

Administration of Justice (Reform of Contempt of Court) Bill

Submission to the Justice Select Committee

14 June 2018

Preliminary

- 1 The submitters are legal academics whose legal interests include public law and the role of the judiciary:

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- 2 This document is our submission to the Justice Select Committee on the Administration of Justice (Reform of Contempt of Court) Bill (**Bill**). Overall, we view the Bill as part of a worthwhile effort to update and clarify the law of contempt of court. However, we are concerned that the specific provisions of the Bill relating to publication of allegations or accusations against Judges or courts, set out in Subpart 6 of Part 2 of the Bill (**Subpart 6**), are disproportionate and draconian, and are likely to unintentionally undermine confidence in the administration of justice by inhibiting responsible criticism of Judges and courts. Those specific provisions are the focus of our submission.
- 3 We wish to appear before the Committee to speak to our submission, with our views presented by Dr Willis and Dr Sirota.

Summary

- 4 The provisions of the Bill set out in Subpart 6 make it a statutory offence for a person to publish an allegation or accusation made against a Judge or a court where there is a real risk that the publication could undermine public confidence in the independence, integrity, or impartiality of the judiciary or a court.
- 5 We agree that maintaining public confidence in the proper functioning of the New Zealand court system is important. However, the provisions in Subpart 6 are overbroad. Specifically:
 - (a) the provisions interfere with freedom of expression and freedom of conscience in ways that are difficult to justify in a modern democracy;
 - (b) the provisions infringe on the presumption of innocence; and
 - (c) the provisions rely on an unacceptable amount of discretion in their enforcement.
- 6 Even if not applied to the fullest extent of which they are capable – and we anticipate that they are meant not to be – these provisions will have a chilling effect on academics, lawyers and laypersons who wish to comment on the courts, whether in the traditional media, new media such as blogs, or in scholarship.
- 7 Internationally, prosecutions of the type contemplated in Subpart 6 are exceedingly rare even where the underlying offence has not itself already been abolished. This reflects the delicate balance between the constitutional considerations set out in paragraph 5 above and the residual need to protect the court system in exceptional circumstances. On this basis, we **recommend** that, if the offence codified by Subpart 6 is not repealed, specific changes ought to be made to Subpart 6 to address the constitutional issues it currently creates. Those amendments are set out in the annex to this submission.

New Zealand context

- 8 Subpart 6 sets out to codify and clarify the common law offence of contempt by ‘scandalising the court’. At common law, “[a]ny act done or writing published calculated to bring a Court or a judge of the Court into contempt, or to lower his authority, is a contempt of Court”.¹ This offence can be punished by fine or imprisonment.
- 9 While the definition of the common law offence quoted above is very broad, it is subject to important qualifications:

1 *R v Gray* [1900] 2 QB 36 at 40.

- (a) It must be “established beyond reasonable doubt that there was a real risk, as opposed to a remote possibility, that the [act or writing] would undermine public confidence in the administration of justice”.²
 - (b) The courts are mindful of “[t]he right of the press or the public to criticise the work of the courts ... provided that criticism is put forward fairly and honestly for a legitimate purpose and not for the purpose of injuring our system of justice”.³ This includes the right, “on the basis of facts truly stated, to make an honest and fair comment suggesting some improper motive, such as partiality or bias” on the part of a judge or court.⁴
- 10 The right of criticism for a legitimate purpose recognised by the courts mirrors the defence of honest opinion recognised by the Defamation Act 1992 (and previously known as the defence of fair comment).⁵ It is worth noting especially that the Defamation Act expressly treats honest opinion that “attributes a dishonourable, corrupt, or base motive” in the same way as any other.⁶
- 11 Subpart 6 borrows some of the language in *Radio Avon*, but it both expands the scope of the offence and enables the state to respond to it in ways that are not contemplated by the common law which it would replace. Subpart 6 thus goes well beyond merely codifying and clarifying the common law.
- 12 Specifically, while the headings of Subpart 6 and clause 24 suggest that only “untrue” “allegations or accusations” are prohibited, this is not the actual effect of these provisions. The falsity of “allegations or accusations” is not an element of the offence created by clause 24(1). Rather, pursuant to clause 24(3), a person accused of this offence “has a defence ... if the person proves on the balance of probabilities that” the “allegation or accusation”, or the publication in which it appeared taken as a whole, was true or substantially true.
- 13 As a result, the expression of honest opinion impugning the integrity or impartiality of a judge or court could constitute an offence under clause 24(1). Even if the opinion is based on fully stated and true facts, it cannot, by its very nature as an opinion, be proven true.
- 14 To contextualise the issue, consider the following examples:
- (a) Lawyer Catriona MacLennan recently criticised a District Court Judge after that Judge discharged a defendant without conviction on charges of assaulting the man, the defendant's wife, and one of his children. Ms MacLennan expressed her

