Law Reform Commission of Western Australia

DISCUSSION PAPER

ON

CONTEMPT BY DISOBEDIENCE TO THE ORDERS OF THE COURT

PROJECT NO 93 (III)

November 2002

The Law Reform Commission of Western Australia

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Executive Summary

Terms of reference

The third term of reference in the Law Reform Commission ("the Commission") of Western Australia's reference on the law of contempt is:

> to inquire into and report upon the principles, practices and procedures relating to contempt by disobedience to the orders of the court and whether the law pertaining thereto should be reformed and, if so, in what manner.

What is disobedience contempt?

The law of contempt was developed by the courts to protect the rule of law by upholding the authority of the courts.[1] The law of contempt remains a creature of the common law and is given only limited recognition by statute.

'Disobedience contempt' is contempt by disobedience to judgments and other orders of the court including undertakings given by a party to the court (which at law have the same effect as court orders). It arises in both civil and criminal contexts, where a person (usually, but not always, a party to proceedings in a court) does not obey a court order. Examples of disobedience contempt in a civil context include a party refusing to pay a sum of money ordered to be paid by the Supreme or District Court to another party. Another example is where a plaintiff[2] has obtained an injunction to prevent the defendant from doing something (such as disposing of assets) and the defendant, ignoring the order, does that which has been prohibited. Disobedience contempt also occurs where an order is made for the delivery of property and the defendant hides the property, making enforcement impossible. Disobedience contempt proceedings allow the plaintiff to seek an order for imprisonment of the defendant until he or she complies with the order or for punishment, in the form of fines and/or imprisonment, when compliance is no longer possible.

1 *Attorney General v Times Newspapers Ltd* [1974] AC 273.

2 In this paper the party or parties to whom an order has been granted that has not been complied with will be referred to as the plaintiff and the party or parties bound by the order but in default will be referred to as the defendant.

In a criminal context, an example of disobedience contempt would be where a person fails to pay a fine imposed by the court or breaches an order prohibiting them from contacting another person.

In the Local Court and Court of Petty Sessions a person can commit disobedience contempt in the same way, by refusing to obey an order in whole or in part.

Orders are made at all stages of court proceedings, not just at the conclusion. Disobedience contempt is in issue where an order is made for discovery of documents, where deadlines are not met in the case management process, where witnesses do not obey orders to come to court and where witnesses disobey orders made in court, including orders to answer questions. Publishing material the courts have ordered not to be published also constitutes disobedience contempt.

In the family law jurisdiction court orders are made in relation to residential and contact arrangements for children, maintenance of children and the division of property upon divorce. Disobedience contempt occurs where a party refuses to meet the orders made, such as hiding children so that contact or residence orders cannot be met. In the case of money orders, disobedience contempt arises either where parties refuse to make payments or hand over assets as required or where they take steps to make compliance with the orders impossible. This includes putting the assets out of reach of the court by transferring them to other entities.

Court orders may also be thwarted by the efforts, or with the encouragement, of others. In the context of family law, professional advisers may assist by hiding assets from the reach of another party; parents and friends may hide children or help a parent to remove the children from the jurisdiction. In a civil context others may assist in destroying evidence, including documents, to make it impossible to meet an order.

In the *Spycatcher* case,[3] the *Sunday Times* newspaper nullified the effect of a court order prohibiting the publication of certain material made against the *Observer* and *Guardian* newspapers by publishing the material before the confidentiality issue had been determined by a court. The newspapers subject to the court order prohibiting publication were not parties to the subsequent contempt proceedings.

3 *Attorney General v Times Newspapers Ltd* [1992] 1 AC 191.

These examples illustrate how wide and varied disobedience contempt is and how it extends beyond a defendant simply refusing to obey a final order made by a court.

Previous law reform findings

This discussion paper refers extensively to the findings published in the *Report of the Committee on Contempt of Court* under the chairmanship of Lord Justice Phillimore in 1974 in the United Kingdom[4] ("the Phillimore Committee") and the recommendations of the Australian Law Reform Commission published in its 1987 *Contempt* report.[5]

4 United Kingdom, Committee on Contempt of Court, *Report of the Committee on Contempt of Court* (HMSO: London, Cmnd 5794, 1974).

5 Australian Law Reform Commission, *Contempt*, Report No 35 (1987).

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The intention of this discussion paper is to promote discussion and comment to enable the Commission to formulate recommendations for reform in a final report. The Commission invites submissions on the many issues and questions raised.

1. Possible Limitations on Reform

Constitutional issues

Any proposed reform of the law of contempt, including disobedience contempt, must be consistent with the limitations on legislative power, express or implied, in the *Western Australian Constitution*.

This issue is pertinent because the contempt jurisdiction of the Supreme Court includes an inherent jurisdiction consequent upon its characterisation as a superior court of record.[6] The sources of power in contempt matters come from both the provisions of the *Supreme Court Act 1935* (WA) ("the *Supreme Court Act*") and through the Court's earlier creation by the British Government.

Section 6 of the *Supreme Court Act* continues, but does not create, the Supreme Court so it can reasonably be said that the inherent jurisdiction has an operation independent of the *Supreme Court Act* and therefore of the state Parliament.[7]

An issue arises as to whether any fundamental principles of law will be infringed by laws purporting to limit or confine the courts' powers to deal with contempt. One such principle is the need to maintain public confidence in the integrity of the courts.

A function of the contempt jurisdiction, including disobedience contempt, is to ensure the rule of law is maintained, and through this, the integrity of the court as the dispenser of the law. Accordingly, any recommendation for change requires the assessment of the change's tendency, if any, to undermine the capacity of the court to maintain its integrity.

Another issue concerns the Commonwealth/state division of powers and the fact that state courts are invested with and exercise federal jurisdiction. In *Kable v Director of Public Prosecutions*[8] the High Court said that state Parliaments cannot legislate in relation to state Supreme Courts in a

6 Paul Seaman, *Civil Procedure in Western Australia*, Vol 1 (Sydney: Butterworths, 1990) [55.4.1].

7 Ibid.

8 (1996) 189 CLR 51.

manner repugnant to, or incompatible with, their exercise of Commonwealth judicial power. [9]

Accordingly, in legislating in respect of contempt of court, state Parliament must have regard to the inherent contempt jurisdiction and the function it performs. Legislative change should have the objective of ensuring that the courts are no less able to enforce their judgments and orders and thereby uphold the rule of law.

2. Current Law and Procedure

Sources of Power

Supreme Court

The Supreme Court of Western Australia has the power to deal with disobedience contempt by s 7(1) of the *Supreme Court Act*, which constitutes the Court as a superior court of record. Under the common law, superior courts of record have the power to enforce their orders by way of contempt proceedings.[10] This includes the power to imprison the defendant, impose fines to secure obedience and, if necessary, to punish[11] and seize assets until an order has been complied with. The *Supreme Court Act* gives the Court 'such and the like jurisdiction, powers and authority within Western Australia'[12] as the English courts of Queens Bench, Common Pleas and Exchequer, as well as specific power in relation to equity and appeals.

Part VII of the *Supreme Court Act* provides for the enforcement of judgments and other orders, not defined as limited to those of the Supreme Court. The provisions deal separately with orders for the payment of money, possession of land, delivery of property, and to do or refrain from doing an act. The powers include the power to order the seizure of property, the charging of property, the execution of sale documents, the imprisonment of the defendant and the sequestration of the defendant's assets.

District Court

The District Court is constituted as a court of record under s 8 of the *District Court of Western Australia Act 1969* (WA) ("the *District Court Act*"), with powers to enforce a judgment 'as

9 Ibid 103 (Gaudron J); 109 and 114–116 (McHugh J).

10 *Connell v The Queen (No 6)* (1994) 12 WAR 133.

11 *Witham v Holloway* (1995) 183 CLR 525.

12 *Supreme Court Act 1935* (WA) s 16.

though it were a judgment of the Supreme Court'.[13] The Court or a judge can compel obedience to, and punish disobedience of, any judgment, being the same power as the Supreme Court or any judge may exercise.[14] The power of the District Court to punish for criminal (as opposed to civil) contempt is limited where the contempt is committed in connection with criminal proceedings.[15]

Local Court

Part VIII of the *Local Courts Act 1904* (WA) ("the *Local Courts Act*") provides for the enforcement of judgments, including execution against land and goods, arrest of the defendant and taking security over debts. Disobedience of an injunction (other than the payment of money) is punishable[16] by a fine of up to $5,000 or imprisonment for up to 12 months. Payment of fines or penalties is enforced in the same way as under the *Justices Act 1902* (WA) ("the *Justices Act*").[17]

Court of Petty Sessions

Courts of Petty Sessions have jurisdiction to determine criminal matters where the offence is punishable by summary conviction. There is also jurisdiction where the offence, act or omission is not treason, felony, a crime or misdemeanour, and there is no other provision made for the manner in which the trial is to be held. The power to enforce orders is given under the *Justices Act*[18] and includes a power of imprisonment, other than for breach of an order requiring the payment of money. [19]

Family Court of Western Australia

Family law in Western Australia is governed by both the *Family Law Act 1975* (Cth) and the *Family Court Act 1997* (WA). Western Australia maintains its own discrete family law jurisdiction exercised by the Family Court of Western Australia. The Western Australian Parliament has power to legislate with respect to family law matters not involving a marriage (regarding ex nuptial children, for example). As a matter of course, changes to the Commonwealth law motivate the Western Australian Parliament to introduce matching legislation ensuring that the law applicable to the Family Court of Western Australia remains consistent with the *Family Law Act 1975* (Cth).

