CRITICISM OF JUDGES AND FREEDOM OF EXPRESSION

ENID CAMPBELL[1] AND HP LEE[2]

ABSTRACT

[77] Judges are not immune from criticism either in respect of their judicial conduct or their conduct in a purely private capacity. But they have cause for concern when criticisms of them are ill-informed or entirely without foundation, and may have a tendency to undermine public confidence in judicial institutions.[3]

Australian laws afford various protections to judges and judicial institutions against unjustifiable criticism. The reputational interests of individual judges are protected to some extent by the laws of defamation. The reputational interests of judicial institutions are protected, to an extent, by the laws concerning contempt of court and sedition. Little protection is, however, afforded to judges when attacks on them have been made under parliamentary privilege.[4]

This article examines the protective laws, and the impact on them of the implied constitutional freedom of political communication.

The Implied Constitutional Freedom

Neither Australia's federal Constitution nor the constitutions of the states of the federation include a Bill of Rights of the kind contained in the Constitution of the United States of America. None of them includes an express guarantee of freedom of speech and expression. Yet in 1992, the High Court of Australia found in the federal Constitution an implied freedom of political communication.[5] The High Court in a unanimous decision in *Lange v Australia Broadcasting Corporation*[6] in 1997 asserted that the [78] implication was based principally on express provisions in the federal

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[1] Emeritus Professor of Law, Monash University.

[2] Sir John Latham Professor of Law, Monash University. The authors wish to express their thanks for the research assistance provided by Dr Gail Kreltszheim.

[3] See M Kirby, 'Attacks on Judges — A Universal Phenomenon' (1998) 72 *Alternative Law Journal* 599.

[4] See E Campbell and M Groves, 'Attacks on Judges under Parliamentary Privilege: A Sorry Australian Episode' [2002] *Public Law* 626

[5] *Nationwide News Ltd v Wills* (1992) 177 CLR 1; *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106; *Theophanous v Herald and Weekly Times Ltd* (1994) 182 CLR 104; *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

[6] (1997) 189 CLR 520 (*Lange*).

Constitution which ordain, at least at federal level, a system of representative and responsible government. The Court said:

> … ss 7 and 24 and the related sections of the Constitution necessarily protect that freedom of communication between the people concerning political or government matters which enables the people to exercise a free and informed choice as electors.[7]

The High Court's decisions of 1992 and later decisions of the Court have established that the implied constitutional freedom inhibits the legislative powers of both federal and state Parliaments.[8] There are also dicta to the effect that it also controls exercise of executive powers. The decision in *Lange* established that the implied freedom also controls common law in Australia, in the sense that common law must be interpreted in light of that freedom. In *Lange* the Court's concern was with the impact of the implied freedom on the laws of defamation.

The implied freedom, it should be added, is not confined to communications regarding commonwealth political matters. It extends also to communications concerning state political matters, principally because commonwealth and state political matters are often intertwined.[9]

The High Court has made it plain that the implied constitutional freedom is not absolute. So constraints may, legally, be imposed on the exercise of that freedom for the protection of various legitimate interests, so long as the constraints are reasonably adapted to and appropriate for the protection of those interests.[10] That qualification of the implied freedom obviously provides considerable room for argument about whether or not particular governmental measures are legitimate and constitutional.

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[7] Ibid 560.
[8] *Theophanous v Herald and Weekly Times Ltd* (1994) 182 CLR 104; *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.
[9] *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 76 (Deane and Toohey JJ); *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 142 (Mason CJ), 168–9 (Deane and Toohey JJ), 216–7 (Gaudron J). See also *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211 and *Levy v Victoria* (1997) 189 CLR 579.
[10] See text associated with n 64–7 below.

There is also some uncertainty about the kinds of communications which can be characterised as political for the purposes of the implied constitutional freedom. Judicial considerations of the concept of political communication are examined in the next part of the article.

Political Communications

The High Court has recognised that, for the purposes of the implied constitutional freedom, political communications include communications concerning the conduct of elected representatives or the fitness for public office of persons seeking election to such an office.[11] But Justices of the High Court have indicated that the implied freedom is not restricted to communications of that nature. In *Nationwide News Ltd v Wills*[12] Deane and Toohey JJ spoke of the freedom as one to communicate

> … information, opinions and ideas about all aspects of the government of the Commonwealth, including the qualifications, conduct and performance of those entrusted (or who seek to be entrusted) with the exercise of any part of the legislative, executive or judicial powers of government which are ultimately derived from the people themselves.[13]

[79] This wide view was affirmed by Deane J in *Theophanous v Herald and Weekly Times Ltd*.[14] In that case an equally wide view of 'political discussion' was expressed in the joint opinion of Mason CJ, Toohey and Gaudron JJ, though they made no specific reference to communications regarding judicial officers.[15] In *Lange*[16] it was suggested that the implied freedom would extend to 'discussion of matters concerning the United Nations and other countries…'[17] In *Cunliffe v Commonwealth*[18] Mason CJ expressed the view that the implied freedom 'necessarily extends to the workings of the courts and tribunals which administer and enforce the laws of this country'.[19] Neither this case, nor any of the other High Court cases referred to, it needs to be

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[11] *Theophanous v Herald and Weekly Times Ltd* (1994) 182 CLR 104; *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211.
[12] (1992) 177 CLR 1.
[13] Ibid 74.
[14] (1994) 182 CLR 104, 179–82.
[15] Ibid 123–4.
[16] (1997) 189 CLR 520.
[17] Ibid 571.
[18] (1994) 182 CLR 272.

emphasised, involved consideration of the application of the implied freedom to discussion of the working of courts or the conduct of judges or the fitness of persons for appointment to judicial office.