2 *Solicitor-General v Radio Avon Ltd* [1978] 1 NZLR 225 at 234 (CA).

3 At 230.

4 At 231.

5 Defamation Act 1992, section 9.

6 Section 12.

concern publicly that the discharge of the defendant, and specific comments made by the Judge to justify that discharge, were significantly out of step with community attitudes towards the seriousness of domestic violence.⁷

- (b) Former Justice Edmund Thomas, in his valedictory lecture at Auckland University, was highly critical of the Supreme Court bench following the decisions in *GE Custodians v Bartle*.⁸ Justice Thomas described the decision as “patently wrong” and “aberrant”, and suggested that the bench had “lost its bearings” and was “dysfunctional” given the decision that it reached.

- 15 These are difficult criticisms for the judges involved to hear but, with respect, they are examples of responsible and fearless criticism of courts. They are the community’s means of holding courts and judges to account for decisions that appear to depart from accepted standards of justice according to the law. For this reason, we believe that such criticisms are actually highly valuable. However, these examples could reasonably fall within the ordinary meaning of the proposed clause 24(1). In our view, that is completely inappropriate as it risks silencing responsible debate on these issues and the important role of the judiciary to deliver justice according to the law in the community interest.
- 16 Moreover, Subpart 6 would authorise the Solicitor-General and the courts to take actions against persons proven or merely believed to have committed an offence under clause 24(1) that are not permitted at common law. Under clause 25(2) the Solicitor-General can request, and under clause 26(1) the High Court can order, retractions and corrections of “allegations or accusations” against judges or courts, before it has been proven that the person who published these statements thereby committed an offence. Under clause 26(1), the High Court can even order an apology.
- 17 At common law, by contrast, no action can be taken against a person accused of “scandalising” a court until he or she has been proven guilty beyond a reasonable doubt. Even then, the courts cannot order that person to retract the offending statement, much less to apologise for it. Subpart 6 therefore goes significantly further than the current common law position, a move that is out of step with treatment of the offence in other common law jurisdictions.

International context

- 18 Enacting the provisions of Subpart 6 would put New Zealand out of step with the practice in other common law jurisdictions. In particular:

⁷ New Zealand Herald “Probe called 'repugnant': High court barrister calls for Law Society committee to be sacked”, available [here](#).

⁸ *GE Custodians v Bartle* (2010) NZSC 146, [2011] 2 NZLR 31.

- (a) In England and Wales, the contempt of scandalising the court was completely abolished by the Crime and Courts Act 2013.⁹ This follows the recommendations of the Law Commission that the contempt of scandalising the court is completely abolished.¹⁰
 - (b) In the United States, it is well-established that the contempt of scandalising the court violates constitutional rights supporting the freedom of speech and the freedom of the press.¹¹
 - (c) In Canada, the offence of scandalising the court still technically exists.¹² However, the common law position (the current position in New Zealand) is understood to be an impermissible limitation on freedom of expression. This means that it is extremely unlikely that a prosecution for the offence would ever succeed.
- 19 We acknowledge that the common law offence of scandalising the court still exists in Australia.¹³ However, this Australian exceptionalism may be in part explained by the ambivalent constitutional status of fundamental rights and freedoms in that jurisdiction. Nations that prioritise rights protection, as New Zealand has with the enactment of the New Zealand Bill of Rights Act 1990, have abolished the offence in law or in practice. Even then, Australia has not lowered the threshold for corrective action of the kind summarised in paragraph 16.
- 20 New Zealand risks being an outlier from the broad consensus that the offence of scandalising the court is unnecessary and unjustifiable in contemporary society. If Subpart 6 is enacted in its current form, New Zealand will have adopted the most disproportionate and draconian position among its major common law peers. As we explain in the following section, there is no benefit in this, in respect of the administration of justice or otherwise.