13 *District Court of Western Australia Act 1969* (WA) s 56.

14 *District Court of Western Australia Act 1969* (WA) s 62.

15 *Connell v The Queen (No 6)* (1994) 12 WAR 133.

16 *Local Courts Act 1904* (WA) s 155.

17 *Local Courts Act 1904* (WA) s 157.

18 *Justices Act 1902* (WA) ss 154A, 155 and 159.

19 *Justices Act 1902* (WA) s 159.

Section 35 of the *Family Law Act 1975* (Cth) gives the Family Court the same powers as the High Court to deal with contempt of court. The provision does not, however, apply to an exercise of power by the Family Court of Western Australia as it is not a Family Court of the Commonwealth (having been created as the Family Court of Western Australia under state, not Commonwealth legislation). There is no mirror provision for s 35 in the state Act; consequently contempt powers are limited to s 234 of the *Family Court Act 1997* (WA), the equivalent of s 112AP in the *Family Law Act 1975* (Cth) which deals with a flagrant challenge. Section 112AP of the *Family Law Act 1975* (Cth) treats contempt involving wilful or contumacious[20] defiance as a criminal matter. Disobedience or breach of orders relating to children, such as where they will reside, who is to have contact with them and on what basis, is dealt with under Division 13A of Part VII of the *Family Law Act 1975* (Cth) which imports the sanctions provided for in the parenting compliance regime. These sanctions vary according to whether it is a first, second or subsequent breach of a parenting order.

The often contentious area of child support is dealt with separately by the Child Support Registrar. Breach of orders other than those relating to children is covered by s 112AD of the *Family Law Act 1975* (Cth).

Matching provisions were introduced in Western Australia by the *Family Court Amendment Act 2002* (WA), which at the date of printing has not been proclaimed.

3. Codification

Disobedience of a court order invokes two responses: enforcement and/or punishment. The benefits of enforcement are limited to circumstances where it is both possible and relevant. However, there are times when enforcement is not possible, or if possible meaningless, and punishment becomes the only relevant sanction.

The law relating to disobedience contempt including enforcement and punishment can be found, in part, in the statutes conferring jurisdiction on the state courts. The

20 'Contumacious' means insubordinate, stubbornly or wilfully disobedient, especially to an order of the court: JB Sykes (ed) *The Australian Concise Oxford Dictionary of Current English* (7th ed, 1987).

capacity to enforce a court order is generally provided for but the capacity to punish for disobeying a court order is not as accessible. It is found only partially in statutes; the balance must be found by researching the common law, an often difficult exercise for a non–lawyer. In contrast to the certainty of the *Criminal Code* and other laws that impose a penalty or threat of imprisonment, common law penalties can be substantial and are not limited.

Both the Phillimore Committee and the Australian Law Reform Commission have recommended codifying the law of contempt, including disobedience contempt. [21] The Australian Law Reform Commission proposed enactment of laws providing for non-compliance proceedings and the inclusion of flagrant contempts as criminal offences to be dealt with under the generally applicable principles of criminal law.[22]

The benefits of providing a statutory basis for disobedience contempt, in the Commission's view, include the capacity to provide for a consistent approach, that is, consistency with the rules applying in a criminal context. Other benefits include certainty of sanction and, in the case of criminal contempt, the removal of the anomaly that it stands outside the general codification of criminal law in Western Australia.

Invitation to submit # 1

The Commission invites submissions as to whether or not a law of disobedience contempt should be enacted to codify the applicable principles and the nature of available sanctions.

4. Orders Susceptible of Enforcement

Not all court orders will be enforced on breach. The threshold requirement is that the order is clear and unambiguous in its terms.[23] Where an order can be construed in more than one

21 United Kingdom, Committee on Contempt of Court, above n 4, recommendations 34, 39, [172]; Australian Law Reform Commission, above n 5, recommendations 64 and 78.

22 Australian Law Reform Commission, ibid.

23 *Australian Consolidated Press Ltd v Morgan* (1965) 112 CLR 483; *R&I Bank of Western Australia Ltd v Anchorage Investments Pty Ltd* (1993) 10 WAR 59, 60.

way, punishment cannot be imposed for non–compliance and the order cannot be enforced.[24]

Provided clarity is not in issue, many court orders can be enforced notwithstanding the refusal to obey on the part of the defendant. For example, an order to pay money can be enforced by charging orders over land and other property[25] independently of the cooperation of the defendant.

In other instances substituted performance can be ordered, such as where the sheriff signs a deed of conveyance under the Transfer of Land Act 1893 (WA) to give good title to a purchaser.[26] The Supreme Court is also empowered to order another person, at the cost of the defendant, to meet an order[27] (for example, an order of mandamus or a mandatory injunction).

Enforcement by way of contempt proceedings should be seen as a last resort and be available only where alternative measures do not suffice.[28] The rationale for this is that enforcement calls upon exceptional powers which only apply where the authority of the court is challenged. Orders which may require enforcement of this kind include those requiring a person to do something which only he or she can do, such as delivering up property only he or she is able to produce,[29] calling off a strike, or making a payment out of secret funds.

Interlocutory orders are typically subject to different considerations because they are made during the course of proceedings when it would be reasonable to expect that the parties have an interest in keeping the matter on foot. Thus, non-compliance with an order made in the course of proceedings is generally determined at that point.[30]

In certain circumstances, the courts have a residual discretion not to enforce an order, as reflected in Order 46 Rule 6 and Order 47 Rule 13 of the *Rules of the Supreme Court 1971* (WA) ("the *Supreme Court Rules*"). Order 46 Rule 6 gives the Supreme Court a discretion not to enforce on the ground of matters that have occurred since the order was given.

24 Ibid.

25 As under the *Supreme Court Act 1935* (WA) Part VII.

26 *Supreme Court Act 1935* (WA) s 121.

27 *Supreme Court Act 1935* (WA) s 140.

28 *Arlidge, Eady & Smith on Contempt* (2nd ed, 1999) [12-15].

29 *Re Barrel Enterprises* [1972] 3 All ER 631 (shares); *Enfield London Borough Council v Mahoney* [1983] 2 All ER 901 (historical artefact).

30 Cairns, *Australian Civil Procedure* (4th ed) 511–513.

Order 47 Rule 13 deals with the power to stay execution based on 'special circumstances' where it is inexpedient to enforce or where the defendant is unable to pay.

Under s 105(1) of the *Family Law Act 1975* (Cth) the Family Court of Western Australia may also exercise its discretion not to enforce an order where subsequent events have altered the circumstances between the parties.[31] This is particularly relevant in relation to orders concerning children. The overriding consideration in these cases is the best interests of the child and enforcement proceedings are subject to this concern.[32]

5. Standing — Who Can Bring Proceedings to Enforce or Punish?

Current law

Disobedience contempt evolved as a branch of the civil law on the basis that it was primarily concerned with the rights of the successful party against another private litigant. Consistent with this principle, standing to enforce is conferred on the successful party.[33]

In its 1987 report on contempt the Australian Law Reform Commission observed that the position as to who had standing to bring proceedings was unclear.[34] More recently, the courts have recognised a wider class of applicant. In *Witham v Holloway*[35] the High Court rejected the submission that only a party can do something about a disobedience contempt. Reference was made to *Matthews v Seamen's Union of Australia*[36] where the majority of the Commonwealth Industrial Court held that a member of the public had standing to seek to punish a union for the alleged disobedience of an order, but not to bring an application to enforce the order.

Notwithstanding the comments of the High Court regarding the wider public interest in securing the vindication of judicial authority in disobedience contempt proceedings,[37] there are

31 CCH *Australian Family Law & Practice*, vol 2, [55.120–55.140].

32 Ibid [55.130].

33 Such as under s 132 of the *Supreme Court Act 1935* (WA) which entitles 'the person prosecuting such judgment or order' to seek leave to issue a writ of sequestration.

34 Australian Law Reform Commission, above n 5, [503].

35 (1995) 183 CLR 525.

36 (1957) 1 FLR 185, 194.

37 *Witham v Holloway* (1995) 183 CLR 525, 533.

no reported cases where this has been done in Western Australia at the instance of someone not a party.

Supreme Court

Enforcement proceedings under Part VII of the *Supreme Court Act* do not specify who can bring the action. Section 117 stipulates the methods available for enforcement of money orders but does not specify who can bring the action. Section 130 provides for the enforcement of an order for possession of land as prescribed by the Rules of Court. Order 62A of the *Supreme Court Rules* entitles a mortgagee, a mortgagor, or any person entitled to foreclose or redeem a mortgage to bring proceedings for delivery of possession. Section 131 deals with the enforcement of orders for recovery of property other than land and requires an *ex parte* application on the part of the plaintiff for a writ of delivery. Alternative methods of enforcement allow for a writ of attachment or a writ of sequestration without specifying who may apply for those remedies. Section 141 sets a six year time limit from the date of the order in which to bring execution of a judgment between the original parties but is silent as to whether they are the only parties who may seek execution.

