northern Territory Local Court to punish contemnors is limited. Upon a finding of guilt, the court may order that the person be imprisoned for not more than one month or fined not more than 15 penalty units.¹⁰⁸ The court may order the person's discharge before the end of the term of imprisonment.¹⁰⁹ The court may accept an apology for a contempt of court and may remit any punishment for the contempt either wholly or in part.¹¹⁰

The Northern Territory Magistrates Court has jurisdiction to commit a person for contempt in the face of the court. Unlike the Supreme Court and Local Court, the offence is defined under statute. The proscribed conduct is defined to capture any person who wilfully interrupts proceedings of the court or conducts themselves disrespectfully to a magistrate during sittings, or who obstructs or assaults any person in attendance, or any officer thereof, in the execution of his duty, in view of the court.¹¹¹ The proscribed conduct also extends to anyone who wilfully prevaricates in giving evidence. If the person apologises, the Justices may, if they think fit, remit the penalty either wholly or in part.¹¹²

2 *Queensland*

Just as in the Northern Territory, the Queensland Criminal Code expressly preserves the authority of courts of record to punish a person summarily for contempt.¹¹³

The Supreme Court's power to commit for contempt in the face of the court is set out in its Rules.¹¹⁴ The *Uniform Civil Procedure Rules 1999* ('UCPR') apply.¹¹⁵ The *UCPR* set out a procedure that is essentially the

¹⁰⁷ *Local Court Act* (NT) s 33(2).

¹⁰⁸ *Ibid* s 33(4).

¹⁰⁹ *Ibid* s 33(5).

¹¹⁰ *Ibid* s 33(6).

¹¹¹ *Justices Act* (NT) s 46.

¹¹² *Ibid*.

¹¹³ *Criminal Code Act 1899* (Qld) s 8.

¹¹⁴ *Supreme Court of Queensland Act 1991* (Qld) s 18.

¹¹⁵ *Uniform Civil Procedure Rules 1999* (Qld) ('UCPR') r 925(1)(b).

same procedure that applies in the *High Court Rules*: the Supreme Court must cause the respondent to be orally informed of the contempt charged, ask the respondent to ‘show cause’ as to why punishment should not be imposed for contempt of court, and, after hearing the respondent, the court determines guilt.¹¹⁶ Conduct amounting to contempt in the face of the court is not defined; therefore, the common law applies.

The *District Court of Queensland Act 1967* (Qld) specifies conduct deemed to constitute contempt of court. Accordingly, the District Court may commit a person for contempt of court if he or she: wilfully insults a judge or juror, or a registrar, bailiff or other court officer during the persons’ sitting or attendance in court, or in going to or returning from the court; wilfully interrupts the proceedings of the court or otherwise misbehaves himself or herself in court; unlawfully obstructs or assaults someone in attendance in court; without lawful excuse, disobeys a lawful order or direction of the court at the hearing of any proceeding; or (otherwise) commits any other contempt of the court.¹¹⁷ The *UCPR* procedure detailed above applying in the Supreme Court also applies in the District Court and the Magistrates Court.¹¹⁸ The District Court enjoys the same power to punish as the Supreme Court of Queensland,¹¹⁹ and the *Penalties and Sentences Act 1992* (Qld) applies.

In Queensland’s Magistrates Courts, conduct constituting contempt is defined under statute to capture a person who: wilfully insults a justice, witness or officer of the court; wilfully misbehaves; wilfully interrupts proceedings; or wilfully assault or obstructs a person in attendance at court.¹²⁰ The *Justice Act 1886* (Qld) sets out the procedure that provides that a ‘person’ may be dealt with without a complaint being made and may be taken into custody by a police officer on order of such court or justice and without further warrant, and may be called upon by such court or justice to

¹¹⁶ Ibid s 924.

¹¹⁷ *District Court of Queensland Act 1967* (Qld) s 129.

¹¹⁸ *UCPR* s 3.

¹¹⁹ *District Court of Queensland Act 1967* (Qld) s 129(2).

¹²⁰ *Justices Act 1886* (Qld) s 40(1) and *Magistrates Court Act 1921* (Qld) s 50.

show cause as to why the person should not be convicted of contempt and may be dealt with by the court upon the court's or justice's own view or upon the evidence of a credible witness.¹²¹ It appears that the procedures under the *UCPR* applicable in Queensland also apply,¹²² which require only that the person be orally informed of the contempt charged and asked to show cause as to why punishment should not be imposed. Punishment in the Magistrates Court extends to 84 penalty units or one year of imprisonment.¹²³ The *UCPR* confirm that a court, including the Supreme Court, the District Court and the Magistrates Court, may sentence under the *Penalties and Sentences Act*.¹²⁴

Importantly, and unlike the other code (and common-law) jurisdictions, the *UCPR* expressly state that the *Penalties and Sentences Act 1992* (Qld) applies when sentencing a person for contempt, though no maximum penalties are stipulated.¹²⁵ The *UCPR* also state that the court may make an order for punishment on conditions, including, for example, a suspension of punishment during good behaviour, with or without the giving of security.¹²⁶ The *Rules* also state that the court may order the person's discharge from prison before the end of the term.¹²⁷

Section 9 of the *Penalties and Sentences Act* is relevant to people who experience mental ill-health and who are convicted of contempt in the face of the court. It sets out criteria to which a court must have regard when sentencing a person in Queensland, including the extent to which the offender is to blame for the offence (a provision that arguably enables the court to give consideration to the issue of intention,¹²⁸ albeit in the sentencing context only), the 'intellectual capacity' of the person convicted (which may be apt to pick up some varieties of cognitive functioning

¹²¹ *Justices Act 1886* (Qld) s 40(3).

¹²² *UCPR* s 3. See also *Magistrates Court Act 1921* (Qld) s 50(2).

¹²³ *Magistrates Court Act 1921* (Qld) s 50(3)(b).

¹²⁴ *UCPR* s 930.

¹²⁵ *Ibid.*

¹²⁶ *Ibid.*

¹²⁷ *Ibid* s 931.

¹²⁸ *Penalties and Sentences Act 1992* (Qld) s 9(2)(c).

deficits),¹²⁹ ‘mitigating factors’,¹³⁰ and ‘any other relevant circumstance’.¹³¹ Plainly, the last two criteria open the door to submissions from people experiencing mental ill-health that their mental health should be taken into account when sentencing.

3 *Tasmania*

The Tasmanian *Criminal Code* expressly preserves the power of Tasmanian courts to punish a person summarily for contempt in the face of the court.¹³² The offence of contempt in the face of the court is not defined, and so the common law applies. The procedure and punishment are dealt with in the *Supreme Court Rules*,¹³³ which requires the court to inform the respondent of the contempt with which the person is charged, require the respondent to defend the charge, and determine the matter of the charge after having heard the respondent.¹³⁴ No requirement exists that the charge be reduced to writing. The power of Tasmanian courts to sentence contemnors is at large, and they can impose imprisonment or a fine for contempt in the face of the court, or both.¹³⁵ The court can also order the person’s discharge before the end of the prison term.¹³⁶

In the Tasmanian Magistrates Court, conduct amounting to contempt is defined under statute to include wilful misbehaviour in court, and wilfully interrupting or obstructing proceedings, or wilfully prevaricating in giving evidence.¹³⁷ The relevant statutes are silent on procedure. In relation to punishment, under the *Magistrates Court Act 1987* (Tas), magistrates may impose a fine up to five penalty units or imprisonment up to three months.¹³⁸ Under the *Justices Act 1959* (Tas), magistrates may impose a fine

¹²⁹ Ibid s 9(2)(e).

¹³⁰ Ibid s 9(2)(f).

¹³¹ Ibid s 9(2)(g).

¹³² *Criminal Code Act 1924* (Tas) s 10.

¹³³ *Supreme Court Rules 2000* (Tas) reg 941.

¹³⁴ Ibid reg 941(2).

¹³⁵ Ibid reg 942(9).

¹³⁶ Ibid reg 942(11).

¹³⁷ *Justices Act 1959* (Tas) s 25; *Magistrates Court Act 1987* (Tas) s 17A.

¹³⁸ *Magistrates Court Act 1987* (Tas) s 17A.

of up to 10 penalty units or, if they proceed by warrant, commit that person to a term of imprisonment not exceeding six months.¹³⁹ In the light of these apparently conflicting provisions, the later statute would impliedly repeal the former, and the lesser penalties would apply.¹⁴⁰

4 *Western Australia*

The power of the Supreme Court of Western Australia as a superior court of record to commit for contempt of court has been expressly preserved,¹⁴¹ and the common law defines the offence. The applicable procedure is set out in the *Supreme Court Rules*, which only require that the ‘contemnor’¹⁴² be informed orally of the contempt with which he or she is charged and that he or she be required to defend the charge.¹⁴³ The court can sentence at large with either an order for commitment to prison, imposition of a fine, or both.¹⁴⁴ The court making an order committing a person for contempt may direct suspension for such a period or on such terms or conditions as the court thinks fit.¹⁴⁵ The court can also order the discharge of the contemnor before the expiry of the term.¹⁴⁶

The power of the District Court of Western Australia to commit a person for contempt of court is more narrowly drawn than that of the District Court of Queensland, and protects that court from wilful insults, wilful interruptions and misbehaviour.¹⁴⁷ The *District Court of Western Australia Act 1969* (WA) is silent on procedure, and the District Court judge

¹³⁹ *Ibid.*

¹⁴⁰ *Kartinyeri v Commonwealth* (1998) 195 CLR 337.

¹⁴¹ *Supreme Court Act 1935* (WA) ss 6(2) and 16(d)(i); *Criminal Procedure Act 2004* (WA) s 183.

¹⁴² In the Supreme Court and District Court of New South Wales and the Supreme Court of Western Australia, the term ‘contemnor’ is defined to mean ‘a person guilty or alleged to be guilty of contempt of court’: *Supreme Court Rules 1970* (NSW) s 55.1; *District Court Act 1973* (NSW) s 199(1); *Rules of the Supreme Court 1971* (WA) O 55 r 1.

¹⁴³ *Rules of the Supreme Court 1971* (WA) O 55 r 3.

¹⁴⁴ *Ibid* O 55 r 7.

¹⁴⁵ *Ibid* O 55 r 8.

¹⁴⁶ *Ibid* O 55 r 9.

¹⁴⁷ *District Court of Western Australia Act 1969* (WA) s 63.

can punish a person for contempt ‘if he thinks fit’.¹⁴⁸ The power to penalise is wide, and includes a power to imprison a person for up to five years or impose a fine of up to \$50,000.¹⁴⁹

The *Magistrates Court Act 2004* (WA) also protects courts from wilful interruptions, misbehaviour or insults.¹⁵⁰ Magistrates can deal with contempt orally and immediately, or by way of a warrant.¹⁵¹ A person guilty of a contempt is liable to a fine of not more than \$12,000 or imprisonment for not more than 12 months, or both.¹⁵² The *Magistrates Court Act* states that where a person apologises to the court for the contempt, the court may amend or cancel the order imposing the punishment.¹⁵³

The Family Court of Western Australia has a power to deal with contempt in the face of the court that is in the same terms as the power enjoyed by the Family Court of Australia.¹⁵⁴ (The Family Court of Australia is dealt with under the heading ‘Commonwealth Courts’, above).

Unlike other Australian jurisdictions, the operation of the *Sentencing Act 1995* (WA) is expressly excluded from applying to punishment for contempt of court.¹⁵⁵

¹⁴⁸ Ibid.

¹⁴⁹ Ibid.

¹⁵⁰ *Magistrates Court Act 2004* (WA) s 15.

¹⁵¹ Ibid ss 15 and 16(2)(a)(i).

¹⁵² Ibid s 16.

¹⁵³ Ibid s 16.

¹⁵⁴ *Family Court Act 1997* (WA) s 234.

¹⁵⁵ *Sentencing Act 1995* (WA) s 3(3)(a). Also confirmed in *Mansell v Mignacca-Randazzo* [2013] WASC 66 (appeal dismissed [2013] WASCA 262). The Western Australian Reform Commission (‘WALRC’) recommended that this be changed: ‘There is no obvious reason for excluding the sentencing options available under the *Sentencing Act 1995* (WA) from courts sentencing offenders for contempt offences and almost all submissions on this issue supported increasing the range of sentencing options available for contempt offences. It is therefore recommended that the *Sentencing Act 1995* (WA) and *Sentence Administration Act 1995* (WA) be amended so as to apply to contempt of court offences’, Western Australian Law Reform Commission, *Report on Review of the Law of Contempt* (Report No 93, 2003) 10.

5 *Summary of the Code jurisdictions*

The Northern Territory, Tasmanian and Western Australian courts have wide powers to commit for contempt in the face of the court, with the Local Court and the Magistrates Court only being limited as to penalty. In the Supreme Court in each Code jurisdiction, the common law defines the offences and, therefore, there is no wilfulness requirement. In contrast, in the Magistrate Court in the Northern Territory, Queensland, Western Australia and Tasmanian, along with the District Court in Western Australia, the offences require that contempt in the face of the court be committed *willfully*. The Queensland District Court requires *wilfulness* but also contemplates punishment for (mere) ‘misbehavior’. Queensland courts retain authority to punish a person summarily for contempt; however, the *Uniform Civil Procedure Rules* are also said to apply. Queensland District and Magistrates Court Rules are more specific in their treatment of prosecutions and penalties.

Sentencing is at large in the Northern Territory, Tasmanian and Western Australian superior courts, characterised by wide latitude in the Western Australian District Court, but is limited in the Magistrates Courts of each jurisdiction. Only Queensland imposes specific criteria that can be interpreted as enabling an inquiry into mental health, via its *Penalties and Sentences Act*.

In broad summary, it is the exception, rather than the rule, for the discretionary power of judges in relation to contempt in the face of the court to be conditioned by procedural safeguards. A requirement of a written charge only applies in the Supreme Court and District Court of South Australia, *wilfulness* is required only in certain inferior courts, with the common-law definition of the offence instead applying in all of the superior courts, procedure is only rigorously circumscribed in the Family Court and Federal Circuit Court exercising family jurisdiction, and sentencing approaches vary significantly across the jurisdictions and among the courts.

IV A CONSTITUTIONAL WRINKLE — THE STATUS OF THE INHERENT JURISDICTION TO COMMIT FOR CONTEMPT IN THE FACE OF THE COURT

Before leaving the review of the law in the various jurisdictions, it is important to make an additional set of observations about the law of contempt in the face of the court in Australia. In *Re Colina; Ex parte Torney*, Gleeson CJ and Gummow J, with whom Hayne J agreed, made the intriguing observation that statutory provisions relating to the powers of Chapter III courts (such as s 24 of the *Judiciary Act 1903* (Cth) and s 35 of the *Family Law Act 1975* (Cth)) ‘should be read as declaratory of an attribute of the judicial power of the Commonwealth which is vested in these courts by s 71 of the Constitution’.¹⁵⁶

Presumably, s 24 of the *Judiciary Act* and s 35 of the *Family Law Act* are supported by ss 76 and 77, along with s 51(xxxix) of the Constitution, which, together, authorise the Commonwealth Parliament to make laws with respect to the vesting of jurisdiction in the High Court, federal courts, and state and territory courts. However, it appears from the remarks of Gleeson CJ, Gummow and Hayne JJ that the judicial power to commit for contempt in the face of the court is not dependent on any statute, per se, but rather is an inherent power of courts contemplated by Chapter III of the Constitution. If this is so, then this could yield a number of possible implications.

First, the ambit of the power to commit for contempt in the face of the court will, in the final analysis, be a question of constitutional law (to be determined by the High Court) rather than by parliaments in statutes.

Second, if that is so, then every Australian court could, conceivably, have contempt powers that are wider than (or, conceivably, more narrowly drawn than) the powers they may have been granted by statute. So, since s 77(iii) of the Constitution contemplates the exercise of judicial power of the

¹⁵⁶ *Bande & Cade* [2011] FamCAFC 93; (2011) 45 Fam LR 376.

Commonwealth by ‘any court of a State’, it is possible that even the inferior courts of the states such as district courts and magistrates courts that have their powers limited by the statutes and codes may enjoy a power, drawn from Chapter III of the Constitution, to commit for contempt in the face of the court that extends beyond (or could conceivably be more narrowly drawn than) their statutory powers. These propositions would be likely to apply to the territories, too.¹⁵⁷

Another complicating wrinkle in the tapestry of principles in Australia is the *inherent jurisdiction* to commit for contempt in the face of the court. Superior courts of record in Australia have an inherent power to commit for contempt in the face of the court.¹⁵⁸ They also enjoy inherent power to supervise decisions by inferior courts to commit for contempt.¹⁵⁹ In 1926, Isaacs J held that the power to deal summarily with contempt of court is ‘inherent’ and ‘a power of self-protection or a power incidental to the function of superintending the administration of justice’.¹⁶⁰ As the Victorian Court of Appeal observed in 1989,¹⁶¹ the ‘jurisdiction of the court which is comprised within the term “inherent” is that which enables it to fulfil itself properly and effectively as a court of law’.¹⁶² Further:

¹⁵⁷ *North Australian Aboriginal Legal Aid Service v Bradley* (2004) 218 CLR 146, 163 (implications arising from Ch III of the Constitution [such as, presumably, the inherent power of a court to commit for contempt] apply to Territory courts, which are capable of exercising the judicial power of the Commonwealth jurisdiction). See also *Northern Territory v GPAO* (1998) 196 CLR 553.

¹⁵⁸ *Sparkes v Martyn* (1608); *Ex p Pater* (1864) 5 B&S 299, 312; *R v Lefroy* (1873) LR 8 QB 134; *R v Metal Trades Employers’ Association*; *Ex parte Amalgamated Engineering Union Australia Section* (1950–51) 82 CLR 208, 241–3; Nigel Vaughan Lowe and Brenda Sufrin, *Borrie and Lowe: the Law of Contempt* (LexisNexis Butterworths, 3rd ed, 1996) 449; *Douglas v Douglas* [1976] Qd R 75; *Skouvakis v Skouvakis* (1976) 11 ALR 204; *Australian Securities & Investments Commission v Matthews* [1999] FCA 706 (27 May 1999) [10]; Jacob, above n 59, 23–4; Keith Mason ‘The Inherent Jurisdiction of the Court’ (1983) 57 *Australian Law Journal* 449; contrast *Gelen v Hall* (1857) 2 H & N 379.

¹⁵⁹ *Re Perry*; *Ex parte Griffith* (1931) 34 WALR 66; *Prefumo v Bradley [No 2]* [2012] WASC 76 (7 March 2012); *Phillis v Szenkovic* [2001] SASC 452.

¹⁶⁰ *Porter v The King*; *Ex parte Yee* (1926) 37 CLR 432, 443, approved by Gleeson CJ and Gummow J in *Re Colina*; *Ex parte Torney* [16]. See also *R v Fletcher*; *Ex parte Kisch* (1935) 52 CLR 248, 257.

¹⁶¹ *Marriner v Smorgon* [1989] VicRp 47; [1989] VR 485 (Murphy, Gobbo, Ormiston JJ); citing Halsbury, vol 37, 22–3, 4th ed; Jacob, above n 59, 24.

¹⁶² *Marriner v Smorgon* [1989] VicRp 47; [1989] VR 485.

A superior court always had an inherent power to prevent an abuse of its process and to maintain its authority. Such a power is intrinsic to a superior Court; it is its very life blood, its very essence, its imminent attribute. Without such a power, the Court would have form, but lack substance.¹⁶³

The relationship between the (undefined) inherent jurisdiction of superior courts to commit for contempt in the face of the court and the ‘constitutional’ power to do so has not yet been clarified. They may be co-extensive, but at present this is unclear. It has long been held that inferior courts had no inherent power to commit a person for contempt in the face of the court;¹⁶⁴ however, the situation may well be different if the inherent jurisdiction is enjoyed by all Chapter III courts, and this question is yet to be resolved.

It has been held that where statutory provisions set out procedures to be followed in contempt prosecutions, they must be strictly adhered to.¹⁶⁵ However, if the inherent power to commit for contempt in the face of the court has a constitutional foundation, then this may conserve the wider powers contemplated by the structured rules contemplated in those jurisdictions that have chosen to be specific in their treatment of the offence, procedure and sentencing. In *DPP v Green and Magistrates’ Court*, Whelan JA of the Victorian Court of Appeal observed that the ‘exercise of inherent jurisdiction to summarily deal with contempt may not necessarily be subject to the same requirements’ as contempt offences governed by statute.¹⁶⁶

¹⁶³ Jacob, above n 59, 23.

¹⁶⁴ *Gelen v Hall* (1857) 2 H&N 379; considered in Comment, ‘Civil Responsibility for Judicial Acts’ (1925) 34 *Yale Law Journal* 309–12; K S Anderson, ‘Contempt In the Face Of The Court: A Paper Presented to Stipendiary Magistrates Conference, Sydney 1977’ (paper presented at Stipendiary Magistrates Conference, Sydney, 1 June 1977). Contra *R v Almon*; *Sparkes v Martyn*; *R v Carroll* (1863) 1 SCR (NSW) 306; *Ex parte Cory* (1865) 3 SCR (NSW) 304; *Reece v McKenna*; *ex parte Reece* (1953) QSR 258; *R v Macindoe*; *Ex parte Searson* (1938) VLR 277; *Morgan v State of Victoria* [2008] VSCA 267.

¹⁶⁵ *Rich v A-G (Vic)* [1999] VSCA 14, 39; *Re Flamingo Park Pty Ltd v Dolly Dolly Creation Pty Ltd*; *Mercedes Textiles Pty Limited*; *Benny Speiser and Sipi Speiser* [1985] FCA 123; 59 ALR 247 / 5 FCR 169 (17 April 1985) [37]; *Tate & Tate* [2002] FamCA 356 (30 May 2002) (proof beyond reasonable doubt); *Deckers Outdoor Corporation Inc v Farley (No 8)* [2010] FCA 657.

¹⁶⁶ [2013] VSCA 78 [98].

The upshot of all of this is that it may be that statutory attempts to control the ambit of prosecutions for contempt of court, whether by way of procedure or penalty, could conceivably be outflanked by the inherent jurisdiction, or constitutional jurisdiction, of any of Australia's courts. That is to say, a court could conceivably decide to exercise power to prosecute and convict for contempt of court disregarding statute, on the basis that to do so is an incident of its inherent jurisdiction as a Chapter III court under the Commonwealth Constitution. If this were attempted, and the High Court confirmed that such an exercise of judicial power could be undertaken by a court, then the question would be how wide such a power would be.

To sum up, a constitutional wrinkle and uncertainty relating to the status of the inherent power of a court to commit for contempt in the face of the court means that a summary power to do so may be enjoyed by every Australian court.

The preceding description of the legislative framework in place in Australian courts highlights significant substantive and procedural differences between contempt laws in different jurisdictions. The question of whether there remains inherent power and/or a constitutional power to commit for contempt adds extra layers of uncertainty that, for the reasons iterated above, remain unresolved. The upshot of the preceding analysis is that, except in some respects in some jurisdictions, the law of contempt in the face of the court is largely characterised by common-law rules and common-law safeguards. For the reasons that follow, this is problematic.

As has been illustrated in this chapter, no barriers exist to the adoption of truly summary contempt procedure in many, if not all, Australian jurisdictions. Where this is adopted, it is possible for contempt proceedings to be commenced and concluded in a matter of seconds. The speed of the procedure allows for a very real risk that defendants, especially unrepresented litigants who may additionally suffer mental ill-health, may be convicted of contempt too swiftly, quite possibly with their conditions going undetected.

The procedure adopted by the Family Court offers the best procedural safeguards in relation to a charge of contempt. In fact, perhaps somewhat ironically, the procedures adopted in that court are in keeping with the procedural safeguards that attach to a standard criminal prosecution, far more so than contempt proceedings as they operate in some of Australia's criminal courts. As previously detailed, in addition to the relevant statutory rules, the Full Family Court has held that, when the relevant provisions of the *Family Law Act* and *Family Law Rules* are invoked to try a person for contempt in the face of the court in that jurisdiction,¹⁶⁷ it is essential that the charge be set out, either orally or in writing. Importantly in the context of this thesis, the Court has held that it is essential that the alleged contemnor understand the charge that is being laid¹⁶⁸ and is given the opportunity to state whether he or she pleads guilty or not guilty to the charge.

Reform of the law governing contempt in the face of the court to conform to the approach taken in the Family Court would have a salutary effect. The Family Court's approach generates a number of opportunities for the court to consider the mental health of the accused. Requiring a formal plea raises the issue of fitness to plead. Requiring that a person understand the charge also focuses attention on their mental state. Providing an opportunity for a plea and a formal defence is likely to involve counsel, who can raise mental health issues if appropriate.

The plight of accused people with mental ill-health is considered in more detail in the next chapter. Here, the use of summary procedure can also be criticised on two fundamental legal grounds: first, it is inconsistent with the principles of procedural fairness ordinarily applicable in a criminal trial; and, second, it is inconsistent with international human rights principles.

¹⁶⁷ *A Bank & Coleiro* [2011] FamCAFC 157 [19].

¹⁶⁸ *Ibid* [17]; *Bienstein v Bienstein* [2001] FamCA 349; *Coward v Stapleton* (1953) 90 CLR 373.

V A CRITIQUE OF THE SUMMARY PROCEDURE FOR CONTEMPT
IN THE FACE OF THE COURT

John Fox observed that the first use of summary procedure for the punishment of contempt ‘has not been clearly traced’,¹⁶⁹ and that the early cases demonstrated that ‘contumelious conduct was ... [only] punished after conviction by a jury and *not* by summary procedure’.¹⁷⁰ Eminent jurists Felix Frankfurter and James Landis, in an article concerned with the power of the US Congress to regulate contempt in the inferior courts in the United States, made similar observations.¹⁷¹ However, John Fox also observed that while the ‘modern practice of proceeding summarily to the punishment of contempt of court has been the subject of comment and protest’, it is also ‘founded upon immemorial usage [and] has, since the eighteenth century, been generally assumed or has not been expressly questioned by the court’.¹⁷²

Some early common-law cases exist in which contempt in the face of the court was characterised as an indictable misdemeanour, with the result that it could be tried as an ordinary criminal offence, on indictment before a jury.¹⁷³ However, the procedure for trial by jury of such a charge or indictment has fallen into disuse and has not been revived.¹⁷⁴ Justice McHugh (as his Honour then was) noted in 1985 that trial by jury for contempt in the face of the court had not been used in England since 1902.¹⁷⁵ At any rate, the controversy surrounding the historical foundation of the practice of summary prosecutions for contempt has been considered by members of the High Court and has been resolved in favour of its

¹⁶⁹ John C Fox, ‘*The King v Almon P* (1908) 24 *Law Quarterly Review* 184, 188.

¹⁷⁰ *Ibid* 197 (emphasis added).

¹⁷¹ Felix Frankfurter and John M Landis, ‘Power of Congress over Procedure in Criminal Contempts in “Inferior” Federal Courts — A Study in the Separation of Powers’ (1923–4) 37 *Harvard Law Review* 1010–113.

¹⁷² *Ibid* 3.

¹⁷³ *Rex v Tibbits* [1902] 1 KB 77, 87.

¹⁷⁴ See *Re Colina; Ex parte Torney* (1999) 200 CLR 386, 393–4 [12]; Lowe and Sufrin, above n 158, 469.

¹⁷⁵ In *A-G (NSW) v John Fairfax & Sons Ltd* (1985) 6 NSWLR 695, 707C–E (McHugh JA) referring to *Rex v Tibbits* [1902] 1 KB 77.

continued use. In *Re Colina; Ex parte Torney*, Gleeson CJ and Gummow J (with whom Hayne J agreed) explained:

[S]ince the latter part of the 18th century, courts have adopted the general practice of punishing all contempts by summary procedure, which has largely superseded trial by jury. Thus, in 1987, the New South Wales Court of Appeal said that ‘the proper procedure by which to prosecute criminal contempt is now by summary proceedings, and not by indictment.’¹⁷⁶ The practice had its origin in an undelivered draft judgment of Wilmot J in *R v Almon*.¹⁷⁷ The soundness of that opinion has been subjected to scholarly criticism,¹⁷⁸ but the practice is well-established,¹⁷⁹ and was so at the time of Federation. In 1900 the Queen's Bench Division, in *R v Gray*,¹⁸⁰ held that the publication of a newspaper article which contained scurrilous abuse of a judge was a contempt punishable on summary process. It is not necessary for present purposes to decide whether Hutley AP was strictly correct when he said, in 1984, that an indictment in respect of contempt was for all practical purposes obsolete.¹⁸¹ It is sufficient to observe that summary procedure is, and has been for at least a century, the usual procedure.

Summary procedure has also been defended on practical grounds, in circumstances where ‘recourse to indictment or criminal information is too dilatory and too inconvenient to afford any satisfactory remedy.’¹⁸² In extrajudicial remarks, Australian High Court Justice Sir Victor Windeyer criticised the notion that a judge before whom a contempt of court has occurred should refer the matter to another judge, saying:¹⁸³

Whatever weight this may have in cases of contempts committed outside the court, for offensive conduct inside the court room it would be historically a monstrosity; and it would, it seems to me, be undesirable, for the occasion *is not one for adjudication to determine facts*, but for prompt action to maintain discipline.

¹⁷⁶ *James v Robinson* (1963) 109 CLR 593, 600–602, 612; *Registrar of Court of Appeal v Willesee* [1984] 2 NSWLR 378, 379; *A-G (NSW) v John Fairfax & Sons Ltd* (1985) 6 NSWLR 695; and *DPP v Australian Broadcasting Corporation* (1987) 7 NSWLR 588, 595.

¹⁷⁷ [1765] Wilm 243; 97 ER 94. See also *James v Robinson* (1963) 109 CLR 593, 600, 612.

¹⁷⁸ Fox, ‘*The King v Almon I*’, above n 169; Fox, ‘The Summary Process to Punish Contempt’ (1909) 25 *Law Quarterly Review* 238.

¹⁷⁹ Lowe and Sufrin, above n 158, 469–73; Clive Walker, ‘Scandalising in the Eighties’ (1985) 101 *Law Quarterly Review* 359.

¹⁸⁰ [1900] 2 QB 36.

¹⁸¹ *Registrar of Court of Appeal v Willesee* [1984] 2 NSWLR 378, 379.

¹⁸² *R v Davies* [1906] 1 KB 32, 41 (Wills J), citing *R v Almon* (1765) Wilm 243, 256 [97 ER 94, 100]; *John Fairfax & Sons Pty Ltd v McRae* ((1955) 93 CLR 351, 370.

¹⁸³ Windeyer, above n 31, 17–34, 18–19 (emphasis added).

Similarly, in *Morris v Crown Office*, Lord Denning MR observed:¹⁸⁴

The phrase ‘contempt in the face of the court’ has an 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 these courts. The course of justice must not be deflected or interfered with. Those who strike at it strike at the very foundations of our society. To maintain law and order, the judges have, and must have, power at once to deal with those who offend against it. It is a great power — a power instantly to imprison a person without a trial — but it is a necessary power.

The immediate nature of the enquiry, which has been described as a ‘truly summary’ procedure, was described by Mustill LJ in *R v Griffin* in the following terms:¹⁸⁵

There is no summons or indictment, nor is it mandatory for any written account of the accusation made against him to be furnished to the contemnor. There is no preliminary enquiry or filtering procedure, such as committal. Depositions are not taken. There is no jury. Nor is the system adversarial in character. The judge himself enquires into the circumstances, so far as they are not within his personal knowledge. He identifies the grounds of complaint, selects the witnesses and investigates what they have to say ... decides guilt and pronounces sentence.

The fundamental legal criticism of the procedure is that the procedure places the judge simultaneously in the position of prosecutor, witness, jury and judge.¹⁸⁶ In *Fraser v The Queen*, Kirby P and McHugh JA, as their Honours then were, said:¹⁸⁷

In the case of summary proceedings for contempt in the face or hearing of the court, there are special reasons for the extension of facilities and privileges to the alleged contemnor. By any standard the procedure is extraordinary. *The judge may be, at once, the witness, possibly even the victim, of the contempt.* He may be the initiator of the former curial proceedings to bring the contemnor before the court, as was the case here. It is he who has to decide the issues of fact, to determine the charge, and then to make the order for punishment or discharge the contemnor. This unusual concatenation of roles imposes upon the judge *peculiar responsibilities and equivalent duties* to ensure that *justice* is done and seen to be done. If he decides to deal with a matter summarily ... *It is trite to say that a person faced with a serious charge, and the risk of punishment, including*

¹⁸⁴ *Morris v Crown Office* [1970] 2 QB 114, 122.

¹⁸⁵ (1989) 88 Cr App R 63, 67. As discussed in the UK Law Commission, *Contempt of Court*, (Consultation Paper No 209, 2012) 108.

¹⁸⁶ *Fraser*, 2245 (Kirby P and McHugh JA); *Zukanovic v Magistrates’ Court at Moorabbin* (2012) 32 VR 216, 224 [37] (Forrest J).

¹⁸⁷ *Fraser v The Queen* (1984) 3 NSWLR 212, 224–5.