Purpose of the offence

- 21 The law of contempt of court exists for the sole purpose of “preserving an efficient and impartial system of justice”.¹⁴ More specifically, the offence of scandalising the court serves to ensure that the courts “command the authority and respect of the public”.¹⁵ It does not, however, serve to protect the dignity, let alone the sensitivities, of individual judges.

9 Crimes and Courts Act 2013 (UK), section 33.

10 Law Commission of England and Wales *Contempt of Court: Scandalising the Court* (LawCom No 335, 2012).

11 *Bridges v California* 314 US 252 (1941) at 287.

12 *R v Kopyto* (1987) 62 OR (2d) 449 (ONCA).

13 *Gallagher v Durack* (1983) 152 CLR 238 (HCA).

14 *Radio Avon*, above n **Error! Bookmark not defined.**, at 229.

15 *Solicitor-General v Smith* [2004] 2 NZLR 540 at [133].

- 22 This means that Subpart 6 cannot be justified as a substitute to the judges' ability to bring proceedings to protect their own reputation. The purpose of the common law offence of "scandalising the court", which Subpart 6 replaces, is not to vindicate judicial reputations.
- 23 Nor can Subpart 6 be justified as a means of securing judicial independence. Of course, we champion judicial independence as a constitutional principle of the highest importance. However, like other constitutional rules and principles, judicial independence ought to be understood primarily as an institutional restriction on the other branches of government. It limits the ability of Parliament and the executive, as well as individuals who are part of either of these institutions, to interfere with the courts. While judicial independence imposes strict limits the freedom of officials to criticise the courts,¹⁶ it does not require, and cannot be protected by, the same kinds of restrictions on the ability of citizens to do so.
- 24 If subpart 6 can be justified at all, it is because it is necessary to uphold the authority of the judiciary and thus the Rule of Law. This requires a highly contextual judgement to be made in all the circumstances, but, even then, bringing a prosecution against a member of the public for expressing their views about the nature and quality of judicial decisions would be constitutionally inappropriate in all but the most extreme circumstances. In our view the authority of the courts is not enhanced, and the respect they command cannot be preserved, by fining or imprisoning their critics. This is likely to be the case even when these critics are intemperate or outright wrong.
- 25 We have in mind a particular example of some of the worst criticism of judges in a common law jurisdiction in recent memory: that which the British press inflicted on the members of the High Court bench that ruled that legislation was required for the UK government to initiate its withdrawal from the European Union in the wake of the "Brexit" referendum.¹⁷ One tabloid went so far as to brand the judges "enemies of the people". No doubt, this egregious and irresponsible accusation could undermine public confidence in the integrity of the judiciary. However, we wonder what would have been achieved in that situation if the headline writer had been jailed and the newspaper fined. Such a response would likely be perceived as heavy handed on the part of the state, which we consider would risk simply further undermining the public's confidence in the justice system.
- 26 Of course, a society where such accusations are not levelled from the front pages of newspapers is to be preferred to one where they are. But to acknowledge this, as we do, is not to agree that any means are acceptable to create such a society. In particular, it is not to say that such a society can be brought about through coercion — whether through punishment or through such means as forced apologies.

16 *Cabinet Manual* 2017, 4.13; *Standing Orders* 2014, S/O 117.

17 See Claire Phipps "British newspapers react to judges' Brexit ruling: 'Enemies of the people'" *The Guardian*, online ed, available [here](#).