District Court

Section 6 of the *District Court Act* reflects the provisions governing enforcement in the Supreme Court and makes no separate provision.

Local Court

Section 120 of the *Local Courts Act* allows for an action on a judgment to be brought in the Supreme Court, but does not specify standing to be limited to the plaintiff. A warrant for execution for the payment of money can only be brought by the plaintiff.[38]

Section 130 empowers a magistrate to imprison a defendant who fails to meet a money order where he or she has the means to pay. There is no provision specifying who has standing to bring an enforcement proceeding. Failure to obey an order other than for the payment of money gives rise to a penalty of up to $5,000 or imprisonment. There is no express requirement that this application be brought by the plaintiff.

An application for security over property owned by the defendant can only be made by the plaintiff.[39]

38 *Local Courts Act 1904* (WA) s 121.

39 *Local Courts Act 1904* (WA) ss 144, 145.

Court of Petty Sessions

As with the Local Court, in the Court of Petty Sessions failure to comply is dealt with by the magistrate as enforcement proceedings, with imprisonment as an option. [40]

Family Court

In an exercise of Commonwealth jurisdiction, a proceeding for a breach of an order under s 35 of the *Family Law Act 1975* (Cth) can be brought under Order 35 Rule 3 of the *Family Law Rules* (Cth) by the plaintiff and certain specified parties, including on direction by the court; but it has been held that proceedings for a flagrant breach can be brought under s 112AP of the *Family Law Act 1975* (Cth) [41] by 'any person'. [42]

Enforcement proceedings seeking compliance with the Court's orders, such as for the sale of property or the payment of money, can be brought by the plaintiff, and in some cases by a third party. [43]

Issues for reform

The current law generally does not expressly exclude parties from bringing an action for enforcement or punishment. Persons other than the plaintiff would, however, be required to establish sufficient interest to support standing. In relation to actions seeking to punish the defendant, only the Local Court and Court of Petty Sessions make express provision. Reliance on contempt jurisdiction is required in the Supreme and District Courts.

In England, motions for disobedience contempt were generally brought by the Attorney General, [44] a role that was subject to criticism in the *Sunday Times* case by the Court of Appeal [45] but not the House of Lords. [46]

The Phillimore Committee supported the Attorney General's exercise of this role because:

– it is rarely required;

– it would not exclude the private individual who is affected;

40 *Justices Act 1902* (WA) s 159.

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

42 *McCulloch and McCulloch; Ex parte Males* (1978) 32 FLC 175, [90.426].

43 CCH *Australian Family Law & Practice,* [55.110].

44 United Kingdom, Committee on Contempt of Court, above n 4 [185].

45 [1973] 1QB 710, 737–38, 742. That case concerned the publication by the *Sunday Times* of an article drawing attention to the plight of children affected by the drug thalidomide, while litigation on the matter was still pending. The Attorney General sought an injunction against the newspaper prohibiting publication of further articles. An appeal against the granting of the injunction was upheld in the Court of Appeal where remarks were passed critical of the Attorney General's action. The decision was overturned by the House of Lords on appeal.

46 [1973] 3 WLR 298.

- contempt is a public offence in the sense of being an interference with the course of justice; and
- where the contempt is in relation to criminal proceedings the attention of the Attorney General should be drawn to the matter before any private proceedings are begun.[47]

The Phillimore Committee also supported the right of the court to proceed of its own motion, to be supported by a requirement to report any breach by the defendant to a court official[48] to cover cases:

- which affect a child;
- which are particularly flagrant cases, where the court should have power to vindicate its authority; and
- where a party is nervous[49] about enforcement and there is then a need to ensure that justice is done.

There is an issue as to whether or not the court that made the decision which is the subject of the contempt proceedings should be involved in policing and enforcing its own orders. The question arises as to how the courts can undertake the role of both prosecutor and adjudicator. In addressing this issue, the Australian Law Reform Commission drew a distinction between the different purposes of disobedience contempt: enforcement on the one hand and punishment on the other. Accordingly, it recommended the introduction of enforcement legislation as civil proceedings at the suit of the plaintiff and the inclusion in the criminal law of offences involving a flagrant challenge to the authority of the court.[50]

In respect of enforcement proceedings the Australian Law Reform Commission concluded that no person other than the plaintiff should have standing to institute proceedings for disobedience contempt.[51] The process of enforcement was not seen as a means of enforcing certain standards of behaviour (that was the role of the criminal law); instead, it was to ensure that orders made are enforced. The public interest was not in the enforcement of a particular order but in the maintenance of court orders in general.[52] On the other hand it may be argued

47 United Kingdom, Committee on Contempt of Court, above n 4, [187].

48 Ibid [171], recommendation 22(b).

49 For example, a party could be 'nervous' if he or she has been intimidated by the defendant and no longer wants to proceed.

50 Australian Law Reform Commission, above n 5, [527–529].

51 Ibid [528].

52 Ibid.

that it is only in the enforcement of a particular order that court orders in general can be maintained.

Moreover, the Australian Law Reform Commission's approach could have the effect of excluding the capacity to enforce for the wider public interest (such as in the case of publication of damaging material or industrial action) or to protect third parties (such as infants or the disabled). In the case of proceedings brought to punish the defendant for contempt, the Australian Law Reform Commission recommended that such proceedings be dealt with by conferring standing on an officer of the court to institute a prosecution, on direction from the court. The offence to be prosecuted was disobedience constituting a flagrant challenge to the authority of the court.[53]

A possible difficulty with this approach is that it requires the matter to come to the attention of the court, but does not specify a mechanism by which this will happen. It also requires the court to exercise a power to direct a prosecution and run that prosecution through an officer. This requires the court to accept the role as both adjudicator and prosecutor in a case where there may be no requirement for immediacy of response[54] unlike, for example, a contempt in the face of the court where the court must act immediately to preserve the authority of the law.

The concept (as proposed by the Australian Law Reform Commission) that there are two severable purposes in disobedience contempt—enforcement and punishment—was questioned by the High Court in *Witham v Holloway*[55] where it was observed that from the perspective of the defendant the nature of the sanctions connotes punishment. The majority in that case said:

> Nothing is achieved by describing some proceedings as 'punitive' and others as 'remedial or coercive.' Punishment is punishment, whether it is imposed in vindication or for remedial or coercive purposes. And there can be no doubt that imprisonment and the imposition of fines, the usual sanction for contempt, constitute punishment.[56]

53 Ibid [529].

54 The criminal prosecution would take place in accordance with the usual procedures.

55 (1995) 183 CLR 525, 534.

56 Ibid. The significance of *Witham v Holloway* is that it recognised the public interest in ensuring obedience to all orders and that proceedings in disobedience contempt are effectively criminal in nature by virtue of their effect on the defendant's punishment. The facts of the case concerned the failure of the appellant to comply with orders made on behalf of the respondent Commissioner for Consumer Affairs. The orders comprised injunctions restraining the appellant from carrying on any house removal business and sought

The High Court suggested that all proceedings for contempt should realistically be seen as criminal. Hence, all charges of contempt must be proved to the criminal standard of beyond reasonable doubt.

The problem the High Court envisaged with 'severable purposes' was that during the course of a hearing, a matter could graduate from a civil to criminal matter with the result that the mode of hearing, and possibly the nature of the sanctions sought, would change. [57]

The question then is whether a plaintiff should be able to punish a defendant where the proceedings are not of a criminal nature, or whether the plaintiff should be limited to enforcement and, possibly, compensatory remedies.

An ancillary question is whether a mechanism is required to enable an independent officer, such as the Director of Public Prosecutions, to be notified of an alleged contempt and bring proceedings for punitive sanctions. If this were to happen, would the action run in tandem with the plaintiff's proceedings or be heard separately? In the latter case there could be issues of duplication and inconsistency.

Invitation to submit # 2

The Commission invites submissions as to:

- who should have standing to bring proceedings for disobedience contempt;
- whether or not standing should be tied to enforcement or punishment sanctions; and
- whether the court or the Director of Public Prosecutions should have the role of bringing contempt proceedings.

damages for loss as a result of the appellant's business activities. It was alleged the defendant breached the injunctions by failing to disclose his assets and liabilities correctly and by disposing of assets in breach of a Mareva injunction. The issue before the High Court was: what standard of proof was required for a civil contempt? The trial judge had applied the civil standard, the balance of probabilities, with a required degree of satisfaction varying according to the gravity of the facts to be proved. In deciding this point, the High Court examined the basis of the distinction between civil and criminal contempt and whether it could be sustained. The Court held that it could not, because it relied on a differentiation of private and public interest in vindicating judicial authority. This is because non–compliance with any order involves an interference with the administration of justice.