*imprisonment, should be given an ample opportunity to be heard ... The rule as to hearing parties is fundamental to due process of law. But it is specifically important in the extraordinary summary procedure for contempt for the reasons already suggested. The requirement of the appearance of justice imposes on the judge a special obligation to ensure that he has not made up his mind until everything that can reasonably be placed on the scale is allowed to be put there.*¹⁸⁸

For these reasons, the United Kingdom Court of Appeal, in *Balogh v St Albans Crown Court*, described the summary power to commit for contempt as ‘salutary and dangerous’¹⁸⁹ and as a power that should only be exercised ‘with scrupulous care and only when the case is clear and beyond reasonable doubt’.¹⁹⁰ It should not be used ‘to subvert principles of fairness or to become an instrument of oppression to an alleged contemnor’.¹⁹¹ Similar observations were made by the Victorian Court of Appeal in *Allen v The Queen*.¹⁹²

In contrast to the normal procedures that apply when an accused person is tried for a criminal offence, the magistrate or judge who has laid the charges on the basis of matters perceived by him or her within the courtroom, takes the further step of deciding whether the charge is proved. This means that nobody independent of the judiciary, such as a jury, is brought into the process of trial, and in the case of contempt in the face of the court, the presiding judge or magistrate may ‘deal with’ an alleged contempt even though he or she is also the chief witness, the victim and the prosecutor.¹⁹³ These features of the procedure make this criminal offence unique.¹⁹⁴

¹⁸⁸ Emphasis added by Forrest J in *Zukanovic v Magistrates Court of Victoria at Moorabbin* [2011] VSC 141 [32].

¹⁸⁹ [1975] 1 QB 73, 91; *Zukanovic v Magistrates Court of Victoria at Moorabbin* [2011] VSC 141 [32].

¹⁹⁰ *Ibid.*

¹⁹¹ *Rich v A-G (Vic)* [1999] VSCA 14 [39].

¹⁹² [2013] VSCA 44 [70] (Priest JA, with whom Maxwell P and Weinberg JA agreed).

¹⁹³ *R v Nicholls* (1911) 12 CLR 280; *Re the Echo and Sydney Morning Herald* (1883) 4 LR (NSW) 237; *Seymour v Migration Agents Registration Authority* [2006] FCA 965 (31 July 2006); *Allen v The Queen* [2013] VSCA 44 (Priest JA), with whom Maxwell P and Weinberg JA agreed; *Green v Magistrates’ Court of Victoria* [2011] VSC 584.

¹⁹⁴ As Lindley LJ observed in 1890, contempt in the face of the court is ‘the *only* offence that I know of which is punishable at common law by summary process’: *O’Shea v*

The Phillimore Committee¹⁹⁵ (which reviewed the law of contempt in the United Kingdom in 1974, which resulted in the enactment of the UK *Contempt of Court Act* of 1981), characterised the power of courts to punish for contempt characterised it as arbitrary and unlimited. The Australian Law Reform Commission ('ALRC') has commented that '[t]hese powers of presiding judges, taken in combination, have a peremptory and authoritarian quality similar to those of school teachers or parents dealing with young children. It is "summary" discipline in the fullest sense of the word.'¹⁹⁶ In submissions made to the Phillimore Committee it was argued that:

first, the judge appears to assume the role of prosecutor and judge in his own cause, especially where the missile or insult is directed against him personally; and secondly, the contemnor usually has little or no opportunity to defend himself or make a plea in mitigation.¹⁹⁷

The use of truly summary procedure — as distinct from the formal procedure followed in local or magistrates courts that is also properly classified as 'summary procedure' — to try and convict people for contempt in the face of the court has been strongly criticised in the two formal reviews of the law of contempt that have been undertaken in Australia. In 1987, the ALRC said:

The Commission considers that the appropriateness of the existing law and procedure relating to contempt in the face of the court is seriously open to question. The avowed aim of the law of contempt as a whole is to preserve the system of administration of justice, and in particular to ensure that this system enjoys public confidence. The Commission views this as an appropriate aim. It follows that, in any proceedings where a person is charged with contempt, on the basis that his or her conduct threatens the due administration of justice, it is imperative that, to use a time-honoured phrase, 'justice should not only be done, but should manifestly and undoubtedly be seen to be done'.¹⁹⁸ If this is not the case, the contempt proceedings are likely to subvert one of the principal purposes for which

O'Shea & Parnell (1890) 15 PD 59, 64, cited with approval in *Australian Building and Construction and Builders' Labourers' Federation v David Syme & Co Ltd* [1982] 59 FLR 48, 52.

¹⁹⁵ United Kingdom, *Report on the Committee on Contempt of Court* (Cmd 5794, 1974).

¹⁹⁶ Australian Law Reform Commission, above n 7, 60.

¹⁹⁷ United Kingdom, *Report on the Committee on Contempt of Court* (Cmd 5794, 1974) [29].

¹⁹⁸ *R v Sussex Justices, ex parte McCarthy* [1924] 1 KB 256, 259 (Hewart CJ).

they were instituted. The conflict between the law and procedure governing contempt in the face of the court and fundamental doctrines of criminal law and procedure — notably those relating to certainty in the definition of offences, a presumption of innocence and, above all, lack of bias or partiality — seems to the Commission to be a real conflict, leading on occasions to injustice which may not always be corrected on appeal. Even if the conflict is not real, but only apparent, the image of the judicial system in the public eye is tarnished. Persons who have been summarily convicted of contempt in the face of the court are inclined to feel that they have not had a fair trial, and other members of the public hearing of their experiences must inevitably ask themselves whether a presiding judge who has been the target of personal insults in the courtroom, or whose proceedings have been disrupted, is the right and proper person to determine liability and impose punishment. Many contempt proceedings are instigated at times of considerable emotional tension in the courtroom. Accordingly, even if the judge seems no longer to be emotionally involved at the time when liability is determined and a penalty imposed, the suspicion that he or she could never be truly impartial in dealing with the case must always persist.¹⁹⁹

The Commission recommended, *inter alia*, that normal procedures for the trial of criminal offences should apply instead of summary contempt procedures. The ALRC also persuasively argued that the rights of alleged contemnors might be better safeguarded by statutory reform rather than relying on ‘notions of elementary justice’ to safeguard procedural fairness.

Although the Western Australian Law Reform Commission (‘WALRC’), in its 2003 review of the topic, reported that judges and judicial officers at all levels regarded the powers to punish for contempt in the face of the court as crucial to their capacity to control proceedings,²⁰⁰ it ultimately recommended that the law of contempt be codified and controlled.²⁰¹

While common-law decisions have injected some safeguards for the accused into summary procedure out of concern for natural justice, the ALRC noted during their review of the law of contempt that a significantly high proportion of summary convictions for contempt in the face of the court have been overruled on procedural grounds by a higher court, and that this was due to the difficulty for the presiding judge to reconcile age-old swift

¹⁹⁹ Australian Law Reform Commission, above n 7, 70 [112].

²⁰⁰ WALRC, above n 155, 59.

²⁰¹ *Ibid* 8.

and summary justice with the recent injection of natural justice. However, the ALRC noted the difficulty in proving the truth of the argument that convictions were being overturned on appeal on procedural grounds, as the relevant statistics are not maintained by the courts.²⁰²

VI THE ISSUE OF 'WILFULNESS' AS A REQUIREMENT OF THE OFFENCE OF CONTEMPT IN THE FACE OF THE COURT

HLA Hart once observed that all 'civilized penal systems make liability to punishment for ... any serious crime dependent not merely on the fact that the person to be punished has done the outward act of a crime, but on his having done it in a certain state or frame of mind or will'.²⁰³ Traditionally, although admittedly not invariably, wilfulness has been required for criminal offences. The review of the law governing contempt in the face of the court in Australian jurisdictions conducted earlier in this chapter highlighted the rarity of any requirement of wilfulness and the lack of uniformity in approach. In most jurisdictions wilfulness is not required. As the WALRC observed in 2003, the question of whether intention to interfere or obstruct is required is 'unclear'. The disjunction of the criminal offence of contempt in the face of the court from the foundational principle of criminal law of wilfulness requires further interrogation.²⁰⁴

At common law, it has been said that it is not necessary to prove any subjective intent on the part of the contemnor.²⁰⁵ The New South Wales Court of Appeal has said that there is no requirement of wilfulness, per se, in the sense that the person need not intend to interfere with or obstruct the due administration of justice. Accordingly, if contempt in the face of the court objectively diminishes the authority of the court, it will constitute

²⁰² Australian Law Reform Commission, above n 7, 67.

²⁰³ H L A Hart, *Punishment and Responsibility* (OUP, 2nd ed, 2007) 113-35, 114.

²⁰⁴ *He Kaw Teh* (1985) 157 CLR 523.

²⁰⁵ *Australian Meat Industry Employees' Union v Mudginberri Station Pty Ltd* (1986) 161 CLR 98, 113; *Ali v Collection Point Pty Ltd, in the matter of Collection Point Pty Ltd (No 2)* [2010] FCA 1125 (18 October 2010) [12]; see also *Circuit Finance Australia Ltd v Sobbi* [2010] NSWSC 789 [10]; *Australian Competition and Consumer Commission v Hughes*, [20]; *Rothmans of Pall Mall v Australian Broadcasting Tribunal* [1985] FCA 91; (1985) 5 FCR 330; *Deputy Commissioner of Taxation v Rotary Offset Press* (1971) 45 ALJR 518.

contempt regardless of the intent of the contemnor.²⁰⁶ Conduct that takes place in the face of the court that is deliberate (in the sense that it is not inadvertent) and which objectively tends to lessen the authority of the court will constitute contempt, even if the person who engaged in the conduct had no intention to obstruct or interfere with the administration of justice.

The leading authority for this principle is a 1970 decision of the New South Wales Court of Appeal in *Ex parte Tuckerman; Ex parte Nash*.²⁰⁷ The applicants had appeared before a New South Wales magistrate to answer charges of trespass that apparently had taken place during a political demonstration relating to Australia's participation in the Vietnam War.²⁰⁸ As the applicants entered the courtroom, they raised their arms in a clenched-fist salute, which, in later explanations to the presiding magistrate, were explained as gestures of solidarity with the oppressed people of the world.²⁰⁹ They were charged with contempt under the *Justices Act 1902* (NSW), remanded in custody for about two hours, brought back to the court to show cause as to why they should not be convicted of contempt of court, tried, and then sentenced to 14 days' imprisonment, the maximum allowed under the relevant provision.²¹⁰ It is notable that the editor of the *Australian Law Journal* later wrote that the applicants had at all times submitted respectfully to the court.²¹¹ The applicants appealed to the Court of Appeal, which said:²¹²

[W]hatever in fact the gestures of the applicants were intended by them to represent, in our opinion, acts, words or other forms of behaviour which give rise to the appearance of defying the authority of a Court of law or which by

²⁰⁶ [1970] 3 NSW 23, 28; *Lewis v Ogden* (1984) 153 CLR 682, 688; contra Australian Law Reform Commission, above n 7, 682, 688.

²⁰⁷ *Ex parte Tuckerman; Re Nash* [1970] 3 NSW 23.

²⁰⁸ *Chesterman*, above n 26, 32-3.

²⁰⁹ *Ibid.*

²¹⁰ Section 152 of the *Justices Act 1902* (NSW) provided that 'if any person shall, during any proceeding before a Local Court presided over by a Magistrate, or during any proceeding under this Act, or any Act amending the same, before a Magistrate, or before Justices (one of whom is a Magistrate), be guilty of contempt, such person may be punished in a summary way by such Magistrate by fine not exceeding 10 penalty units or by imprisonment for a period not exceeding 14 days'.

²¹¹ 'The Faces of Contempt' (1971) 45 *Australian Law Journal* 165, 166.

²¹² *Ex parte Tuckerman; Re Nash* [1970] 3 NSW 23 (emphasis added).

intimidation, ridicule or otherwise tend to lessen the authority of the courts to administer the law and seek to apply even-handed justice between parties in a calm and orderly manner may be regarded as contempt of Court.

The Supreme Court of New South Wales has also more recently held that it is not necessary for a defendant charged with contempt in the face of the court to establish intent, the objective effect of what is done being of paramount importance.²¹³ As such, at least at common law, the offence of contempt in the face of the court is an offence of general intent only. It is sufficient that the alleged contemnor intended only the action — in the case of *Nash*, the act of raising their clenched fist — but not the consequence of that action, which was the disruption to court proceedings.

In the United Kingdom, the common law requires that a person accused of contempt must be proven to have intended to do the act in question.²¹⁴ However, Borrie and Lowe have said that ‘it is not yet settled whether it must also be proved that the accused intended to interfere with the course of justice’.²¹⁵

As noted above, in the majority of Australian jurisdictions there is no requirement of wilfulness. In the remaining jurisdictions, intention extends beyond intentionally committing the act, to intentionally causing a result, typically disruption to the court proceedings. For example, in Queensland, the District Court may commit a person for contempt of court if a person, relevantly: willfully insults a judge or juror, or a registrar, bailiff or other court officer during the persons’ sitting or attendance in court, or in going to or returning from the court; willfully interrupts the proceedings of the court or otherwise misbehaves himself or herself in court; unlawfully obstructs or assaults someone in attendance in court; without lawful excuse, disobeys a lawful order or direction of the court at the hearing of any proceeding; or

²¹³ *O’Hair v Wright* (1971) SASR 436; *Carus Wilson’s case* (1845) 7 QB 984; 115 ER 759; *Jesus Aquarius* (1974) 59 CAR 165.

²¹⁴ *R v K* (1983) 78 Cr p R 82 (duress).

²¹⁵ *A-G v Butterworth* (1963) 1 QB 722.

(otherwise) commits any other contempt of the court.²¹⁶ In Queensland's Magistrates Court, conduct constituting contempt is defined under statute to capture a person who: wilfully insults a justice, witness or officer of the court; wilfully misbehaves; wilfully interrupts proceedings; or wilfully assault or obstructs a person in attendance at court.²¹⁷ The power of the District Court of Western Australia to commit a person for contempt of court is more narrowly drawn than that of the District Court of Queensland, and protects that court from willful insults, willful interruptions and misbehaviour.²¹⁸ The Magistrates Court Act also protects courts from willful interruptions, misbehaviour or insults.²¹⁹ In the Tasmanian Magistrates Court, conduct amounting to contempt is defined under statute to include willful misbehaviour in court, and willful interrupting or obstructing of proceedings.²²⁰ The Family Court has also held that the contempt must be wilful (but not necessarily contumacious).²²¹ The Family Court of Western Australia has a power to deal with contempt in the face of the court that is in the same terms as the power enjoyed by the Family Court of Australia.²²² Presumably this means that contempt in the Family Court of Western Australia involves the element of 'wilfulness'.

'Wilfulness' is not defined under any of the relevant statutes governing contempt. It reflects a less culpable state of mind than that required where *intention* to cause a specific result is an element of an offence, such as the intention to interrupt court proceedings. It also reflects a less culpable state of mind than *knowledge*; it does not require that the person had *actual* knowledge that the disruption would occur as a result of their behaviour. There is general consensus that *wilfulness* is analogous to

²¹⁶ *District Court of Queensland Act 1967* (Qld) s 129.

²¹⁷ *Justices Act 1886* (Qld) s 40(1) and *Magistrates Court Act 1921* (Qld) s 50.

²¹⁸ *District Court of Western Australia Act 1969* (WA) s 63.

²¹⁹ *Magistrates Court Act 2004* (WA) s 15.

²²⁰ *Justices Act 1959* (Tas) s 25; *Magistrates Court Act 1987* (Tas) s 17A.

²²¹ *A Bank & Coleiro* [2011] FamCAFC 157 [15]; *Bande & Cade* [2011] FamCAFC 93.

²²² *Family Court Act 1997* (Cth) s 234.

recklessness,²²³ such that all that is required is some awareness or foresight of a possibility that an event will occur.

As noted above, in the remaining state criminal courts, and in the Commonwealth courts, the offence of contempt is not defined and so the common law applies, meaning that in the majority of jurisdictions, the offence is one of basic intent only.

All of this is significant because the presence of a requirement of wilfulness opens up the possibility of a defence that a person with mental health issues did not *intend* to commit contempt. An inquiry into wilfulness involves subjective consideration of the state of mind of the accused rather than an objective consideration of the state of mind of a reasonable person. Accordingly, all matters bearing upon the state of mind of the accused are relevant, including mental health issues. Everyone is presumed to be sane and to be in control of his or her actions. It may be that in a limited set of circumstances, a person's mental state might impair their volitional control to the extent that they did not have even basic intent to engage in the conduct. A defendant who tries to argue that his or her actions were involuntary bears the burden of proof given the presumption of sanity and voluntariness. It may well be that some conditions affect volitional control to the extent a person's conduct in court was unwilled, or at least committed in circumstances where the person was experiencing an irresistible impulse.

Volitional control relates to an ability to control one's conduct. Some disorders can cause volitional incapacity such that the person may lack control over their actions. At other times, or for other disorders, control may not be lost altogether but rather merely impaired. Where a person engages in contumacious conduct while suffering some form of mental ill-health, it is necessary for careful consideration to be given to the impact of his or her condition on the person's volitional capacity in relation to the specific conduct complained of.

²²³ *R v Lockwood; Ex parte A-G* [1981] Qd R 209. Cf A P Simester et al, *Simester and Sullivan's Criminal Law* (Hart, 4th ed, 2010) 159–60.

The case of *Keeley v Brooking* is worthy of consideration here, particularly the issues explored by Murphy J in his dissenting judgment following Keeley's unsuccessful appeal to the High Court. Justice Brooking, sitting as the Supreme Court of Victoria, had convicted Keeley of contempt in the face of the court on 9 May 1978. Keeley had been a prosecution witness in a trial of a police officer on bribery and related misconduct charges. The jury returned a verdict of not guilty. Keeley gave evidence over three days during the trial, saying on numerous occasions that he was unable to remember various events in detail or at all. He also indicated that he could not remember what he had said at the committal proceeding against the police officer. Justice Brooking declared that he was a hostile witness, advised Keeley that he had formed an opinion that he was not telling the truth, warned him that he could be charged with perjury, directed him to the fact that he could be dealt with for contempt of court and then, after the conclusion of Keeley's evidence, asked him to show cause as to why he should not be dealt with for contempt. At the conclusion of the police officer's trial, Brooking J dealt with Keeley, summarily, for contempt on the basis of his finding of fact that Keeley had been prevaricating.²²⁴

Keeley's defence consisted of four affidavits by doctors that Keeley's memory and concentration were impaired. The first medical witness said that Keeley was experiencing 'an acute anxiety state'; the second said that he suffered 'fluctuating anxiety' and it was reasonably possible that this affected his memory; the third said that the majority of his symptoms were genuine; and the fourth said that Keeley experienced depression that was likely to impair his memory.

Justice Brooking rejected this evidence and concluded that Keeley was 'a sly and thoroughly untruthful person, well capable of misleading

²²⁴ Justice Brooking defined prevarication as an expression used 'to describe the conduct of a witness who deliberately evades evades questions by falsely swearing that he has no recollection': *Morriss v Withers* (1954) VLR 100, 103. Only Murphy J questioned whether there was evidence to support Brooking J's conclusions that satisfied the criminal standard of proof.

members of the medical profession for his own purposes'.²²⁵ In the High Court appeal, Murphy J, in dissent, observed that '[t]he judge formed the opinion on his experience of Mr. Keeley as a witness at the police officer's trial, and by reference to extrinsic evidence, a tape recording.'²²⁶ After dealing with a number of authorities from the United States of America relating to findings of fact in prevarication contempt cases, Murphy J said:²²⁷

A difficulty inherent in criminal contempt in refusing to answer is that to constitute contempt the affront to the court must be so obvious to the judge that a summary trial of the question by the same judge is generally a mere formality. Only in rare cases (for example, where an attempt is made to show cause by evidence that the accused was physically or mentally incompetent to give evidence) is a trial more than a formality. The more a charge of such contempt requires a real trial, the less it resembles criminal contempt.

When there is a charge by the judge and a summary trial conducted by the same judge, the trial commences, as this one did, by requiring the accused to show cause. The requirement to show cause is not mere form, for the accused is required to meet, not a case which is presented against him by evidence given at his trial, but a case which exists in the mind of the judge at the commencement of the trial, although it may be explained, as it was here, by reference to various matters which formed the basis of the judge's opinion. This can only mean that the tribunal commences, not with a presumption of innocence, but with a presumption of guilt. Such procedures are not easily reconcilable with fundamental principles of justice. ...

The summary procedure cannot be reconciled with fundamental principles where, as here, the charge of contempt called for a consideration of material other than those answers which were alleged to constitute the contempt. In any event, it should not have been persisted with after the question of the applicant's mental condition, that is, his capacity to concentrate and to recall, arose as a real issue.

The significance of the inclusion of a requirement of wilfulness in the Australian laws governing contempt of court is that a person who is alleged to have committed the offence would have an opportunity to exonerate his or her behaviour on the basis of mental ill-health, for example, that they did not appreciate that disruption of court proceedings was a likely consequence of their behaviour. The Phillimore Committee on Contempt of Court

²²⁵ *Keeley v Brooking* (1979) 143 CLR 162, 182.

²²⁶ *Ibid* 186.

²²⁷ *Ibid*.

recommended that *intention* be required (that is, intention to pervert the course of justice) and that it should therefore be dealt with as a criminal offence unless there were compelling reasons for urgent action.²²⁸ The WALRC also pointed to the fact that ‘codification would bring certainty to the identification of the basis for liability and clearer guidance to participants in judicial proceedings’.²²⁹

A uniform adoption of a requirement of wilfulness would serve an important function. While in the vast majority of instances it may be that, notwithstanding a person’s deficits in executive functioning or reduced volitional control, the court still forms the view that the person has *wilfully* interrupted the court, it would open the door for expert evidence to be led relating to the mental health of the alleged contemnor, and then, in appropriate cases, the diversion of contemnors with mental health issues toward services and away from inappropriate penalties.

The ALRC recommended that the common-law offence of contempt in the face of the court should be replaced by a series of offences.²³⁰ The ALRC recommended:

The principal offence to be substituted for contempt in the face of the court should be drafted in terms of willfully causing ‘a substantial disruption’ to the conduct of a hearing. This means that conduct which was disrespectful, offensive or insulting would not attract liability unless it amounted to substantial disruption.²³¹

The Commission stated that drafting the offence in terms of ‘wilfulness’ meant that the person ‘should be liable for the offence of substantial disruption only if he or she intended to disrupt the relevant proceedings, or was recklessly indifferent as to whether the conduct in question would have this effect’.²³² The wilfulness of the disruption could then be tested having regard to relevant psychological evidence. Indeed, as

²²⁸ United Kingdom, above n 197.

²²⁹ WALRC, above n 155, 61.

²³⁰ Australian Law Reform Commission, above n 7, 71 [113].

²³¹ *Ibid* lxxii [4].

²³² *Ibid* 71 [116].

will be demonstrated later in this thesis, the human rights of people experiencing mental ill-health militate in favour of this reform.

Just like the ALRC, the WALRC recommended that the existing statutory and common-law offences relating to contempt in the face of the court be replaced by a series of statutory offences to apply to all courts of civil and criminal jurisdiction in Western Australia.²³³ However, the WALRC recommended that the state of mind of the alleged offender should generally not be an element of contempt in the face of the court, that is, unless otherwise stated.²³⁴ The Commission recommended that the offence should provide courts with an option to prosecute wilful contempt and non-wilful contempt along the following lines:

- (a) A person shall not wilfully insult the presiding judicial officer or officer of a court acting in the course of his or her official duties.
- (b) A person shall not interrupt or disrupt proceedings of a court without reasonable excuse.²³⁵

This recommendation should not be implemented for the reasons set out above.

VII EXPULSION FROM THE COURT

It should not be overlooked that an alternative approach available to a court — in circumstances where a person is being unruly — is the remedy of temporary expulsion from court. Judges have an inherent power to exclude people from the courtroom. As Lord Loreburn observed in *Scott v Scott*:²³⁶

The Court may be closed or cleared if such a precaution is necessary for the administration of justice. Tumult or disorder, or the just apprehension of it, would certainly justify the exclusion of all from whom such interruption is expected, and, if discrimination is impracticable, the exclusion of the public in general ... It would be impossible to enumerate or anticipate all possible contingencies, but in all cases where the public has been excluded with admitted propriety the underlying principle, as it seems to me, is that the

²³³ WALRC, above n 155, 61.

²³⁴ Ibid 62.

²³⁵ Ibid 63.

²³⁶ *Scott v Scott* [1913] AC 417, 445–6; see also *Ex parte Tubman* [1970] 3 NSWLR 41, 52–3 (Asprey JA).

administration of justice would be rendered impracticable by their presence, whether because the case could not be effectively tried, or the parties entitled to justice would be reasonably deterred from seeking it at the hands of the Court. ... It is, therefore, well established that those who preside in the courts of petty sessions as well as in other courts of justice in this State inherently have the power, where it becomes necessary in order to administer justice, to exclude from the court-room all or any persons by whose behaviour interruption to the orderly procedures of the court is caused or is reasonably to be apprehended.

In *Ex parte Cory*, the power of inferior courts to control disturbances by removing a person engaged in poor behaviour from the court was also confirmed. The Court observed:²³⁷

[T]o remove a turbulent or misbehaving person for the moment, merely, without the correlative necessary power of continuing his enforced absence, for the required period of peaceful progress, would be nugatory and idle. It would seem reasonably to follow that a Magistrate might, instead of removing the offender, refuse any further to hear him in the case pending — at all events, until he shall have given full assurance by apology or retraction, and otherwise, that he will not repeat the objectionable conduct.

There are significant access-to-justice implications associated with exclusion from court. However, there can be little doubt that exercise of such a power is warranted where a person is engaging in seriously contumacious behaviour.²³⁸ Importantly, resort to the power of expulsion can obviate the need to have regard to the contempt power altogether, or, if not, it can be utilised together with the power of adjournment to commence a contempt prosecution on a preferable footing: consistently with human rights.

²³⁷ [1864] SCR 304, 309.

²³⁸ App No 66484/09 [45]-[50].

VIII CONCLUSION

To sum up this chapter, as matters currently stand, with some small exceptions in the Family Court, Queensland inferior courts and South Australian courts, and assuming that a wider inherent or constitutional jurisdiction to commit for contempt is not availed of in those jurisdictions, the principles governing contempt in the face of the court in Australia reflect only the most rudimentary of safeguards for the accused. Contempt prosecutions reflect an absence of the procedural safeguards that typically operate in a criminal trial. This renders especially vulnerable accused persons affected by mental ill-health.

Do human rights principles point the way to a more just approach to people with mental health issues accused of contempt in the face of the court?

Chapter Two

Reforming Contempt Law and Procedure by Reference to Human Rights Principles

I INTRODUCTION

This chapter critically analyses the procedural law of contempt in the face of the court set out in the last chapter by reference to the yardstick of human rights principles. In the last chapter, it was demonstrated that the procedure adopted in many Australian jurisdictions is deficient in material respects. To ensure that Australian law is consistent with human rights principles, a person accused of contempt in any Australian court should have: the charge against them specifically stated; an opportunity to plead to the charge (with an associated opportunity to plead that they are unfit to plead); an opportunity to have their trial adjourned in order that they may seek legal advice; and the opportunity of a fair hearing of the charge before an impartial tribunal.

Of most direct relevance to any consideration of the standards to be applied within Australian criminal trials is the *International Covenant on Civil and Political Rights* ('ICCPR' or 'the Covenant'). Australia is a signatory to the Covenant, and a signatory to its First Optional Protocol, which entitles Australians to communicate breaches of the Covenant to the United Nations Human Rights Committee for consideration. It should be acknowledged that Australia has a poor record of compliance with decisions of the Committee under the Protocol;²³⁹ however, there are instances of

²³⁹ Darren O'Donovan and Patrick Keyzer, "Visions of a Distant Millennium"? The Effectiveness of the UN Human Rights Petition System', in Patrick Keyzer, Vesselin

statutory reform based on principles in the Covenant, and the common law may be adapted by reference to the principles of international law.²⁴⁰

Article 14 of the ICCPR relevantly guarantees:

- Equality before the courts and the right to a fair hearing by an impartial tribunal (article 14.1);
- The right to be presumed innocent (article 14.2);
- The right to be informed promptly and in detail of the nature and cause of the charge against oneself (article 14.3);
- The right to have adequate time and facilities for the preparation of one's defence and to communicate with counsel of one's own choosing (article 14.3(b));
- The right to defend oneself in person or through legal assistance (article 14.3(d)) and the right to examine, or have examined, the witnesses against oneself (article 14.3(e)); and
- The right to have one's conviction and sentence reviewed by a higher tribunal (article 14.5).

The availability of these rights under the contemporary law of contempt in the face of the court will now be considered. Reference will also be made to the jurisprudence of the European Court of Human Rights developed pursuant to article 6 of the *European Convention on Human Rights* ('ECHR'), as article 14 of the ICCPR and article 6 of the ECHR are drafted in similar terms. Conveniently, the United Kingdom Law Commission has also undertaken a review of the laws of contempt in England and Wales to test their compliance with the ECHR. The consultation paper released by the Law Commission included an examination of the compatibility of current English and Welsh laws of contempt, including contempt in the face of the court, with the ECHR.²⁴¹ This consultation paper will be referred to in

Popovski and Charles Sampford (eds), *Access to International Justice* (Routledge, 2015) ch 9.

²⁴⁰ *Jumbunna Coal Mine NL v Victorian Coal Miners' Association* (1908) 6 CLR 309, 363.

²⁴¹ Appendix B to Consultation Paper No 209, Contempt of Court and the European Convention on Human Rights.

the analysis that follows. The European principles are relevant to a consideration of the principles that may be developed and applied in those Australian jurisdictions with statutory protection of human rights: the ACT and Victoria.²⁴²

Each principle will now be discussed in turn.

II EQUALITY BEFORE THE COURTS AND THE RIGHT TO A FAIR HEARING BY AN IMPARTIAL TRIBUNAL (ARTICLE 14.1)

The principle of equality before the law and the right to a fair trial are enshrined in article 14.1 of the ICCPR:

All persons shall be equal before courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.

Perhaps the most obvious issue that arises for consideration in relation to the compatibility of summary contempt procedure is whether a judge who has just been abused by an alleged contemnor can guarantee a fair and impartial hearing when he or she enjoys the power to charge, prosecute and adjudicate contempt in the face of his or her own court. No requirement exists in any Australian jurisdiction for a court to transfer proceedings for contempt in the face of the court to another court. The Family Court approach indicates that it would be an exceptional case for a judge to determine a contempt prosecution in *brevi manu*, but that does not mean that it will not take place.

The ALRC, in its report of almost 30 years ago, observed that '[w]hile a presiding judge would undoubtedly make every conscious effort to eliminate bias in his or her assessment of the relevant facts, there is undoubtedly a danger that the judge's role as the target of the relevant

²⁴² Michelle Harper, 'The winds of change: The impact of the charter of rights' (2007) 81(12) *Law Institute Journal* 42.

conduct (in many cases) may subconsciously influence his or her impression as to what happened.’²⁴³

The relevance of human rights principles to this issue was considered in the United Kingdom Law Commission consultation paper, specifically, compliance with article 6.1 of the ECHR. As noted above, that provision is drafted in similar terms to article 14.1 of the ICCPR. Article 6.1 of the ECHR provides that ‘everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law’. The Law Commission reviewed case law that highlighted issues regarding the difficulty of ensuring both subjective and objective impartiality (justice being done and also being seen to be done) in cases where the judge may have personally been insulted by the alleged contemnor.

The Commission drew attention to the decision of the European Court of Human Rights in *Lewandowski v Poland*.²⁴⁴ In that case, Mariusz Lewandowski was a Polish man who, in 2009, was serving a prison sentence. He applied for a stay of execution of his sentence and his application was denied. In his appeal submissions, Lewandowski drew attention to a factual error made by the trial judge, and recorded his opinion that the judge must have drafted his judgment ‘under the influence of intoxicating substances, for instance alcohol or other narcotic substances’, that the judge’s ‘mental functions were therefore impaired’, and that the Court of Appeal should ‘examine the capacity of the judge to decide cases’.²⁴⁵ Lewandowski’s appeal was rejected by the trial judge, who sat as the Court of Appeal from his own judgment, and in proceedings where Lewandowski was neither present nor represented. The judge gave Lewandowski 28 days’ solitary confinement as punishment for the remarks he made in his appeal submissions. A subsequent Court of Appeal quashed the decision, citing the

²⁴³ Australian Law Reform Commission, above n 7, 69 [110].

²⁴⁴ *Lewandowski v Poland*, App No 66484/09 [45]–[50].

²⁴⁵ *Ibid.*

purpose of contempt was to control order in the court, not punish people for criticising judges.