Defences

- 27 Subpart 6 offers one defence to a person accused of having published “allegations or accusations” that risk “undermin[ing] public confidence in the independence, integrity, or impartiality of the judiciary or a court”. Such a person can, under subclause 24(3), prove on the balance of probabilities that their “allegations or accusations” were true, or at least substantially true, or part of a true or substantially true publication.
- 28 This defence is not adequate, for three reasons:
- (a) It is not sufficient to uphold the freedom of expression, which is a fundamental constitutional right protected by the New Zealand Bill of Rights Act 1990.
 - (b) Making truth a defence that must be proven by an accused person rather than an element of the offence to be proven by the prosecution trenches on the presumption of innocence.
 - (c) The defence of truth may be illusory or, at best, put the courts asked to adjudicate on it in a difficult position.
- 29 As noted above, the common law has long recognised the right of the members of the public and of the press to engage in discussion and criticism of the courts. Such discussion and criticism are as necessary in a free and democratic society as those of Parliament and the executive. Like these other branches of government, the Courts wield the power of the community. They speak and act in the community’s name. The community must, therefore, be able to know, and to criticise, what the courts say and do.
- 30 To be sure, courts may not directly respond to criticism. They must also be independent and free to render controversial and unpopular decisions whenever they are required to do so by the law they apply. However, criticism of the courts, including criticism of the judiciary’s impartiality or integrity, can be essential to support changes not only in the law, but also in judicial appointments, training, and accountability procedures. Such criticism can also have an expressive function that is no less legitimate in a free society than is advocacy of reform.
- 31 As also noted above, much of the criticism of the courts, including perfectly legitimate and indeed very important criticism, will take the form of statements of opinion. Such criticism might include statements to the effect that the judiciary is unduly sympathetic, or hostile, to a particular class of litigant; or that the judges are self-interested; or, indeed, that the courts are insufficiently independent of the government. These statements cannot be proven true, and the defence offered by subclause 24(3) would not apply.
- 32 Accordingly, it is imperative that Subpart 6 provide a defence for statements of opinion that would otherwise fall within the scope of the offence created by subclause 24(1), at least where these statements are supported by sufficient context to be identified as

such. Consistently with the recognition of the importance of the right of fair comment by the courts, this defence would mirror the defence of honest opinion in the Defamation Act 1992.

- 33 Particularly concerning in our view is the apparent overturning of the presumption of innocence in relation to the offence. As the onus of proving the truth of any allegation or accusation as part of a defence falls on the accused, the prosecution need not positively demonstrate the lack of truth as part of its case. This places a worryingly low onus on the prosecution, which in our view is *prima facie* inconsistent with section 25(c) of the New Zealand Bill of Rights Act 1990, which affirms the right of any accused person to be presumed innocent until proved guilty according to law.
- 34 Moreover, requiring an accused to prove the truth of “allegations or accusations” about a judge or a court is problematic quite apart from concerns regarding the presumption of innocence. For an accused to establish the defence of truth, a judge will need to rule that it is more likely than not true that another judge or a court has behaved in a way that risks undermining “public confidence in the independence, integrity, or impartiality of the judiciary”.
- 35 Judges called upon to make such a ruling will be, at best, in an uncomfortable position. The courts or judges on whose behaviour they would need to comment may be colleagues, or indeed hierarchical superiors. The judges may, quite understandably, be reluctant, if not unwilling, to impugn their impartiality or integrity. Besides, judges may also be justifiably concerned that, in doing so, they may pre-empt, undermine, or even contradict the results of an inquiry into judicial conduct. As a result, the availability of the defence of truth may in practice be limited if not illusory.

Prosecutorial discretion

- 36 A natural response to our concerns is to argue that the offence created by subclause 24(1) will only be applied in serious cases. Bringing the justice system itself into disrepute is contextual, and so prohibited conduct cannot be proscribed precisely.
- 37 The Bill quite clearly contemplates that the enforcement of its proscription on “allegations or accusations” against the judiciary will be highly discretionary. Prosecutions are required to be “in the public interest”,¹⁸ and “may consider” the existence of any complaints about a judge and “any explanation provided by the Judge”.¹⁹ The drafting of the Bill implicitly recognizes that its provisions are overbroad, and hope that the good judgement of prosecutors can be relied on to avoid fining or imprisoning people for legitimate criticism of the judiciary.

18 Administration of Justice (Reform of Contempt of Court) Bill, subclause 25(4).

19 Administration of Justice (Reform of Contempt of Court) Bill, subclause 25(5).

- 38 In our view, this is simply not sufficient protection given the fundamental nature of the rights involved. The chilling effect of the criminalisation of the criticism of the judiciary will be felt even if there are no abusive prosecutions, as those who write about the courts constantly watch their words and wonder whether they are crossing a line that only exists in the prosecutors' minds, and that can shift without anyone but the prosecutors being aware of this.
- 39 As a result, the Bill risks failing in its fundamental purpose, which is to clarify the law and give citizens fair notice of their responsibilities vis-à-vis the justice system. Judgement may be necessary to apply the provisions in context, and to rely on prosecutorial discretion to avoid these responsibilities becoming a crushing burden.