57 Ibid 545.

6. Bringing an Action

Current law

Actions for disobedience contempt in the Supreme and District Courts, other than in respect of execution of judgments, are brought summarily[58] on a motion to a single judge. The intent is to provide for a speedy resolution of the issues.[59]

The *Supreme Court Rules* do not require the Full Court to hear an allegation of disobedience contempt nor do they require the judge who made the order to hear or not hear the summons.

The law historically denied a defendant the right to be heard while still disobeying the order. This rule also prohibits the defendant bringing proceedings in the same cause.[60] The present position seems to be that the court has a flexible discretion[61] to enable a defendant to be heard or to bring proceedings, such as an appeal, in the same cause.

Issues for reform

The use of the summary procedure means there is no provision for trial by jury and such use can limit the defendant's opportunity to know and test the nature of the evidence the plaintiff is to rely on. In *R v Lovelady; Ex parte Attorney General*[62] Burt CJ considered that there was no reason for the summary procedure to be used where contempts were not in the face of the court and had no impact on current proceedings. However, in *R v Minshull*[63] Malcolm CJ stated that the summary procedure was appropriate for proceedings in respect of disobedience of court orders or undertakings.

The Phillimore Committee recommended that the summary procedure be retained for contempt proceedings on the basis that the law of contempt should only operate where the achievement of its objectives required this procedure.[64] In other words, the law of contempt should not be expanded to deal with new matters if they were adequately covered by the general criminal and civil law. This recommendation is, in a sense circular, because it identifies the need for the law of

58 *Rules of the Supreme Court 1971* (WA) Order 55.

59 For example, *Castlecity Pty Ltd v Newvintage Nominees Pty Ltd* [2002] WASC 2.

60 Seaman, above n 6, [55.1.8; 55.7.4].

61 Ibid.

62 [1982] WAR 65–66.

63 *R v Minshull; Ex parte Director of Public Prosecutions for Western Australia* (unreported, Supreme Court of Western Australia, Malcolm CJ, Kennedy and Franklyn JJ, 21 May 1997, Library Number 970255A) 17.

64 United Kingdom, Committee on Contempt of Court, above n 4, recommendation 2, 92.

contempt according to where the procedure is required, rather than identifying where the law is required and then determining an appropriate procedure.

The Australian Law Reform Commission recommended that sanctions be dealt with separately according to their purpose.[65] Enforcement and generally punitive proceedings should be dealt with by way of a summary trial in the court which made the order. It was considered that for coercive sanctions, the plaintiff in civil proceedings should be entitled to the benefit of that order without endless litigation, undue cost and unnecessary anxiety.[66]

The Australian Law Reform Commission also recommended that the defendant should have the right to require the judge who made the order not to hear the case because of the severity of possible sanctions, which comprise imprisonment, fines and sequestration of assets.[67] A concern with this approach is that it gives the defendant an automatic right to question and decide the judge's impartiality and impliedly accepts that the judge may have a particular interest in the proceedings acquired through the earlier hearing. This concern could be addressed by requiring the matter to be heard by another judge, or possibly by leaving the matter to be dealt with in the usual way for bias.

Generally, the Australian Law Reform Commission considered that punishment was best dealt with in the current summary regime by the same court, to save time and money. In the rare cases of criminal sanctions for flagrant challenges to the authority of the courts, no reason could be seen why they should not be dealt with as for any other offence; that is, as an indictable offence triable summarily before a magistrate.

The point has already been made that the High Court in *Witham v Holloway* denied that there was a proper distinction between proceedings in the public interest and those that are coercive or remedial in the interest of a private individual.[68] Brennan, Deane, Toohey and Gaudron JJ considered that all orders, of whatever nature, are made in the interests of justice, so that non–compliance necessarily constitutes an interference with the administration of justice, even if the position can be remedied as between the parties.[69]

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65 Australian Law Reform Commission, above n 5, [559–560].

66 Ibid [559].

67 Ibid.

68 (1995) 183 CLR 532.

69 Ibid 533.

The majority in *Witham v Holloway* also questioned whether a true distinction can be drawn between coercive/remedial and punitive purposes, on the basis that once an individual brings enforcement proceedings a penal or disciplinary jurisdiction may be called into play – even where the parties have settled their differences.[70]

The High Court's position in *Witham v Holloway* highlights the difficulty of maintaining the distinction between private enforcement proceedings and those that constitute an outright challenge to the authority of the courts. There is also the issue of gradation: at what point does a refusal to comply become outright defiance so that the punitive jurisdiction comes into play?

Right to be heard

Does the defendant by his or her behaviour disqualify himself or herself from the usual privileges accorded litigants? Is it appropriate that a defendant be denied such privileges? On one view, contempt indicates a disregard for the law so that its protections could reasonably be withheld. The alternative view is that the right to be heard is a fundamental protection to defendants that should not be lost in any circumstances.

Issues for reform

The primary issue of concern is the current use of a non–criminal procedure in a context where sanctions are clearly penal in nature.[71] One way of dealing with this would be to preserve the summary procedure with its advantages of speed and knowledge (where the judge hearing the matter continues to do so) whilst ensuring that appropriate protections are maintained to minimise the risk of unfairness to the defendant. This approach recognises the interests of a plaintiff who has successfully proved the case against a defendant in obtaining an order and minimises delay and duplication.

Maintaining separate categories of civil and criminal contempt also has some disadvantages.[72] One disadvantage is where a civil matter involves a clear challenge to the rule of law and may graduate to a criminal matter where a defendant progressively became more defiant. There is also the possible risk of unfairness to a defendant where a plaintiff seeks to rely on draconian sanctions to enforce obedience, such as imprisonment, unlimited fines and seizure of assets in what is otherwise regarded as a 'civil' context.

70 Ibid.

71 See also the discussion of sanctions below.

72 See *Witham v Holloway* (1995) 183 CLR 525, 531–532.

The question of the appropriate judge to hear the matter, and the issue of possible bias, may be dealt with either by relying on the usual rules governing bias[73] or by adopting a rule that precludes the judge making the order from hearing the contempt application. The advantage of the latter course is that the judge who made the order does not have to decide whether or not it is ambiguous. This is important because an order must be clear on its terms to be enforced, or for the defendant to be subject to punishment for disobedience. The disadvantage is that it requires multiple handling of the same case by different judges which is an inefficient use of judicial resources and may result in protracting the proceedings. There is a further risk that the defendant may seek a de facto appeal in requiring a different judicial officer to hear the matter.

Invitation to submit # 3

The Commission invites submissions as to whether or not:

- the existing summary procedure should be retained;
- further safeguards to protect the defendant should be incorporated into the summary process;
- the distinction between civil and criminal contempt should be maintained;
- there should be a requirement for a specific rule governing the capacity of the judge making the order to hear the contempt allegation; and
- the defendant should have a right to be heard whilst still in contempt.

Local Court

In the Local Court, disobedience contempt is dealt with by the magistrate making the order. In the case of a failure to pay money where the defendant has the means to pay, the proceedings are brought on summons before the magistrate.[74] The magistrate can take evidence of the means to pay as he or she sees fit, including the summonsing and examining of witnesses. This power can be delegated to a clerk[75] where a

73 The rule against bias applies the test whether the relevant circumstances are such as would give rise in the mind of a party or a fair-minded and informed member of the public to a reasonable apprehension or suspicion of a lack of impartiality on the part of the decision maker. For a discussion of the rule against bias, see Aronson and Dyer, *Judicial Review of Administrative Action* (2nd edition, Law Book Company, 2000) 455.

74 *Local Court Rules 1961* (WA) Order 26.

75 *Local Courts Act 1904* (WA) s 130.

person disobeys an injunction or other order (other than for the payment of money). Order 27 of the *Local Court Rules* provides for the defendant to be summonsed as for a simple offence under the Justices Act.

A judgment summons can be issued in a Local Court other than the court making the order. Provision is made for a copy of the order to be filed in the Court together with an affidavit deposing to the sum due.76 Leave to issue a judgment summons is required where it is to be issued out of a court which is not the nearest to where the debtor resides, carries on business or is employed.77

Orders for discovery may be enforced78 in the same way as in the Supreme Court and the magistrate can order arrest 'whenever he deems it necessary to do so for the purposes of s 68'. 79

Where a person is in custody under any order made under ss 68 or 155 of the *Local Courts Act*, Order 27 Rule 3 allows for an application for discharge from custody supported by an affidavit showing cause and on notice to the plaintiff.

Issues for reform

A concern could be raised that the Local Court should not have access to such draconian penalties as imprisonment in support of its orders, and either that orders made within the jurisdiction of the *Local Courts Act* should not attract such sanctions or that the proceedings should be in the Supreme or District Court in exercise of their supervisory jurisdiction.

There may also be a concern regarding the role that a clerk–delegate may take in a process that can lead to imprisonment and seizure of assets, albeit that some protection is built into the process by requiring the magistrate to confirm the order of commitment made by the clerk–delegate.[80]

Invitation to submit # 4

The Commission invites submissions as to the appropriate forum for hearing allegations of disobedience contempt to orders made in the Local Court.