Lewandowski sought confirmation of his human rights under the European Charter. The European Court of Human Rights declared the cause admissible, deciding that contempt in the face of the court is properly characterised as a criminal offence, and that, accordingly, article 6 of the ECHR was applicable.²⁴⁶ As to Lewandowski's substantive claims, the Court held that personal impartiality should be presumed unless evidence is secured to rebut the presumption. The Court then observed:²⁴⁷

The fact that the judge whom the applicant criticised sat as a single judge in considering whether the criticism of him constituted contempt of court and whether to punish the applicant must have implications for the characterisation of the type of bias in question. In its case-law the Court has already recognised the difficulty of establishing a breach of Article 6 on account of subjective bias and for this reason has, in the vast majority of cases raising impartiality issues, focused on the objective test. However, there is no watertight division between the two notions, since the conduct of a judge may not only prompt objectively held misgivings as to impartiality from the point of view of the external observer (the objective test) but may also go to the issue of his or her personal convictions (the subjective test) ... The Court further notes that in his letter to the applicant the President of the Elbląg Regional Court stated that Judge E.O. had felt offended by the allegations made in the applicant's letter and that Judge E.O. was envisaging bringing criminal proceedings against the applicant for defamation punishable under Article 212 of the Criminal Code. In these circumstances, given that the judge decided a case concerning criticism directed personally against him alone, the absence of that watertight division is even more pronounced.

Lewandowski was a relatively extreme case. There was no hearing at all, and the punishment was very severe. However, the case does draw attention to the human rights issues associated with judges acting *in brevi manu*. Such proceedings amplify the risk of bias and compel a search for fairer procedures.

The decision of the European Court of Human Rights in *Kyprianou v Cyprus*, which also applied article 6 of the ECHR in a case of contempt in

²⁴⁶ Ibid [42]-[44].

²⁴⁷ Ibid [47].

the face of the court, is worth considering as well.²⁴⁸ Michalakis Kyprianou, a Cypriot national and lawyer, was defending a person accused of murder in a Cypriot court in 2001. During the trial, Kyprianou objected to being interrupted during his cross-examination of a prosecution witness, and sought leave to withdraw from the proceedings. When leave was not granted, Kyprianou alleged that the judges were biased, pointing to the fact that they had been talking to one another and sending each other secret notes during the trial ('ravasakia' — short and secret letters/notes, or love letters, or messages with unpleasant contents). The judges said they had been 'deeply insulted', that they could not 'conceive of another occasion of such a manifest and unacceptable contempt of court by any person, let alone an advocate', and opined that 'if the court's reaction is not immediate and drastic, we feel that justice will have suffered a disastrous blow'.²⁴⁹ Kyprianou was offered the choice to be sentenced to contempt or to retract what he had said. He refused. The Court found Mr Kyprianou to be in contempt of court and sentenced him to five days' imprisonment, enforced immediately. His appeal to the Supreme Court of Cyprus was dismissed on 2 April 2001.

Kyprianou sought a ruling in the European Court of Human Rights, complaining, *inter alia*, that he had not been tried by an independent and impartial tribunal, contrary to article 6(1), as the same court that had charged him with contempt had also tried and punished him. The European Court noted the trend in common-law jurisdictions acknowledging that summary procedure should be used sparingly, after careful reflection, and with appropriate safeguards. However, the Court said that in a case like the present, the confusion of roles between complainant, witness, prosecutor and judge could self-evidently prompt objectively justified fears as to the conformity of the proceedings with the time-honoured principle that no one should be a judge in his or her own cause and, consequently, as to the impartiality of the bench. The Court found that the impartiality of the lower

²⁴⁸ *Kyprianou v Cyprus* No 7397/101.

²⁴⁹ *Ibid* [18].

Court was open to doubt. It noted that judges enjoy the power to commit for contempt in the face of the court, but they had reached the conclusion that Kyprianou was found to be guilty too hastily, and that the judges had not detached themselves from the situation.

In the light of the long-standing criticisms of summary procedure for contempt in the face of the court — criticisms made at common law, within the law reform commission reports, and in respected international human rights tribunals — it is submitted that the international human right to an impartial court should extend to include the reform of contempt procedure to require the empanelment of a new judge for any contempt trial.²⁵⁰ This reform will not only have the salutary effect of reforming an unusually dangerous procedure, but also help to ensure that Australian law is consistent with the nation's human rights obligations. While a number of commentators who have proposed reforms to the law and procedure of contempt in the face of the court have stopped short of making this recommendation, preferring instead to leave open the option of 'swift action' where required, the case law demonstrates that the power to commit for contempt in the face of the court is vulnerable to abuse.

III THE PRESUMPTION OF INNOCENCE (ARTICLE 14.2)

Article 14.2 of the ICCPR relevantly states that in the determination of any criminal charge, everyone shall be presumed innocent until proven guilty. The presumption of innocence is not an obvious feature of prosecutions for contempt in the face of the court in Australia. Instead, many jurisdictions require a person to 'show cause' as to why they should not be dealt with for contempt. In the ACT and in Queensland, in the criminal courts at each level, the accused is placed in a show-cause position as to why punishment should not be imposed for the contempt; so while there may be an

²⁵⁰ UK Law Commission, above n 185, 116 [5.77]; *O'Toole v Scott* (1965) 65 SR (NSW) 113; [1965–66] 39 ALJR 15; *Ex parte Cory* (1865) 3 SCR 304.

opportunity to make a defence, the burden is reversed.²⁵¹ In the Magistrates Court in Tasmania, the relevant statutes allow for the person who commits contempt to be ‘deemed guilty’.²⁵² The statutes are silent as to any opportunity to argue that the conduct was not committed or that it did not amount to contempt in the face of the court. In the Northern Territory Magistrates Court, the relevant provision is largely silent on procedure, stating that the ‘Court in whose presence any offence under this section is committed may forthwith convict the person guilty of the offence’.²⁵³ As Murphy J observed in his dissenting judgment in *Keeley v Brooking*:²⁵⁴

The requirement to show cause is not mere form, for the accused is required to meet, not a case which is presented against him by evidence given at his trial, but a case which exists in the mind of the judge at the commencement of the trial, although it may be explained, as it was here, by reference to various matters which formed the basis of the judge's opinion. This can only mean that the tribunal commences, not with a presumption of innocence, but with a presumption of guilt. Such procedures are not easily reconcilable with fundamental principles of justice.

Some jurisdictions expressly provide for the accused’s right to make a defence to the charge, while in most jurisdictions the relevant legislation provides that the judge is to adopt such procedure as the court thinks fit. In New South Wales the accused is required to make a defence to the charge in the courts at each level.²⁵⁵ The same is true in Tasmania, but only in the Supreme Court.²⁵⁶ In the Supreme Court of Western Australia, the accused is also required to make his or her defence,²⁵⁷ but no such requirement exists in the District and Magistrates Courts. In the High Court of Australia, the alleged contemnor is required to make his or her defence to the charge.²⁵⁸ In South Australia, the relevant statute governing proceedings in the Magistrates Court is silent on procedure; however, in the

²⁵¹ *Court Procedures Rules 2006* (ACT) reg 2504, *Uniform Civil Procedure Rules 1999* (Qld) s 924 applies in the Queensland Supreme, District and Magistrates Court: s 3.

²⁵² *Justices Act 1959* (Tas) s 25; *Magistrates Court Act 1987* (Tas) s 17A.

²⁵³ *Justices Act* (NT) s 46(3).

²⁵⁴ *Keeley v Brooking* (1979) 143 CLR 162, 186.

²⁵⁵ *Supreme Court Rules 1970* (NSW) r 55.3; *District Court Act 1973* (NSW) s 199(3); *Local Court Act 2007* (NSW) s 24.

²⁵⁶ *Supreme Court Rules* (Tas) reg 941(2).

²⁵⁷ *Rules of the Supreme Court 1971* (WA) O 55 r 3.

²⁵⁸ *High Court Rules 2004* (Cth) pt 11.01.2.

Supreme and District Courts the relevant statutes require that the court hear evidence for and against the charge.²⁵⁹ The same is true under the *Family Court Rules*.²⁶⁰

Also relevant to the presumption of innocence is the terminology used in some contempt proceedings. In some jurisdictions a person accused of committing contempt in the face of the court is referred to as the ‘contemnor’ before the charge has been made out. In the Supreme Courts of both New South Wales and Western Australia, the term ‘contemnor’ is defined to mean ‘a person guilty *or alleged to be guilty of* contempt of court’.²⁶¹ The WALRC found that the use of the term ‘contemnor’ when referring to defendants was unduly prejudicial and recommended that the term ‘defendant’ be adopted instead.²⁶²

In *Woolmington v Director of Public Prosecutions*, Lord Sankey observed:²⁶³

Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to ... the defence of insanity and subject also to any statutory exception. If, at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given by either the prosecution or the prisoner ... the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.

It is trite to observe that in contemporary criminal law a great many offences are characterised by strict liability, omissions liability and reverse-onus provisions for exculpation. This is not necessarily a bad thing.²⁶⁴ However, there is no compelling policy reason why the offence of contempt

²⁵⁹ *Supreme Court Civil Rules 2006* (SA) s 305(3), *District Court Act 1991* (SA) s 48.

²⁶⁰ *Family Law Act 1975* (Cth) s 112AP and r 21.08 of the *Family Law Rules 2004* (Cth).

²⁶¹ *District Court Act 1973* (NSW) s 199(1); *Rules of the Supreme Court 1971* (WA) O 55 r 1 (emphasis added).

²⁶² WALRC, above n 155, 11.

²⁶³ [1935] AC 462.

²⁶⁴ See further Jeremy Horder, ‘Bureaucratic “Criminal” Law: Too Much of a Bad Thing?’ *LSE Law, Society and Economy Working Papers* 1/2014.

in the face of the court should be characterised as such. Instead, the presumption of innocence should apply.

Human rights could be secured in the present context if the reforms developed in the preceding passage of this chapter were adopted. If there were a statutory requirement to refer proceedings for contempt in the face of the court to a different judge, then the new court could apply the presumption of innocence. There are invariably witnesses in the court other than the judge who would be available to give evidence. Guilty pleas may well be common (not that this is relevant). The Crown could be put to proof and procedural fairness would be maintained.

IV THE RIGHT TO BE INFORMED PROMPTLY AND IN DETAIL REGARDING THE NATURE AND CAUSE OF THE CHARGE AGAINST ONESELF (ARTICLE 14.3(A))

Article 14 of the ICCPR states that the person is entitled to be ‘informed promptly and in detail in a language which he understands of the nature and cause of the charge against him’.

It is a fundamental rule of trial fairness that an accused is entitled to have the charge specified.²⁶⁵ Specificity is required so that the accused has an opportunity to prepare a proper defence.²⁶⁶ This principle also applies in prosecutions for contempt in the face of the court.²⁶⁷

A review of the procedural law governing contempt in the face of the court across the various Australian jurisdictions highlights that the right to have the charge specified is not standard. Only in South Australia is there a specific requirement that the court must formulate a written charge. In that jurisdiction the written charge must contain reasonable details.²⁶⁸ In the vast majority of the remaining jurisdictions, there is only a requirement to

²⁶⁵ *Johnson v Miller* (1937) 59 CLR 467.

²⁶⁶ *Coward v Stapleton* (1953) 90 CLR 573, 579–80. See also *Johnson v Miller* (1937) 59 CLR 467.

²⁶⁷ See, eg, *MacGroarty v Clauson* (1989) 167 CLR 251.

²⁶⁸ *Supreme Court Civil Rules 2006* (SA) ss 301, 302.

orally inform the accused person of the charge, with no additional requirement for any detail to be provided (although at common law the ‘gist’ of the charge must be plain).²⁶⁹ In many jurisdictions no statutory requirement exists to inform the accused of the charge, orally or otherwise, before the magistrate proceeds to sentence.²⁷⁰ In the District Court of Western Australia, a judge can punish a person for contempt ‘if he thinks fit’, and there is no statutory requirement to inform the defendant of the charge.²⁷¹

It is recommended that a requirement to formulate a written charge should be a standard feature of contempt proceedings, if for no other reason than it slows down the process and affords the parties, including the judge, an opportunity for passions to cool. At the very least, fairness requires that the person be informed orally of the charge with sufficient detail so that the person might be able to prepare a defence.

In contrast to a standard criminal prosecution, there is no requirement to ask the alleged contemnor to formally plead to the charge. The *Family Court Rules* come close in so far as there is a requirement to ask the respondent whether he or she wishes to admit or deny the allegation,²⁷² but in no jurisdiction does a requirement exist to *plead* to the charge. The absence of such a requirement means that fitness to plead — a procedural safeguard that can be utilised to ensure that people with mental ill-health

²⁶⁹ The jurisdictions where there is a statutory requirement to inform the accused of the charge include: The ACT Supreme and the ACT Magistrates Courts: *Court Procedures Rules 2006* (ACT) reg 2504; the NSW Supreme Court: *Supreme Court Rules 1970* (NSW) r 55.3; the NSW District Court: *District Court Act 1973* (NSW) s 199(3); the NSW Local Court: *Local Court Act 2007* (NSW) s 24; the Victorian Supreme and County Courts: *Supreme Court (General Civil Procedure) Rules 2005* (Vic) reg 75.03 and the *County Court Act 1958* s 54; the Northern Territory Supreme Court: *Supreme Court Rules* (NT) r 75.03; the Northern Territory Local Court: *Local Court Act* (NT) s 33(2); the Queensland Supreme Court and the Queensland District Court: *Uniform Civil Procedure Rules 1999* (Qld) s 924; the Tasmanian Supreme Court: *Supreme Court Rules* (Tas) reg 941(2); the High Court of Australia and the Family Court of Australia: the *High Court Rules 2004* (Cth) pt 11.01.2, *Family Law Act 1975* (Cth) s 112AP and r 21.08 of the *Family Law Rules 2004* (Cth).

²⁷⁰ See *Justices Act* (NT) s 46(3); *Justices Act 1959* (Tas) s 25; *Magistrates Court Act 1987* (Tas) s 17A; *Magistrates Court Act 2004* (WA) ss 15 and 16(2)(a)(i); *Magistrates Court Act 1989* (Vic) s 133; *Magistrates Court Act 1991* (SA) s 45.

²⁷¹ *District Court of Western Australia Act 1969* (WA) s 63.

²⁷² *Family Law Act 1975* (Cth) s 112AP and r 21.08 of the *Family Law Rules 2004* (Cth).

are not convicted when they lack adjudicative competence — is not enlivened in contempt proceedings.

A requirement to formally plead to a charge of contempt in the face of the court should be a standard feature of reformulated contempt proceedings. It would flow from this requirement that the additional safeguard requiring defendants to be fit to plead could be invoked to ensure that people with significant mental health issues are not improperly convicted. Common-law notions of fairness dictate that an accused person must be fit to stand trial²⁷³ before he or she can be convicted of an offence. Contempt in the face of the court is a criminal offence and should be afforded the same procedural protections as other criminal offences. The concept of ‘fitness for trial’ requires a threshold mental capacity before a person can stand trial.²⁷⁴ In *Eastman v The Queen*,²⁷⁵ Gaudron J said:

Traditionally, an accused person has not been put on trial unless fit to plead because of ‘the humanity of the law of England falling into that which common humanity, without any written law would suggest, has prescribed that no man shall be called upon to make his defence at a time when his mind is in that situation as not to appear capable of so doing.’ That statement may indicate a positive and independent right on the part of an accused not to be tried unless fit to plead. It is unnecessary to decide whether that is so. It is sufficient to approach the present matter on the basis that the common law guarantees an accused person a fair trial according to law and that one aspect of that guarantee is that a criminal trial cannot proceed unless the accused is fit to plead.

A defendant is presumed to be of sound mind, and therefore fit to plead and stand trial, unless unsoundness of mind is put in issue. The person who raises the issue has the onus of proving unfitness. At common law, the burden is different, depending on whether the issue is raised by the prosecution or the defence. At common law the prosecution must prove

²⁷³ The expression ‘fitness to stand trial’ or ‘fitness for trial’ is sometimes used interchangeably with ‘fitness to plead’, but the latter technically refers to the question of fitness at the arraignment stage: Australian Human Rights Commission, ‘Capacity and People with Disability Who Need Communication Supports Or Who Have Complex and Multiple Support Needs’ in *Equal Before The Law: Towards Disability Justice Strategies* (February 2014) ch 4.

²⁷⁴ *Eastman v R* (2000) 203 CLR 1.

²⁷⁵ (2000) 203 CLR 1.

unfitness beyond reasonable doubt,²⁷⁶ whereas the defence must only prove unfitness on the balance of probabilities.²⁷⁷ This difference has been removed by statute in many Australian jurisdictions.²⁷⁸

The common-law test for determining fitness to stand trial, which applies in all states and territories where fitness issues have not been regulated by statute, is set out in *R v Presser*.²⁷⁹ The ‘*Presser* rules’ require that the defendant must be able to understand the charge, plead to the charge, (though not relevant here) exercise the right to challenge the empanelling of jurors, understand generally the nature of the proceedings, follow the course of the proceedings, understand the substantial effect of any evidence that may be given against them, make a defence or answer the charge, and give any necessary instructions to his or her lawyer.²⁸⁰ The length of the trial, and also, importantly, the likely mental condition of the accused during the course of proceedings, are relevant considerations in the court’s calculus of fitness.²⁸¹

One case that demonstrates how a fitness inquiry might operate in this context of a trial for contempt in the face of the court is the decision of the Federal Magistrates Court in *Hogan & Lennard (No 3)*.²⁸² Even though a substantial number of Family Court authorities have described the procedures relating to contempt prosecutions in that jurisdiction as tantamount to a code (and therefore exhaustive of the procedure that ought to be adopted),²⁸³ in *Hogan & Lennard (No 3)*, Federal Magistrate Altobelli

²⁷⁶ *R v Presser* [1958] VR 45.

²⁷⁷ *R v Donovan* [1990] WAR 112.

²⁷⁸ Australian Human Rights Commission, above n 273, 58.

²⁷⁹ [1958] VR 45; see also *R v Kesevarajah* (1994) 181 CLR 230.

²⁸⁰ See also *R v Mailes* [2001] NSWCCA 155.

²⁸¹ *Kesavarajah v R* (1994) 181 CLR 230.

²⁸² *Hogan & Lennard (No 3)* [2008] FMCAFam 741 (2 April 2008).

²⁸³ In *Rutherford v Marshal of the Family Court of Australia* [1999] FamCA 1299 the Full Court of the Family Court described the jurisdiction of courts exercising family jurisdiction to commit for contempt under s 112AP of the *Family Law Act* as ‘a complete code for dealing with contempts of the Court’. If that is so, then there may be no room for the operation of common-law inherent powers (in the case of superior courts) or common-law implied powers (in the case of inferior courts) to order that a fitness inquiry be undertaken. On the other hand, if the Family Court, Family Court of Western Australia and Federal Circuit Court exercising family-law jurisdiction also

ordered that an inquiry be undertaken into the fitness of a person accused of contempt. It is convenient to set out the description of the circumstances of the case provided by the magistrate, which, while lengthy, provide necessary context:

The basis of Mr Schroder's application was his concern in relation to the ability of the husband to understand the nature and gravity of the proceedings and the consequences of them. He expressed concern about the husband's ability to provide instructions and that led him to have prima facie concerns about the husband's mental capacity. Of course it was not appropriate for him to give me examples but he described the situation that he was dealing with as one where there were illogical instructions that are incoherent and fly in the face of common sense.

He sought an adjournment in order to place material before the Court as to his client's medical condition. Obviously that medical evidence is not available today.

Mr Gates is the solicitor appearing for the applicant wife. He was ready to proceed today and he opposes the application for an adjournment and has serious concerns about whether there is any genuine issue about fitness to plead. Mr Gates made the appropriate submission that, based on experience in this jurisdiction, there are many clients who could be described as incoherent, illogical, do not understand and probably do not listen to advice that is given. He frankly admitted, however, that he could not comment on the husband's mental capacity, an appropriate admission to make.

He pointed out that when this matter was before me last week, no concerns were expressed in relation to the husband's capacity. He also reminded me of the history of the proceedings and of the gravity of the situation that confronted, it should be noted, not just the wife but the husband too, for if the mortgagee exercises its power of sale, it will be to the ultimate detriment of both the husband and the wife. In short, Mr Gates indicated that it was the wife's position that the bona fides of the husband should not be accepted.

Altobelli FM referred to the authorities on fitness to plead and said:²⁸⁴

Where an accused's representative raises a question concerning the unfitness of the accused, the trial judge would ordinarily be expected to accept that the issue has been raised in good faith. Legal representatives, whether barrister or solicitor, are subject to professional obligations. Once

have a general power to try people for contempt, *Rutherford* presents no obstacle to the recognition of the approach taken by the Federal Magistrate's Court in *Hogan & Lennard (No 3)*. *Rutherford* could be distinguished on the basis that case was not concerned with the general power of the courts exercising family jurisdiction to try people for contempt in the face of the court.

²⁸⁴ *R v Tier* [2001] NSWCCA 53 [72].

raised by a practitioner, there is, prima facie, an obligation upon the trial judge to halt the trial and to conduct an enquiry before a separate jury.

If, however, the basis for concern is not obvious or the validity of that concern is dubious, it is appropriate for the trial judge to seek an elaboration upon the matters giving rise to the concern. Where that elaboration demonstrates a real and substantial question, good faith will be presumed. The question of unfitness must then be determined by a separate jury. It is only where there is patently no real and substantial question that the Court may impute an absence of good faith and decline to conduct an enquiry.

Applying this test, Altobelli FM halted the trial on the charge of contempt.

For both the reasons given by Altobelli FM and the preceding reasons, it is submitted that the law and practice relating to fitness to plead provides a vital judicial safeguard of the rights of the accused,²⁸⁵ and this safeguard should be extended to people who have been accused of contempt.

Ultimately, it is unclear whether, in those jurisdictions that provide a code for the management of contempt in the face of the court, an implied power to make a fitness inquiry would not be available.²⁸⁶ However, the decision of the Federal Magistrates Court in *Hogan & Lennard (No 3)* indicates that there is some foundation for arguing that such a power may be exercised by a judge of a court with statutory or limited jurisdiction. This would include a power to adjourn proceedings and take other steps necessary in order to secure procedural fairness.²⁸⁷

At present the power to inquire into fitness in criminal trials is far from uniform throughout the various criminal courts in Australia. Some courts do not have any power to dispose of a matter on the basis of unfitness. While jurisdictional gaps remain such that magistrates in some states and territories cannot formally inquire into fitness and dispose of matters on that basis, it would arguably still be open to these magistrates to

²⁸⁵ See, eg, Jodie O’Leary, Suzie O’Toole and Bruce D Watt, ‘Exploring Juvenile Fitness for Trial in Queensland’ (2013) 20 *Psychology, Psychiatry and Law* 853.

²⁸⁶ *O’Brien v Northern Territory* [2003] NTCA 4 [49].

²⁸⁷ *Pfitzner v Pfitzner* (1988) 62 ALJR 323.

hear submissions on unfitness in contempt prosecutions on the basis of the inherent or constitutional jurisdiction identified in Chapter One.

Perhaps it should not be overlooked that *Hogan & Lennard (No 3)* involved an alleged contemnor who was legally represented. The legal representative was able to raise the issue of unfitness, which then led the judge to order the inquiry into unfitness. Many people accused of contempt, and dealt with by way of summary procedure, will not be represented. In addition, it is unlikely that a self-represented litigant experiencing mental ill-health would appreciate that he or she has the right to raise fitness for trial as an issue. It is unlikely that such a person would appreciate that he or she has the option of seeking an adjournment to take legal advice, which could be a circuit-breaker that might bring this defensive option to their attention. Yet in these circumstances a judge considering a fitness inquiry would not have the benefit of opposing submissions on fitness, and could urge the provision of legal aid or even appoint a lawyer to act as *amicus curiae* to assist the court.

The absence of legal safeguards relating to charges and pleas in the context of a prosecution for contempt in the face of the court is particularly problematic for a person with mental health issues. This is especially so where that person appears in court without legal representation. Successfully navigating the distinct stages of considering a specified charge, deciding how to plead to that charge, and deciding whether there is fitness to plead to that charge all contemplate executive functioning of a relatively high order, or, at the very least, lucid intervals, which may not be realistic depending on the mental health issues at play.

The human right to a *fair hearing* guaranteed by article 14 of the ICCPR, understood within the context provided by article 12 of the *International Covenant on Economic, Social and Cultural Rights* ('ICESCR'), would support the conclusion that, where fairness requires it, a fitness inquiry ought to be conducted. To the extent that the power to conduct a fitness inquiry in the context of a criminal proceeding is drawn

from inherent or implied powers, the common law can and should be adapted where possible to conform to international human rights principles.²⁸⁸ There is no reason why the human right to the enjoyment of the highest attainable standard of mental health should not be enjoyed at every moment, including during criminal trials. That being so, the courts should and do have the power to conduct fitness inquiries when a person is accused of contempt in the face of the court. Adopting such a procedure would be consistent with the position taken by the Full Family Court that a person charged with contempt must understand the charge and have the opportunity to avail himself or herself of defensive options.²⁸⁹

Human rights principles arguably require that an enquiry as to fitness to plead should be ordered when relevant. The common law guarantees an accused a fair trial according to law, and one aspect of that guarantee is that a criminal trial should not take place unless the accused is fit to plead. The diversity and prevalence of mental health issues in the community, the over-representation of people with mental health issues in the prison system, and human rights principles together warrant the implementation of an assessment procedure. For reasons that are further developed in the concluding chapter of this thesis, initial screening in relation to fitness to plead could be conducted by a court-based mental health professional with an understanding of court processes.

The presence of the human right to be informed promptly and in detail regarding the nature and cause of the charge against the accused enshrined in article 14(3)(a) of the ICCPR soundly reinforces the need for Australian law to be reformed. The Family Court's requirement that the accused understand the charge in a contempt prosecution demonstrates compliance with the human right stated in article 14(3)(a). It is submitted that the human right to have the charge specified would be best

²⁸⁸ *Jumbunna Coal Mine NL v Victorian Coal Miners' Association* (1908) 6 CLR 309, 363.

²⁸⁹ *A Bank & Coleiro* [2011] FamCAFC 157 [19].

implemented in combination with the Family Court approach, and by making specific provision for a fitness inquiry to be undertaken.

V THE RIGHT TO HAVE ADEQUATE TIME AND FACILITIES FOR THE
PREPARATION OF A DEFENCE AND TO COMMUNICATE WITH COUNSEL OF ONE'S
OWN CHOOSING (ARTICLE 14.3(B))

Article 14(3)(b) also sets out an entitlement for a person accused of contempt in the face of the court to have adequate time and facilities for the preparation of his or her defence, to defend himself or herself in person or through legal assistance of his or her own choosing, and, if he or she does not have legal assistance, to be informed of this right and to have legal assistance assigned to him or her, in any case where the interests of justice so require, and without payment by him or her in any such case if he or she does not have sufficient means to pay for it.

Article 14.3(b) is drafted in similar terms to article 6.3(b) of the ECHR, which provides that anyone charged with a criminal offence has the right 'to have adequate time and facilities for the preparation of his defence'. The Law Commission cautioned that 'the requirement under article 6(3)(b) of adequate time and facilities for the preparation of a defence is one of the main reasons that a court should be very wary of proceeding too summarily, and even if a court deals with a contempt immediately, this right must be respected'.²⁹⁰

The review of the law in the preceding chapter highlighted that not only is summary procedure (without an adjournment or provision of counsel) typical, it is also very widely regarded as being perfectly acceptable. Only in South Australia, in both the Supreme Court and the District Court, is there a requirement for the court to contemplate whether the matter is urgent such that the matter should proceed on that day. Even where the matter is considered urgent, a requirement remains for the charge to be reduced to

²⁹⁰ UK Law Commission, above n 185, 115 [5.75].

writing and that the charge contain reasonable detail. Where the matter is not urgent, a different procedure is mandated, whereby the Registrar is required to formulate a written charge and issue the person with a summons such that the matter can be put over to a later date.²⁹¹ The *High Court Rules*, by contrast, state that after hearing the alleged contemnor make his or her defence, the court may proceed then or after adjournment to determine the charge; there is no *requirement* to adjourn.²⁹²

The rights contemplated by article 14(3)(b) of the ICCPR would have a significant and positive effect on the law of contempt in the face of the court in Australia. The provision of time and facilities would considerably enlarge the possibility that the person would be referred to services, enabling the person to make better-considered submissions that would advance his or her position. The provision of time and facilities could, if relevant services were made available in the court precinct (a recommendation made in the final chapter of this thesis), also increase the likelihood that submissions could be made drawing attention to any issues of mental ill-health relevant to culpability or punishment. An adjournment to allow the accused to prepare a defence might even provide the judge who has witnessed the contempt the opportunity to compose himself or herself and develop a sense of proportion — composure that can be lost in the heat of the moment. As Moses LJ observed in *R v Huggins*:²⁹³

In the heat of the moment there may be a perception in the judge of the need for speedy action and condign punishment, but the importance of the time for reflection is that it presents an opportunity to consider whether a less stringent course may be taken. Indeed, that time for reflection may itself avoid the need for any further action at all.

²⁹¹ *Supreme Court Civil Rules 2006* (SA) ss 301, 302.

²⁹² *High Court Rules 2004* (Cth) pt 11.01.2.

²⁹³ [2007] 2 Cr App R 108, 110 [18].

VI THE RIGHT TO DEFEND ONESELF IN PERSON OR THROUGH LEGAL ASSISTANCE (ARTICLE 14.3(D))

In Australia, unlike many other common-law jurisdictions, there is no constitutional or common-law right to legal representation. There is a limited ‘right’ to representation that springs from the common-law power of courts to stay proceedings in the event that an indigent person has been accused of a serious offence and, through no fault of his or her own, has been unable to secure legal representation.²⁹⁴ However, this limited common-law right fails to protect people accused of contempt in the face of the court who really require legal representation.

In its review of the law of contempt, the Law Commission commented that ‘[i]t may be particularly important for the alleged contemnor to be legally represented on a contempt allegation if he or she was an unrepresented defendant at the time of engaging in the behaviour alleged to be a contempt’.²⁹⁵ This observation is doubly reinforced in cases where a person is experiencing mental ill-health and may have particular difficulties understanding what is taking place and what decisions should be made in his or her best interests. These propositions are well evident in the cases studies detailed in the next chapter.

VII THE RIGHT TO EXAMINE, OR HAVE EXAMINED, THE WITNESSES AGAINST ONESELF (ARTICLE 14.3(E))

Even in those Australian jurisdictions where the governing statutes expressly provide that the accused can make a defence to the charge, no provision is made for the accused to cross-examine the presiding judge as to the judge’s perceptions or conclusions on the relevant conduct. In its review, the ALRC — commenting on the reliability and adequacy of the ‘judge’s-eye view’ — frankly and forthrightly acknowledged that

²⁹⁴ *Dietrich v The Queen* (1992) 177 CLR 292.

²⁹⁵ UK Law Commission, above n 185, 116 [5.76].

factors contributing to its unreliability include the expectations of the witness as to what might have happened, the witness being under stress at the time of the relevant events and the witness being of an advanced age. Any or all of these factors may be operative when a presiding judge is reaching a conclusion, based entirely on his or her own perceptions, as to what has happened in the courtroom. If, on the other hand, the mode of trial employed allows a number of persons who were present in the courtroom — including both the presiding judge and the accused — to describe the relevant events according to their individual perceptions, the likelihood of inaccuracy is reduced.²⁹⁶

Australian judges enjoy immunity from suit that would preclude them from serving as witnesses in contempt proceedings. However, people accused of contempt in the face of the court may generate some forensic benefit in cross-examining other witnesses, and in the light of the stigma of criminal conviction and the seriousness of the punishment, they ought not be denied any forensic advantage that might flow from the implementation of the right enshrined in article 14(3)(e).

VIII CONCLUSIONS

As the United Kingdom Law Commission has observed:²⁹⁷

Courts have emphasised in a number of cases that the purpose of having power to deal with contempt is to protect the course of justice. If, however, the procedure by which the court seeks to impose its authority lacks the basic features of justice which apply to criminal proceedings, then it undermines rather than enhances the rule of law.

The material above demonstrates that Australian principles governing contempt in the face of the court fall well short of human rights standards. While the Australian Law Reform Commission explicitly referred to article 14 of the ICCPR in its 1987 review of the law of contempt, it stopped short of recommending cessation of summary procedure. Instead, the Commission recommended the following safeguards for the accused:

- the charge should be in writing and specify the particulars of the alleged offence;

²⁹⁶ Australian Law Reform Commission, above n 7, 68 [110].

²⁹⁷ UK Law Commission, above n 185, 115 [5.72].