Additional enforcement mechanisms

- 40 Subpart 6 creates mechanisms for the enforcement of the prohibition on “allegations and accusations” against the judiciary that can be used in addition to – or indeed instead of – prosecutions under subclause 24(1). In particular, the Solicitor-General can request, and the High Court can order, that a person suspected of having committed an offence against subclause 24(1) retract or correct the offending statement. The High Court can also order such a person to apologise.
- 41 These mechanisms give rise to significant constitutional difficulties, in particular in relation to the freedom of thought, conscience, and belief, and the freedom of expression, protected by the New Zealand Bill of Rights Act.²⁰ It is worth recalling that, as noted above, these mechanisms would be the creation of the Bill. They have no common law antecedent.
- 42 The power to request (and, worse, require) a retraction, correction or apology in advance of an offence being proven is draconian. There is a real danger that it will become an alternative to actual criminal proceedings: rather than prove the offence under clause 24(1), the Solicitor-General will request action under subclause 25(2) or seek an order under subclause 26(1) and then leave the matter there.
- 43 This likelihood is all the greater, and this course of action the more problematic, because subclauses 25(2) and 26(1) posit a much lower bar to the Solicitor-General's requests and the High Court's orders than does a conviction under subclause 24(1). The Solicitor-General can make requests under subclause 25(2) if he or she “has reason to believe that a person may have committed an offence”, while the High Court can make orders under subclause 26(1) “if satisfied that there is an arguable case that a person has committed an offence”. Needless to say, either of these burdens is much easier to discharge than proof of guilt beyond a reasonable doubt.

20 New Zealand Bill of Rights Act 1990, ss 13 and 14.

- 44 It is worth noting that, although ostensibly they are not coercive, requests by the Solicitor-General are likely to be perceived as such. Their recipients would know (or be informed by the Solicitor-General) that, should they not comply, they would be faced with costly and time-consuming proceedings in the High Court subject to a very low burden of proof against them.
- 45 Yet although they are not criminal penalties in a technical sense, requests, let alone orders, for a retraction, a correction or, especially, an apology, are violations of fundamental constitutional freedoms. Retractions, corrections, or apologies made at the government's behest or at a court's order are all, of course, instances of compelled speech. They force a person to convey a message that is the government's or the court's, rather than his or her own – a message which the person may not believe, and with which he or she may vehemently disagree.
- 46 But there is more. In the case of coerced apologies, the persons being made to apologise are made not only to communicate what the government or the courts – but not they – believe to be facts, but also to express a moral judgment about their own culpability which they presumably do not share. A modern, democratic state cannot extort such moral judgments from its citizens. Doing so is an affront to the freedoms of thought, conscience, and belief that are essential to our democracy.

Recommendations

- 47 In light of the issues raised in this submission, we consider there is a strong case that Subpart 6 ought to repeal the offence of “scandalising the court” entirely instead of preserving (and indeed expanding) it. That said, we note that the issue has been given specific and detailed consideration by the Law Commission, who has recommended that the offence be retained and clarified.
- 48 On that basis, **we strongly recommend that, if the offence is not repealed, Subpart 6 be substantially amended so as to pursue its purpose by means more consistent with important constitutional rights and principles.** Our specific recommendations are set out in the annex to this submission.

Annexure

Recommended drafting changes

24 Offence to publish untrue allegation or accusation against Judge or court

- (1) A person commits an offence if the person publishes ~~an~~ a false allegation or accusation made by that person or another person against a Judge or a court, and there is evidence ~~a real risk~~ that the publication ~~could~~ undermines public confidence in the independence, integrity, or impartiality of the judiciary or a court.
- (2) A person who commits an offence against subsection (1) is liable on conviction,—
 - (a) in the case of an individual, to a term of imprisonment of less than 2 years or a fine not exceeding \$50,000;
 - (b) in the case of a body corporate, to a fine not exceeding \$100,000.
- (3) A person has a defence in a prosecution for an offence against subsection (1) if the person proves on the balance of probabilities that—
 - ~~(a) the allegation or accusation was true or not materially different from the truth; or~~
 - (ba) where the prosecution is based on all or any of the contents of a publication, that publication taken as a whole was in substance true or in substance not materially different from the truth; or
 - (c) the defence of honest opinion applies; or
 - (d) the publication of the allegation or accusation was in the public benefit.
- (4) A person has a defence in a prosecution for an offence against subsection (1) if the person proves that, as the online content host or distributor of the publication, the person did not know that it contained an allegation or accusation against a Judge or a court that created a real risk of undermining public confidence in the independence, integrity, or impartiality of the judiciary or a court.
- (5) In this section,—