76 *Local Court Rules 1961* (WA) Order 26, Rule 7.
77 *Local Court Rules 1961* (WA) Order 26, Rule 5.
78 *Local Courts Act 1904* (WA) s 68.
79 *Local Court Rules 1961* (WA) Order 27, Rule 2.
80 *Local Court Rules 1961* (WA) Order 26, Rule 2.

Petty Sessions

This jurisdiction is concerned with disobedience to orders made in the context of criminal prosecutions. The *Justices Act* provides for administrative enforcement of money orders, so that money due becomes recoverable as a judgment debt.[81] Any other order may be enforced on imprisonment[82] and a magistrate may issue a warrant. There is no express provision dealing with disobedience contempt in this jurisdiction.

Invitation to submit # 5

The Commission invites submissions as to whether or not an express provision dealing with disobedience contempt should be enacted in Western Australia for Courts of Petty Sessions in addition to the provisions for enforcement contained in the *Justices Act*.

Family law

Power to deal with contempt is conferred by s 35 of the *Family Law Act 1975* (Cth) which gives the Family Court, exercising Commonwealth jurisdiction, the same powers as the High Court. Disobedience contempt is dealt with in three streams:

1. Criminal contempt, involving wilful or contumacious defiance

This is treated as a criminal matter under s 112AP[83] of the *Family Law Act 1975* (Cth). The power is rarely exercised; the majority of disobedience contempts are dealt with in the other two streams.

2. Sanctions for breach of orders relating to children

These are dealt with under the new Division 13A to Part VII of the *Family Law Act 1975* (Cth)[84] which introduces a three stage 'parenting compliance regime'. Stage 1 requires the Court to explain the effect of any parenting orders made to the parties.[85] Stages 2 and 3 apply on breach. On a first breach the defendant (or the defaulting party) must attend an approved parenting course, the purpose of which is to educate

81 *Justices Act 1902* (WA) s155.

82 *Justices Act 1902* (WA) s159.

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

84 Introduced by *Family Law Amendment Act 2000* (Cth); matching provisions for Western Australia were introduced by the *Family Court Amendment Act 2002* (WA).

85 *Family Law Act 1975* (Cth) s 65DA.

the parent as to his or her obligations. Compensatory orders may also be made, such as making up lost contact time.[86]

Stage 3 brings in a range of penalties where the breach is the second or subsequent one or where the first breach was of a sufficiently serious nature.[87] The main orders in contention are contact orders, in particular, issues arising from ambiguity in drafting the orders[88] and in some instances very minor infractions. The Child Support Agency deals with issues of child support so they do not arise in this context.

3. Sanctions for breach of orders other than those relating to children

Section 112AD of the *Family Law Act 1975* (Cth) empowers the Family Court to impose sanctions for breach of any order made under the Act. This is limited by s 112AA which excludes parenting orders. A contravention is only identified where, under s 112AB, the defendant (or defaulting party):

- intentionally failed to comply with the order;
- made no reasonable attempt to comply with the order;

or any other person;

- prevented compliance by the person bound by the order or aided and abetted their contraventions.

The Commonwealth approach to enforcement contempt was introduced as a result of extensive consultation. In September 2002 Western Australia passed legislation (awaiting proclamation) that mirrors the Commonwealth approach to contempt in all relevant family law matters.[89] Given that legislative action in this area is so recent, the Commission does not intend to comment on this issue or propose issues for reform.

7. Civil / Criminal Classification

Current law

Disobedience contempt was developed differently to other branches of the law of contempt. As a result, disobedience contempt was classified as a 'civil' matter in civil proceedings, except in cases involving wilful or contumacious defiance,

86 As at 30 August 2002 no party was in stage two in Western Australia.

87 See the discussion in CCH *Australian Family Law and Practice Reporter*, vol 2, [56.186].

88 Such as in relation to school holidays.

89 *Family Court Amendment Act 2002* (WA).

breaches by solicitors and other officers of the court and in certain other instances, including orders respecting a ward of court,[90] all of which were classified as criminal contempt. The basis for the distinction appears to reflect the duties owed by officers of the court, and in the case of wards, the need for their protection. Contempt in criminal proceedings is treated as a criminal matter.[91]

The civil classification reflected the party–party nature of litigation, the plaintiff's interest in enforcing an order made in his or her favour and the fact that the plaintiff in disobedience contempt proceedings sought enforcement for private benefit rather than punishment for breach of the public interest.

The competing need to have access to potentially draconian penalties to ensure enforcement and the balancing requirement to provide a fair hearing for a defendant at risk of those penalties persists as a difficulty in the treatment of disobedience contempt as a civil matter.

The Australian Law Reform Commission sought to deal with the difficulty by removing flagrant breaches into the arena of criminal law and importing a number of the protections usually available to a defendant in the criminal jurisdiction into the civil process.[92]

The Phillimore Committee recommended that the distinction between civil and criminal contempts be abolished.[93] The basis for its recommendation was that the practical importance of the distinction was minor and that in many cases of serious contempt, disobedience to a court order assumes a criminal nature, through the action the defendant takes.[94] In Scotland no such distinction existed.[95] The Committee's recommendation has never been adopted,[96] one reason being that a number of practical differences exist between civil and criminal contempt which would have to be resolved if the distinction were abolished.[97]

90 *Witham v Holloway* (1995) 183 CLR 525, 530.

91 *Connell v The Queen* [No 5] (1993) 10 WAR 424.

92 Australian Law Reform Commission, above n 5, discussed in [561, 569–583].

93 United Kingdom, Committee on Contempt of Court, above n 4, [176].

94 Ibid [169]. This proposition depends on how a 'serious' contempt is defined, and how flagrant defiance of a non-criminal nature, such as refusing to hand over significant property, would be classified.

95 Ibid.

96 This issue is discussed at length in *Arlidge, Eady & Smith on Contempt* (2nd ed, 1999), above n 28, [3-44–3-51].

97 Ibid [3-87].

The distinction assumed importance in Australia in *Witham v Holloway*[98] where the question in issue was the standard of proof that had to be met to convict a defendant of disobedience contempt. The High Court unanimously held that the criminal standard, beyond reasonable doubt, should apply. In reaching this decision. The majority commented on the illusory nature of the differences upon which the distinction between civil and criminal contempt was based. The majority said that all proceedings for contempt must realistically be seen as criminal in nature.[99]

Given that the current law is that the criminal standard of proof applies, a number of procedural issues must be considered.

Standard of service

The standard of service in criminal matters requires personal service on the defendant. This standard is required in Western Australia in civil contempt proceedings.[100]

Particularising the charge

The notice of motion must specify the contempt of which the defendant is alleged to be guilty.[101] This means that the defendant is entitled to know exactly what he or she is said to have done or omitted to have done to constitute contempt of court[102] in order to defend himself or herself.

Power of arrest

In *Kaleen Holdings Pty Ltd v Patek*[103] Ipp J held that the arrest of a person to answer a charge of contempt of court is not of the same character as the execution of an ordinary civil process. This case concerned a 'civil' (non-contumacious) contempt. The basis for this ruling was the public interest in the exercise of the contempt power.[104]

Other distinctions

In *Witham v Holloway*[105] McHugh J identified a number of distinctions between civil and criminal contempt which no longer apply, including standing to bring an action, waiver, unlimited imprisonment, the power to fine and standard of proof. The tendency to break down distinctions reflects a recognition of the public interest in having court orders obeyed. The distinctions that do remain include clarity as to

98 (1995) 183 CLR 525.

99 Ibid 534.

100 *Supreme Court Act 1935* (WA) s 135; *The Swan Brewery Co Pty Ltd v Newman* (1998) WASC 271.

101 *Rules of the Supreme Court 1971* (WA) Order 55 Rule 5.

102 Seaman, above n 6, [55.5].

103 (1989) 2 WAR 31.

104 Ibid 35.

105 (1995) 183 CLR 525, 539–541.

the right to appeal[106] and the right to administer interrogatories.

Issues for reform

The question is whether it serves any useful purpose to maintain a distinction between civil and criminal contempt in the context of disobedience contempt in civil proceedings.

In support of maintaining the distinction is the need to recognise the interests of the plaintiff in securing compliance, and the necessary erosion of those interests by according fuller rights to the defendant. The opposing argument focuses upon the nature of the sanctions the plaintiff may call in aid and the anomaly that the defendant is deprived of full criminal procedure in a context where the sanctions may be greater than under most criminal trials.

Invitation to submit # 6

The Commission invites submissions regarding the abolition of the category of civil contempt and its inclusion within the law governing criminal contempt.

8. Mental Element

Current law

In the past, unless the defendant acted flagrantly or 'contumaciously'—that is, in open defiance to an order of the court—the contempt was treated as a 'civil' and not a 'criminal' matter, except in certain specific situations.[107] This did not necessarily mean that the sanction was lighter.

The current law provides that intent is not a necessary element in proceedings for contempt.[108] What is required is the establishment of a deliberate act by the defendant which the court is persuaded beyond a reasonable doubt is in clear breach of the order made. The intent required is therefore limited to a wilful or deliberate act and no longer requires any element of defiance, such as where the defendant destroys an object the subject of a court order, or refuses to hand over an object known to be in his or her possession. The intention to breach the order and a belief on the part of the defendant that

106 Discussed below; see Seaman above n 6, [55.1.4].

107 *Witham v Holloway* (1995) 183 CLR 525, 530.