- the charge should contain a statement as to the rights of the defendant to elect the alternative mode of trial; and
- there should be an adjournment for a reasonable period to give the defendant an adequate opportunity to obtain legal advice or legal representation and to prepare a case in defence.²⁹⁸

Similarly, the Western Australian Law Reform Commission recommended replacing the existing procedures for dealing with contempt in the face of the court with a uniform procedure applicable in all Western Australian courts. Under the procedure recommended by the WALRC, a contempt offence may only be tried by the presiding judicial officer where the alleged offender consents to that procedure, or where the conduct has occurred in the presence of the judicial officer, and the judicial officer considers ‘that the alleged contempt presents an immediate threat to the authority of the court or the integrity of the proceedings then in progress unless dealt with in a summary manner’.²⁹⁹ The WALRC recommended that where a court proceeds to determine a contempt offence summarily, it should:

- (a) inform the accused of the nature and particulars of the charge;
- (b) allow the accused a reasonable opportunity to seek legal advice, to be heard and to call witnesses and, if necessary, grant an adjournment for any of those purposes;
- (c) after hearing the accused, determine the charge and give reasons for the determination; and
- (d) make an order for punishment or discharge of the accused.³⁰⁰

Where the conditions for the exercise of the summary power were not satisfied, the WALRC recommended referring the matter to a different judicial officer, along with additional requirements that the alleged offence be reduced to writing and provided to the alleged offender.³⁰¹ Where the matter was referred to a different judge rather than handled by the presiding judicial officer, the WALRC recommended that the judicial officer

²⁹⁸ Australian Law Reform Commission, above n 7, lxxiii [14].

²⁹⁹ WALRC, above n 155, 74.

³⁰⁰ Ibid.

³⁰¹ Ibid 75.

be immune from giving evidence unless he or she chose to do so. Instead, the matter would be determined by reference to the transcript or recording of the events, and other available evidence and compellable witnesses.³⁰²

While these recommendations are worthwhile, they fall short of what is required to ensure justice for people with mental health issues in the courts. It is clear from the analysis in this chapter that summary procedure falls foul of article 14 of the ICCPR. Summary procedure has traditionally been justified on the basis that contempt in the face of the court requires immediate discipline and the avoidance of delay associated with an adjournment and a trial. However, summary procedure can truncate fairness to the accused and, worse, it is clear that in some cases it can be used as an instrument of oppression. For people who are experiencing mental ill-health, the use of summary procedure may be particularly unfair and discriminatory. It is strongly arguable that, in the light of the above, adherence to human rights principles, particularly those enshrined in article 14 of the ICCPR, require that:

- the charge of contempt should be specified and a written charge be formulated;
- the accused should be required to plead to the charge (with an associated opportunity to argue that they are unfit to plead);
- the accused should be advised of his or her right to an adjournment;
- the accused should be afforded representation;
- the accused should be afforded time and facilities to prepare his or her defence; and
- the matter should be heard by a different judge than the one who witnessed the contempt.

If nothing else, such reforms would serve to slow the process down and provide time for passions to cool.

³⁰² Ibid 76.

As contempt in the face of the court is a criminal offence, the ICCPR is of most direct relevance to any consideration of the relevant human rights standards to be applied. Article 14 of the ICCPR, in particular, has been the main focus of this chapter. However, Australia has also signed and ratified other international treaties that are relevant in the context of this thesis. For example, article 12 of the ICESCR recognises ‘the right of everyone to the enjoyment of the highest attainable standard of physical and mental health’. In General Comment No 14, the United Nations General Assembly’s Third Committee observed that ‘the right to health must be understood as a right to the enjoyment of [a] variety of facilities, goods, services and conditions necessary for the realization of the highest attainable standard of health’.³⁰³ As Ben Saul, David Kinley and Jacqueline Mowbray have observed, the ‘foundational feature of any health care system’ is availability, and ‘availability boils down to addressing the dual questions [of] whether the state has suitable and sufficient resources, and whether it has the capacity and willingness to utilize them appropriately and effectively’.³⁰⁴ This is an evolutionary process.³⁰⁵ Article 12 of the ICESCR is also reinforced by the 1991 United Nations *Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care* (‘MI Principles’). The Australian Government was closely involved in the negotiation of both the International Covenants, and the MI Principles. These principles only reinforce Australia’s obligation to take steps to reform the law to ensure justice for people with mental health issues accused of crimes in Australian courts. While litigants in the Australian Capital Territory and Victoria can have recourse to their human rights statutes to press for recognition of their rights in this context, for the reasons that are developed further in the concluding Chapter of this thesis, it is recommended that the approach taken in the Family Court should be

³⁰³ Ben Saul, David Kinley and Jacqueline Mowbray, *The International Covenant on Economic, Social and Cultural Rights: Commentary, Cases and Materials* (OUP, 2014) 996.

³⁰⁴ *Ibid* 996.

³⁰⁵ Hunt and Backman, cited *ibid* 999; see also *ibid* 1040, fn 101, 1009 (especially [8], [43] and [44]).

accepted and implemented via a national, co-operative law reform initiative, to ensure uniformity of treatment across all Australian jurisdiction.

In the analysis in this chapter, international human rights principles have been adopted as the normative framework and reference point for the critical analysis of the principles and procedures governing contempt in the face of the court. It is true that Australia has traditionally had a poor record of compliance with the decisions of the United Nations Human Rights Committee. As Darren O'Donovan and Patrick Keyzer have observed, 'even rich, developed, liberal democracies can pursue a policy of deliberate and persistent non-compliance. Ultimately, access to international justice in this context is meaningless if the parties to international human rights instruments fail to comply.'³⁰⁶ However, it has been repeatedly recognised that Australian governments should redouble their efforts to meet the needs of people with mental health issues exposed to the criminal justice system.³⁰⁷ This was acknowledged by the Council of Australian Governments in the *National Statement of Principles for Forensic Mental Health*, which provides that state and territory legislatures must, when developing policies to support people experiencing mental ill-health, comply with the ICCPR and with the MI Principles.³⁰⁸

In the next chapter, the defects of the current regime of principles, and of the consequent denial of human rights, are illustrated via a number of case studies. In addition, the chapter will highlight circumstances where human rights must be balanced against other considerations, and punishment or even exclusion from access to the courts may be necessary to ensure the due administration of justice.

³⁰⁶ O'Donovan and Keyzer, above n 239.

³⁰⁷ NSW Law Reform Commission, above n 7. See also Leonie Armstrong, 'The reality of rights: people with an intellectual disability and the criminal justice system' (1997) 3 *Australian Journal of Human Rights* 78.

³⁰⁸ Council of Australian Governments, *Roadmap for National Mental Health Reform 2012–2022* (7 December 2012) 6.

Chapter Three

Cases Studies of People With Mental Health Issues Who Commit Contempt In the Face of the Court

I INTRODUCTION

The man's not well. He should not be here.³⁰⁹

In this chapter, a number of detailed case studies of contempt in the face of the court are provided and critically analysed. These cases have been selected for a number of reasons: they demonstrate the diverse mental health issues experienced by litigants; they demonstrate the diverse circumstances that can give rise to contempt prosecutions; they demonstrate the utility of an approach that concentrates on the question of whether mental ill-health has overborne the will of the person concerned at the relevant time; and they demonstrate the diverse responses of the courts to people who commit contempt in the face of the court. After each case study, a series of questions are raised that are framed against the backdrop of the legal analysis conducted in Chapter One and the human rights issues traversed in Chapter Two. These questions then propel the analysis and the search for policy solutions in the final chapter of the thesis, Chapter Four.

³⁰⁹ This quotation is attributed to Beryl Collins, the long-suffering wife of Goldsmith Collins, a Victorian man later declared to be a vexatious litigant. Beryl Collins made this comment as Goldsmith Collins was being led from the Supreme Court of Victoria in handcuffs after berating the judges. Collins was jailed for contempt. See Simon Smith, *Maverick Litigants: A History of Vexatious Litigants in Australia 1930-2008* (Maverick Press, 2008) 198, 210. Smith notes observations by one Supreme Court judge that Collins' first litigated grievance, a dispute over a fence, had been 'genuine': *R v Collins* [1954] VLR 46, 58.

II CASE STUDY ONE: THE MOORE-MCQUILLAN SAGA

A search using the name ‘Markham Moore-McQuillan’ across databases provided by the Australasian Legal Information Institute discloses that he has been a party — almost invariably a plaintiff, applicant or appellant — in about 100 cases reported on that database, spanning a period of two decades. Moore-McQuillan recently appeared in the High Court in *Moore-McQuillan v The Queen*, heard by Kiefel and Keane JJ on 18 June 2015,³¹⁰ in which he unsuccessfully appealed from the decision of the Court of Criminal Appeal of the Supreme Court of South Australia finding him guilty of threatening people in court. An important question raised by the Moore-McQuillan cases is: How much is enough?³¹¹

On 26 February 2007, Moore-McQuillan committed contempt in the face of the court. Justice Perry of the Supreme Court of South Australia had rejected various applications by Moore-McQuillan to re-open previously unsuccessful applications he had made,³¹² and as Perry J handed down his judgment to that effect, his Honour was met by the following response from Moore-McQuillan:³¹³

Moore-McQuillan: Thank you for being an arsehole and thank you for being prejudicial and thank you for being a cunt.

Perry J: That’s enough from you.

Moore-McQuillan: Hope you have a good fucking retirement you stupid fucking idiot. Thank Christ we are getting rid of a fucking cunt like you.

³¹⁰ [2015] HCASL 97.

³¹¹ ‘How much is enough’ is the title and hook line of the chorus of a song published in 1993 on You Am I’s breakthrough release ‘Hi-Fi Way’.

³¹² The details are inconsequential, as none of the applications made by Moore-McQuillan in this particular trajectory of litigation had any foundation: *Moore-McQuillan v Workcover Corporation SA* [2007] SASC 55; *Moore-McQuillan v Workcover Corporation SA* [2007] SASC 219.

³¹³ *Registrar of the Supreme Court of South Australia v Moore-McQuillan* [2007] SASC 447 [5].

Witnesses in court also gave evidence that Moore-McQuillan had also called Perry J ‘corrupt’.³¹⁴ Moore-McQuillan was charged with contempt in the face of the court.³¹⁵

The contempt prosecution was heard by Nyland J.³¹⁶ On this occasion Moore-McQuillan was represented by counsel. Expert evidence was considered. A psychologist named Richard Balfour examined Moore-McQuillan and gave evidence about Moore-McQuillan’s mental health. Justice Nyland summed up Balfour’s evidence in the following terms:³¹⁷

Mr Balfour concluded that the defendant fitted the diagnostic criteria for being a Querulant of the Vexatious Litigant and Paranoid subtypes as referred to in an article by Paul Mullen and Grant Lester (2006) *Vexatious Litigants and Unusually Persistent Complainants and Petitioners: From Querulous Paranoia to Querulous Behaviour, Behavioural Science and The Law*, (24:33-349).³¹⁸

Mr Balfour considered that the defendant had now lost all rational perspective with regard to the inappropriateness of his behaviour in court and did not see how his behaviour had severely undermined his credibility and legal cause. Mr Balfour thought that the defendant’s querulous behaviour was entrenched and there was ‘a high probability that he will continue to lose his temper in court and become obnoxious and abusive’. Mr Balfour described the defendant’s behaviour as challenging but believed that there was some hope that he might respond to rehabilitation.

The psychologist, Mr Balfour, said that he had discussed the concept of contempt of court with Moore-McQuillan, and the psychologist concluded that ‘he does not understand the concept at all’.³¹⁹ However, in re-

³¹⁴ Ibid [7].

³¹⁵ Ibid [1].

³¹⁶ Ibid. Justice Nyland had previously rejected an application by Moore-McQuillan that she recuse herself from hearing the matter on the basis that she was biased: *Registrar of the Supreme Court of South Australia v Moore-McQuillan* [2007] SASC 292.

³¹⁷ Ibid [37]–[38].

³¹⁸ Paul Mullen and Grant Lester, ‘Vexatious litigants and unusually persistent complainants and petitioners: from querulous paranoia to querulous behaviour’ (2006) 24 *Behavioral Sciences and the Law* 333–49. If a person is diagnosed as a querulous litigant, they are very unlikely to behave properly in court if things are not going their way. Paul Mullen and Grant Lester have defined querulous litigants as people who are unusually persistent in their pursuit of a personal grievance in a manner that is seriously damaging to their interests and disruptive to the functioning of the courts and/or other agencies attempting to resolve their claims. They are to be distinguished from public interest litigants, even notorious and disruptive ones.

³¹⁹ *Registrar of the Supreme Court of South Australia v Moore-McQuillan* [2007] SASC 447, [40].

examination, Mr Balfour said that Moore-McQuillan would have understood that what he said was insulting to a judge of the Supreme Court, and inappropriate in the circumstances.

Moore-McQuillan offered a written apology — but it was heavily qualified. He wrote:

I am apologizing for me [sic] behaviour which is more reactional to the stress and asking for assistance in my quest to have my rights pursuant to the legislation of South Australia that I have been denied. Forgive my outburst on 26-2-07.

Later in the ‘apology’, Moore-McQuillan said he had been asked whether he had respect for the court. He responded:³²⁰

[T]he answer would be NO as respect has to be earnt [sic] not given and I have yet to see any fairness or effort from the courts to suggest respect should be given. I do have respect for the law but not for the manipulation of it by people who should know and do better. I have witnesses [sic] Judges openly lie about talking to other judges about myself which smacks of bias and prejudice. I have watched lawyer and Judges take the high ground and openly manipulate matters against me. I have seen the use of the Sherriff [sic] and Police dept [sic] to manipulate circumstances in a court against me. I ask that I be treated fairly but that is a joke as it’s more a behind the closed doors [sic] that my matters are solved to me [sic] detriment.

The document concluded with what Nyland J described as a plea by the defendant that an investigation be conducted into his matters by ‘a SUITABLE IMPARTIAL LEGAL OFFICER WHO IS NOT PART OF THE COURTS LEGAL OR JUDICIY [SIC] SYSTEM SO COMMONSENSE WILL APPLY’.³²¹ A separate document filed by Moore-McQuillan said that it ‘is easier to say I am paranoid etc when the courts fail to investigate, protect or allow injustice and corruption to continue’.³²² Before the Supreme Court hearing, Nyland J asked Moore-McQuillan ‘Will you confirm that you will do

³²⁰ Ibid [44].

³²¹ Ibid [45] (emphasis in original).

³²² Ibid [44].

the best you can to behave during the court proceedings?’ to which he responded: ‘I have always tried to do that.’³²³

Notwithstanding this undertaking, Nyland J held that Moore-McQuillan’s apology for his contempt before Perry J was not genuine. Her Honour concluded:³²⁴

I am satisfied that the words used were a contempt in the face of the court notwithstanding that they were uttered after judgment had been delivered. I am satisfied that the defendant was aware of what he was saying and was able to control what he said. The statements were deliberately made by the defendant with the intention to insult, ridicule and to defy the authority of the court simply because the defendant had received a judgment which was not in his favour. To refer to a judge as ‘corrupt’ is an insult of the worst kind, designed to impair ‘confidence in the courts and their judgments’. I therefore find the defendant guilty of the charge of contempt.

Moore-McQuillan was sentenced to a three-month suspended sentence conditional on his being of good behaviour for 18 months.³²⁵

Significantly, Nyland J referred to the evidence of the psychologist, Mr Balfour, and recommended that Moore-McQuillan participate in a supervised, structured rehabilitation program, receive intensive case-management support from a Community Corrections Officer, that he be referred to a psychiatrist with the intention that he take mood-stabilising drugs for anger and depression, and that he seek the assistance of a psychologist in order to receive cognitive behaviour therapy.³²⁶

On 12 May 2008, less than a month after the contempt conviction, Moore-McQuillan breached his bond when he lost his temper in the Workers Compensation Tribunal. He became angry with a submission made by counsel for Workcover (a Mr Downs) and said:³²⁷

³²³ *Moore-McQuillan v Registrar of the Supreme Court* [2009] SASC 265 [6] (Gray J with whom Bleby and Sulan JJ agreed).

³²⁴ *Registrar of the Supreme Court of South Australia v Moore-McQuillan* [2007] SASC 447 [46].

³²⁵ *Moore-McQuillan v Registrar of the Supreme Court* [2009] SASC 265 [3].

³²⁶ In *Moore-McQuillan v Registrar of the Supreme Court* [2009] SASC 265 [9], Gray J sets out the sentencing remarks made by Nyland J on 17 April 2008.

³²⁷ *Ibid* [12].

Moore-McQuillan: Listen, you just shut the fuck up and fucking sit down and don't be a dickhead and instead of fucking turning around and dictate the terms—

His Honour: That's—

Moore-McQuillan: I'm talking to you and I don't need this fuckwit interrupting.

His Honour: That is enough, Mr Moore-McQuillan.

Moore-McQuillan: I don't think so. Why doesn't Downs tell us what his fucking instructions to—

His Honour: Mr Moore-McQuillan, stop it.

Moore-McQuillan: You lying piece of shit. Now, sit down, you dick-face.

Moore-McQuillan also accused both the Workers Compensation Tribunal and Workcover's lawyer of bias.³²⁸ Moore-McQuillan's bond was estreated and he was arrested, taken into custody and imprisoned.

Plainly, Moore-McQuillan had behaved very badly, and his behaviour warranted censure. But the circumstances of the case raise a number of very important questions. First, why were the recommendations of the psychologist not heeded and implemented? Secondly, was imprisonment an appropriate option for a person who was diagnosed as being paranoid and querulous? Imprisonment is the most severe punishment that can be inflicted in Australia.³²⁹ While the due and orderly administration of justice may require that a person who commits contempt of court should be expelled from court or even detained for a short period, the objective of recovery from mental illness may not be well served by prolonged periods of incarceration.³³⁰ How did things get to this point? Why is Moore-McQuillan still in the courts? Could something have been done earlier in this 25-year period to secure appropriate mental health services for Moore-McQuillan?

³²⁸ Ibid.

³²⁹ *Power v The Queen* (1974) 131 CLR 623, 627.

³³⁰ See, eg, *Wilson v Prothonotary* [2000] NSWCA 23 [40]–[41], discussed further later in this chapter.

Moore-McQuillan's problems seem to have started in 1990.³³¹ At that time he was employed as a shop assistant and dive instructor at the Wolf Air and Dive Shop in South Australia.³³² On 9 September 1990, it appears that he may have slipped down some stairs and injured his left knee and several toes.³³³ Moore-McQuillan was dissatisfied with the amount of compensation he was awarded by WorkCover, and commenced a series of cases in the Workers Compensation Tribunal, a number of appeals to the Supreme Court, appeals to the Full Bench of the Supreme Court, and even appeals to the High Court in order to increase his compensation.³³⁴

Early on, Moore-McQuillan enjoyed some victories in his cases against WorkCover. But Moore-McQuillan's fortunes changed when his ex-wife informed WorkCover that his claims were fraudulent.³³⁵ WorkCover conducted an investigation and Moore-McQuillan was charged and convicted in March 1996 of six counts of obtaining dishonest payments.³³⁶

Moore-McQuillan appealed the convictions. The appeal grounds provide some insight into Moore-McQuillan's ingenuity as a self-represented litigant. He claimed, among other things, that he had been inappropriately advised to plead guilty, and that he now wished to plead not guilty to the offences. He argued that there had been an abuse of process by the prosecution. He argued that he had been given unclear legal advice, and consequently he had suffered prejudice because he did not have sufficient time to prepare his case. He also argued that because he had been held in custody immediately before the trial, this had also prejudiced his

³³¹ Moore-McQuillan also appears to have sought judicial review of a decision of the Department of Corrective Services to terminate his employment as a probationary corrections officer: see *McQuillan v Commissioner for Public Employment (Department of Corrective Services)* [1993] SAIRC 26 (8 September 1993).

³³² *Moore-McQuillan v Workcover Corporation/Vero Workers Compensation (SA) Ltd (formerly Royal & Sun Alliance Workers Compensation (SA) Ltd (Wolf Air and Dive Shop)* [2006] SAWCT 70.

³³³ *Ibid* [8].

³³⁴ *Ibid*.

³³⁵ Moore-McQuillan's former wife advised Workcover South Australia that Moore-McQuillan's claims were fraudulent: see *Markham Moore-McQuillan v SA Police* [1997] SASC 6215.

³³⁶ Contrary to s 120 of the *Workers Compensation and Rehabilitation Act 1986* (SA).

preparation. He argued that the pleas of guilty he made before a Special Magistrate were entered as a result of a misapprehension caused by his unclear legal advice, producing a mistake as to the basis of the plea he had entered, and that this resulted in a miscarriage of justice.³³⁷

Justice Perry rejected the appeal, holding that the evidence indicated that Moore-McQuillan had been fully advised of his rights at all times. This is when the contempt incident described above took place.

Over the last 20 years, Moore-McQuillan has been variously convicted of assault against a person seeking to serve a restraining order on him,³³⁸ convicted of assault for threatening and spitting on a barrister working for an opposing party,³³⁹ and declared bankrupt due to unpaid court fees and legal fees.³⁴⁰ But this does not appear to have chilled his ardour for litigation. In 2012 he appeared in the South Australian Workers Compensation Tribunal, self-represented, on no fewer than four occasions.³⁴¹ He was back in the courts, appealing (unsuccessfully) from one of the findings of the Tribunal to the Full Bench of the Tribunal in late 2013.³⁴² In 2014, Moore-McQuillan appealed — partly successfully — a conviction for three counts of threatening to cause harm (threatening a barrister, abusing a judge and threatening a solicitor by saying ‘I know where you live’).³⁴³ As noted above, his June 2015 application for special leave to appeal to the High Court of Australia against his conviction was unsuccessful.³⁴⁴

³³⁷ *Markham Wayne Moore-McQuillan v Workcover Corporation* [1996] SASC 5727 [8].

³³⁸ *Moore-McQuillan v Police* [2010] SASC 149.

³³⁹ *Moore-McQuillan v Police* [2001] SASC 95.

³⁴⁰ *Moore-McQuillan v Scot* [2006] FCA 63.

³⁴¹ *Moore-McQuillan v Workcover/Vero (Wolf Air and Dive Shop)* [2012] SAWCT 14; *Moore-McQuillan v Workcover/Vero (Wolf Air and Dive Shop)* [2012] SAWCT 27; *Moore-McQuillan v Workcover/Vero (Wolf Air and Dive Shop)* [2012] SAWCT 36; *Moore-McQuillan v Workcover/Vero (Wolf Air and Dive Shop)* [2012] SAWCT 44.

³⁴² *Moore-McQuillan v WorkCover Corporation/Employers Mutual Ltd (Wolf Air and Dive Shop)* [2013] SAWCT 41.

³⁴³ *R v Moore-McQuillan* [2014] SASFC 113.

³⁴⁴ [2015] HCASL 67.

In one of these matters, Olsson AJ had the opportunity to reconsider evidence gathered by investigators employed by WorkCover who had, unknown to Moore-McQuillan, taken video footage of him engaged in various physical activities that were inconsistent with his account of the damage caused by his injury.³⁴⁵ This video footage and the evidence of the investigators were totally at odds with Moore-McQuillan's sworn testimony that he had suffered long-term damage as a result of his 1990 accident. The video evidence showed Moore-McQuillan engaging in diving and diving-instruction activities without any apparent impediment. Moore-McQuillan could climb into his boat and use his putatively damaged left leg as a prop while pulling himself up. The video showed that he could bend, lift and carry heavy items. He could climb up and down the steps of jetties to enter and leave the water while wearing scuba diving gear, a weight belt and an air tank on his back. The video also showed that he could climb over rocks on the seashore. For his part, Moore-McQuillan denied that he was the person in the video footage and suggested that it had been concocted. Olsson J dismissed these evasions as 'ridiculous'.

Remarkably, it transpires that during a significant part of the period Moore-McQuillan has been in the South Australian courts, questions about his mental health have been raised.³⁴⁶ Almost 15 years ago, Moore-McQuillan himself argued in the Workers Compensation Tribunal that he was unfit to maintain various actions he had commenced in that Tribunal because he was consulting a psychiatrist.³⁴⁷ Later, in the Supreme Court hearing in 2007 for Moore-McQuillan's contempt, Nyland J, commenting on the evidence given by an experienced psychologist, observed:³⁴⁸

³⁴⁵ *Moore-McQuillan v Workcover/Vero Workers Compensation (SA) Ltd (Wolf Air and Dive Shop)* [2012] SAWCT 14 [86]-[113].

³⁴⁶ See, eg, *Markham Moore-McQuillan v Workcover Corporation* [1996] SASC 5727; *Moore-McQuillan v WorkCover/Royal and Sun Alliance Insurance Co (Wolf Air and Dive Shop)* [2000] SAWCT 95; *Registrar of the Supreme Court of South Australia v Moore-McQuillan* [2007] SASC 447.

³⁴⁷ *Moore-McQuillan v Workcover/Royal and Sun Alliance Insurance Co (Wolf Air and Dive Shop)* [2000] SAWCT 95.

³⁴⁸ *Registrar of the Supreme Court of South Australia v Moore-McQuillan* [2007] SASC 447 [36].

Mr Balfour considered there was no clinical evidence to suggest that the defendant suffered from a psychotic illness, intellectual disability or drug or alcohol problems. He did, however, refer to the defendant's dysfunctional childhood and considered that the defendant's present mental health was poor. Mr Balfour believed that a number of factors were responsible for the defendant's behaviour in court:³⁴⁹

1. I believe his presentation and personal history are consistent with having a personality disorder of moderate severity characterised by paranoid and narcissistic traits. He has a degree of grandiosity, exaggerated egocentricity, lacks empathy with others, and has a narcissistic sense of entitlement to special treatment. He views the legal system as working in collusion against his best interests. He is paranoid but has not experienced a psychotic break with reality. I do not believe he has an encapsulated paranoid delusional disorder.
2. He suffered a severe work-related injury on the 09/09/1990. He suffers from chronic pain which has made him depressed and irritable. He has been treated with the antidepressant, Endep, for the last two years. I believe he has suffered from a major depressive disorder which has waxed and wane[d] in severity in response to the psychosocial stressors in his life. He has felt increasingly suicidal and hopeless about his legal circumstances. He has experienced a major loss of quality of life. ...
6. He has decided to legally represent himself in court because he believes he cannot afford or find competent lawyers to represent him. Nevertheless, I believe the experience of legally representing himself would be very stressful and intimidating for an individual with no formal legal training. He has no capacity to disengage his emotional investment in his legal case and to examine legal issues at an intellectually rational level. He has a very low tolerance of frustration in court. He projects his anger onto court officials.

As noted above, Nyland J had recommended that Moore-McQuillan be referred to a psychiatrist, take medication for anger and depression, and seek the assistance of a psychologist in order to receive cognitive behavioural therapy. But there is no evidence that any of these orders or recommendations were complied with, and over the next five years Moore-McQuillan was back in the South Australian Workers Compensation Tribunal causing problems.³⁵⁰

³⁴⁹ Ibid [14]–[15], [36].

³⁵⁰ *Moore-McQuillan v Workcover/Royal and Sun Alliance Insurance Co (Wolf Air and Dive Shop)* [2012] SAWCT 14.

Olsson AJ described Moore-McQuillan's evidence as a witness in 2012 as giving rise to 'great difficulty' because of the 'overt animosity projected by him towards the legal representatives of the respondent and certain of the witnesses called'.³⁵¹ His Honour said that the evidence and other exchanges during the hearing 'gave rise to frequent acrimonious exchanges, virtually uncontrollable emotional outbursts on the part of the applicant and the constant use by him of foul language or making of gratuitous, highly offensive remarks, directed variously to, or in relation to, counsel, witnesses and both myself and other members of the Tribunal'.³⁵² This 'rendered an orderly hearing process extremely difficult, if not impossible, at times'.³⁵³ During the course of his judgment, Olsson AJ described Moore-McQuillan as deliberately uncooperative and obstructive, unreliable, lacking credibility, impractical, childish, incredible, intemperate, uncontrolled, bizarre, obsessional, gratuitously and persistently discursive, deliberately false, evasive, unconvincing and ridiculous.³⁵⁴ His Honour observed:³⁵⁵

In the result, and having regard to such medical evidence as is before me, I entertain no doubt that the bizarre behaviour exhibited by him was, at least in large measure, the product of his emotional and seemingly obsessional mental health state.

It is to be noted that his intemperate and angry outbursts, use of foul language and reckless abuse of various persons, including myself, were as unpredictable as they were bizarre. On the face of them they often did not seem to be the actions of a rational person.

At other times he behaved reasonably and rationally and was quite cooperative, albeit for short bursts of time. Things said or occurrences in the courtroom seemingly triggered off quite unpredictable conduct on his part. In short, his conduct begged a conclusion that he was suffering from some mental health or emotional difficulty.

This case study shows that Moore-McQuillan behaved very badly, assaulting lawyers and abusing judges. Yet it was known to the courts as early as 2000 that Moore-McQuillan had mental health issues, and that

³⁵¹ Ibid [42].

³⁵² Ibid [43].

³⁵³ Ibid [44].

³⁵⁴ Ibid [45]-[57].

³⁵⁵ Ibid.

these issues caused him to threaten people and swear at people in court. By the time Moore-McQuillan committed contempt, he had already been in and out of South Australian courts and tribunals for almost 20 years.

Justice Nyland carefully considered Moore-McQuillan's mental health, and yet her Honour's very sensible recommendations that he seek help and take medication do not appear to have been implemented. When one takes into account the observations of the judges in the various cases above, the diagnosis of Moore-McQuillan's psychologist that his 'mental health was poor', and his previous applications in which he said he was unfit to plead, not to mention the hundreds of sitting days occupied by Moore-McQuillan's baseless actions, and the thousands of days of work engaged in by judges, court workers, lawyers, Workcover employees, experts and witnesses, it beggars belief that there had been no effective mechanisms in place to guide Moore-McQuillan to appropriate services. It is important to note that these events may well have affected the mental health of other people in court at the times these events took place.

Moore-McQuillan has consumed a vast quantity of public resources and appears to have wasted much of his life as a 'court ghost'.³⁵⁶ Should he have been declared a vexatious litigant many cases ago? Could more have been done earlier to help Moore-McQuillan with his mental health problems? Could more be done to assist litigants with mental health issues before they commit contempt in the face of the court?

It is submitted that the answer to all three of these questions is 'yes'. Moore-McQuillan has been wasting court time for over 25 years. Over twenty years ago, South Australian courts decided that his workers' compensation claims were bogus, and his pattern of continuing to press baseless actions richly reinforces the conclusion that he is a querulent litigant. Dr Balfour concluded that Moore-McQuillan had (in 1997) a 'personality disorder of moderate severity characterised by paranoid and narcissistic traits. He has a degree of grandiosity, exaggerated egocentricity,

³⁵⁶ This expression is used to describe vexatious litigants in Smith, above n 309.

lacks empathy with others, and has a narcissistic sense of entitlement to special treatment'. However it is difficult to accept any contention that this affected his will in the relevant sense. His outbursts in court and abuse of judges, lawyers and others were not irresistible impulses. While his mental health might be 'poor', his behaviour was *wilful*. For these reasons, rules governing abuse of process could and should have been applied to prevent Moore-McQuillan from accessing court to make any further baseless claims.

However the question remains whether the courts could have done more to prevent Moore-McQuillan from becoming a court ghost. It is arguable that *effective* diversion to mental health services may well have quelled or even halted Moore-McQuillan's repeated attempts to access the courts to advance baseless actions. Accessing such services might even have improved his mental health and advanced his prospects of recovery.

Australian courts have the power to recommend that a person seek psychological treatment. It is submitted that where a person has been found guilty of contempt in the face of the court, that court could require evidence of successful treatment before providing leave to a person to commence new proceedings. This would not prevent contumacious behaviour for one-off litigants, but it would assist with those like Moore-McQuillan. For one-off contemnors, referral to mental health services would be appropriate. This topic will be revisited after the next case studies are outlined.

III CASE STUDY TWO: THE COLEIRO CASE

The second case study, *A Bank & Coleiro*,³⁵⁷ is quite different. But it raises important additional questions about the adequacy of the law and procedure of contempt in the face of the court to protect the human rights of litigants.

³⁵⁷ [2011] FamCAFC 157.

The case also raises questions about the adequacy of judicial mental health literacy and judicial mental health.

In *A Bank & Coleiro*, Mrs Coleiro, the former wife of Mr Coleiro, had filed an application against her husband in the Federal Magistrates Court at Parramatta in February 2011 seeking final property settlement orders, including an order that her former husband pay her \$100,000, and interim orders that would restrain her former husband from dealing with the proceeds of the sale of the family home, which had been sold in January 2010.³⁵⁸ Other orders were sought seeking to restrain the husband from dealing with the proceeds of the sale.³⁵⁹ The husband declined to appear at the hearing and Joseph Harman FM made the orders sought.³⁶⁰

At the next hearing the wife appeared with counsel and the husband attended with an interpreter, but no legal representation.³⁶¹ The husband confirmed that the house had been sold, who the solicitors were, and that the money was with the solicitors.³⁶² Counsel for the wife referred to bank records that indicated that some of the proceeds had been banked in other accounts contrary to the Court's original orders.³⁶³ After a short adjournment a duty lawyer appeared to represent the husband and the following exchange with the magistrate took place:³⁶⁴

HIS HONOUR: You have come into the matter very recently. Of the \$200,050, have you had an opportunity, or if not, could you have an opportunity to find out where that all is or what has occurred to it? Because certainly ...

[MS N]: Your Honour, my concern at the moment is that [the husband] firstly has trouble hearing, and secondly, that he also has dementia. And I do have some concerns about his capacity to instruct me at the moment.

HIS HONOUR: Certainly.

³⁵⁸ Ibid [67].

