

Fact Sheet #2 Contempt of Court

The law recognises the importance of courts and other tribunals being open to the public and the media's role in informing the community about how justice is administered. However, it also imposes some rules and restrictions intended to maintain the authority and integrity of the system, ensure the right of a person to a fair trial, and to protect certain categories of vulnerable people involved in proceedings. This fact sheet explains the basics of Contempt of Court law, the other main restrictions on court reporting, and how to get more advice and information.

What is contempt law?

The most relevant part of the law of Contempt for media practitioners is criminal contempt. Criminal contempt includes conduct which interferes with the administration of justice by:

- publishing material that has a real tendency to interfere with pending proceedings (known as 'sub judice contempt').
- publishing material that is calculated to undermine confidence in the judicial system or the authority of a judge (known as 'scandalising contempt').
- disclosing what takes place in closed court or in breach of a non-publication order.
- refusing to disclose to a court the identity of a source.

What constitutes 'sub-judice' contempt?

The risk of publishing material that interferes with matters that are 'sub judice' (before the courts) exists during the period that proceedings are pending.

Criminal proceedings are pending from the time a person is arrested or charged (and possibly also from when a warrant for arrest has been issued or extradition proceedings have commenced) until the matter has been disposed of. While it includes the time until all appeals have been heard or time for appeal has passed, the risk of committing sub judice contempt is significantly reduced once a jury has delivered its verdict.

Civil proceedings are pending from the time of issue of a writ or summons until the matter has been disposed of, including any appeals.

What material 'tends to interfere' with pending proceedings?

Criminal proceedings

The law seeks to ensure that the guilt or innocence of a person is determined by evidence presented in court, not by extraneous material in the media. Any such material that could prejudice or influence a jury in its deliberations or might adversely affect a witness can be a sub judice contempt. Examples include publishing:

- an accused's prior criminal record;
- that an accused has allegedly confessed to the crime;
- prejudgments as to an accused's guilt or innocence;
- images of an accused person where the identity of the person who committed the crime is in issue;
- anything that suggests the bad character of the accused;
- in jury trials, any part of the proceedings conducted in the absence of the jury.

Case Study 1: In the Mason case, various media outlets, including the ABC, published reports which included statements that a man charged with several murders had confessed; and had led police 'back to the scene of the crime'. Footage of the accused in which he is clearly identifiable was also published, as was a comment by a police officer that it was fortunate the accused had been apprehended before he had a chance to commit further murders.

Case Study 2: Krystal Johnson and her employer Yahoo 7 News were each found guilty of contempt after publishing an article during an active murder trial that contained Facebook comments the accused had

made in the lead up to the murder. This information had not been admitted as evidence, and so had not previously been seen by the jury. Justice Lasry aborted the trial believing that knowledge of the comments would prejudicially influence the jury against the accused. At the contempt trial, the court heard that 4,123 users across Victoria viewed the offending article before it was removed. However, an image of the Facebook posts taken from the article was still viewable via a Google search. Justice John Dixon said the article broke the golden rule of journalism stating, 'you don't publish what's not before the jury'.

Case Study 3:

Lack of intention to interfere with pending proceedings is irrelevant. So too is whether, for example, a jury was in fact influenced or prejudiced. The tendency of the material to prejudice is the key issue and is determined as at the time of publication.

Civil proceedings

The risk of committing a sub judice contempt of civil proceedings is relatively low, given that most cases are not heard before a jury. The law presumes that judges are trained not to be influenced by what they might see or hear in the media.

However, care must be taken not to pre-empt or pre judge the outcome of civil proceedings, or be seen to be pressuring a judge into a particular decision in a case. Conduct that might be perceived as interfering with witnesses must also be avoided; this may include recording or publishing interviews with witnesses, at least before they have given their evidence.

Case Study 3: At a coronial inquest into the deaths of seven people on the Luna Park ghost train, a witness gave evidence that an attendant sent two boys into the ghost train despite having been told there was a fire and despite the boys protesting. The Daily Telegraph 'door stopped' the attendant before he had been called to give evidence and published his contradictory account. The newspaper was found to have committed a contempt because there was a real risk the attendant would feel compelled to stick to the account published in the newspaper, regardless of whether it was true.

What can be published when criminal proceedings are pending?

It is generally permissible to publish the following types of information:

- The bare, undisputed facts in relation to an offence.
- The nature of the charge/s, including name/s of the accused, unless that has been suppressed or is otherwise prohibited.
- Protestations of innocence by an accused and, usually, also, family members
- A fair, accurate and contemporaneous report of the proceedings, to the extent they are held in open court and, in a jury trial, in the presence of the jury. Generally, this includes information that would otherwise be prejudicial and a contempt. For example, if a prosecutor opposes a bail application, telling the court the accused has prior convictions, that could be reported as a fair, accurate and contemporaneous report of proceedings (except in Tasmania where bail proceedings cannot be reported).

Beware of statements and comments made outside court by the police. While the natural inclination is to assume they wouldn't do anything prejudicial, they sometimes do.

Case Study 4: A 2018 report in a Sydney newspaper following the arrest and charging of a man over the sexual assault of an 11-year-old girl, contained this quote from a Detective Superintendent: 'The person responsible for this crime is now in custody. It is what I would describe as a very compelling circumstantial proof. The comment clearly prejudices the guilt of the man charged.'

What about criticising a judge or court process?

It is also a criminal contempt to publish material which detracts from the authority of a court or is calculated to impair the community's confidence in the judicial system.

Generally, reasoned criticism of a court's decision, such as 'I think the sentence was too lenient', is permitted but suggestions of incompetence or bias of a judge would likely be a contempt.

What about general discussion of public interest issues?

The commission of a crime can raise trigger debate about broader issues such as whether bail laws are too lenient, or child protection agencies did not act do enough for a child at risk of harm. The law acknowledges that it is important to strike a balance between a person's right to a fair trial and the discussion of issues of public importance. Accordingly, it will not be a contempt to publish such discussion, even where the catalyst for it is the charging of a person with criminal offence, provided that the public interest in having that discussion outweighs the prejudicial effect. This can be a delicate balancing act and shouldn't be undertaken without legal advice. It is clear, however, that the more the discussion delves into the detail of the charges the more likely it is that the prejudicial effect would be such as to amount to a contempt.

If the ABC considers such an order to be unreasonably restrictive it may seek to challenge it.