108 *R v Pearce, R v WA Newspapers Ltd; Ex parte DPP (WA)* (1996) 16 WAR 518; *The Swan Brewery Co Pty Ltd v Newman* [1998] WASC 271.

his or her conduct was not in breach of the order is irrelevant.[109] However, intention remains relevant to the question of penalty.[110] For example, in *Resolute Ltd v Warnes*[111] absence of intent was reflected in a suspension of an otherwise applicable prison sentence.

Issues for reform

The question arises whether there should there be a requirement for a level of intent beyond wilfulness as an element of disobedience contempt. In considering this question the Phillimore Committee concluded that the nature of the intent of the defendant in breaching the order could be adequately reflected in the penalty the court imposes.[112]

The Australian Law Reform Commission recommended that the plaintiff should have the onus of establishing that the defendant wilfully intended to disobey the order or made no reasonable attempt to comply with it.[113] Punitive sanctions should not be imposed where the defendant satisfies the court that the disobedience was due to a failure, based on reasonable grounds, to understand the nature of the obligation imposed by the order.[114]

The Australian Law Reform Commission did not consider this recommendation to be relevant to the availability of coercive sanctions, because the plaintiff is entitled to the benefit of the order. Thus where the defendant either intended to disobey the order or made no reasonable attempt to obey it the court should be able to impose coercive sanctions whether or not the defendant realised he or she was in breach.[115]

The Australian Law Reform Commission considered that punitive sanctions should be imposed only where there is an intention to disobey the order or knowledge that the relevant act or omission constituted a breach of the order. The reason for this was said to be that where the conduct of the defendant is not culpable it is difficult to identify what the court is trying to deter by imposing punitive sanctions.[116] This relies on acceptance of the principle that the purpose of punitive sanctions is to deter, rather than punish.

109 *The Swan Brewery Co Pty Ltd v Newman*, [1998] WASC 271.

110 *Resolute Ltd v Warnes* [2001] WASCA 4 (Full Court) (17January 2001), [3].

111 Ibid.

112 United Kingdom, Committee on Contempt of Court, above n 4, [19–20].

113 Australian Law Reform Commission, above n 5, recommendation 67.

114 Ibid.

115 Ibid [525].

116 Ibid [526].

Invitation to submit # 7

The Commission invites submissions as to:

– whether or not an intent to disobey should be an element of disobedience contempt;

– the nature of the intent that should be required; and

– whether or not intent should have any impact on the nature of sanctions imposed by the court.

9. Waiver

Current law

Traditionally the plaintiff in civil proceedings could waive enforcement of an order and that would dispose of the matter for all purposes.[117] This followed from the civil nature of the proceedings. No account was taken of the wider public interest in ensuring obedience to orders of the court.[118] Waiver was not, of course, available for criminal contempt.

In *Witham v Holloway* the majority observed that notwithstanding that proceedings may be brought by an individual, a 'penal or disciplinary jurisdiction' may be called into play and be exercised even when the parties have settled their differences and do not wish to proceed further.[119] In other words, waiver no longer determines the matter beyond the specific interests of the plaintiff. The notion of waiver in cases of disobedience contempt was found to be unsatisfactory because of the need to accommodate the broader public interest in the maintenance of the rule of law. McHugh J, in particular, pointed out the anomaly of allowing waiver in cases of civil, but not criminal, contempt.[120]

Issues for reform

Should the plaintiff be able to waive the contempt for all purposes? The Phillimore Committee recommended that the rule of waiver by the plaintiff in civil proceedings automatically relieving the defendant of liability be abolished.[121] This recommendation was based on the consideration that the courts' role in disobedience contempt is now wider and that

117 *Attorney-General v Times Newspapers Ltd* [1974] 1 AC 273, 308 (Lord Diplock).

118 As discussed in *Witham v Holloway* (1995) 183 CLR 525.

119 Ibid 533.

120 Ibid 549.

121 United Kingdom, Committee on Contempt of Court, above n 4, recommendation 22 (b).

there are three classes of cases where the court should have the power to proceed against the defendant in any event because a broader public interest requiring enforcement can be identified:[122]

- any order in respect of a child;
- where the plaintiff is nervous about enforcement; or
- in cases of flagrant defiance of an order.

The last category was historically treated as criminal contempt, which would remove the capacity of the plaintiff to waive in any event.

The Phillimore Committee commented that doubt had been cast on the capacity to waive and that it would be clearer if it were formally abolished.

The Australian Law Reform Commission recommended that the doctrine of waiver be retained, except where there is a flagrant challenge (where it would be an offence) and in family law matters.[123] The reason for this recommendation was that neither the interest of the plaintiff nor that of the community is furthered by the continuance of proceedings against, and the imposition of punitive sanctions on, a defendant against the wishes of the plaintiff.[124] This recommendation deals with two of the three exceptions identified by the Phillimore Committee, but leaves aside the category of the plaintiff who is 'nervous' about enforcement.

The difficulty with the recommendation not including the 'nervous' plaintiff (that is, one who does not want to proceed for fear of the defendant) is the nature of the wider public interest in enforcement of court orders in general, and the requirement, then, of having to determine whether an act of disobedience was such that it required classification as a criminal offence.

Invitation to submit # 8

The Commission invites submissions as to whether or not a doctrine of waiver should be recognised for disobedience contempt, and if so, whether it should be limited in any way.

122 Ibid [171] p 73–74.

123 Australian Law Reform Commission, above n 5, [534].

124 Ibid.

10. Accessories

Current law

As has already been observed, a person other than the defendant may be liable in disobedience contempt proceedings. This is usually a person who aids or abets the defendant in disobeying the court order. Traditionally all accessories (other than the defendant) were subject to 'criminal' as opposed to 'civil' contempt proceedings[125] which could mean that different procedural rules applied for the hearing of the same allegation of disobedience contempt against the defendant and a person who assisted in the contempt. The rationale was that the involvement of a person other than the plaintiff was clearly to undermine the administration of justice, taking it outside the civil party–party arena.[126]

There is also a category of case where a third party effectively nullifies the terms of an order, without necessarily involving the defendant. This happened in the *Spycatcher*[127] cases, where the effect of an order restraining further publication of confidential papers was overcome by their publication in a newspaper. In this case the Court of Appeal held that those who deliberately interfere with the administration of justice by undermining judicial orders may be guilty of contempt, even though not directly bound by the court's order.

Issues for reform

The Australian Law Reform Commission endorsed the current law requiring a party to have knowingly aided or abetted the non-compliance.[128] The current law provides that unless the requisite mental element is present then a party who aids and abets non-compliance is not liable to sanction. The Australian Law Reform Commission recommended that:

- the defendant must be liable to sanctions and the person assisting has to have had actual knowledge both of the terms of the order and that the relevant conduct constituted disobedience;
- coercive sanctions generally should not apply to a person who aids or abets, other than in the case of officers of a corporation[129] who are excepted due to their controlling role in a corporation's contempt.

125 *Attorney-General v Times Newspapers Ltd* [1992] 1 AC 191, Seaman above n 6, [55.4.26].

126 *Arlidge, Eady and Smith on Contempt*, above n 28.

127 *Attorney-General v Newspaper Publishing PLC* [1988] Ch 333.

128 Australian Law Reform Commission, above n 5, [536].

129 Ibid.

It is arguable, however, that the requirement of 'actual' knowledge may excuse a deliberate failure to gain the knowledge, and possibly also the independent 'disobeyer' (the *Spycatcher* scenario, for example) who should be within the reach of the courts if the object is to ensure that the rule of law is upheld.

The Phillimore Committee did not make recommendations on this issue.

Invitation to submit # 9

The Commission invites submissions as to how persons, other than the defendant, who assist or are involved in the breach of a court order, should be treated. Should the same or different rules apply to those persons and the defendant?

11. Sanctions

Current law

Supreme and District Courts

The sanctions for disobedience contempt in the Supreme and District Courts derive both under the statutes forming the respective courts and in the case of the Supreme Court, as part of its inherent jurisdiction as a superior court of record.[130]

Statutory provisions – enforcement

The *Supreme Court Act*[131] provides for the charging and seizure of property to meet an order for the payment of a sum of money. It may also be enforced by a writ of sequestration or in certain circumstances by the arrest or imprisonment of the defendant. Imprisonment is limited to a maximum of one year. Orders for the recovery of land and other property may be enforced by a writ of delivery[132] or in certain circumstances by a writ of attachment or a writ of sequestration. There is no limit on the period of imprisonment in these cases.

An order requiring a person to do or abstain from doing any act other than the payment of money can be enforced by a writ of attachment or by committal.[133] There is no time limit on the period of imprisonment. A mandatory injunction or mandamus can also be enforced by the court ordering someone else to

130 Seaman, above n 6, [55.4.1].

131 *Supreme Court Act 1935* (WA) s 117.

132 *Supreme Court Act 1935* (WA) s 131.

133 *Supreme Court Act 1935* (WA) s 135.

perform the act, or abstain from doing the act, at the cost of the defendant.