³⁵⁹ Ibid [69].

³⁶⁰ Ibid [70].

³⁶¹ Ibid [72].

³⁶² Ibid [73].

³⁶³ Ibid [74].

³⁶⁴ Ibid [75].

[MS N]: I have attempted to seek instructions from him in relation to the money and all he has been able to tell me is that he no longer has the money. I am ...

The federal magistrate interrupted, and, addressing the husband via the interpreter, said:³⁶⁵

HIS HONOUR: Right. Can I ask you, Ms Interpreter, to explain. I want [the husband] to tell me where the \$200,050 is; and **if he either refuses to tell me or he genuinely no longer has the money, he starts a gaol sentence today.**

THE INTERPRETER: Okay. [The husband] says that he fell sick. He put the money in the back of the car and that when he looked for that, they were no longer there.

HIS HONOUR: Can you ask him is there any money left in any account with [the bank]?

THE INTERPRETER: Okay. All I have left is about \$3000.

HIS HONOUR: **Then can you ask him is there somebody who can bring his toiletries because he is going into a police cell in about five minutes time?**

THE INTERPRETER: I don't have any money.

HIS HONOUR: **I am getting the police here now. They are going to take you into custody and put you in a cell.**

THE INTERPRETER: Okay. I can't do anything about it.

HIS HONOUR: Very well. While we are waiting for them, you need to go to the witness box, please.

Bryant CJ later observed:³⁶⁶

At this stage I observe the husband had not given any sworn evidence and had not been charged with any contempt. Although an injunction had been granted ex parte on 1 April 2011 restraining him from disposing of funds, there was no order to pay any money to the wife. Thus there was no legal basis on which his Honour could have had the husband imprisoned. His comments then, assuming he was aware of this, could only be seen as *in terrorem*. Such an approach is inconsistent with an obligation to apply the law fairly and to exercise discretion judicially, not arbitrarily.

The husband was then sworn and gave evidence. ... As a result of the husband's evidence that he had apparently withdrawn funds originally deposited with the bank his Honour charged the husband with contempt.

³⁶⁵ Ibid (transcript, 7 April 2011, pages 9–10) (emphasis added by Bryant CJ).

³⁶⁶ Ibid [22]–[23].

After the husband was sworn, the federal magistrate continued his questioning of the husband.³⁶⁷ The husband's answers were inconsistent and unclear.³⁶⁸ The duty lawyer from Legal Aid tendered a doctor's report informing the Court that her client had dementia.³⁶⁹ The duty lawyer also advised the Court that Mr Coleiro suffered from acute diabetes and needed to eat, and asked the federal magistrate to allow her client to wait in the duty lawyer room and eat, instead of being sent to the cells.³⁷⁰

The matter resumed later in the afternoon, at which point the Court held a teleconference with the bank to ascertain the whereabouts of the money. The witness from the bank was not sworn or affirmed. After the phone call, the federal magistrate indicated that he was thinking about gaoling the husband until he had produced \$120,000.³⁷¹ Counsel for the husband then made a submission that, as her client had dementia, he should be released. The federal magistrate indicated that he would accept that submission but that:³⁷²

I'm going to release [the husband] on condition that he appear on the next occasion and that he present 120,000 bucks or he goes to gaol next time. I don't believe for one second his story, or his friend's story about 200 grand in the back of the car; not for one second. I would slot him for perjury now, if somebody could produce a \$20 note that shows he was lying. But I'm just unimpressed that he is served with an application, and two working days later, banks the cheque and proceeds to withdraw it by telephone banking — whether he did it or somebody else — but he must have given them the details for telephone banking after 1 March because that's when he set up the account, as it would appear, a new customer of [the bank].

Counsel also sought an adjournment in order to arrange a grant of legal aid for the husband and legal representation for him. The matter was then adjourned and later resolved without the need for the contempt proceedings to go ahead.

³⁶⁷ Ibid [22].

³⁶⁸ Ibid [23].

³⁶⁹ Ibid [34].

³⁷⁰ Ibid [31].

³⁷¹ Ibid [35].

³⁷² Ibid.

It is difficult to imagine things getting worse, but they did. In a subsequent hearing in the same matter, Harman FM contemplated that if Mr Coleiro received a beating in jail after he had been imprisoned for contempt of court that it might have the positive effect of causing Coleiro to recant what the magistrate regarded to be Coleiro's previous, perjured evidence:³⁷³

HIS HONOUR: But I just don't see — I suppose, being blunt, I don't particularly want to see the *Sunday Telegraph* with a banner headline about the nasty **Federal Magistrate who caused an elderly deaf man to get beaten in jail, when it's not achieving a purpose. If it achieved a purpose, well, he can cop the beating.**

The bank, which had been joined to the proceedings on the motion of the federal magistrate, appealed on grounds that are presently immaterial. While the matter in the Full Family Court was not an appeal in relation to any contempt in the face of the court, Bryant CJ, with whom Finn and Strickland JJ agreed, took the opportunity to observe that Harman FM had failed to observe the *Federal Magistrates Court Rules* by failing to allow the husband to plead to the charge, to obtain advice, or to have an opportunity to call evidence in relation to the charge.³⁷⁴ Proceedings were not adjourned to allow these things to happen.³⁷⁵ Bryant CJ also criticised the magistrate for using the threat of prison to elicit evidence from Coleiro regarding the putatively withdrawn funds.³⁷⁶ The Chief Justice, reflecting on Harman FM's misapplication of the *Federal Magistrates Court Rules* relating to contempt, observed:³⁷⁷

[I]t is obvious no proper procedure to arrive at a conviction and imprisonment had taken place. However it accords with the order that his Honour made, which had the character of punishment for contempt rather than a remand until the contempt could be heard. If that is so, it needs no further comment to demonstrate the clear and unambiguous failure to comply with the *Federal Magistrates Court Rules*, established authority and basic tenets of procedural fairness. The admission from his Honour that he had convicted and imprisoned the husband reveals that he failed:

³⁷³ Ibid [54](emphasis added by Bryant CJ).

³⁷⁴ Ibid [35].

³⁷⁵ Ibid [53].

³⁷⁶ Ibid.

³⁷⁷ Ibid [53]–[56].

- to allow the husband to plead to the charge;
- to afford the husband an opportunity to get advice or be heard;
- to allow the husband to call evidence in relation to the charge;
- to make findings on the evidence to determine whether the charge was proven beyond reasonable doubt;
- to make a formal conviction;
- to properly sentence;
- to give reasons.

Judges have significant powers which must be exercised judicially. In particular, the deprivation of the liberty of an individual is something not to be treated lightly by ignoring Rules and procedural fairness or by being used as a weapon with which to threaten a party as a means of seeking to achieve an end.

I am conscious that no appeal by the husband was brought against his asserted conviction (and that his capacity to conduct proceedings still remains uncertain) and that there is no contradicter to support the manner in which the Federal Magistrate conducted the proceedings. Accepting those caveats however the transcript itself makes clear the flaws in the process adopted by the Federal Magistrate.

The wider interests of public confidence in the administration of justice and expectation that judicial officers will not act arbitrarily, has caused me to take the unusual step of commenting on the process adopted by his Honour in relation to the contempt charge against the husband, absent an appeal against his orders.

While Coleiro was not committed for contempt of court, this case demonstrates how the power to commit for contempt can be abused. As the Full Family Court recorded, Mr Coleiro was not charged, not given an opportunity to plead to a charge, not given an opportunity to make a submission that he was unfit to plead to the charge, was not provided with timely legal representation, and was not heard, there was no finding that he was guilty of contempt, and there was no conviction, sentence, or reasons. The federal magistrate utterly failed to give due consideration to Mr Coleiro's mental health and its impact on his behaviour and testimony in court.

A Bank & Coleiro provides an illustration of what can occur when a person with mental health issues is dealt with summarily. The case demonstrates why an explicit procedure is required to safeguard the rights of the accused. The case demonstrates that if procedures for the determination of contempt of court are truncated, a person with poor mental

health can find himself or herself at risk of being incarcerated through no real fault of his or her own. The case also illustrates the need for judicial education about mental health and the need for careful treatment of people with mental health issues.

Finally, the case indicates that steps should be taken to ensure that judges themselves have good mental health. Remarkably, it transpires that the magistrate who heard the Coleiro matter was also experiencing mental ill-health at the time of these matters.³⁷⁸ This raises an important additional reform issue: a case of contempt in the face of the court involves two people, the person who commits the offence and the judge who makes the decision to commit that person. Some attention to the mental health of judges in contempt cases is warranted in the development of a holistic approach to the problems that plainly emerge in this area.

IV CASE STUDY THREE: *WILSON V PROTHONOTARY*

The third case study, *Wilson v The Prothonotary*,³⁷⁹ is particularly useful to illustrate the role that appropriate sentencing can play in achieving a just outcome in cases where people with mental health issues commit contempt in the face of the court. As Heydon J observed in the appeal judgment in this case, John Wilson, a dentist with obsessive compulsive disorder, was seated behind the bar table in the Supreme Court of New South Wales in 1999 waiting to receive judgment in a case he had brought against a bank.³⁸⁰ But Wilson entered the courtroom with a folder containing three bags of paint. Immediately after Murray AJ delivered his decision (which Wilson had lost), Wilson³⁸¹

threw one of the bags of paint towards him. The bag hit his Honour and landed on the bench before him, causing yellow paint to splash onto his

³⁷⁸ Geesche Jacobsen, 'Magistrate suspended after rulings overturned', *Sydney Morning Herald* (Sydney) 26 August 2011.

³⁷⁹ [2000] NSWCA 23.

³⁸⁰ The details are set out in a subsequent paragraph.

³⁸¹ [2000] NSWCA 23 [11].

Honour's coat. The appellant then threw a second plastic bag of yellow paint towards his Honour. The second bag landed between the judge's Associate and the Court Reporter, splashing paint on impact. The court staff thereafter restrained the appellant.

The Chief Judge at Common Law directed the Prothonotary of the Supreme Court to commence proceedings against Wilson for contempt in the face of the court. Wilson was also charged with the crime of threatening a judicial officer.³⁸²

Before his trial, Wilson sought unsuccessfully to have his trial heard before a jury, on the basis that he had a right to trial by jury protected by the Magna Carta and the Constitution.³⁸³ These submissions were destitute of foundation. An appeal from this judgment was unsuccessful.³⁸⁴ Wilson subsequently appealed to the High Court — an appeal heard by Gaudron and Callinan JJ on 16 April 1999. Wilson represented himself, re-running his arguments that the Magna Carta and the Constitution protected his right to trial by jury, but adding a submission that the English Bill of Rights of 1688 also protected his right to trial by jury. (A number of these judgments are conveniently set out on a website that John Wilson appears to have created called 'rightsandwrongs.com.au'). Justice Gaudron patiently explained that the English laws that Wilson had invoked no longer apply in Australia, and that s 80 of the Constitution does not apply to state laws at any rate.³⁸⁵

After losing in the High Court, Wilson made another application in the Supreme Court alleging breaches of various international covenants.³⁸⁶ This application was also dismissed. Wilson later filed a communication with the United Nations Human Rights Committee. The Committee held

³⁸² Pursuant to s 326(1) of the *Crimes Act 1900* (NSW).

³⁸³ *Prothonotary v Wilson* [1998] NSWSC 26.

³⁸⁴ *John Wilson v Prothonotary* 40127/1998, Monday 24 August 1998.

³⁸⁵ Section 80 of the *Constitution* states that '[t]he trial on indictment of any offence against *any law of the Commonwealth* shall be by jury, and every such trial shall be held in the State where the offence was committed, and if the offence was not committed within any State the trial shall be held at such place or places as the Parliament prescribes' (emphasis added).

³⁸⁶ *John Wilson v Prothonotary* 12914/97, 6 September 1999.

that the claims made by Wilson were inadmissible and unsubstantiated.³⁸⁷ (A number of these judgments and Mr Wilson's submissions are set out at a website on the Internet called 'corrupt.club' — perhaps a title selected by Wilson to describe the courts that have not accepted his arguments.)

At his trial for contempt, Wilson represented himself and tendered no evidence as to his mental state at the time of the contempt. The Court sentenced him to two years' imprisonment.³⁸⁸ The trial judge said that he chose not to give Wilson a sentence offering the opportunity of release on parole because of Wilson's³⁸⁹

refusal to acknowledge the criminality involved in throwing paint bombs at a judicial officer. In the absence of any sign of contrition or of insight on his part into the wrongness of his conduct and in the presence of his belligerent defiance of the court, it is evident that no purpose whatever will be served by a period of supervised release on parole.

The New South Wales Court of Appeal unanimously rejected his appeal against conviction, but Heydon JA, with whom Sheller JA agreed (Meagher JA dissenting), upheld his appeal against sentence. Importantly, the majority of the Court of Appeal placed weight on the diagnosis of a psychologist that Wilson had Obsessive Compulsive Personality Disorder (OCD). The psychologist opined that OCD 'is not strictly a mental illness' but rather a description of inflexible personality traits that were 'exceedingly unlikely' to change 'given his age and persistence in attitude'.³⁹⁰

It transpires that the litigation that was punctuated by the contempt in the face of the court was part of a campaign by Wilson against variable interest rate loans, which he contended rendered loan contracts inherently uncertain.³⁹¹ Wilson had himself had a home loan that left him and his wife 'owing more money after 13 years than they had borrowed despite having paid off substantial sums'.³⁹² Wilson's wife gave evidence that Wilson was

³⁸⁷ *John Wilson v Australia* No 1239/2004.

³⁸⁸ *A-G (NSW) v Wilson* [2010] NSWSC 1008 [23]-[136].

³⁸⁹ *Ibid.*

³⁹⁰ [2000] NSWCA 23 [24].

³⁹¹ *Ibid* [26].

³⁹² *Ibid.*

very concerned about people who were less well off, such as destitute farmers and young homeowners, who were losing their properties and experiencing personal distress as a result of their home loans.³⁹³ These experiences led him to despise the legal system.

Wilson was a frequent user of the Supreme Court, but also brought cases in the District Court and the High Court, activities that eventually led to him being declared a vexatious litigant in 2010.³⁹⁴ Up to that point, Wilson had expended very considerable time and energy on his campaign against variable interest rate loans. This campaign involved writing to newspapers, politicians and interest groups, speaking on talkback radio, moving motions at Liberal Party conventions, and making submissions to public bodies.³⁹⁵ Wilson had ‘studied legal books from libraries and represented himself in court due to an overwhelming stubborn streak that makes him do things his way’.³⁹⁶

The evidence was that Wilson’s campaign against variable interest rate loans was not his only crusade.³⁹⁷ He also campaigned for the safe handling of mercury by dental workers in dental surgeries, believing that dental workers risked being poisoned by mercury vapours, and that this would cause physical, mental and gynaecological damage.³⁹⁸ This campaign had lasted over 12 years, and had involved extensive research, the development of safety boxes, the taking out of patents, numerous appearances on media, contact with sympathisers in the United States, including travel there, and publication of an article in *The Lancet*.³⁹⁹ Mrs Wilson estimated ‘that the campaign cost \$500,000, and [ironically enough] forced the Wilsons to re-finance their mortgage’.⁴⁰⁰ Wilson was also involved in other crusades ‘against smoking, to reduce speeding, against drugs in

³⁹³ Ibid.

³⁹⁴ Ibid.

³⁹⁵ Ibid.

³⁹⁶ These were the comments of a witness at his trial: *ibid.*

³⁹⁷ Ibid.

³⁹⁸ Ibid.

³⁹⁹ Ibid.

⁴⁰⁰ Ibid.

sport, in favour of rule changes in squash and changes in the size of the squash ball, in favour of the placement of traffic lights on roundabouts, against an Australian Republic, in favour of a return to Privy Council appeals, against the Dentists Act, against behaviour at rock concerts, against television advertising and against aspects of shopping centre leases.⁴⁰¹

Meagher JA, the senior justice hearing the matter in the Court of Appeal, dissented. His judgment is short and can be reproduced in full:⁴⁰²

I have read in draft the judgment of Heydon JA. I disagree with it. The relevant facts are as follows: Mr Wilson threw a bag of paint at a judge. On that fact alone he had committed a serious contempt of court, a contempt in the face of the Court. The learned Chief Judge at Common Law sentenced him to two years' imprisonment. That is the decision now appealed from. At the hearing before the Chief Judge, Mr Wilson led virtually no evidence, although invited to do so several times by His Honour. On appeal from His Honour, there was an application to lead further evidence, said to be of a 'subjective' nature. This was acceded to by the court, although in my opinion wrongly so. Neither before His Honour, nor on appeal, was there any apology, or any sign of contrition. It was made clear to the Court that this was not due to any inadvertence, but was a calculated decision. In my view this is a fact which on its own should preclude any alteration to his Honours' sentence. There was nothing novel about the additional evidence led before this court. It could have been led before His Honour, who invited Mr Wilson to do just that. There has been no explanation why it was not led. There is no evidence that Mr Wilson is mentally unbalanced: eccentric yes, obsessive certainly, but demented no. It follows that at all stages of the case, both below and before us, he knew exactly what he was doing. In my view the appeal against sentence should be dismissed with costs.

It is plain that Meagher JA saw Wilson's failure to apologise as decisive. Disagreeing with Heydon J, Meagher JA rejected the evidence that was led on appeal (by leave) relating to Wilson's mental health. Justice Meagher rejected the notion that Wilson's obsessive-compulsive disorder had caused him to behave in the way that he did.

Heydon J (as his Honour then was) reached the opposite conclusion, and Sheller JA agreed. The majority concluded that the 'difficulty' with the contempts that Wilson had committed was that 'serious as they were, [they]

⁴⁰¹ Ibid.

⁴⁰² Ibid [1]–[9] (paragraph references have been removed in the quotation above).

have their origin' in the appellant's obsessive-compulsive disorder.⁴⁰³ While the majority acknowledged that OCD may not be a mental illness, 'it is a mental or personality disorder which, according to (psychiatrist) Dr McMurdo, is exceedingly unlikely to be treatable'.⁴⁰⁴ In a significant passage, the majority went on to observe:⁴⁰⁵

If general deterrence of persons not suffering from ... Obsessive Compulsive Personality Disorder can be achieved by imprisoning those who do so suffer, the period already served does so sufficiently. A further period in gaol for the appellant would not appear to operate as a legitimate means of deterring persons who do not suffer from that Disorder. If the appellant were not suffering from the Disorder, the time already served would sufficiently deter him from similar conduct in the future. There is no reason to suppose that continuance of the term will deter the appellant any more than it has done already. To endeavour to do so appears futile.

Much of the difficulty in this appeal stems from the appellant's failure to offer an apology at any stage, or otherwise to manifest contrition for or awareness of his serious wrongdoing, or to indicate appropriate acceptance of the court's authority. In the case of an offender who did what the appellant did but did not suffer from the Disorder, that would weigh heavily against a sentence as light as that which is proposed below. *But given that the appellant does suffer from the Disorder, a failure to apologise loses significance given that it appears to flow from the Disorder as much as did the contempts themselves.*

On this basis, Heydon JA restricted the penalty to time served (Wilson had been imprisoned from 9 November 1999 to 28 February 2000 in the Silverwater Correctional Centre).⁴⁰⁶

The decision of the New South Wales Court of Appeal in *Wilson v Prothonotary* demonstrates that judges can have regard to evidence of mental ill-health in cases of contempt in the face of the court.⁴⁰⁷ Justice Heydon's remarks directly acknowledge the principle that a person's mental health issues may cause them to commit contempt, and also that imprisonment for contempt in the face of the court may serve no deterrent

⁴⁰³ Ibid [38].

⁴⁰⁴ Ibid.

⁴⁰⁵ Ibid [40]-[41] (emphasis added).

⁴⁰⁶ Ibid [43].

⁴⁰⁷ See also *Muldock v The Queen* [2011] HCA 39; *R v Mooney* unreported, Victorian Court of Criminal Appeal, 21 June 1978, 5 (Young CJ), cited in *R v Anderson* [1981] VR 155, 160.

purpose when the contemnor has mental health issues. It is submitted that the majority of the Court of Appeal very sensibly took Wilson's mental condition into account in sentencing. The case points the way to an evidence-informed approach to the consideration of contempt in the face of the court that, for reasons developed in this thesis, is preferable.

The *Wilson* case also demonstrates the diversity of perspectives within the judiciary about mental health issues in contempt cases. Meagher JA would have required a person to be demented, rather than merely obsessive, to attract leniency in sentencing. So what about someone with paranoid schizophrenia? Such a person is not, by definition, demented, but nonetheless experiencing serious mental health issues. Overwhelmingly, people diagnosed with paranoid schizophrenia are found not guilty of crimes more serious than contempt, such as murder, by reason of mental illness. Why should contempt in the face of the court be treated any differently? Also, while the decision of the Court of Appeal and recent decisions of the High Court demonstrate a greater awareness of the need to take into account mental health issues in sentencing, it is clear that sentences ordered in cases involving contempt in the face of the court can still be disproportionate or excessive.⁴⁰⁸

The *Wilson* case study also points to the need for evidence of mental health conditions to be available *during* the trial to avoid the risk of unnecessary incarceration. A case like *Wilson* demonstrates that provision may need to be made to ensure that such evidence is available in spite of the accused (and a case like *Coleiro* demonstrates that provision may need to be made at the initiative of counsel). The *Wilson* case also makes it clear that the moral architecture of contempt in the face of the court, which classically requires an apology as the first step in purging the contempt, may be utterly irrelevant to the contemnor with mental health issues, and yet it could conceivably result in indefinite imprisonment. Even though Wilson's actions

⁴⁰⁸ See, eg, *Clampett v A-G (Cth)* [2009] FCAFC 151 (for the judgment as to costs, see [2010] FCAFC 13 (Black CJ, Finkelstein and Greenwood JJ); *O'Brien v Northern Territory* [2003] NTCA 4.

constituted a very serious contempt, if the trial court was aware of the fact that Wilson suffered from OCD, it may well have decided, like the majority of the Court of Appeal, that no purpose would be served imprisoning him, and instead ordered some other penalty, such as a fine or a suspended sentence. Ideally, an order could provide a pathway to mental health services.

As a postscript, it is notable that on 23 September 2010, John Wilson was declared a vexatious litigant. Just as with the Moore-McQuillan cases, many hundreds of sitting hours and thousands of hours of judicial and court-worker time might have been saved had effective services been provided to John Wilson at an earlier juncture. The court could have been protected from an assault. Early diversion to effective services might have also assisted his long-suffering wife and family. In addition, John Wilson might have held onto his dentistry practice in North Rocks, improving the dental health of thousands of people. These litigants consume a significant proportion of court resources.

A declaration that a person is a vexatious litigant is always an extraordinary step to take, as it directly impacts access to justice. If mental health services were made available for Wilson when he committed the contempt, it is conceivable that he might have desisted from using the courts, and the vexatious litigant declaration might never have been made.⁴⁰⁹ While the courts have been reluctant to make vexatious litigant declarations, some consideration may now need to be given to making continued access to court contingent on a person completing (independently ordered) treatment and having been declared competent to conduct proceedings by appropriately qualified senior psychologists.

⁴⁰⁹ It may also be acknowledged that, in the light of the evidence of the psychologist in the appeal that his OCD was 'exceedingly unlikely to be treatable', it might be that it would not have made any difference. This issue is dealt with in more detail in Chapter Four.

The final case study is the case of Dr Megumi Ogawa. This case is a difficult one. On one view, if the findings of fact made by the District Court of Queensland and accepted by the Court of Appeal and High Court are correct, then the case illustrates the risk that mental health issues can be invoked by a litigant seeking to avoid punishment for contemptuous behaviour for which they were properly held responsible. On the other hand, if Ogawa was genuinely experiencing severe depression and anxiety (as one of the experts had testified) at the time she committed contempt in the face of the court, then the case illustrates the inadequate mental health literacy of the courts, and the inappropriateness of expecting people with serious mental health issues to understand what is in their best interests when they participate in court proceedings.⁴¹⁰

Ogawa committed contempt of court when she screamed abuse at a District Court judge and flashed her buttocks at him.⁴¹¹ After Ogawa was convicted of contempt of court and sentenced to prison she appealed on the basis that she was experiencing mental ill-health at the time of the contempt. However, the Queensland Court of Appeal rejected these submissions and concluded that Ogawa was a ‘humbug’ who was ‘feigning an incapacity to represent herself’.⁴¹²

Megumi Ogawa was in court because in two 18-hour periods in April and May 2006, she sent 83 emails and made 176 phone calls to the Federal

⁴¹⁰ Some of the material in this first part of the chapter is drawn from my article, ‘A Proposal for the Improvement of Mental Health Service Delivery to Barrators, Contemnors and the Courts That Have to Deal with Them’ (2012) 19 *Psychiatry, Psychology and Law* 720. See *R v Ogawa* [2009] QCA 307 [3]. This case has also been noted by Louise Floyd in ‘Fitness for trial; trial in the absence of (unrepresented) litigant; contempt of court and evidentiary issues’ (2010) 33 *Australian Bar Review* 56.

⁴¹¹ Mark Oberhardt, ‘Court buttock flasher fails to win right of appeal’, *Courier-Mail* (online), 27 August 2010 <<http://www.couriermail.com.au/news/queensland/court-buttock-flasher-fails-to-win-right-to-appeal/story-e6freoof-1225910802914>>; Tony Keim, ‘Court buttock flasher Dr Megumi Ogawa loses latest bid against deportation’, *Courier-Mail* (online), 28 March 2012 <<http://www.couriermail.com.au/news/queensland/court-buttock-flasher-dr-megumi-ogawa-loses-latest-bid-against-deportation/story-e6freoof-1226312446188>>.

⁴¹² *R v Ogawa* [2009] QCA 307 [29].

Court Registry and federal court justices' chambers, threatening, among other things, to kill people. The subject lines of just a few of the emails give an indication of the flavour of her correspondence with the Court:⁴¹³

'RETURN MY DOCKET JUDGE!'

'Bastard fink'

'Why do I have to be VICTIMISED'

'STOP HARASSING ME!'

'sneaky court'

'CORRUPTED FEDERAL COURT'

'I CANNOT TAKE IT'

'I WILL KILL PEOPLE'

In March 2009, the Queensland District Court and a jury, having regard to evidence of these emails and phone calls, convicted Ogawa — who was self-represented at trial — of four counts of using a carriage service to harass people and make threats. As the Court of Appeal later noted:⁴¹⁴

On 18 January 2008, the indictment was mentioned before his Honour Senior Judge Skoien. At that stage, the trial had been listed to commence in the following week. At the mention, the prosecution was ready to proceed. Representatives from Legal Aid Queensland ('LAQ') appeared to advise his Honour that the appellant, though then unrepresented, had been previously represented by six different law firms funded by LAQ. In each instance, the appellant had indicated to those firms that she did not wish them to represent her. LAQ confirmed that it would no longer fund the appellant's representation.

During the trial Dr Ogawa was highly disruptive. She screamed at the judge, had to be removed from the Court on several occasions, and, at one point, started taking off her clothes. After sentencing Ogawa to six months for the email and telephone threats, the District Court charged her with contempt of court. Ogawa was later convicted, and she was imprisoned for four months.⁴¹⁵ The Court of Appeal dismissed an appeal by Ogawa

⁴¹³ Ibid [71].

⁴¹⁴ Ibid [10].

⁴¹⁵ On 27 March 2009: see *ibid* [3].

against this sentence.⁴¹⁶ In August 2010, the High Court of Australia dismissed an application by Ogawa for special leave to appeal from the judgment of the Queensland Court of Appeal.⁴¹⁷

Megumi Ogawa has a doctorate in intellectual property law from the University of Queensland. She has been employed as a tutor or lecturer at several Australian universities.⁴¹⁸ Her book, *Protection of Broadcasters' Rights*, was published by respected international publisher Martinus Nijhoff in 2005 with a Foreword by Sir Anthony Mason AC KBE in which his Honour described Ogawa as an expert in the field of intellectual property and her research as making an invaluable contribution to that field.⁴¹⁹ However, after her criminal convictions for making threats and for contempt, it appears that Ogawa has returned to the Courts to file further applications that lack foundation.⁴²⁰ What caused things to go awry? It is important to consider how Ogawa's mental health issues emerged and developed, in order to consider what sort of policies or programs might be developed in the future to assist people with mental health issues before they commit contempt in the face of the court.

In 1999, Megumi Ogawa came to Australia on a Rotary International Scholarship to enrol in a PhD at the University of Queensland. She was later offered scholarships by the University of Melbourne and decided to transfer her doctoral candidature there. Unfortunately, her PhD derailed at Melbourne Law School. Her doctoral supervisor left the University and was replaced by a supervisor with different, and arguably the wrong, expertise.⁴²¹ In 2002, Ogawa's enrolment expired after continued problems

⁴¹⁶ *R v Ogawa* [2009] QCA 307.

⁴¹⁷ *Ogawa v The Queen* [2010] HCASL 188 (B45/2009), 25 August 2010.

⁴¹⁸ This is clear from her site on LinkedIn, and various newspaper reports, including Ross Irby, 'SCU lecturer flashes bottom in court', *The Northern Star*, 26 March 2009.

⁴¹⁹ Adam Morton, 'Learning to fight', *The Age*, 29 July 2006, 1.

⁴²⁰ The *Courier-Mail* reported on 28 March 2012 that Ogawa had failed in an application alleging discrimination in the Queensland Civil and Administrative Tribunal. The newspaper also reported that Ogawa risked being deported as a result of this decision; however, it is unclear on what basis deportation could be ordered: Keim, above n 411.

⁴²¹ Some details are provided in *Ogawa v Secretary, Department of Education, Science & Training* [2005] FCA 1472.

securing appropriate supervisory arrangements. This resulted in the cancellation of her student visa. This was a significant setback, resulting in her spending 10 weeks in an immigration detention centre.⁴²²

There is a substantial literature that demonstrates that immigration detention can cause mental health problems.⁴²³ It was apparent that the detention was having an impact on Ogawa. Fears for her mental health resulted in her being placed on suicide watch. Interestingly, this fact does not figure in the later judgments in the District Court, Court of Appeal or High Court, in which Ogawa made submissions that her contemptuous behaviour was driven by mental health issues. (Indeed, there are grounds for reaching different conclusions to the trial and appellate courts in the *Ogawa* case: the evidence was most certainly not ‘unequivocal’, as the Court of Appeal held. To demonstrate this, passages from the judgments have been italicised in the analysis below.)

Ogawa fought to keep her visa.⁴²⁴ But she was then arrested and charged with the offences described above: making threats using a carriage service and contempt in the face of the court.

These offences took place within the broader context of Ogawa’s trade practices litigation against the University of Melbourne. When her PhD supervision arrangements fell apart, Ogawa initiated proceedings in the Federal Court against the University of Melbourne for misleading conduct

⁴²² Richard Ackland, ‘Locked-up and angry: the lot of a foreign student’, *Sydney Morning Herald*, 31 July 2009 <<http://www.smh.com.au/federal-politics/lockedup-and-angry-the-lot-of-a-foreign-student-20090730-e2wz.html>>: ‘It is strangely comforting to know that even those with a doctorate in law feel compelled, on special occasions, to bare their bottom in the direction of a judge and scream when near a courtroom. Megumi Ogawa was doing only what countless defendants must feel the urge to do but lack the courage or the necessary mental agitation.’

⁴²³ Glenda Koutroulis, ‘Detained Asylum Seekers, Health Care, and Questions of Human(e)ness’ (2003) 27 *Australian and New Zealand Journal of Public Health* 381–4; Lynda Crowley-Cyr, ‘Mental Illness and Indefinite Detention at the Ministers’ Pleasure’ (2005) 9 *University of Western Sydney Law Review* 53; Claire O’Connor, ‘The Impact of Detention on the Mental Health of Immigration Detainees: Implications for Failure to Deliver Adequate Mental Health Services — Who Cares?’ (2007) 9 *University of Technology, Sydney Law Review* 125, 127, 134–44; *Behrooz v Secretary, DIMA* (2004) 208 ALR 271; *S v Secretary DIMIA* (2005) 216 ALR 252.

⁴²⁴ *Ogawa v Minister for Immigration* [2004] FCA 1006.

under s 52 of the *Trade Practices Act 1974* (Cth), seeking, under s 82 of that Act, an award of damages of over \$400,000.⁴²⁵ She alleged that the University of Melbourne had made misleading comments about the support it could provide PhD candidates.⁴²⁶ The action was instituted in the Federal Court's Queensland registry because Ogawa had re-enrolled at the University of Queensland after her problems at the University of Melbourne.⁴²⁷ The matter was transferred to the Melbourne registry, and then, mistakenly, to the Federal Magistrates Court. The case should have gone to the Federal Court because of the size of the damages claim.⁴²⁸

After seeking a stay of the orders of the Federal Magistrate Court to take jurisdiction, and appealing against an adverse costs order in that case, Ogawa engaged in a series of unsuccessful applications and collateral litigation.⁴²⁹ For example, in late 2005, she brought a discrimination case against the Federal Court for failing to provide her with an interpreter, and alleged that the Queensland Registry of the Federal Court had engaged in discriminatory conduct by failing to do so.⁴³⁰

Ogawa's arguments are elaborated in several scholarly (but also self-serving) articles describing her trials and tribulations in Australian courts. Of particular note is 'A Second Language Speaker in Court' in the *Alternative Law Journal* in which Ogawa writes:⁴³¹

I have been running a case in court as a litigant in person since 2003 with occasional assistance from a counsel or an interpreter. I have spent almost my entire life in Japan speaking Japanese until arriving in Australia ... My research area (copyright law) has nothing to do with my action primarily under consumer protection law and, in my view, my research helps little to overcome the language-oriented advantages ...