court means any court, including a court as defined in section 4

honest opinion means the defence of honest opinion set out in the Defamation Act 1992

Judge means a Judge of any court.

25 Further provisions applying for purpose of section 24

- (1) This section applies if the Solicitor-General has reason to believe that a person may have committed an offence against section 24(1).
- ~~(2) The Solicitor-General may do 1 or more of the following:~~
 - ~~— (a) request the alleged offender to retract the allegation or accusation or apologise for it, or both;~~
 - ~~— (b) request the alleged offender to retract the allegation or accusation pending the hearing of the charge;~~
 - ~~— (c) request an online content host to take down, or disable public access to, any specified information relating to the allegation or accusation that the online content host has made accessible to members of the public;~~
 - ~~— (d) apply to the High Court for an order under section 26.~~

- ~~(3) Nothing in subsection (2) obliges the Solicitor-General to take any action described in paragraphs (a) to (c) of that subsection or requires that a charge for the alleged offence be filed before he or she may apply for an order under section 26.~~
- (42) A charge for an offence against section 24(1) may be brought only by or on behalf of the Solicitor-General, and the prosecutor must be satisfied that there is a sufficient evidential foundation for the charge and that the prosecution is in the public interest.
- (53) For the purpose of deciding whether to prosecute a person for an offence against section 24(1), the prosecutor may consider whether any complaint about the Judge's conduct has been made to the Police, or to the Judicial Conduct Commissioner under the Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004, and consider any explanation provided by the Judge.
- (64) Despite anything in the Criminal Procedure Act 2011 or the Search and Surveillance Act 2012,—
- (a) the Solicitor-General may investigate whether a person has committed an offence against section 24(1) or may request the Police to do so:
- (b) the Solicitor-General and the Police may exchange information for the purpose of an investigation:
- (c) the powers that a constable or any other Police employee may exercise under any enactment in the case of an alleged offence punishable by a term of imprisonment of less than 2 years may be exercised in relation to the alleged offence against section 24(1) and, subject to subsection (4), a charge may be filed against the alleged offender.

26 **High Court may make orders upon conviction under section 24(1)**

- (1) ~~On application under section 25(2)(d),~~ The High Court may, if satisfied that there is an arguable case that a person has committed upon convicting a person of an offence against section 24(1), order the person to do 1 or more of the following:
- (a) take down, or disable public access to, material:
- (b) if taking down, or disabling public access to, material is not possible, retract the allegation or accusation:
- (c) not encourage any other persons to engage in similar communications:
- ~~(d) publish a correction:~~
- ~~(e) publish an apology.~~
- (2) ~~The court may—~~
- ~~(a) make an order on an interim basis, pending the filing of a charging document:~~
- ~~(b) vary or discharge any interim order:~~
- ~~(c) make an interim order permanent if the interim order is accepted or a person is convicted of the charge.~~
- (32) In addition, the court may order that an online content host take down, or disable public access to, any material related to the ~~suspected~~ offence that the online content host has made accessible to members of the public.
- (4) ~~In making an order that a correction or an apology be published under subsections (1)(d) or (e), the court may include requirements relating to—~~
- ~~(a) the content of the correction or apology:~~
- ~~(b) the time of publication of the correction or apology:~~

- ~~— (c) the prominence to be given to the correction or apology in the particular medium in which it is published.~~
- (53) In doing anything under this section, the court must act consistently with the rights and freedoms contained in the New Zealand Bill of Rights Act 1990.
- (64) A person to whom section 12(1) applies has standing to be heard in relation to, any application for an order under subsection (1)(a), and any application to renew, vary, or revoke the order.
- ~~(7) If an interim order is not made permanent, it lapses.~~