Order 55 Rule 7 of the *Supreme Court Rules* provides for imprisonment and the imposition of fines; Order 55 Rule 8 allows an order for arrest to be suspended and for a person to be released prior to the expiry of the term of imprisonment. At common law the court has the capacity to impose a fine for non-performance,[134] including an accruing fine until performance[135] that is, a daily fine until the defendant complies with the order.

There is also the capacity at common law to seize assets, take over the running of the business (sequestration) and imprison the defendant indefinitely. Under Order 55 Rule 7(3) of the *Supreme Court Rules* sequestration is limited to a corporation.

Under the *Local Courts Act* a magistrate may imprison for up to 12 months or fine up to $5,000 in punishment for breach of an order to do an act other than pay money.[136] In the case of an order to pay money the magistrate may order seizure of the defendant's property.[137] Imprisonment for non-payment of money, which is limited to six weeks, is not in substitution of the requirement for payment. [138]

Issues for reform

The issues raised concern the range of sanctions that should be available and whether or not they should be the same for breaches of orders at all levels of the court system.

1. Should all the present sanctions be available to enforce an order made in the civil context?

The present concern is that the sanctions of seizure of property and imprisonment can be imposed in a civil context, and potentially at the behest of a private litigant, often involving the significant participation of, and cost to, the state.

It could be argued that a private litigant should not be able to require such state intervention and that private remedies such as damages and substituted performance should suffice. Such a solution may be effective up to a point, but private remedies may be ineffective where performance can only be carried out

134 *Witham v Holloway* (1995) 183 CLR 525, 541–542.

135 *Mudginberri Station Pty Ltd v Australasian Meat Industry Employees Union* (1986) 12 FLR 10.

136 *Local Courts Act 1904* (WA) s 155.

137 *Local Courts Act 1904* (WA) Part VIII.

138 *Local Courts Act 1904* (WA) s 130.

by the defendant[139] or where the defendant lacks the means to pay a fine. There is also the argument that once an order is made by the court the administration of justice is in issue, justifying state intervention where a defendant chooses not to obey.

The Phillimore Committee made no recommendation regarding the nature of the sanctions that should be available in civil proceedings.

The Australian Law Reform Commission considered the use of imprisonment for disobedience to a court order[140] and recommended its retention because:

– the majority of submissions favoured retention (only a limited number favoured abolition); and

– isolated cases of serious disobedience will occur for which no other form of sanction is adequate.

In examining the use of imprisonment in this context, the Commission is mindful that sometimes imprisonment is the only sanction – either because of the nature of the conduct complained of or because the defendant has put the capacity to pay a fine beyond reach.

Invitation to submit #10

The Commission invites submissions as to whether or not the sanctions that should be available to enforce an order made in a civil context should be limited to exclude imprisonment.

2. Should private parties have the capacity to call in aid the full range of sanctions—including imprisonment, fines and seizure of assets—for the purposes of punishment?

This issue focuses on the 'civil' or private aspect of proceedings as between the parties, and the purposes for which contempt proceedings are brought. Earlier it was noted that the High Court in *Witham v Holloway*[141] had doubted the utility of the distinction between the private and public purposes of disobedience contempt proceedings. Indeed, it

139 Such as where the relevant item of property is hidden away.

140 Australian Law Reform Commission, above n 5, [538].

141 (1995) 183 CLR 525.

could be said that all plaintiffs impliedly seek punishment, at least in the eyes of the defendant.

The issue then is the extent to which a plaintiff can punish a defendant as opposed to seek enforcement of, or compensation for, an order that has not been met.

If the plaintiff's interests are redressed by compensation, those interests would not appear to justify the imposition of a punitive sanction in themselves. To the extent that a defendant has challenged the authority of the courts, provision could be made for the state to conduct punitive proceedings for the wider purposes of upholding the rule of law.

The Phillimore Committee did not make any recommendations in this regard. The Australian Law Reform Commission dealt with the issue of punitive sanctions in two streams: where the disobedience was of such a nature as to constitute an offence (in which case it would be prosecuted by the state under the criminal law) and lesser disobedience, where the rights being protected were identified as those of the plaintiff.[142] In the latter case punitive sanctions would be imposed at the suit of the plaintiff.[143] What happens with any fines imposed in this instance, and to whom they would be paid, was not considered.

It might be argued that the problem with the Australian Law Reform Commission's recommendation is that the defendant is imprisoned as a punishment, at the suit of (and, on this argument, for the benefit of) the plaintiff. If compliance is no longer an option and financial compensation is not available, a plaintiff may well derive some satisfaction from punishing the defendant. This is in contradistinction to the state punishing the defendant for flouting the rule of law. Is this an appropriate outcome in civil proceedings?

One approach would be for the Director of Public Prosecutions to bring an action for punitive sanctions to be heard with the plaintiff's action for enforcement to ensure that the orders made reflect the respective interests of plaintiff and state. The alternative would be along the lines recommended by the Australian Law Reform Commission so that, save in exceptional cases, penalties would be imposed in support of the wrong done to the plaintiff, at the suit of the plaintiff rather than the state.

142 Australian Law Reform Commission, above n 5, [560].

143 Ibid.

Invitation to submit # 11

The Commission invites submissions as to whether or not punitive sanctions in cases of disobedience contempt should be available at the suit of the plaintiff.

3. Should there be a limit on the sanctions available?

A further issue is whether or not limitations should be placed on available sanctions:

- in the case of fines, as to the amount; and
- in the case of imprisonment, as to the term.

The advantage of not limiting sanctions is that maximum flexibility is retained for sentencing, either as a threat to force compliance or as a punishment. The disadvantage is that open-ended sentences may not be enough to enforce compliance in some cases[144] so that the sanction imposed can seem disproportionate both to the nature of the order and the behaviour constituting non-compliance. It also can put the courts in the position of seeming to be forced to retreat where compliance has not been achieved, even if the sentence served satisfies the interests of justice. Accruing fines, (fines imposed on a daily basis until an order is complied with) have been imposed in Australia in the context of an industrial dispute, to coerce compliance with a court order.[145] In *Mudginberri Station Pty Ltd v Australasian Meat Industry Employees' Union* the fine was set at a lump sum of $10,000 and a further fine of $2,000 for each day the breach continued. The advantage of imposing an accruing fine is that it provides a strong incentive for compliance; the disadvantage is that the fine can climb quickly to a level either beyond the capacity to pay or out of proportion to the culpability of the conduct constituting breach. Taking the fine beyond the reach of the defendant may destroy a business or other organisation, with significant consequences for innocent parties such as employees.

144 See for instance *Re Barrel Enterprises* [1972] 3 All ER 631; *Enfield London Borough Council v Mahoney* [1983] 2 All ER 901.

145 *Mudginberri Station Pty Ltd v Australasian Meat Industry Employees' Union* (1986) 12 FLR 10.

The Australian Law Reform Commission supported the concept of an accruing fine to coerce obedience because it may lessen the need to resort to coercive imprisonment.[146]

The Phillimore Committee recommended that the power to fine should be unlimited in the superior courts and limited in the lower courts for other forms of contempt, such as contempt in the face of the court and contempt by publication[147] enabling the courts to determine an effective punishment for a defendant with substantial assets and as a deterrent to others.[148]

In the case of imprisonment, the Australian Law Reform Commission considered open-ended imprisonment should be abolished.[149] It recognised that the law would lose some flexibility, but this could be countered by retaining a right to order earlier discharge on compliance for coercive penalties. In the case of imprisonment imposed to punish—as distinct from to coerce—the Australian Law Reform Commission saw no basis for open-ended sentences.[150] It considered that there was no reason why a punitive sentence for disobedience contempt should differ from a sentence for a criminal offence.[151]

The Phillimore Committee recommended the abolition of open-ended sentences, favouring instead a fixed term with a power to review a case and order early release.[152] This was because imprisonment was primarily to enforce obedience and obstinate defendants have to be released eventually, despite non-compliance.[153] The advantages of a fixed term were threefold: it prevented the appearance of a climb-down by the court; it obviated the need for an application for release; and it eliminated uncertainty as to the timing for the prison term.[154]

The issue comes down to flexibility versus certainty, and whether it is necessary to maintain flexibility to cover a small number of difficult cases at the expense of ensuring community awareness of the maximum sanction that can be imposed.

146 Australian Law Reform Commission, above n 5, [551].

147 United Kingdom, Committee on Contempt of Court, above n 4, recommendations 34–37.

148 Ibid [202] p 86.

149 Australian Law Reform Commission, above n 5, [538–547].

150 Ibid [546].

151 Ibid.

152 United Kingdom, Committee on Contempt of Court, above n 4, recommendation 39.

153 Ibid.

154 Ibid [172] p 74.

Invitation to submit # 12

The Commission invites comments on the benefits or otherwise of unlimited sanctions for disobedience contempt.

4. Should a broader range of sentencing options be available?

At present, sentencing options for disobedience contempt do not include the broader range of penalties provided by the *Sentencing Act 1995* (WA)[155] and the *Sentence Administration Act 1999* (WA).[156] Flexible sentencing options such as home detention, which are now part of modern criminal law, are not available.