⁴²⁵ *Ogawa v Federal Magistrate Phipps* [2006] FCA 361. A claim that Melbourne University engaged in unconscionable conduct contrary to s 51AB of the *Trade Practices Act 1974* (Cth) was not pressed.

⁴²⁶ *Ibid.*

⁴²⁷ *Ibid.*

⁴²⁸ *Ibid.*

⁴²⁹ See, eg, *Ogawa v The University of Melbourne* [2005] FCA 1208; *Ogawa v Secretary, Department of Education, Science & Training* [2005] FCA 1513 (21 October 2005).

⁴³⁰ *Ogawa v Secretary, Department of Education, Science & Training* [2005] FCA 1650.

⁴³¹ Megumi Ogawa, 'A second language speaker in court: linguistic phenomena threatening justice', (2007) 32 *Alternative Law Journal* 28.

The article then sets out four pages of thinly veiled criticism of the Federal Court and its judges for failing to provide an interpreter, which Ogawa later unsuccessfully claimed constituted institutional bias.

Ogawa has excellent English. She wrote a doctoral thesis in English, a book in English and a number of refereed journal articles in English.⁴³² In such circumstances, it would have been extremely difficult to argue that the Court had discriminated against her by failing to provide her with an interpreter. However, this litigation, baseless or not, would probably have contributed to her stress, and, quite possibly, affected her mental health. Indeed, by early 2006 Ogawa had failed to attend court as required to argue her various cases, citing ill health.⁴³³

On 4 April 2006, the Federal Court held that Ogawa's jurisdictional claim had merit, and that her original trade practices claim should indeed have been heard in the Federal Court. This might appear to have been good news for Ogawa, but she did not take it that way. By this stage, Ogawa had decided that the Federal Court of Queensland was biased against her for opposing her initial jurisdictional claims (and for failing to provide her with an interpreter, as noted above), and so she opposed transfer of her trade practices claim to the Queensland District Registry of the Federal Court because of her concerns about possible bias because of her discrimination case against the Court.⁴³⁴

⁴³² Megumi Ogawa, 'Copyright in Broadcasts: Japan Strays' (2001) 6 *Media & Arts Law Review* 123; Megumi Ogawa, 'The new Copyright Management Business Law' (2001) 3 *Media & Arts Law Review* 243; Megumi Ogawa, 'The possibility of copyright in broadcasts in Japan' (2001) 19 *Copyright Reporter* 89; Megumi Ogawa, 'The destination of Australia's digital agenda: implications of the panel case' (2004) 15(7) *Entertainment Law Review* 6; Megumi Ogawa, *Protection of Broadcasters' Rights* (Martinus Nijhoff, 2006); Megumi Ogawa, 'Overseas students protection law in Australia: universities, the ESOS Act, and the National Code' (2007) 28 *Statute Law Review* 73; Megumi Ogawa, 'Security for costs: an overseas student advances her case' (2006) 31 *Alternative Law Journal* 40; Megumi Ogawa, 'University grievance handling for overseas students: ESOS Act and the National Code' (2003) 10 *Australian Journal of Administrative Law* 162.

⁴³³ *Ogawa v Secretary, Department of Education, Science & Training* [2006] FCA 214 (6 March 2006).

⁴³⁴ *Ogawa v Reynolds* [2006] FCA 384.

It is hard to imagine things getting worse, but they did. Ogawa then made the threats that were the subject of the criminal action described above. Then, when Ogawa was sentenced for those crimes, she committed contempt of court by screaming at the judge and flashing her buttocks at him.

Before her trial in the District Court, Ogawa made ‘a number of applications’ over ‘a long period’ seeking an adjournment or extension of time to prepare her case.⁴³⁵ Ogawa said that she had not been well enough to prepare, and that she would not have the capacity to conduct a trial.⁴³⁶ Townsville District Court Judge Durward SC rejected these applications. His Honour said there had been a number of previous applications of this nature, and that they appeared to be ‘directed to the avoidance of hearings and ultimately the avoidance of being brought to trial’.⁴³⁷ After rejecting an application that he recuse himself from the bench on the ground of an apprehension of bias (an application made in the light of the judge’s prior decisions not to support Ogawa’s submissions in respect of these and some other procedural matters), Durward J reflected on Ogawa’s approach to representation and concluded that Ogawa was ‘self-represented by her own choice’ because she had repeatedly dismissed her publicly funded legal representatives.⁴³⁸ Durward J then observed that:

the applicant wishes all of the proceedings to be adjourned until she has recovered from her ‘incapacity’, either temporarily caused by changes to her prescribed medication or to a condition she refers to as her ‘depression’. Dr Kingswell diagnosed a personality disorder. He specifically withdrew a preliminary diagnosis of major depressive disorder. I have accepted the evidence upon which he re-diagnosed the applicant’s psychiatric condition.⁴³⁹

⁴³⁵ This is the language used by Judge Durward SC in *R v Ogawa* [2008] QDC 338 [3].

⁴³⁶ Ibid [4].

⁴³⁷ Ibid [8].

⁴³⁸ Ibid [22].

⁴³⁹ Ibid [25].

Judge Durward later quoted a portion of the transcript from the trial hearing on 10 December 2008, including a question he asked the psychiatrist, Dr Kingswell:⁴⁴⁰

HIS HONOUR: I'll cut to the chase. She has said that because of her medical or psychiatric or psychological condition she is unable to prepare or properly be able to represent herself for Court. So prepare the case and then to present her case following a presentation of the prosecution case in a trial situation. That is, I think the core of what she may be saying to you, which is associated with the question of fitness and the considerations you have to make for that. You see, you do appreciate the distinction, if there is a distinction. In other words, we get to the eve of the trial and she may say 'I haven't been well. I haven't been able to prepare. I'm ill. I have a condition. The trial can't go on. It is unfair if it goes on. I can't represent myself. I have no capacity to do that. I don't have the capacity to prepare. I need more time', and this has been going on for a very long time?

(ANSWER [DR KINGSWELL]) In my view that would be simply untrue.

On that basis, the judge refused the application. Kingswell had said:⁴⁴¹

Miss Ogawa is quite disturbed and she is prone to anxiety and depression. Her disturbance in large measure is due to her personality disorder rather than a mental illness. Nonetheless, she needs ongoing psychiatric supervision. She needs continued surveillance for worsening of her anxiety and depression. Treatment for anxiety and depression is appropriate. It is likely that psychological management would assist Miss Ogawa [to] control some of her care enlisting behaviour and perhaps form more stable relationships. Treatment could be provided as an outpatient.

I am not of the view that Miss Ogawa suffers from any illness that would warrant her hospitalisation, particularly not her involuntary hospitalisation.

Judge Durward then directed Ogawa to make submissions about the evidence of Dr Kingswell.

Ogawa responded by making (late) submissions that the trial be vacated or adjourned until she could be seen by a private psychiatrist (Dr Michele Calvird). Judge Durward then delivered a second judgment in which he concluded:⁴⁴²

⁴⁴⁰ Ibid [26].

⁴⁴¹ Ibid [25] (emphasis added).

⁴⁴² Ibid [17].

In my view the accused was and continues to be engaged in a wilful course of frustrating the legal system. She is more intent on avoiding the continuation of the proceedings than in dealing with the charges. Dr Kingswell said the following in his second report:

The principle [sic] risk Miss Ogawa poses to herself is repetitive querulous behaviour in the ... Court that will severely limit the Court's capacity to continue its job and frustrate the attempts to resolve this matter.

And further:

In my view it is for Miss Ogawa a matter of choice as to whether she pursues this matter in a committed way, motivated by a desire to resolve the issue or whether she chooses to frustrate the Court.

Judge Durward concluded:⁴⁴³

I accept Dr Kingswell's evidence of the accused's capacity to prepare for and to appear self-represented on a trial before judge and jury. I accept the opinion expressed by him on this issue. I have no doubt that the accused has the capacity to represent herself in this matter including preparation for any pre-trial hearings, if any, and to prepare for a trial and appear without legal representation.

Concluding his treatment of the mental health issues, Judge Durward said:⁴⁴⁴

The applicant has sought that the trial date (09 March 2009) be vacated. The grounds appear to be those previously relied upon by her in seeking adjournments. She has made articulate and relevant submissions in this Court, including before me. She is a trained lawyer and is employed in an academic capacity at an Australian University. She has a doctorate [in law] awarded in Australia. She may not have practised as a solicitor or barrister but in my view she is intelligent and perfectly able to look after her own interests in respect of the trial. She has had ample time to prepare for trial. There is no reason or proper basis for the trial date to be vacated. I refuse the application in respect of this ground.

The contempt charges were heard on 27 March 2009. Evidence emerged from an independent psychiatric examination that Ogawa had significant mental health issues (including 'a major depressive disorder of a severe degree' and anxiety).⁴⁴⁵ However, after cross-examination by the

⁴⁴³ Ibid [36].

⁴⁴⁴ Ibid [32] (emphasis added).

⁴⁴⁵ Ibid [23]-[24]; *R v Ogawa* [2009] QCA 307 [44].

contempt trial judge (who was also the judge who had experienced the contemptuous behaviour himself), the psychiatrist, Dr Kingswell, withdrew his diagnosis that Ogawa's behaviour was caused by her mental health issues.

On this occasion, Ogawa was represented by counsel, who tendered an apology on her behalf. However, Judge Durward rejected the apology, stating that he did not believe it to be genuine. Judge Durward said that Ogawa's 'behaviour involved what I regard as derogatory statements about the Court and the system of justice, constant loud screaming in Court and physical struggle with the Corrective Services officers. You also attempted to disrobe in Court.'⁴⁴⁶ He went on to say, 'I doubt that any other Court has ever had to endure the level of disgraceful conduct that you are responsible for in the course of this trial.'⁴⁴⁷ Finding that her behaviour was intended, his Honour concluded:⁴⁴⁸

I do not regard your conduct as being driven by a psychiatric condition or the effects of it, *although your personality disorder may have been an influencing factor* in your decision to behave as I have described.

Ogawa appealed to the Queensland Court of Appeal.⁴⁴⁹ On this occasion she was represented by senior counsel. On her behalf, it was argued that the District Court trial judge had erred: first, by failing to allow the jury to consider whether she was capable of understanding the proceedings so as to be able to make a proper defence;⁴⁵⁰ and, second, by failing to allow a jury to consider whether she was of sound mind during the course of the trial.⁴⁵¹ It was argued that the Court should have applied the principles enunciated in *Kesavarajah v The Queen*,⁴⁵² which required an inquiry into the fitness of the accused for trial.

⁴⁴⁶ *R v Ogawa* [2008] QDC 338.

⁴⁴⁷ *R v Ogawa* [2009] QCA 307 [179].

⁴⁴⁸ *Ibid.*

⁴⁴⁹ *R v Ogawa* [2009] QCA 307.

⁴⁵⁰ Pursuant to s 613 of the *Criminal Code 1899* (Qld): *R v Ogawa* [2009] QCA 307 [101].

⁴⁵¹ *Ibid.*

⁴⁵² *Kesavarajah v The Queen* (1994) 181 CLR 230.

The Crown submitted that there was ‘no real question’ as to the capability of the defendant to understand the proceedings and make a proper defence.

The Court of Appeal concluded that the Crown’s submissions had to be accepted:⁴⁵³

The present case is not analogous to *Kesavarajah* ... where it was held that the trial judge ought to have directed an inquiry as to the accused’s fitness. In *Kesavarajah* the trial court was faced with competing evidence as to the accused’s fitness to plead; that is, the fact that there was competing evidence gave rise to ‘a real question’. That was not the case here. Indeed on the evidence which had been adduced at pre-trial hearings instigated by the appellant, the learned trial judge had formed views distinctly adverse to the appellant. ... That view was well open to his Honour.

His Honour had the benefit of having seen and heard the appellant conduct her applications over many days. She conducted lengthy cross-examinations of medical witnesses with competence and energy inconsistent with a debilitating mental illness. *The expert medical evidence was all one way* to the effect that the appellant suffers from no mental illness which would impair her participation in the trial process ...

The appeal was rejected. The Court of Appeal upheld the conviction and rebuked Ogawa. Keane J (as his Honour then was), with whom Chesterman and Jones JJ agreed, said that Ogawa was ‘a humbug’ who was ‘feigning an incapacity to represent herself’.⁴⁵⁴

Ogawa applied for special leave to appeal to the High Court. One of her grounds for appeal was that ‘the Court of Appeal erred with respect to the need for a fitness hearing’.⁴⁵⁵ The High Court rejected her application, saying:

The applicant’s complaint concerning the failure to direct a fitness hearing does not involve any question of principle. It is a challenge to the Court of Appeal’s conclusion that no ‘real question’ concerning the applicant’s fitness to plead was raised.⁴⁵⁶ The Court of Appeal found that the medical evidence was all one way to the effect that the applicant was not suffering from a

⁴⁵³ *R v Ogawa* [2009] QCA 307 [108]–[109] (emphasis added).

⁴⁵⁴ *Ibid* [29].

⁴⁵⁵ *Ogawa v The Queen* [2010] HCASL 188 [6] (French CJ and Bell J).

⁴⁵⁶ *R v Ogawa* [2009] QCA 307 [105], [108] referring to *Kesavarajah v The Queen* (1994) 181 CLR 230, 245 (Mason CJ, Toohey and Gaudron JJ) citing *Ngatayi v The Queen* (1980) 147 CLR 1, 9.

mental illness which would impair her participation in the trial process in accordance with the criteria set out in *R v Presser*.⁴⁵⁷ Nothing in the submissions filed on the applicant's behalf gives rise to any reason to doubt the correctness of the Court of Appeal's conclusion.⁴⁵⁸

Megumi Ogawa has lectured in law at several Australian universities. How could someone so highly qualified, so knowledgeable in the law and having the personal wherewithal to complete a doctorate in intellectual property law from the University of Queensland find herself in prison for contempt in the face of the court?⁴⁵⁹ One possibility is that Ogawa was experiencing significant mental health problems at the time of the contempt.⁴⁶⁰ That is why she later argued that her fitness to plead should have been considered.

The alternative reading of the events — the one preferred by the District Court, Court of Appeal and High Court — was that Ogawa's diagnosis did not excuse her contemptuous conduct.⁴⁶¹

Regardless, the case does support a call for law reform to ensure that litigants with mental health problems are diverted to services that assist the courts in dealing with such issues swiftly and effectively. Leaving aside the question of the correctness of the findings of fact made by the various courts, there is no doubt that Ogawa had a miserable time, and suffered depression and anxiety. Could more have been done at an earlier stage in Ogawa's litigation — *before* she unravelled and started threatening people — to divert her from the court system to mental health services? Should we wait until a person has committed contempt and consumed substantial legal and judicial resources before reaching the conclusion that they require mental health services? Is it possible to devise a system that would yield better outcomes than this before all this time and energy is wasted? This case, like that of Moore-McQuillan, illustrates the need for procedures

⁴⁵⁷ *R v Ogawa* [2009] QCA 307 [109] citing *R v Presser* [1958] VR 45.

⁴⁵⁸ *Ogawa v The Queen* [2010] HCASL 188 [9].

⁴⁵⁹ Ackland, above n 422.

⁴⁶⁰ *R v Ogawa* [2008] QDC 338 [17]. See also Floyd, above n 410, 65–6.

⁴⁶¹ Contrast Ackland, above n 422.

enabling diversion to psychological and/or psychiatric services earlier in a person's participation in litigation. This would assist the due administration of justice and possibly also advance the litigant's prospects of recovery. While the appeal was determined against Ogawa, the case indicates that more could be done to assist people to manage what are quite possibly litigation-induced mental health issues.

Assuming that the Court of Appeal reached the correct conclusion, the case also indicates that any procedure that is developed to advance the human rights of people with mental health issues accused of contempt must also ensure that mental ill-health is not invoked spuriously to avoid the consequences of poor behaviour in court. A person should not be able to invoke mental health issues as a basis for avoiding punishment for contempt in the face of the court if they are not genuinely experiencing mental health issues at the time of the relevant events. A balance must be settled between the human rights of the accused and the need for the due administration of justice.

VI ANALYSIS

The case studies reviewed in this chapter raise a number of important questions and issues. The power to commit for contempt in the face of the court contains some questionable features and it is a power that can be abused. The cases highlight that prosecutions for contempt can be swift, with little attention being given to matters of procedural fairness. Litigants are not always formally charged, and are often deprived of the opportunity to plead or raise fitness to plead as an issue.

A *A Failure to Give Due Weight to Mental Ill-health and the Need For Better Mental Health Literacy Among Judges*

In some cases, particularly evident in *Coleiro*, judges can fail to give proper consideration to a defendant's mental health issues when determining

whether contempt has taken place. What principles relating to intention or wilfulness should be applied when people with mental health issues are dealt with for contempt in the face of the court? This was a live issue in *Coleiro*, but perhaps not in *Moore-McQuillan* or *Ogawa*. Should people be held responsible for contempt if they have no idea what they are doing is wrong, or what is going on? The very loose procedures governing prosecutions for contempt in the face of the court mean that significant mental health issues might be given insufficient weight or, worse, go completely unnoticed. In such cases justice may only be served once a sentence has been appealed and proper consideration of mental health issues has taken place. This is little comfort for the unrepresented litigant further disadvantaged in the criminal justice system due to mental ill-health.

The *Coleiro* matter unequivocally demonstrates that judges must be conscious of the possibility that participants in litigation in their courts may be experiencing mental health conditions that render them vulnerable. Judges have a responsibility to maintain a sound working knowledge of mental health issues to ensure that the mental ill-health of a litigant in their court does not go undetected. The importance of mental health literacy within the judiciary is addressed in the following chapter. The need for integrated mental health services will also be addressed.

B *The Need For Nuanced Consideration of the Impact of Mental Ill-health on the Conduct of the Contemnor*

In the Introduction to this thesis it was submitted that it is likely that in only a small subset of cases a person's mental ill-health will negate a finding that they *wilfully* committed contempt. A distinction between the irresistible impulse and the resistible impulse is necessary to ensure that a diagnosis of mental ill-health is not invoked inappropriately by people to

blame their mental ill-health for contumacious behaviour over which they had control.

In the first case study considered in this chapter, it was noted that Moore-McQuillan's principal diagnosis was that he is a querulous litigant. It is submitted that this diagnosis could not properly be invoked to exculpate him, even if it is an acceptable diagnosis (it is not in the DSM-V, which superseded the DSM IV in 2013, after Moore-McQuillan was convicted for contempt). This would be an exercise in circular logic. Moore-McQuillan's other diagnoses were anger and depression. He was aware of his depression as early as 2000, and he knew that he had a tendency to threaten people and swear at people in court. He should have sought professional help. Indeed, an argument could be mounted that he should have received a stiffer sentence than the one handed down by Nyland J in the Supreme Court, as Moore-McQuillan knew that he had a tendency to lose his temper in court. This case study (comprising over 100 cases) would provide a solid foundation for a conclusion that Moore-McQuillan is a vexatious litigant, and that he should be excluded from the courts, and only allowed to participate subject to leave and formal written undertakings regarding his behaviour, and subject to costs.

Coleiro was not convicted (or even tried) for contempt. However it appears that he suffered from dementia. Federal Magistrate Harman took issue with Coleiro's prevaricating, which, as noted in Chapter One, is one variety of contempt in the face of the court. Bearing in mind that the nature and quality of Mr Coleiro's mental health was not the subject of contested evidence and review by any court, it certainly appeared that his will was overborne in the circumstances of the hearing before Harman FM. If a contempt charge had proceeded and a trial held, it would have been grossly unfair to convict him of contempt given his mental ill-health.

Wilson had obsessive-compulsive disorder. As the psychiatric evidence in that case indicated, it is a personality disorder that is exceedingly unlikely to respond to treatment. Nevertheless he was not

suffering from a disorder that can properly be regarded as having the potential to overbear his will. His crime was premeditated, at any rate – he intended to throw the bags of paint at the judge if he lost. The finding of contempt was correct. Reasonable minds could differ on the question of punishment, but the approach taken by the majority of the Court of Appeal, to consider the disorder in sentencing, was appropriate and showed mercy.

Ogawa was diagnosed with depression. There was no evidence indicating that her depression had an overbearing effect on her will. The conclusion of the Court of Appeal that she was in control of her behaviour at the relevant time is difficult to resist, and psychological expert evidence was considered. On the basis of the psychological evidence available, the finding of the District Court was appropriately upheld.

As noted in the Introduction, since some contemnors with personality disorders continue to appear in the courts and commit contempt after contempt, appearing not to respond to judicial attempts to manage their contumacious behaviour, even under pain of imprisonment, a real question can be raised whether any recommendations made by a court for treatment would be followed. In these cases, rules governing abuse of process and rules designed to control vexatious litigation could properly be invoked to prevent further disruptions to court processes. While Wilson and Ogawa appear to have stopped accessing the courts to mount further baseless claims, an order to control Moore-McQuillan may be necessary. The invocation of a rule requiring the leave of the court before proceedings are issued might be the only way possible to balance the human right to access to justice, on the one hand, and the need for a court to control order, on the other.

C *Judicial Stress and the Need for Mental Health Supports for the Judiciary*

As noted above, it transpired that the magistrate who heard the *Coleiro* matter was also experiencing mental ill-health. Maybe the magistrate's own

mental health condition caused him to behave in the way that he did? The *Coleiro* case study raises the important and substantially unexplored question of whether mental health support might need to be available to judges. While this thesis focuses predominantly on the mental health of people accused of contempt, it is sensible, in the context of a review of the principles and practice in this area, to consider the mental health of the principal *dramatis personae* in this context. A case of contempt in the face of the court ultimately boils down to the activity of two people: the person who is alleged to have committed the offence, and the judge who determines whether they are guilty. Some attention must be paid to the role and behaviour of the judge in contempt cases in the search for a holistic solution. This issue will be explored in the following chapter.

D *How Much Is Enough? Querulous Litigants and Vexatious Litigant Declarations*

The *Wilson*, *Moore-McQuillan* and *Ogawa* sagas raise important questions about the balance that should be struck between access to justice on the one hand, and the due administration of justice on the other. In the Australian legal system, courts play the final role in dispensing access to justice under law. People need access to courts to achieve justice, and access to justice is a basic human right; however, controlling access to courts might sometimes be in the best interests of some litigants.

Wilson, *Moore-McQuillan* and *Ogawa* all consumed vast quantities of public resources; they also assaulted and threatened people in their dealings with the courts. Could something have been done earlier on to secure appropriate services for these people? Should we wait until a person has committed contempt and consumed substantial legal and judicial resources before reaching the conclusion that they require access to mental health services? Is it possible to devise a system that would yield better outcomes, and before all this time and energy is wasted? Should vexatious litigant provisions have been invoked sooner and used as a trigger to ensure that litigants who have been diagnosed with mental ill-health get access to

mental health services. The colossal waste of time and resources associated with the predominantly baseless litigation advanced by some litigants demonstrates the need for legislative and policy reforms to speed up access to services. These ‘court ghosts’ are a sorry lot, and steps should be taken to help them access needed services.

It is notable that in both the *Moore-McQuillan* and *Ogawa* cases, concerns were expressed early in the litigation about each contemnor’s questionable mental health. In fact, both *Ogawa* and *Moore-McQuillan* were described as exhibiting repetitive querulous behaviour.⁴⁶² Some or even many querulous litigants experience mental health issues, and some, like *Ogawa* and *Moore-McQuillan*, are ultimately dealt with for contempt. Should judges or court administrators have seen *Ogawa*’s or *Moore-McQuillan*’s behaviour coming? Could it be argued that courts owe querulous litigants a duty of care to limit their access to courts in some way — for example, restrict them to written submission or insist that they are not self-represented — so that they might not end up imprisoned for contempt? At the very least, members of the judiciary should be aware of the literature on querulousness in the hope that they might be able to recognise querulous behaviour when it presents itself.

As Lester, Wilson, Griffin and Mullen have observed:

It would be ‘cavalier to ignore the possibility that knowledge and approaches developed in the mental health field might offer help to organisations and individuals in avoiding the damaging and distressing effect of unusually persistent complaining’.⁴⁶³

⁴⁶² As to which, see Mullen and Lester, above n 318; Grant Lester et al, ‘Unusually Persistent Complainants’ (2004) 184 *British Journal of Psychiatry* 352; Ian Freckelton, ‘Querulous Paranoia and the Vexatious Complainant’ (1988) 11 *International Journal of Law and Psychiatry* 127; P T d’Orban, ‘Psychiatric aspects of contempt of court among women’ (1985) 15 *Psychological Medicine* 597.

⁴⁶³ Lester et al, above n 462, 356.

And as Mullen and Lester have also reflected, ‘by the time they reach our clinic, [querulents] have usually laid waste to the financial and social fabric of their lives’.⁴⁶⁴

Currently the main way courts eventually respond to litigants like *Moore-McQuillan* is to prevent them from accessing the courts without leave, via vexatious litigant declarations. Simon Smith deals with this topic comprehensively in his recent Australian book, *Maverick Litigants*, and so this topic is addressed only incidentally here in this thesis. This is because vexatious litigant provisions do not directly address the issue sought to be addressed here; they are invoked in extreme cases only, and their focus is not on the mental health of the litigant, but rather on the impact of that litigant’s activity on the courts. In addition, measures to control vexatious litigants are only invoked well after the fact of any contemptuous behaviour. The focus of this thesis is on what can be done by the courts, *before and during* the relevant events, if possible, to deal effectively with the mental health issues of people charged with contempt in the face of the court, in a manner that is consistent with their human rights.

Effective diversion to mental health services may well have quelled or even halted Ogawa and Moore-McQuillan’s repeated attempts to access the courts to advance baseless actions. Accessing such services might even have improved their mental health and advanced their prospects of recovery. Even if the Queensland Court of Appeal was correct when it reached the conclusion that Ogawa was just a ‘humbug’ (rather than a person experiencing a serious depressive disorder, which was a finding open on the evidence), it is clearly plausible to suggest that if Ogawa had been diverted to appropriate psychological and/or psychiatric services, this may have produced better outcomes for her in the long run, as well as possibly

⁴⁶⁴ Mullen and Lester, above n 318, 338–9. See also P E Mullen, ‘Querulous behaviour: Vexatious litigation, abnormally persistent complaining and petitioning’, in Michael G Gelder et al (eds), *New Oxford Textbook of Psychiatry — Volume 2* (OUP, 2009, 1977–1980).

preventing the crimes that she later committed — the threats and the contempt.

VII CONCLUSIONS

Statistics relating to the number of contempt prosecutions are not kept in Australia.⁴⁶⁵ Statistics relating to the number of people who have been tried or convicted for contempt who have mental health issues are not kept either. It may be noted, though, that, while dated, in a study of 72 case histories over a five-year period, d'Orban found that almost 40 per cent of women imprisoned for contempt of court had a psychiatric disorder. Most had a paranoid disorder, with litigiousness being a prominent feature of their illness.⁴⁶⁶ There has been no subsequent research about the mental health of contemnors. However, the recent case studies identified in this chapter underscore the need for strategies for managing people who unravel in court and for improved mental health literacy in the courts.⁴⁶⁷ Appropriate policies and programs need to be developed and implemented within the courts that are guided by human rights principles. The ICCPR prohibits arbitrary detention and the ICESCR guarantees the right to health, including mental health. As Australia is a signatory to both of those Covenants, legitimate questions can be raised regarding the compliance of Australian law with their provisions.

The law governing contempt in the face of the court in the majority of the Australian jurisdictions allows for contempt proceedings to be commenced and concluded in a very short space of time. In Chapter One it was demonstrated that the absence of safeguards typically found in a

⁴⁶⁵ As was noted by the Australian Law Reform Commission in 1987. See Australian Law Reform Commission, above n 7, 67 [107].

⁴⁶⁶ P T d'Orban, 'Psychiatric aspects of contempt of court among women' (1985) 15 *Psychological Medicine* 597.

⁴⁶⁷ Mental health literacy may be defined as 'knowledge and belief about mental disorders that aid their recognition, management or prevention'. See Nicola J Reavley and Anthony F Jorm, *Mental Health Literacy in Australia — Is it Getting Better?* (University of Melbourne, 2012) 2.

criminal prosecution mean that a very real chance exists that an alleged contemnor who suffers mental ill-health could be convicted and possibly imprisoned without his or her impairment being detected. The absence of procedural safeguards is also of concern because it allows the power to punish for contempt to be abused by judges when tension between difficult litigants and highly stressed judges boils over.

A more sophisticated set of laws and protocols are necessary, if for no other reason than the fact that a contemnor can be sent to prison. The seriousness of this outcome cannot be overstated. Imprisonment is the most severe punishment that can be inflicted in our system of justice⁴⁶⁸ and, in many Australian jurisdictions, sentencing remains ‘at large’ for contempt in the face of the court where the relevant legislation fails to set maximum terms. Prison is a place in which egregious abuses of human rights take place.⁴⁶⁹ Imprisonment can have very serious, negative psychological impacts on anybody, let alone vulnerable people.⁴⁷⁰ Even in cases where a person receives a fine or a suspended sentence, the convicted person carries the stigma of the criminal conviction⁴⁷¹ and the reputational damage associated with a criminal conviction.⁴⁷² For all these reasons, it is important that steps be taken to ensure that people who exhibit signs of mental ill-health be referred for assessment so that a judge can have insight into any bearing that their condition has on their courtroom behaviour.

It is not suggested that every person with questionable mental health should be excused when they behave badly in court, lest there be a risk that

⁴⁶⁸ As Barwick CJ, Menzies, Stephen and Mason JJ observed in *Power v The Queen* (1974) 131 CLR 623, 627: ‘We cannot understand how ... imprisonment, either with or without hard labour, can, however enlightened the prison system is, be regarded as otherwise than a severe punishment.’ See also *Witham v Holloway* (1995) 183 CLR 525, 534, 545; but cf *Fardon v A-G (Qld)* (2004) 223 CLR 575, 610 (Callinan and Heydon JJ).

⁴⁶⁹ Erin Schiller and Jeffrey Wertkin, ‘F frivolous Filings and Vexatious Litigation’ (2001) 14 *Georgetown Journal of Legal Ethics* 909, 917.

⁴⁷⁰ Mika’il DeVeaux, ‘The Trauma of the Incarceration Experience’ (2013) 48 *Harvard Civil Rights-Civil Liberties Law Review* 257.

⁴⁷¹ *R v Gillian* (1991) 54 A Crim R 475–80, discussed in Richard Edney and Mirko Bagaric, *Australian Sentencing: Principles and Practice* (Cambridge, 2007) 355.

⁴⁷² See, eg, *O’Brien v Northern Territory* [2003] NTCA 4 [51] (Mildren J).

every bitter person experiencing anxiety or depression would have a defence for contempt. Instead, procedures need to be developed to ensure that judges have all relevant facts before making a decision to deal with someone for contempt. Once all the facts are before the judge, the presence of mental illness and/or personality disorders should be taken into account. First, the diagnosis should be taken into account to see whether the person had the necessary wilfulness, should wilfulness be included as an element of the offence, as was argued in Chapter One. Secondly, if the judge does proceed to convict a person for contempt, the diagnosis should be taken into account by way of mitigation of penalty.

Chapter Four

Policy Reforms: Improved Mental Health Literacy, Access to Mental Health Court Liaison Clinicians, and Mental Health Supports for The Judiciary

I INTRODUCTION

The *Roadmap for National Mental Health Reform 2012–2022* developed by the Council of Australian Governments reflected a commitment ‘to mental health reform as an ongoing national priority’ and committed to ‘ensuring that people affected by mental health issues and their families have access to appropriate services and supports’. The Roadmap envisages that people should be ‘able and encouraged to access appropriate services and support — early in the course of illness, and early in episode’.⁴⁷³ The Roadmap calls for ‘well-integrated and well-coordinated services, including in the fields of health and justice’ that ‘work closely together to provide early support to at-risk individuals, and are set up to be responsive to ongoing need in chronic or episodic ill-health; ensuring that there are multiple service pathways’.⁴⁷⁴ In addition, the Roadmap says that governments ‘need to improve the effectiveness of their systems by improving the planning, organisation and integration of relevant services and support’.

With this backdrop, attention now turns to consideration of policies and practices needed to buttress the legal reforms recommended in this thesis. The case studies examined in the preceding chapter highlighted a

⁴⁷³ Council of Australian Governments, *Roadmap for National Mental Health Reform 2012–2022* (7 December 2012) 6.