The Phillimore Committee rejected access to sentencing options other than imprisonment. In the Committee's opinion, civil courts simply did not have the supervisory personnel to administer other sentencing options. In the view of the Committee they were not appropriate in any event because of the nature of the contempt jurisdiction where the threat of immediate punishment is what matters.[157]

The Committee's finding does not consider the role of punitive sanctions, which may not need to be imposed as swiftly as sanctions to seek enforcement. Nor does it take into account the broader thinking of recent times that resulted in the introduction of more flexible sentencing options.

The Australian Law Reform Commission supported the introduction of alternative sanctions in preference to custodial sentences in recognition of the trend towards a more flexible approach.[158]

The Australian Law Reform Commission raised the issue of the nature of monetary payments that a defendant can be required to make. A 'fine' would not appear to be payable to the plaintiff. Yet monetary compensation may be the best remedy when compliance is not possible or when costs incurred for the period of non-compliance should be compensated. The imposition of tort-like remedies—putting the

155 *McGillivray v Piper* [2000] WASCA 245 (7 September 2000).

156 Ibid.

157 United Kingdom, Committee on Contempt of Court, above n 4, [203].

158 Australian Law Reform Commission, above n 5, [552].

plaintiff in the position he or she would have been in but for the contempt[159]—could provide a means of achieving this outcome whilst at the same time not giving the plaintiff the windfall of a fine. The concern is that fines are different to damages. Fines are imposed as a state–based punishment, as opposed to compensation assessed in the light of loss suffered by the plaintiff.

The capacity to order damages currently appears to be limited.[160] However, if damages were available they could allow for the award of punitive or exemplary damages where the defendant is guilty of a contumelious[161] disregard of the plaintiff's rights.[162] This could be perceived as blurring state and private interests if the state also sought to punish for the contempt. However, the purpose and basis of each award are different, so that there is a legal basis for the defendant seeming to be 'punished' twice.

Invitation to submit # 13

The Commission invites submissions as to whether or not a broader range of sentencing options should be available and whether or not damages calculated on the basis of compensating the plaintiff for the loss suffered by the contempt should be available.

5. Should the sanction available be limited according to the court which made the order?

Should an order by a magistrate in the Local Court be enforceable or punishable with the same sanctions as those available for a breach of an order made in the Supreme Court? The jurisdiction of the Local Court is limited in civil matters to a claim for not more than $25,000 and therefore the argument could be made that the stringency of the sanction should reflect the lower jurisdiction. Such a view tends to misread the nature of disobedience contempt. It is the *conduct* of the defendant that counts; an order to pay $25,000 can be breached just as flagrantly as an order to pay $250,000.

159 John Fleming, *The Law of Torts*, (9th ed, 1998) 259–66.

160 *Arlidge, Smith & Eady on Contempt*, above n 28, [14-111–14-133], but in *Resolute v* Warnes [2001] WASCA 4 (Full Court) the court referred to the breadth of the remedies available in contempt cases [5].

161 'Contumelious' means insolent; reproachful: JB Sykes (ed) *The Australian Concise Oxford Dictionary of Australian English* (7th ed, 1987).

162 *Arlidge, Smith & Eady on Contempt*,, above n 28, [14-111–14-133].

It is also necessary to consider whether the power to impose sanctions should reside with a magistrate or whether, in some circumstances, contempt proceedings should be heard only in the Supreme Court in the exercise of its supervisory jurisdiction.[163] Supervision by the Supreme Court would recognise the jurisdictional and hierarchical differences between the courts, and the importance of the contempt jurisdiction. However, the authority of the lower court might suffer if it were perceived to be incapable of dealing with contempt proceedings itself.

Invitation to submit # 14

The Commission invites submissions as to whether or not the sanctions available should be limited according to the court that made the order.

12. Appeal

Current law

An appeal against a finding of disobedience contempt is not necessarily available to all defendants. In the case of an order made during proceedings, the right of appeal depends on whether the order is final or interlocutory. If it is interlocutory, leave to appeal will be required. A right of appeal exists where the order is regarded as of a civil nature, and it is a final order. The law is described as unclear with respect to the right of appeal in a criminal context.[164]

Section 688 of the *Criminal Code* requires a conviction on indictment to enable an appeal to be brought under the *Criminal Code*. No indictment is created on proceedings under Order 55 of the *Supreme Court Rules*. While ss 80–83 of the *District Court Act* preserve the inherent supervisory jurisdiction of the Supreme Court, the capacity for review is substantially less than could be provided on appeal.

The *Justices Act* provides for appeal with the leave of the Supreme Court from a 'decision of justices'.[165] 'Decision' is defined to include a conviction or finding, any other final determination of a proceeding, and a sentence imposed or

163 Seaman, above n 6, [55.1.10].

164 Ibid [55.5.3].

165 *Justices Act 1902* (WA) s 184.

order made consequent on any such conviction finding, dismissal or determination.[166] A finding of disobedience would therefore give a right of appeal.

The *Local Courts Act* requires there to be a judgment to confer a right of appeal.[167] Section 3 defines judgment widely, and would include decisions made in enforcement proceedings.

The *Australian Constitution* provides rights to appeal to the High Court for a contempt conviction in the Supreme Court,[168] subject to the requirement for special leave.[169]

A further issue arises where the defendant is found not to have disobeyed an order. The plaintiff has a right of appeal in a civil context, but it may be excluded if a criminal matter.[170] This is based on the principle that a defendant who has been acquitted cannot face a further trial of the complaint. Unless there are specific legislative provisions to the contrary, a plaintiff could lose the right to appeal an unfavourable decision if the civil/criminal distinction is removed for all purposes and all disobedience contempts are classified as criminal. The point was raised in *Witham v Holloway*[171] on the basis of the *New South Wales Criminal Appeal Act 1912* (NSW). The majority judgment considered that although the proceedings were essentially criminal in nature this did not equate them with the trial of a criminal charge, and that there were clear procedural differences, the most obvious being the absence of a trial by jury. The High Court saw no basis for importing the rule limiting a rehearing into the law of contempt.

Issues for reform

The two issues which require consideration are whether or not:

- a right to appeal should be conferred on either party; and
- there should be a bar against a retrial or rehearing where the defendant successfully appeals against a finding of contempt.

The absence of a right to appeal confirms the earlier finality of a decision, to the advantage of the successful party. In the case of other forms of contempt the requirement under Order 55 of the *Supreme Court Rules* that the matter be heard by the

166 *Justices Act 1902* (WA) s 4.

167 *Local Courts Act 1904* (WA) s 107.

168 *Australian Constitution* s 73.

169 *Judiciary Act 1903* (Cth) s 35(2).

170 *Thompson v Mastertouch TV Service Pty Ltd* (1978) 19 ALR 547, *Davern v Messel* (1984) 155 CLR 21.

171 (1995) 183 CLR 525.

Full Court means that the appeal issue does not arise in the same way. To the extent that limiting appeals is desirable, it could be met half way by requiring leave to appeal or by restricting the grounds upon which an appeal is available.

The countervailing consideration is that rights of appeal are generally available from decisions of lower courts and single judges. The effect of disallowing or limiting appeals carves out an exception for this area of law, and removes a ground of review usually available, with the risk of allegations of unfairness or injustice.

The Australian Law Reform Commission recommended that a determination made in non-compliance proceedings (disobedience that is not so flagrant that it should be treated as a criminal matter), should be subject to appeal in the same manner as any other final order of the relevant court. [172] The reason for this is that sanctions of a penal nature may have been imposed. In the case of disobedience treated as a criminal matter, appeal rights would follow the usual procedures.173

The Phillimore Committee recommended an extension of certain rights of appeal in Scotland, on the basis that appeal rights otherwise existed in England and Wales.[174]

Whether or not there should be a bar against a retrial raises the issue of balancing the rights of plaintiff and defendant, and whether or not there are any reasons why contempt proceedings should be treated differently to criminal proceedings generally.

Invitation to submit #15

The Commission invites submissions as to whether or not a right to appeal should be available in disobedience contempt proceedings for both plaintiff and defendant, and whether or not the rights should be the same for both civil and criminal proceedings.

172 Australian Law Reform Commission, above n 5, [583].

173 Ibid.

174 United Kingdom, Committee on Contempt of Court, above n 4, recommendation 33, [198, 169].

13. Conclusion

The key issues for the Commission in this discussion paper stem from the historical development of the law of disobedience contempt. The anomalies generated by such development have left this area of the law out of step, to a considerable extent, with reforming trends towards consistency and certainty in the application of the law. In particular, the Commission seeks to resolve key issues as to whether or not:

- codification is a priority;
- the distinction between civil and criminal contempt should remain;
- the process for prosecuting an alleged contempt of court should continue as a summary process under the *Supreme Court Rules* or whether it should follow another form of criminal (or civil) procedure;
- the sanctions presently available should continue, including imprisonment, fines and, in the case of a corporation, sequestration of assets;
- any limitation should be placed on penalties; and
- the role of the Director of Public Prosecutions should be strengthened in recognition of the public interest in securing compliance with court orders.