⁴⁷⁴ *Ibid* 7.

need for greater mental health literacy among judicial officers and administrators so that they can detect possible mental ill-health among court users. When necessary, judicial officers should then be able to access court-based mental health liaison services in order to quickly obtain 'mental state assessments' on court users suspected of suffering mental ill-health. Both of these issues will be examined in this chapter.

However a further, important issue will also be dealt with in depth in this chapter. How can we ensure that the judges who determine contempt matters are themselves in good mental health? In the last chapter, the decision of Federal Magistrate Harman was considered in detail. In that case, an elderly, deaf man who suffered from dementia was threatened with imprisonment for contempt in the face of the court by the magistrate, in circumstances which the Full Family Court held was an abuse of power. Mr Coleiro had not been charged, was not given an opportunity to plead and was not given an opportunity to make a submission that he was unfit to plead. Magistrate Harman failed to give due consideration to Mr Coleiro's mental ill-health, and, it transpires, was himself experiencing mental ill-health at the time of these matters. This raises an important additional reform issue: a case of contempt in the face of the court involves two people, the person who commits the offence and the judge who makes the decision to commit that person. Some attention to the mental health of judges in contempt cases is warranted in the development of a holistic approach to the problems that plainly emerge in this area. Consideration of these issues will be the subject of this final chapter. It is hoped that recent developments and improvements in mental health awareness and acceptance may provide the catalyst for the policy reforms set out here.

II THE NEED FOR MENTAL HEALTH LITERACY AND ACCESS TO COURT-BASED MENTAL HEALTH PROFESSIONALS TO SUPPORT LITIGANTS AND ENSURE INFORMED JUDICIAL DECISION-MAKING

It is clear that litigation can have significant psychological consequences for litigants,⁴⁷⁵ and Australian courts should develop better ways to manage the stress of litigation for participants rather than imprisoning them for contempt of court.

Certainly, the correlation between a litigant's condition and his or her courtroom behaviour is a matter that deserves careful attention and, ideally, expert advice. Sometimes the litigant's condition might attract him or her to litigation, in the case of querulous litigants. For others, they might not have arrived before the court voluntarily, such that they did not bring the action; however, once there, their conditions might make it very difficult to control their behaviour, leading them to misbehave in court. Not every person seeking to avoid a punishment for contempt should be able to do so by citing mental illness. But, at the very least, steps should be taken to ensure that such people are identified and assessed so that their condition can be taken into account to assist the judge or magistrate in deciding how best to proceed.

The principles of contempt in the face of the court emerged some centuries before the emergence of psychology and psychiatry. It is timely to conduct a review and ensure that judicial officers have the skills, and have access to the knowledge, that they need to discharge their duties in a fair and considered fashion. As illustrated in the Chapter Three case study of *Coleiro*, the undoubted advances in knowledge of how the mind works appear to some judges to be of little import. As Ian Coyle and David Field have observed:⁴⁷⁶

⁴⁷⁵ Laurence Strasburger, 'The litigant-patient: mental health consequences of civil litigation' (1999) 27 *Journal of the American Academy of Psychiatry and Law* 203.

⁴⁷⁶ Ian Coyle and David Field, 'Psychology from the bench' (2013) 20 *Psychiatry, Psychology and Law* 91.

For over two centuries the observations of Lord Mansfield in *Chadd v Folkes* (1782) have stood sentinel to the capacity of juries to discharge their fact-finding functions without the assistance of expert opinion in matters of human behaviour. Therein it was noted:

The fact that an expert witness has impressive scientific qualifications does not by that fact alone make his opinion on matters of human behaviour within the limits of normality any more helpful than that of jurors themselves; but there is a danger that they may think it does.

Despite the undoubted advances in medicine and the behavioural sciences that have occurred since *Chadd v Folkes*, the thrust of this opinion still exerts influence on judicial thinking.

However, judicial office does not, by this fact alone, make judicial officers' opinions on putative mental health issues (which may be relevant vis-à-vis contempt in the face of the court) any more important than that of any lay witness — but there is a danger that they may think it does. More recently, Ian Coyle and Don Thomson have drawn attention to the following observations of Heydon J in *Aytugrul v The Queen*:⁴⁷⁷

[S]ometimes general references are made by courts to the causes of psychiatric injury⁴⁷⁸ and the diagnosis of psychiatric illness.⁴⁷⁹ Sometimes more specific reasoning is propounded after the court has had recourse to expert literature. ... If frailty rests on a psychological fact, and on psychological research,⁴⁸⁰ expert material bearing on the psychological fact must have potential significance.

Rejecting the notion that this expertise could be relied on as 'common knowledge', Heydon J said that the 'technical sophistication' of some scientific evidence militates in favour of a conclusion that expert guidance will be necessary. In terms relevant to the issues raised in this thesis, Heydon J stated:

⁴⁷⁷ Ian Coyle and Donald Thomson, 'Opening up a can of worms: how do decision makers decide when witnesses are telling the truth' (2014) 21 *Psychiatry, Psychology and Law* 475.

⁴⁷⁸ *Gifford v Strang Patrick Stevedoring Pty Ltd* (2003) 214 CLR 269, 304 [99].

⁴⁷⁹ *Tame v New South Wales* (2002) 211 CLR 317, 420 [308].

⁴⁸⁰ *The People (A-G) v Casey (No 2)* [1963] IR 33, 38; *Longman v The Queen* (1989) 168 CLR 79, 108.

To borrow the words of Judge Frank speaking about psychiatry, it would be dangerous for the Court ‘to embark — without a pilot, rudder, compass or radar — on an amateur's voyage on [this] fog-enshrouded sea.’⁴⁸¹

Are the legal principles governing contempt in the face of the court in Australia cognisant of the importance of expert psychological evidence relevant to contempt prosecutions? The central argument of this thesis is that reforms are necessary to ensure that the courts are properly appraised of the mental health condition of people who engage in contumacious behaviour. The gravity of the consequences and human rights principles require no less.

In the absence of the reforms recommended below, judges may need to be ‘proactive’ to ensure that litigants with mental health issues are diverted from the court, and they may need to adopt a posture characteristic of the inquisitorial system.⁴⁸² This approach challenges the traditional notion of the judge as passive. Indeed, the litigant with mental health issues challenges the role of the traditional court administrator, which is also passive. Basic assumptions of the traditional common-law method of dispute resolution are particularly inapt when a litigant with mental health issues comes to court: they cannot be relied on or expected to describe their own case to maximum advantage, they lack the capacity to make sensible forensic decisions, they may not have the capacity to act in their own best interests, and they will almost certainly be unable to accept the outcome if they are not vindicated.⁴⁸³

Whether this active approach is taken or the reforms outlined below are accepted and implemented, judges and magistrates should also be supported and resourced in practical ways to ensure that they are better

⁴⁸¹ *United States v Flores-Rodriguez* 237 F 2d 405, 412 (2nd Cir 1956).

⁴⁸² See, to like effect, Smith, above n 309, 8.

⁴⁸³ Richard Moorhead, ‘The Passive Arbiter: Litigants in Person and the Challenge to Neutrality’ (2007) 16 *Social and Legal Studies* 405, 415. See also Richard Moorhead, ‘A Challenge for Judgecraft’ (2006) *New Law Journal* 156 and Richard Zorza, ‘The Disconnect Between the Requirements of Judicial Neutrality and Those of the Appearance of Neutrality when Parties appear Pro Se: Causes, solutions, recommendations, and Implications’ (2004) 17 *Georgetown Journal of Legal Ethics* 423.

equipped to deal with difficult court users. Trained mental health workers should be available to assist the identification of litigants whom a judge, magistrate or legal practitioner might suspect suffers mental ill-health. This would ensure that the judicial officer has all the relevant information before deciding whether to resort to punishment for contempt. It is recommended that mental health services be made available in courts so that workers can provide judges and magistrates with preliminary assessment, including screening for fitness to plead.

In Chapter Three, a number of detailed case studies were set out. In Moore-McQuillan, it was clear that the contemnor had failed to respond to prior treatment, and it appeared that he had not complied with the recommendations of his psychologists. Compulsory treatment would only be available under mental health legislation, and it is not proposed here that people to be tried for contempt should be subjected to compulsory treatment unless their mental health condition plainly warranted that approach. None of the people in the case studies set out in Chapter Three would qualify for compulsory treatment. So how would the courts ensure that they were taking appropriate steps to address the mental ill-health of alleged contemnors? How could the courts avoid having an adjournment for such purposes lead to an indefinite hiatus?

These are difficult questions. If proper resourcing and services are available along the lines outlined above, then it is more likely that the courts will be placed in a position in which evidence of recovery is available. Courts could make orders requiring parties to tender relevant evidence for consideration, and they could even interview the people concerned, much as Nyland J did in the Supreme Court hearing of the Moore-McQuillan case. As far as the second question is concerned, time limits might be necessary to ensure that adjournments do not delay proceedings indefinitely. However the ordinary prudential considerations relating to decision-making regarding such matters (as adjournments) could apply. Given the variability of people and their mental health conditions there is no need to take a hard

and fast approach, and every reason not to. Where an adjournment for assessment and/or treatment results in a matter being stalled, the prosecutor could take steps to expedite the matter by way of an application.

Summing up the legal and procedural reforms enunciated to this point, it is submitted that the appropriate approach to take is to:

1. enable courts to order that an alleged contemnor undergo psychological assessment and treatment before the contempt prosecution is progressed;
2. punish contemnors whose mental health issues are found, on the basis of expert evidence that is available for proper testing in a court, not to have overborne their will at the relevant time;
3. exonerate people charged with contempt where mental health issues are found, on the basis of expert evidence, that is available for proper testing in a court, to have overborne the will of the alleged contemnor at the relevant time;
4. where disruptions continue in proceedings (or take place in future proceedings) that courts should be authorised to order that a contemnor file evidence relating to their assessment or treatment, in a format that is confidential to the litigant and the court, and that the court then have the power to order that the litigant only be given the opportunity to participate in court proceedings if they behave properly, with the court retaining a power to punish the contemnor with costs if required.

This approach is essentially consistent with the approach taken by Justice Nyland in the Supreme Court of South Australia in the *Moore-MacQuillan* case, analysed above. The difference would be that the rules relating to this procedure would be made explicit, and referral pathways would be carefully defined. This would help to ensure an effective balancing of the rights of the participants.

A detailed analysis of the mental health services that ought to be made available by way of referral from the courts is outside the scope of this thesis. However it is notable that the *Council of Australian Government's Roadmap to Mental Health Reform 2012-2022*, touched on in the conclusion of Chapter One, states, inter alia (at p 11):

Community-funded and private service providers (including those in the fields of health, community services, education, employment, housing, justice and corrections) need to work more effectively with each other and with individuals, families and carers, to help people with mental illness to recover and maximise their wellbeing. Where possible, they also need to work towards preventing and reducing the risks associated with the development and exacerbation of mental health issues.

At page 22, the Roadmap states:

Early detection of mental health issues and mental illness, followed by appropriate, timely intervention can significantly reduce the severity, duration and recurrence of mental illness and its associated social disadvantage, no matter when in life the episode or episodes occur. Early detection of mental health issues can improve people's prospects of completing education and training, increase their opportunities for securing and retaining employment, help them maintain stable accommodation, and minimise their interactions with the corrections and justice system.

While successful referral from court is not, in and of itself, a performance criterion recognised in the Roadmap, performance criteria relating to the number of people accessing mental health services does provide a criterion for measurement of progress against the goals enunciated in the preceding paragraphs, and such figures could be maintained without compromising the privacy of the people concerned.

There are already court-based mental health liaison services in many courts in Australia, but these tend to be concentrated at the Magistrate or Local Court level. Magistrates in all Australian states and territories, excluding the Northern Territory, have dedicated court liaison mental health services.⁴⁸⁴ But there are geographical gaps in coverage. For example, while a court liaison service provides services to 23 Local Courts in New South Wales,⁴⁸⁵ in Western Australia the service is provided on a daily basis at the Metropolitan Central Law Court only, on an ‘as-required basis’ to other metropolitan Magistrates Courts, and via video conference to regional and remote courts.⁴⁸⁶

The Australian Centre for Research Excellence in Offender Health issued a comprehensive report in 2015 describing the availability of court liaison services in each Australian jurisdiction. The report also described both the role and model of each court liaison service. The report found:

[W]hile there is variation between the models and the legislation that supports mental health diversion, the services all have the primary aim of identifying individuals with mental illness (and in some cases intellectual disability) who have been charged with an offence. Court liaison services (CLS’s) seek to intervene in the criminal justice process as early as possible. While CLS’s may have a role at various stages in the process ... they describe the majority of their role as identifying those with mental health needs at the pre trial stage or during the trial process. CLS’s undertake mental health assessments of individuals and then provide timely clinical advice to the court to assist it in decision making regarding appropriate disposal.⁴⁸⁷

The research found that the form and level of detail provided to the courts by way of assessment varied between jurisdictions. For example, in Victoria and Queensland, brief written feedback through the use of a pro forma was utilised. In Tasmania, the majority of the information was provided verbally. In Western Australia and South Australia, both written and verbal information was supplied to the court. In the ACT and New

⁴⁸⁴ Fiona Davidson, *Mental Health Liaison and Diversion: Court Liaison Services and Mental Health Court Programs in Australia* (The Australian Centre for Research Excellence in Offender Health, 2015) 6.

⁴⁸⁵ Ibid 6.

⁴⁸⁶ Ibid 8.

⁴⁸⁷ Ibid 6.

South Wales, lengthier feedback was supplied. In New South Wales, a written report of two-to-three pages of descriptive, rather than 'brief tick box pro forma', were typically supplied.⁴⁸⁸

In the majority of jurisdictions, mental health nurses provided the largest professional discipline undertaking the assessments,⁴⁸⁹ and in each jurisdiction, except Western Australia, South Australia and Tasmania, the nurses could seek advice from a psychiatrist on an 'as-required' basis.⁴⁹⁰

The research found that 'mental state assessments' were the most common form of assessment undertaken by the court liaison service clinicians,⁴⁹¹ as distinct from standard mainstream mental health assessments, which was reported to be the norm in Victoria.⁴⁹² Interestingly, none of the jurisdictions described a waiting list for the assessments.⁴⁹³

In several jurisdictions — specifically, Queensland, Western Australia, Victoria, the ACT, and New South Wales — mental health databases were used to cross-check custody and court lists to determine whether a person had a history of mental ill-health or a current treatment plan.⁴⁹⁴ In addition to providing assessment and referral services, some of the court liaison services also indicated that they provided education and training to court personnel on mental health matters.⁴⁹⁵

The Family Court of Australia also offers a comprehensive service to support litigants, judges and administrators. The Family Court has the highest proportion of self-represented litigants, as well as a client group experiencing the stress of a family breakdown. In 2004 the Family Court of Australia, along with the Department of Health and Ageing, responded by

⁴⁸⁸ Ibid 24.

⁴⁸⁹ Ibid 10.

⁴⁹⁰ Ibid 23.

⁴⁹¹ Ibid 22.

⁴⁹² Ibid.

⁴⁹³ Ibid.

⁴⁹⁴ Ibid.

⁴⁹⁵ Ibid 6 and 8.

conducting a pilot project in the Adelaide and Darwin registries of the Court, enabling referral of litigants to external mental health organisations. The project also involved the development of protocols for staff, improved mental health literacy and staff training.⁴⁹⁶ In 2006 the project was implemented nationally throughout the Family Law Courts (comprising of the Family Court of Australia and the Federal Magistrates Court of Australia), as part of the Integrated Client Services Delivery Program.⁴⁹⁷ The main activities of the Integrated Client Service Delivery Program are: to provide client access to counselling and mental health support services not available in courts via a referral network; to deliver a national, integrated client-service training program for staff encompassing mental health, in addition to family violence, special client needs and non-judgemental communication; to train staff on protocols so that they knew what was expected of them in a range of client-service situations, such as how to respond in emergencies when clients threaten to harm themselves or others.⁴⁹⁸

Different courts have different client groups with different levels of need for mental health support services. The pilot program run by the Family Court of Australia proved successful for its clients and court staff alike, and was therefore rolled out on a nationwide basis. The client liaison service model in operation in many, but not all, magistrate or local courts has the advantage of being able to access court-based mental health clinicians, rather than seeking assistance from external agencies. This results in an ability to access mental health assessments in a timely fashion, which is essential given the fast pace of the workload in that jurisdiction. Ideally, all Australian courts should be able to call upon the

⁴⁹⁶ Family Court of Australia, *A Report on the Mental Health Support Pilot in the Family Court of Australia and the Federal Magistrates Court* (June 2006) 3.

⁴⁹⁷ See Chief Justice Diana Bryant, 'Self Represented and Vexatious Litigants in the Family Court of Australia', (Paper presented at Access to Justice: How Much is Too Much? The Legal and Medical Issues Arising From Vexatious or Querulous People, Prato, Italy, 30 June–1 July 2006) 36.

⁴⁹⁸ Family Law Courts and LIFE, *Integrated Client Service Delivery featuring Mental Health Support: Final Report, A Family Law Courts' Skilling and Client Support Program* (2009) 7.

services of a mental health practitioner when needed, and consideration should be given to adopting programs, like those detailed above, in all Australian courts, adapted to fit the requirements of the particular court.

III IMPROVING THE MENTAL HEALTH OF JUDGES

Ultimately, a prosecution for contempt in the face of the court boils down to the choices and actions of two people: the person who is alleged to have committed the offence, and the judge who determines their guilt. To this point, the mental health of litigants has been the focus of this thesis. The mental health of judges will now briefly be explored. It is submitted that the human-rights approach explicated previously should be supported by programs that not only provide training for judges in mental health literacy, but also support judges experiencing mental health challenges themselves. While it is likely that mental ill-health among judges impacting negatively upon work performance would be relatively rare, it was plainly an issue in *Coleiro*, and it is a factor that should not be overlooked in the search for justice in this field.

Judges are expected to be sober, alert and impartial.⁴⁹⁹ Ideally, they are also good-humoured and efficient.⁵⁰⁰ However, as some of the cases illustrate, judges have their patience sorely tested at times by difficult and highly abusive litigants. It would not be easy to remain cool, calm and collected when someone calls you a ‘cunt’ or throws a dead cat at you. On occasion it may well be that the judge has no real choice but to punish a person for contempt. Releasing laughing gas into a court is an amusing prank in the abstract, but it could be extremely dangerous. Given that judges are people, and experience mental health issues just like anyone else, it is necessary to consider whether judicial mental ill-health might

⁴⁹⁹ Council of Chief Justices of Australia, *Guide to Judicial Conduct* (Australian Institute of Judicial Administration, 2nd ed, 2007) ch 2.

⁵⁰⁰ Thomas W Church and Peter A Sallmann, *Governing Australia’s Courts* (Australian Institute of Judicial Administration, 1991) v.

occasionally cause judges to commit a person for contempt when they should not have done so, resulting in injustice.⁵⁰¹

A number of Australian judges have recognised that judges are not immune to stress. In a series of speeches, Justice Michael Kirby, then a recent appointee to the High Court, brought judicial stress ‘out of the closet’.⁵⁰² Justice J B Thomas, from the Supreme Court of Queensland, gave a differing account of judicial stress in his 1997 paper titled ‘Get up off the ground’.⁵⁰³ And former Chief Justice Murray Gleeson once said that ‘judicial stress is something I give, not something I have’.⁵⁰⁴ However, the balance of extra-curial commentary since these papers were published indicate that Justice Kirby’s account of judicial stress — that it is real and many judges experience it — is more likely to be correct.⁵⁰⁵

Justice Kirby has pointed out that the judge’s life is a lonely one: ‘an element of distance ... is a usual part of the judicial life after our tradition’.⁵⁰⁶ Most judges sit alone, write their judgments alone, and only have contact with a small court staff.⁵⁰⁷ The connection between isolation at work and psychological ill-health is well established.⁵⁰⁸ Even in larger courts, where a number of judges sit together (as in state and territory courts of appeal and the High Court) and loneliness could be alleviated by

⁵⁰¹ As in the cases *O’Brien v Northern Territory of Australia* [2003] NTCA 4 and *Clampett v A-G (Cth)* [2009] FCAFC 151, discussed below. See Richard Ackland, ‘High time to put an end to clubby protection’, *Sydney Morning Herald* (online), 17 June 2011 <<http://www.smh.com.au/federal-politics/political-opinion/high-time-to-put-an-end-to-clubby-protection-20110616-1g5sw.html>>.

⁵⁰² Michael Kirby, ‘Judicial Stress’ (1995) 13 *Australian Bar Review* 101; Michael Kirby, ‘Judicial stress: an update’ (1997) 71 *Australian Law Journal* 774; Michael Kirby, ‘Judicial stress — a reply’ (1997) 71 *Australian Law Journal* 791.

⁵⁰³ James Burrows Thomas, ‘Get up off the ground: (a commentary on Justice Kirby’s “Judicial stress — an update”)’ (1997) 71 *Australian Law Journal* 785.

⁵⁰⁴ Joel Gibson, Deborah Snow and Elizabeth Sexton, ‘Jogging and yoga help curb anxiety’ *Sydney Morning Herald*, 18 October 2010.

⁵⁰⁵ See, eg, Gerard Brennan, ‘Why Be a Judge?’ (Speech delivered at the New Zealand High Court and Court of Appeal Judges’ Conference, April 1996, Dunedin). See Gibson, Snow and Sexton, above n 504 (referring to comments by Supreme Court Justice George Palmer).

⁵⁰⁶ Michael Kirby, ‘Judicial Stress’, above n 502, 112.

⁵⁰⁷ Brennan, above n 505.

⁵⁰⁸ Dieter Zapf, Carmen Knorz and Matthias Kulla, ‘On the relationship between mobbing factors, and job content, social work environment, and health outcomes’ (1996) 5(2) *European Journal of Work and Organizational Psychology* 1.

collegiality, tension within the court can make the work environment very unpleasant.⁵⁰⁹

In addition, judgments — the principal product of judicial work — are subjected to intense professional scrutiny and critique by lawyers, academics, the media⁵¹⁰ and other judges (on appeal or in other cases).⁵¹¹ The relentlessness and intensity of this professional scrutiny is very likely to cause a psychological reaction in some people. It is well documented that many lawyers experience depression, and there is no reason to think that judges, a subset of lawyers (and a subset under very particular pressures), are immune from depression or other mental health issues.

There is no systematic research that specifically demonstrates that Australian judges suffer mental health problems. There are some constitutional sensitivities attending research on this topic, which will be considered further below. However, it is fair to hypothesise that at least some Australian judges could be suffering from stress and mental health problems. This material, surveyed below, amply justifies the consideration of policy responses to judicial mental health needs.

Justice Michael Kirby noted in 1995 that the workload of the New South Wales Court of Appeal trebled in volume over 30 years.⁵¹² That was 20 years ago and it is difficult to imagine that things have gotten any better. In relation to magistrates, the Magistrates Research Project has analysed the work of Australian judicial officers since 2000.⁵¹³ Kathy Mack, Sharon Roach Anleu and Anne Wallace recently reported that magistrates' work is dominated by a high volume of unpredictable in-court activity and that magistrates frequently work additional hours in order to complete their

⁵⁰⁹ See, eg, A J Brown, *Michael Kirby: Paradoxes/Principles* (Federation, 2011) ch 17.

⁵¹⁰ See, eg, Ronald Sackville, 'The Judiciary and the Media: A Clash of Cultures' (Speech delivered at the Australian Press Council Forum, Sydney, March 2005).

⁵¹¹ Brennan, above n 505.

⁵¹² Michael Kirby, 'Judicial Stress: The Unmentionable Topic' (1995) 13 *Australian Bar Review* 101, 107.

⁵¹³ See Kathy Mack, Sharyn Roach Anleu and Anne Wallace, 'Everyday work in the magistrates courts: Time and tasks' (2011) 21 *Journal of Judicial Administration* 34, 34.

many and varied tasks.⁵¹⁴ Three-quarters of magistrates regard the volume of cases as ‘unrelenting’.⁵¹⁵ In a 2009 Submission to the Senate Judicial System Inquiry, Mack and Anleu said that the work of magistrates was characterised by ‘long lists each day, unrepresented litigants, disadvantaged litigants and significant time pressure’.⁵¹⁶ It is also worth noting that members of the judiciary have limited capacity to delegate their workload.⁵¹⁷

A very substantial literature exists indicating that overwork leads to stress and mental health problems across a range of occupations, including among white-collar workers and public servants.⁵¹⁸ Indeed, the proposition that overwork can lead to stress and mental health problems is regarded as axiomatic in Australia.⁵¹⁹ While it may be conceded that no data exist that specifically links *judicial* overwork in Australia with stress and mental health problems, there is foreign research that confirms that judicial overwork can lead to stress and mental health problems.⁵²⁰ In addition,

⁵¹⁴ Ibid 34–5. Justice J B Thomas reports that a ‘high percentage of the cases dealt with in Australia are resolved by magistrates ... numerically well over 90% of all cases are dealt with in Magistrate’s Courts’: ‘The Ethics of Magistrates’ (1991) 65 *Australian Law Journal* 387, 388.

⁵¹⁵ Mack, Anleu and Wallace, above n 513, 34–5.

⁵¹⁶ Kathy Mack and Sharyn Roach Anleu, Submission to Senate Standing Committee on Legal and Constitutional Affairs, *Inquiry into Australia’s judicial system and the role of judges*, 4.

⁵¹⁷ Contrast Andrew Leigh, ‘Behind the Bench: Associates in the High Court of Australia’ (2000) 25 *Alternative Law Journal* 295, 296.

⁵¹⁸ S Michie and S Williams, ‘Reducing work related psychological ill health and sickness absence: a systematic literature review’ (2003) 60 *Occupational Environmental Medicine* 3; M R Fusilier, D C Ganster and B T Mayes, ‘Effects of social support, role stress, and locus of control on health’ (1987) 13 *Journal of Management* 517; R A Karasek, ‘Job demands, job decision latitude, and mental strain: implications for job redesign’ (1979) 24 *Administration Science Quarterly* 285; R A Karasek, ‘Lower health risk with increased job control among white collar workers’ (1990) 11 *Journal of Organisational Behaviour* 171; J M LaRocco, J S House and J R P French, ‘Social support, occupational stress, and health’ (1980) 21 *Journal of Health and Social Behaviour* 202; M Shields, ‘Long working hours and health’ (1999) 11 *Health Reports* 33; S A Stansfeld, F M North and I White, ‘Work characteristics and psychiatric disorder in civil servants in London’ (1995) 49 *Journal of Epidemiological Community Health* 48.

⁵¹⁹ Andrew Noblet, ‘Building health promoting work settings: identifying the relationship between work characteristics and occupational stress in Australia’ (2003) 18 *Health Promotion International* 351.

⁵²⁰ C R Showalter and D A Martell, ‘Personality, stress and health in American judges’ (1985) 69 *Judicature* 83; M Middleton, ‘Judges told how to deal with stress’ (1981) 67 *American Bar Association Journal* 1100; R Sangeorge, ‘Psychologists says judges suffer from stress’ (1981) 108 *New Jersey Law Journal* 103.

lawyers, as a profession, experience stress from overwork⁵²¹ depression, and other varieties of mental ill-health.⁵²² In a 1999 survey of Western Australian lawyers, it was reported that those who left the profession did so because they had worked under sweat-shop conditions, that their work spilled over into their personal lives, and that they had suffered the physical conditions associated with high stress, including ‘exhaustion, ulcers, broken sleep, crying, loss of confidence and self-worth, irritability and depression’.⁵²³ A 2007 survey of professionals that included lawyers found that they had higher levels of depression than the general population, and were more likely to use alcohol or drugs to cope with their depression.⁵²⁴ A 2008 review of solicitors in private practice in Melbourne found that many were exhausted, and that they are ‘caught up in a system that appears remarkably hostile to employee choice and employee-oriented flexibility’.⁵²⁵ A 2009 study of criminal lawyers found higher levels of vicarious trauma effects, including depression, stress and concern for their safety.⁵²⁶ The Brain and Mind Research Institute’s major 2009 study found that ‘members of the legal profession exhibit higher levels of psychological distress and depression than do community members of a similar age and sex’.⁵²⁷ If we can hypothesise with safety that judges — as former lawyers — share these

⁵²¹ Paulette Cooper, ‘Lawyers succumb to stress: overwork role conflict sending more attorneys to analysts’ couches’ (12 January 1980) *National Law Journal* 3; Patrick J Schiltz, ‘On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession’ (1999) 52 *Vanderbilt Law Review* 871; Briana Everett, ‘Perils the profession can’t ignore’ *Lawyers Weekly*, 13 December 2011 <<http://www.lawyersweekly.com.au/features/9630-perils-the-profession-can-t-ignore>>.

⁵²² Norm Kelk et al, *Courting the Blues: Attitudes towards depression in Australian law students and legal practitioners* (The Brain and Mind Research Institute: University of Sydney, conducted in conjunction with the Tristan Jepson Memorial Foundation, 2009).

⁵²³ The Law Society of Western Australia and Women Lawyers of Western Australia, *Report on the Retention of Legal Practitioners* (1999).

⁵²⁴ *Annual Professions Study 2007* (Beaton Consulting, 2007).

⁵²⁵ Iain Campbell, Jenny Malone and Sara Charlesworth, “‘The Elephant in the Room’: The Working-Time Patterns of Solicitors in Private Practice in Melbourne’ (Centre for Employment and Labour Relations Law, Working Paper No 43, 2008). Interestingly, the Organisation for Economic Co-operation and Development reported in 2006 that Australian full-time workers generally had the highest average number of total hours worked per week of all OECD countries: *Average usual weekly hours worked on the main job*, OECD.stat <stats.oecd.org/wbos/Index.aspx?DatasetCode=AVE_HRS>.

⁵²⁶ Lila Petar Vrklevski and John Franklin, ‘Vicarious Trauma: The Impact on Solicitors of Exposure to Traumatic Material’ (2008) 14 *Traumatology* 106.

⁵²⁷ Kelk et al, above n 522, 48.

problems, then these studies give cause for concern for judicial mental health.

Now, it may be that some judges find that they are *less* busy on the bench than they were at the bar, and may therefore be *less* prone to stress and mental health problems than lawyers generally. However, it would be implausible to suggest that, as a group, judges, who are selected from a pool of people who have higher levels of psychological distress and depression than the general population,⁵²⁸ would be freed from those problems upon appointment to the bench. While there is a need for further systematic research to specifically demonstrate that Australian judges suffer stress *and* mental health problems, the reports of the hearings of Australian judicial disciplinary bodies demonstrate that at least some judges experience mental ill-health.

On 21 April 2011, the Conduct Division of the New South Wales Judicial Commission published a report of its Inquiry in relation to Magistrate Jennifer Betts. Betts had repeatedly lashed out at litigants in her courtroom and was the subject of a series of complaints over a six-year period from 2003 to 2009, including a complaint that her Honour had a tendency to abuse the power to commit for contempt.⁵²⁹ In her defence, Betts claimed she was stressed and depressed from overwork. There is no reason to doubt that this explanation was accurate.⁵³⁰ Ultimately an inquiry was conducted by Justice Carolyn Simpson, David Lloyd QC, and former police commissioner Ken Moroney on behalf of the Judicial Commission, and the New South Wales Parliament was invited to consider whether Magistrate

⁵²⁸ *Annual Professions Study 2007*, above n 524.

⁵²⁹ Geoff Chambers, 'Magistrate Betts fights for her own judgment', *Daily Telegraph*, 27 May 2011.

⁵³⁰ New South Wales, *Conduct of Magistrate Jennifer Betts: Ministerial Statement of the Hon Greg Smith MP, Attorney-General and Minister for Justice*, Legislative Assembly, 26 May 2011, 1173 (Greg Smith).

Betts should be removed from the bench.⁵³¹ The Parliament decided not to do so.⁵³²

Magistrate Betts was not the only Australian judge whose mental health issues affected her and her court. Magistrate Brian Maloney recently escaped the censure of the New South Wales Parliament after admitting to bipolar disorder after receiving many complaints about his erratic judicial behaviour. One of the complaints levelled against Magistrate Maloney was by a pregnant doctor who said he made inappropriate comments about childbirth to her during a hearing (namely, that she would have difficulty giving birth to her baby given the size of her belly). Another complaint came from a female colleague to whom he showed a computer screensaver depicting three half-naked women. In a court hearing in 2009, Magistrate Maloney pronounced the name of an Arabic man in an 'exaggerated accented fashion', demeaning his heritage.⁵³³

Maloney said he accepted his diagnosis of bipolar disorder and was receiving treatment for it, including regularly seeing a psychiatrist and taking anti-depressive medication.⁵³⁴ He launched Supreme Court action to stop a Judicial Commission report from being tabled in Parliament on the grounds his mental health condition was under control.⁵³⁵ During the hearing to stop the report being tabled, counsel for the Judicial Commission had argued that the 'mischief' of Mr Maloney's condition was that 'it's not possible to say when the condition will interfere with his judicial duty'.⁵³⁶ Maloney admitted that he had engaged in inappropriate behaviour but

⁵³¹ Chambers, above n 529.

⁵³² Adam Bennett, 'NSW Magistrate Betts avoids sacking', *The Sydney Morning Herald*, 16 June 2011.

⁵³³ Leo Shanahan, 'Magistrate Brian Maloney in plea to retain job', *The Australian*, 22 June 2011.

⁵³⁴ *Ibid.*

⁵³⁵ Lisa Davies, 'Bipolar magistrate Brian Maloney loses appeal', *The Daily Telegraph* (Sydney) 24 May 2011.

⁵³⁶ *Ibid.*

insisted that he was now medicated and consequently his work would not be affected.⁵³⁷ The Parliament exonerated him.⁵³⁸

The Betts and Maloney inquiries were unusual. Very few judges are subject to disciplinary proceedings.⁵³⁹ However, there are a legion of anecdotes that indicate that judicial stress and mental ill-health may be more widespread than is presently appreciated. An article in the *American Bar Association Journal* noted:⁵⁴⁰

An irate Philadelphia judge throws a glass of water at a lawyer in his courtroom. A Walla Walla, Washington judge calls a defendant a 'smart aleck' and yells 'shut up before you go to jail'. In St Tammany, Louisiana, a judge explains to a witness that she is on his turf and, in that venue at least, he is God. From the odd to the bizarre, these are only a few examples of 'black robe fever'.

In one remarkable incident, a judge named Joseph Troisi stepped down from the bench, took off his judicial robe, confronted a defendant who had sworn at him, and then bit off a chunk of the defendant's nose.⁵⁴¹ A report prepared for the state Supreme Court said that Judge Troisi had a long-standing inability to control his temper on the bench and had lost his temper some 19 times in the two years preceding the nose-biting incident.

⁵³⁷ Barbara Hocking, *Open letter to all NSW parliamentarians: parliamentary vote on Brian Maloney* (10 June 2011) SANE Australia <<http://www.sane.org/releases-2011/993-parliamentary-vote-on-nsw-magistrate-brian-maloney>>.

⁵³⁸ Ibid.

⁵³⁹ For the sake of completeness it should be noted that Justice Vince Bruce of the Supreme Court of New South Wales resigned after admitting he had depression: he said that he was so debilitated by mental ill-health that he could not finish his judgments (Rachel Morris and Ben English, "'Unfit" judge to defend his job', *Daily Telegraph*, 27 May 1998). Before he resigned, the Parliament convened a joint sitting to determine his fitness for office. Bruce was not removed. Interestingly, a consulting psychiatrist observed '[T]here is no evidence of major psychiatric disorder. His personality profile is not unlike other highly ambitious professional [sic] who may tend to have narcissistic traits associated with a sense of entitlement. The major problem is a lack of follow-through and completion of projects which requires a steady and disciplined capacity for routine work. Justice Bruce had established psychological personality deficiencies which constituted "ingrained habits of procrastination".' This observation serves as a reminder that claims to mental ill-health need to be based on evidence, and evidence that is carefully scrutinised, as all evidence should be.

⁵⁴⁰ Pamela Coyle, 'Bench Stress' (1995) 81(12) *American Bar Association Journal* 60. Admittedly, this is an article from *America*.

⁵⁴¹ Associated Press, 'Judge Who Bit Nose of Defendant Faces Prison', *Los Angeles Times*, 11 October 1997 <<http://articles.latimes.com/1997/oct/11/news/mn-41742>>; Judge Bites off Defendant's Nose because the Man Cussed at Him! *Weekly World News*, 19 May 1998, 13.

Troisi was acquitted of federal charges after pleading no contest to a state charge of battery, served five days in jail, and resigned.

Sometimes a judge experiencing stress or mental ill-health may use contempt in the face of the court as a weapon.⁵⁴² In *O'Brien v Northern Territory of Australia*,⁵⁴³ the Northern Territory Court of Appeal held that a magistrate exceeded his jurisdiction when he sent a young solicitor to the cells for contempt in the face of the court because the solicitor disagreed with the magistrate about whether he should enter a plea on behalf of his client. To set the scene, some further background is necessary. Peter O'Brien was representing an aboriginal young person for an offensive weapon charge (possession of a knife) in the Northern Territory children's court. O'Brien had instructions from his client, which were confirmed by the client's mother, that the police had agreed to the young person being diverted from court through a (new) diversionary policy of the Northern Territory government. It appears that the police who advised the young person and his mother that this would take place had not advised the police prosecutor of the children's court, Sergeant Perry. When the matter was called on, Stipendiary Magistrate Richard Wallace invited O'Brien to enter a plea for his client. O'Brien started to explain to Wallace SM why his client should not be placed in a position where a plea was required, and why the police diversionary program had foundered in this instance. Wallace SM misconstrued O'Brien's submission as resistance to his request for a plea. When O'Brien persisted with his submission — in a courteous tone and in circumstances where it was manifestly appropriate and in the best interests of his client to do so — Wallace SM directed a police auxiliary to remove O'Brien from the court to the cells.

A police auxiliary then took O'Brien to the cells, where he handed over his wallet, keys and mobile phone, and removed his belt and shoelaces.

⁵⁴² Shai Danziger, Jonathan Levav and Liora Avnaim-Pesso, 'Extraneous factors in judicial decisions' (2011) 108(17) *Proceedings of the National Academy of Sciences* 6889. The *O'Brien* case and the *Clampett* case were previously considered in Suzanne O'Toole, 'A Bad Day At The Office' (2010) 16 *The National Legal Eagle* No 5, 14.

⁵⁴³ [2003] NTCA 4.

In the meantime, up in the court, the magistrate, who had apparently cooled down, adjourned the offensive weapons charge. After a few more minutes he asked the police auxiliary to retrieve O'Brien. O'Brien was brought up from the cells and stood in the court, in front of the bar table, holding up his pants with one hand (his belt had been taken from him, which is standard practice to avoid people hanging themselves in the cells) and in bare feet (his shoelaces had been taken away, so his shoes would not stay on). The magistrate then advised O'Brien that the charge had been adjourned, and asked him whether he was ready to proceed with other matters in the list, as if nothing had happened. O'Brien, who was plainly shaken from his experience of being sent to the cells, apologised to the magistrate. The magistrate indicated that he would make a decision about whether to charge O'Brien for contempt of court after lunch, but then, after a short adjournment, indicated he would not.

What could make a magistrate imprison a lawyer because of a disagreement over a submission? The Northern Territory Court of Appeal later found that O'Brien had been respectful at all times, and was only persisting with a submission that was in his client's interests.

In a more recent case, a federal magistrate was held to have exceeded his jurisdiction when he committed a person *in the public gallery* for contempt. Leonard Clampett was in court to support Lesley Noah, who had brought previous unsuccessful proceedings and was liable for a debt of about \$3,000 in legal costs. The Attorney-General brought enforcement proceedings in the Federal Magistrates Court. Noah, who represented herself, was unsuccessful in her application to have the proceedings for debt rejected. This made her upset and, along with Clampett, she had the following exchange with the judge:⁵⁴⁴

FEDERAL MAGISTRATE: Now, gentlemen, if you don't be quiet, I'll deal with you. Is that what you'd like? One further utterance from you, madam, and I will deal with you as well. MS NOAH: In which way? FEDERAL MAGISTRATE: Yes. Just watch your tongue or I will deal with you as well.

⁵⁴⁴ [2009] FCAFC 151 [7].

MS NOAH: You already are dealing with me, sir, in not a very fair and equitable way. FEDERAL MAGISTRATE: Ms Noah, I'll give you one further warning. MR CLAMPETT: Will that be civil contempt or criminal contempt? MS NOAH: Yes, that's what I'd like to know. Would that be civil or criminal? FEDERAL MAGISTRATE: Okay, that's it. What's your name sir? MR CLAMPETT: It has got nothing to do with you, your Honour. FEDERAL MAGISTRATE: What is your name? MR CLAMPETT: I'm [in] the public gallery. FEDERAL MAGISTRATE: Would you get the — just get the Federal Police along here, thank you, Mr Bailiff. MR CLAMPETT: They know who I am. FEDERAL MAGISTRATE: I'm not interest[ed] in — I want to know your name, please. MR CLAMPETT: Leonard William Clampett. You know very well who I am. FEDERAL MAGISTRATE: I have no idea. MR CLAMPETT: That's the reason why you've got a kangaroo on the wall behind you. It's called the Kangaroo Court. MS NOAH: Yes. MR CLAMPETT: Both you and Mr Henry are paid by the Commonwealth Government. MS NOAH: To represent the people, not protect your public [sector] colleagues, conspire with them, to pervert the course of justice. FEDERAL MAGISTRATE: Anything further you want to add? MS NOAH: Quite a lot actually, I'd like to appeal this and I don't recognise [indistinct] — FEDERAL MAGISTRATE: Well, you'll get your chance to appeal but after I've dealt with you for contempt. MS NOAH: I don't like — FEDERAL MAGISTRATE: Just adjourn the Court for the time being, thanks. MS NOAH: I want to challenge the jurisdiction of this whole Court actually.

The federal magistrate charged Mr Clampett with contempt in the face of the court for his remarks, found him guilty, and ordered him to spend 28 days in prison with hard labour.⁵⁴⁵ Clampett appealed successfully to the Full Federal Court. The Court concluded that there were several unsatisfactory features of Clampett's case and that there had been a substantial miscarriage of justice. Of relevance to the issue of tension between the judicial officer and the litigant was the Federal Magistrate's decision to order that Clampett remain handcuffed while seeking to make his defence in circumstances where there was no reason to think that he was violent.⁵⁴⁶

The cases of *O'Brien*, *Clampett* and *Coleiro* suggest that the power to punish for contempt in the face of the court can lend itself to abuse when emotions in the courtroom boil over. It has been noted earlier in this thesis that the magistrate who heard the *Coleiro* matter was also experiencing

⁵⁴⁵ Ibid [15].

⁵⁴⁶ Ibid [54]–[55].

mental ill-health, and it may have been that the magistrate's own mental health condition caused him to respond in the way that he did. These case studies raise the important question of whether mental health supports might need to be made available to judges and court staff. As has been stated previously, a case of contempt in the face of the court ultimately comes down to the activity of two people: the person who is alleged to have committed the offence, and the judge who determines whether they are guilty. It is therefore necessary to pay attention to the role and behaviour of the judge in contempt cases in the search for system-wide improvements.

When it comes to judges, it may be necessary to establish formal mental health support systems for judges and magistrates. A cultural shift is also necessary to overcome barriers to seeking help. Shortly after the Betts and Maloney affairs, the *Sydney Morning Herald* conducted some investigative reporting about how judges and courts manage mental health issues. The comments of journalists Joel Gibson, Deborah Snow and Elizabeth Sexton are illuminating and worthy of quotation at length.⁵⁴⁷

For better or worse they [the courts] have largely resisted the encroachments of human resources managers and taken responsibility for pastoral care on themselves.

'I don't see why judges would be any different statistically to the general community and that would include relatively manageable ailments such as anxiety and depression,' Judge Richard Cogswell says. To keep stress at bay he practises Christian meditation for half an hour twice daily. 'I do it on planes, trains, in cars,' he says.

Judge Helen Murrell practises yoga. Justice Ruth McColl is a keen cyclist. Others report jogging, swimming or regular gym visits. Justice Peter Young finds escape in his model bus collection. He grew up near a bus-stop and says 'I've always been interested in timetables and buses'.

The Chief Magistrate and his deputies make a point of speaking one-on-one to each of their flock at least once a year. 'The health of members of this court is paramount,' says Judge Graeme Henson. 'I chant it almost like a mantra to them, health first, family first, work second.'

In the District Court, a support committee of four senior judges was established in 2005 to assist with issues such as health, behaviour in court and other 'difficulties', says Judge Dianne Truss, one of its members. 'It just

⁵⁴⁷ Gibson, Snow and Sexton, above n 504.

works very informally. If it were a formal process I think the judges would be [reluctant].’

All judicial officers have annual health checks and access to a free counselling service, although the magistrate Daphne Kok suspects lawyers ‘are averse to accepting free government-sponsored help because they do not believe it will necessarily remain confidential’.

In the Supreme Court, Chief Justice Jim Spigelman has baulked at forcing a formal monitoring system on his colleagues. ‘It’s just not that kind of a problem,’ he says, preferring to rely on the collegiality of the court as a support system.

After Justice Anthony Whealy left his liquor licensing practice 10 years ago, he was struck by the sight of a retiring judge who ‘just left the building by himself — and nobody said anything to him’.

Whealy has since emerged as an unofficial social secretary, organising dinners for retirees and new arrivals, annual concerts and regular Friday evening drinks from his impressive cellar.

This article — while not reporting systematic research — is nevertheless illuminating. It demonstrates, at least anecdotally, that judges see stigma in admitting to mental health problems. It also indicates that judges, who are not experts in the clinical management of mental health, have hitherto only developed informal policies relating to the management of their own mental health. It demonstrates that the former Chief Justice (though not the Chief Magistrate) did not see mental ill-health as a problem among judges. And it demonstrates that judges are inclined to self-diagnose and then resort to practices that may well reduce stress (such as ‘Christian meditation’ or ‘yoga’), but will likely prove ineffective in countering mental illness. In fact, some responses, such as drinking on Friday nights, may well be the last thing that a depressed person really needs, as alcohol is a depressant. It is surprising how little these judges seem to understand about mental health conditions such as depression, and the availability of proven remedies, such as medication and/or cognitive behavioural therapy.

It is necessary to acknowledge that there are many barriers to treatment solutions for judges and magistrates who are significantly stressed or who suffer mental ill-health. First, if judges admit that they are

not coping well or are suffering mental ill-health,⁵⁴⁸ then they risk undermining their own authority. Second, there is a significant stigma associated with seeking out psychological or psychiatric assistance.⁵⁴⁹ People who work in intensive professional environments act out ‘scripts’ that disable them from seeking help.⁵⁵⁰ As Jennifer Jolly-Ryan has observed:⁵⁵¹

Ironically, the very people who are in the best position to increase the number of lawyers who intimately understand the discrimination and health care laws in our society impose some of the highest hurdles to employment and educational opportunities. Lawyers stigmatize and often decline to hire other lawyers unless they have a clean mental health history — free of disabilities, disorders, and illnesses.

Third, judges today are more accountable than ever before, and if they admit to having mental health problems, this could cause them to be counselled and affect their chances for promotion.⁵⁵² While judges who admit they have mental health issues may experience catharsis in doing so, they may well damage their career. Professor Ian Freckelton has also noted that disciplinary proceedings can bring on psychological problems. Professionals who are the subject of disciplinary proceedings can be deeply

⁵⁴⁸ As Justice Kirby counsels in ‘Judicial Stress’, above n 502, 113.

⁵⁴⁹ David L Vogel, Nathaniel G Wade and Shawn Haake, ‘Measuring the self-stigma associated with seeking psychological help’ (2006) 53 *Journal of Counseling Psychology* 325; James R Mahalik, Glenn E Good and Matt Englar-Carlson, ‘Masculinity scripts, presenting concerns, and help seeking: Implications for practice and training’ (2003) 34 *Professional Psychology: Research and Practice* 123; and note the report of the Australian Medical Students Association that 55 per cent of medical students believed there was a stigma associated with experiencing stress and 72 per cent perceived a stigma around mental health: James M Hillis et al, ‘Painting the picture: Australasian medical student views on wellbeing teaching and support services’ (2010) 192 *Medical Journal of Australia* 188; Danielle Clode, *The conspiracy of silence: emotional health among medical practitioners* (Royal Australian College of General Practitioners, 2004); Lisa Elliott, Jonathon Tan and Sarah Norris, *The Mental Health of Doctors: A Systematic Literature Review* (Beyond Blue, 2010).

⁵⁵⁰ Mahalik et al, above n 549.

⁵⁵¹ Jennifer Jolly-Ryan, ‘The Last Taboo: Breaking Law Students with Mental Illnesses and Disabilities Out of the Stigma Straitjacket’ (2010) 79 *University of Kansas City Missouri Law Review* 123.

⁵⁵² Ian Freckelton, ‘Disciplinary Investigations and Hearings: A Therapeutic Jurisprudence Perspective’, in Greg Reinhardt and Andrew Cannon (eds), *Transforming Legal Processes in Courts and Beyond* (A Collection of Refereed Papers from the 3rd International Conference on Therapeutic Jurisprudence, Australian Institute of Judicial Administration, Perth, Western Australia, 7–9 June 2006) <<http://www.aija.org.au/online/Pub%20no83.pdf>>.

traumatised by the experience, which may result in the onset of depression and other mental health problems.⁵⁵³

Finally, in extreme cases, if a judge admits to mental health problems, this could bolster the case for their dismissal. The cases of Magistrate Betts and Magistrate Maloney were previously noted. In the case of Maloney, counsel for the Judicial Commission explicitly identified Maloney's mental health problems as a justification for his dismissal. This does not encourage reporting by judges.

It may also be noted that in some jurisdictions, the threshold test for removal of a magistrate is quite low. Magistrates in the ACT, New South Wales, Tasmania and Victoria enjoy the same protections against removal as judges in the superior courts in those jurisdictions, but in Western Australia the Attorney-General can initiate proceedings to determine a magistrate's physical or mental unfitness for office; and in Queensland and South Australia, magistrates can be removed on the (potentially) wider ground of 'proper cause'. Magistrates in the Northern Territory have the least protection and can be removed by the Administrator on the grounds of incompetence, incapacity, failure to comply with a direction of the Chief Magistrate, or if the magistrate is 'unsuited to the performance of his duties'.⁵⁵⁴ This category is arguably sufficiently wide to encompass the indiscretions of Magistrates Betts and Maloney, and, if applied, might have resulted in their removal from office.⁵⁵⁵

Federal guarantees of judicial tenure are not necessarily stronger. While the proceedings contemplated by s 72 of the Constitution involve a joint parliamentary sitting (which has never been required), the criterion of 'proved misbehaviour or incapacity' has never been applied. As the Senate Legal and Constitutional Affairs Committee noted, there 'is no settled

⁵⁵³ Ibid.

⁵⁵⁴ Kathy Mack and Sharyn Roach Anleu, 'The Security of Tenure of Australian Magistrates' (2006) 30 *Melbourne University Law Review* 370.

⁵⁵⁵ This wide category might have also been applied to remove Justice Bruce for his intense procrastination: see n 545 above.

process for the application of section 72'.⁵⁵⁶ Duncan Kerr SC, a former Minister for Justice and now President of the Administrative Appeals Tribunal, has observed that 'any ad hoc procedure put in place after a specific allegation of judicial misconduct or incapacity has been brought to light can, and almost certainly will, be criticised as lacking at least some of the institutional attributes appropriate for a fair hearing and respect for the rule of law'.⁵⁵⁷ A submission to the Senate Legal and Constitutional Affairs Committee in 2009 concluded:⁵⁵⁸

At present it appears there are only two alternatives when a member of the federal judiciary becomes incapacitated by mental illness. There is the constitutional response — removal by both houses — which is likely to encompass some kind of ad hoc investigatory body attended by many of the doubts which Mr Kerr has highlighted. Or there is the possibility of an informal approach made by the individual's colleagues.

There is a wide gap between these alternatives. And yet, as Norm Kelk and his colleagues from the Brain and Mind Research Institute have said, 'mental health problems and psychological distress must be seen as legitimate health problems for which students and legal professionals can seek special consideration and support'.⁵⁵⁹ While there may well be cases where a judge who is seriously ill will satisfy the constitutional criteria for removal, it is more likely that there would be cases where a judge would simply need support and treatment. The Parliament of New South Wales reached this conclusion in the cases of Magistrate Betts and Magistrate

⁵⁵⁶ Senate Legal and Constitutional Affairs Committee, *Australia's Judicial System and the Role of Judges* (December 2009) [6.10].

⁵⁵⁷ Gilbert + Tobin Centre of Public Law, 'Inquiry into Australia's Judicial System, the Role of Judges and Access to Justice' (27 March 2009) <http://www.gtcentre.unsw.edu.au/sites/gtcentre.unsw.edu.au/files/mdocs/Submission_Senate_Inquiry.pdf> 4.

⁵⁵⁸ Duncan Kerr, *The removal of federal justices: qui custodio custodis?* (Paper presented at the Australian Institute of Administrative Law, Administrative Law Forum, Canberra, 30 June 2005) 9.

⁵⁵⁹ Kelk et al, above n 522, 48. See also 'Black Dog Institute Welcomes Legislative Council's Strong Message to Employers and the Community on Mental Health' (News Release, 21 June 2011) <<http://www.blackdoginstitute.org.au/docs/BoardComment3.pdf>>.

Maloney. And as Luke Foley MP remarked during the parliamentary hearing into Magistrate Maloney's fitness for office:⁵⁶⁰

I do believe that it is possible for people who suffer from depression when treated well, and when found the right medication, for them to lead completely fulfilling and productive lives, including productive working lives.

For many years, Justice Thomas's robust response to Justice Kirby's admission of judicial stress — 'Get up off the ground!' — was seen as adequate.⁵⁶¹ There is now too much material pointing to a real problem in this area, and these types of problems cannot be solved without expert services and help. Judges are not clinical psychologists or occupational health and safety experts. They rely on expert evidence in determining matters, and there is no reason why they should not adopt the same approach in tackling the problem of stress and mental ill-health among their own vocational community. A significant literature in the field of occupational stress indicates that *appropriate, structured* supports in the workplace can minimise stress and the development of mental health problems among workers.⁵⁶² Judges should adopt approaches to the management of mental health issues that are informed by psychological knowledge. Such measures will better assist them to remain calm and impartial in their dealings with difficult court-users.

The issue of judicial overwork has been touched on above. Judicial overwork is an institutional concern largely out of the hands of judges themselves. The Magistrates Research Project has demonstrated that magistrates are overworked. Overwork can lead to stress and mental health problems. Steps should be taken to address this, perhaps by appointing more judges, through the provision of court-annexed meditation, and the like. While there is no systematic research that specifically demonstrates

⁵⁶⁰ Adam Bennett, 'NSW magistrate Betts avoids sacking', *Sydney Morning Herald*, June 16, 2011.

⁵⁶¹ J B Thomas, 'Get up off the ground' (1997) 71 *Australian Law Journal* 785 (a commentary on Justice Kirby's 'Judicial stress — an update', above n 502).

⁵⁶² LaRocco, House and French, above n 518.

that Australian judges suffer stress and mental health problems, sufficient material nevertheless exists to indicate that the courts should take steps to reduce the risk that judges will become stressed or develop mental health problems as a consequence of overwork. The posture of denial adopted by Chief Justice Gleeson, Chief Justice Spigelman and Justice Thomas needs to be replaced with a posture of acceptance that a problem at least *may* exist. Assisting judges who are stressed or who suffer from mental ill-health is a task for courts; it is not just a problem for judges.⁵⁶³ Courts need to take on the mental well-being of their judges as a central institutional concern. Courts should focus on the risk factors for psychological distress in the courts. Stress and mental illness must be seen as legitimate health problems for which judges can seek special consideration and support.

In this regard, it would be useful if the Judicial Research Project conducted by Mack, Anleu and Wallace were expanded to (sensitively) generate intelligence about judicial mental health. Alternatively, a confidential study could be commissioned by the courts themselves.

Acknowledging the constitutional sensitivities, disclosure by judges of issues relating to mental health needs to be handled in a discreet and utterly confidential way. The state and territory legislation governing the tenure of magistrates (reviewed earlier in this chapter) should be revised to develop a more nuanced approach to the issue of judicial incapacity that acknowledges that people *can* live with mental health problems and still function at a high level in their professional lives, with the right supports in place.

Judges and magistrates have difficult jobs to do, and under stressful circumstances. They are often overworked and, given their work environment, they may themselves be experiencing mental ill-health. To add to the mix, the number of people with mental health issues appearing in courts has risen since deinstitutionalisation, and the number of people self-

⁵⁶³ See, similarly, Kelk et al, above n 522, 48–9.

representing has also increased. Judges and magistrates are forced to manage people who are experiencing the stress of the court case and, as illustrated in the case studies in this thesis, some of these people also have mental health issues.

For their part, judges ought not be isolated, but rather assisted. This will ensure that they are better placed to deal with litigants with mental ill-health in ways that are more appropriate than punishing for contempt in the face of the court. We should aim to create court environments that allow our judges with mental ill-health to, as Luke Foley put it, 'lead completely fulfilling and productive lives, including productive working lives'.⁵⁶⁴

A holistic response to dealing with litigants experiencing mental ill-health requires steps to be taken to ensure that judges are able to respond calmly and rationally. Court administrators need to take on the mental well-being of all participants as a central institutional concern. This should not be left to judges who may themselves have developed dysfunctional coping mechanisms. Court Registrars would be better placed to organise expert supports and programs to engender cultural change. It is recommended that steps be taken to promote the mental health and resilience of all court staff, including judges and magistrates.

The Judicial College of Victoria has been recognised as a world leader among judicial educators in developing programs and resources to promote judicial well-being.⁵⁶⁵ The College primarily deals with mental health and well-being through its judicial education programs. Four years ago it ran a judicial-stress program that had unexpectedly high attendance. In 2013, a program for long-serving judicial officers identified the impact of accumulated stress, and vicarious trauma was further identified as an issue as part of the sexual assault reforms of the previous government. The College has continued its work over the past two years, by delivering programs on resilience, trauma and the judicial role, and another on the

⁵⁶⁴ Referred to in Chambers, above n 529.

⁵⁶⁵ Judicial College of Victoria, Prospectus (2015) 14.

impact of stress on cognitive performance and decision-making.⁵⁶⁶ In April 2014 the College ran a program examining ‘the nature, risk and signs of maladaptive responses to stressful and traumatic events’. The session encouraged judicial officers to think about ‘prevention and management techniques that promote resilience in the judicial role and environment’.⁵⁶⁷ These programs should be independently evaluated and, if successful, they should be made available across the country.

It may be that more than education is needed. Properly trained psychologists should be available to the courts, with strict confidentiality obligations. A court psychologist could develop referral networks for people who seek their assistance. If the psychologist had good experience and forensic skills, then she or he could also assist the court with reports about people who commit contempt in the face of the court, opening the door to allied services.

It would be sensible to provide a basic level of service at the court precinct, with additional services being made available on an ‘as-needs’ basis. A court psychologist could be appointed with a role of assisting litigants and judges, and be given access to referral networks to deal with volume and complex cases.

IV CONCLUSIONS

In Chapter One, it was demonstrated that Australia’s relatively complicated federally organised justice system has produced diverse rules and approaches. In some jurisdictions the rules governing contempt in the face of the court have scarcely changed in a century. In the majority of jurisdictions, only the most rudimentary common-law safeguards protect contemnors, leaving litigants with mental health issues particularly vulnerable. Although the law in this area has been the subject of two long

⁵⁶⁶ Judicial College of Victoria, Annual Report 2013/14, 24.

⁵⁶⁷ Ibid 23.

and searching reviews by the ALRC and the WALRC, respectively, the recommendations of those Commissions have not been implemented, except in the Family Court. Perhaps the United Kingdom's Law Commission final report into contempt in the face of the court, which is due for release in late 2015, may finally provide a sufficient motivation for much needed reform of Australian law.

Chapter Two identified the human rights principles that are relevant in the context of contempt in the face of the court, and considered whether Australian law and practice were in compliance. It was demonstrated that, according to what is demanded by the principles, Australian law falls well short of what is required to ensure justice for those with mental health issues coming before the courts. In extreme cases, vexatious litigant declarations may be warranted, but the human right of access to justice and the human right to the highest attainable standard of mental health requires that a more nuanced set of responses are employed to manage litigants who may be suffering mental ill-health.

Chapter Three considered a number of detailed case studies against the backdrop provided by the human rights principles discussed in Chapter Two. People with mental health issues were denied procedural fairness in a variety of ways, such as being deprived of the opportunity to plead to a specified charge, or of an opportunity to raise fitness to plead as a distinct issue. In all of the trials where summary procedure was adopted, judges failed to give proper consideration to the mental health issues of the accused and justice was only achieved on appeal. All of the case studies raised the question of whether substantial resources could have been saved if appropriate diversions to mental health services were in place. Quite apart from anything else, early diversion might have prevented the deteriorating mental health of the accused and more swiftly provided a pathway to recovery.

The majority of Australian jurisdictions make no special provision to ensure that a person accused of contempt in the face of the court has an

opportunity to have his or her mental state taken into account in determinations of culpability. It was submitted that the substantive law governing contempt in the face of the court should be reformed to incorporate a *wilfulness* requirement. If a contempt offence does not require *wilfulness*, an important opportunity for a person with mental health issues to excuse his or her behaviour is lost. At common law and under many statutes, no *wilfulness* is required to be established prior to a conviction for contempt in the face of the court. While many contemporary statutory offences remove this traditional requirement of a crime, it is particularly important for a person with mental health issues, as the presence of such a requirement can at least yield an opportunity to ventilate issues relating to mental functioning, even where such evidence of mental illness might not ultimately prove exculpatory.

The approach to *wilfulness* favoured by the ALRC seems sound — that is to require that the substantial disruption caused to the court must have been committed *wilfully*. Although wilfulness sets a low level of *wilfulness*, and one that is often easily established, it still has the potential for triggering an inquiry into the mental health of the accused. Such an approach would not only accord with traditional principles of criminal responsibility, it would also enable the injection of traditional common-law procedural safeguards into the process, helping to ensure that the defendants in such cases receive a fair trial.

Procedural reforms are also required. Standard procedure for the trial of criminal offences should be adopted for a charge of contempt, and recourse to truly summary procedure should be abandoned or at least reserved for rare cases. Summary procedure has traditionally been justified on the basis that contempt in the face of the court requires immediate discipline and the avoidance of the delay associated with an adjournment and a trial, but not all situations require immediate action. There will continue to be rare instances where a judge feels compelled to act swiftly — for example, to protect people in the court from physical harm — and

recourse to truly summary prosecution could perhaps be retained for these occasions. But judges should then be required to state his or her reasons for departing from normal procedures for the trial of a criminal offence. Limiting recourse to summary procedure is very important, as people with mental health issues can be at greater risk in circumstances where summary procedure has been adopted. There is a very real risk that a litigant's mental ill-health might go undetected due to the fact that summary procedure can be particularly swift. Not only can the use of summary procedure in these circumstances be an affront to human rights, the power to punish for contempt can be used as an instrument of oppression. This was particularly apparent in the Coleiro case study set out in Chapter Three. The case studies reviewed in this thesis reinforce the need for the implementation of the human rights principle that a criminal tribunal should be free from bias when it determines whether a person has committed contempt in the face of the court. Referring the matter to another judge helps guarantee a hearing free from bias, and helps ensure that if a judge is experiencing mental health issues that these do not affect his or her handling of a case.

The majority of Australian jurisdictions also make no provision to ensure that a person accused of contempt in the face of the court has an opportunity to have their mental state taken into account in mitigation of penalty. Only one Australian jurisdiction, Queensland, makes *explicit* provision for courts to have regard to the mental health of the convicted contemnor in sentencing. The law should be reformed in each jurisdiction to ensure that the mental health of the contemnor is taken into account in sentencing. The decision of the majority of the New South Wales Court of Appeal in *Wilson v Prothonotary* reflected a nuanced understanding of the psychological condition of the contemnor, and was informed by expert evidence.⁵⁶⁸ Given the prevalence of mental ill-health in the general community, and among court-users specifically, it is incumbent upon judges

⁵⁶⁸ [2000] NSWCA 23.

to develop and maintain a high degree of mental health literacy, and have this inform their decision-making in every instance.

In summary, the law governing contempt in the face of the court should be reformed to ensure that:

- the offence of contempt in the face of the court require *mens rea*, such as *wilfulness*;
- the charge of contempt is specified and a written charge formulated;
- the accused is required to plead to the charge (with an associated opportunity to argue that they are unfit to plead where relevant);
- the accused is advised of his or her right to an adjournment;
- the accused has the right to seek legal representation;
- the accused is afforded time and facilities to prepare his or her defence;
- the matter is heard by a judge other than the one who witnessed the contempt; and
- there is an opportunity for evidence relating to the mental health of the accused to be led to possibly deny culpability or mitigate penalty.

To comply with human rights principles and common-law principles of fairness, Australian law — both substantive and procedural — should be reformulated in every jurisdiction to match the ALRC recommendations reflected in the Family Court provisions. These reforms would provide an antidote for many of the injustices that have characterised the law in this field. The tension between the need to control order in the courtroom and principles of procedural fairness and human rights should be recalibrated in favour of the latter principles. The ALRC recommendations adopted in the Family Court reflect these principles. As demonstrated in this thesis, particularly in Chapter Two, they are consistent with the relevant human rights principles.

In addition, in this final chapter, it has been submitted that mental health policies and programs should operate in all courts to assist judicial officers when court-users present with difficult behaviours, possibly attributable to mental ill-health. This should include regular training programs to promote a high level of mental health literacy among judicial officers so that they can detect possible mental ill-health among court-users. Judges and magistrates should be able to call on mental health clinicians to provide mental health assessments in a timely fashion to assist the court in decision-making about appropriate disposal. It has also been submitted that formal supports need to be put in place to assist judges experiencing mental health challenges themselves, to assist them to remain dispassionate in their dealings with difficult court-users. The right to health soundly reinforces the need for such reforms.

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