In *John Fairfax Publications Pty Ltd v Attorney-General (NSW)*[20] a majority of the New South Wales Court of Appeal[21] were of the view that the implied constitutional freedom extended to the institution and conduct of proceedings by the Attorney-General.[22] They upheld a challenge to the validity of State legislation (s 101A of the *Supreme Court Act 1970* (NSW)) which stipulated that certain court proceedings instituted by the Attorney-General were to be heard in camera and which also prohibited publication of any report of submissions made in those proceedings. The majority concluded that the legislation was in breach of the implied constitutional freedom of political communication. Although the legislation would not, if sustained, constrain what might be said in the course of the judicial proceedings required to be conducted in camera, its practical effect would be to preclude comment on the conduct of those proceedings, and, to an extent, their outcome.

The decision of the New South Wales Court of Appeal was considered by a judge of the Supreme Court of Victoria (Bongiorno J) in *Popovic v Herald and Weekly Times Ltd*.[23] This case did not concern the validity of State legislation. Rather it concerned the application of the implied constitutional freedom of political communication in a suit for defamation instituted by a judicial officer (a Deputy Chief Magistrate) in respect of statements published in a newspaper.[24] The statements suggested (by inference) that she was no longer fit to hold judicial office.[25] One of the defences pleaded by the defendants was the extended defence of qualified privilege, based on

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[19] Ibid 298.
[20] (2000) 181 ALR 694.
[21] Spigelman CJ and Priestley JA.
[22] (2000) 181 ALR 694, 713 [107] (Spigelman CJ), 721 [157] (Priestly JA).
[23] [2002] VSC 174 (21 May 2002).
[24] Andrew Bolt, *Herald Sun* (Melbourne), 13 December 2000.
[25] In *Popovic*, Bongiorno J characterised the article as follows: 'The article discusses the conduct of the plaintiff in critical terms. It questions her fitness for office and details a number of instances in which she is accused of having acted either illegally, improperly or at least inappropriately. It discusses her behaviour as not upholding the law and asserts that judicial officers who do not uphold the law ought to be removed': [2002] VSC 174, [43]

the implied constitutional freedom. Bongiorno J thought it followed from *John Fairfax Publications Pty Ltd v Attorney-General (NSW)*[26]

> that discussion concerning what might be called the ordinary working of the courts including discussion critical of judicial decisions and judicial officers does not constitute, ordinarily, discussion of government or political [80] matters so as to give rise to an occasion of qualified privilege. There needs to be some nexus between the discussion and the concept of representative government as it operates in this country for the extended privilege to be applicable.[27]

Nevertheless, in the instant case, his Honour found that the requisite nexus existed because the publication alleged to be defamatory suggested that the judge should be removed from office, and because the power of removal was vested, by statute, in the executive government.[28]

If the implied constitutional freedom of political communication extends to communications concerning the conduct of judicial officers, we question whether it is appropriate for the protected freedom in relation to such communications to be restricted in the manner suggested by Bongiorno J. Criticisms levelled against judges may fall short of a suggestion that they be removed from office, pursuant to powers vested in the executive branch of government, or in the executive branch and houses of Parliament. For example, what may have been suggested by way of criticism, is that, by reason of certain conduct, a particular judge is disqualified from adjudicating certain cases on account of reasonable apprehension of bias on his or her part. Discussion about affairs of government must, we think, comprehend discussion about whether judges have exceeded their constitutional roles by, for example, purporting to exercise what are essentially legislative powers reserved to an elected legislature.

Criticisms relating to courts may, of course, concern not only the conduct of individual judges. They may concern what are perceived to be excessive delays in the handling of court business. They may concern judicial procedures. Sometimes the criticisms may be ones concerning the laws the courts are obliged to apply in

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[26] (2000) 181 ALR 694.
[27] [2002] VSC 174, [33].

adjudication of cases brought before them. Those laws could be parliamentary enactments or proposed legislation.

Suits for Defamation

What is said or written about judges may be defamatory, but if a judge chooses to sue the publisher of the defamatory material, the defendant may plead one or more of several defences. These defences will be examined in turn.

Truth

Under the common law, truth is a defence, but under Queensland, Tasmanian and ACT legislation a defendant who relies on this defence must also establish that the defamatory material was published for the public benefit.[29] The New South Wales *Defamation Act 1974* requires the defendant to establish that the defamatory material was published in the public interest.[30] Truth was one of the defences pleaded in *Popovic*,[31] but the jury found the defamatory article to be untrue.

Fair and Accurate Report of Judicial Proceedings Held in Public

This is a statutory defence, the availability of which varies between the Australian jurisdictions. In South Australia and Victoria, faithful and accurate reports of judicial proceedings appearing in newspapers are absolutely privileged.[32] In *Popovic* the jury found that the offending newspaper article was not a faithful and accurate report of proceedings before the Magistrates' Court in Melbourne on 30 November 2000.

[81] In NSW, Queensland, Tasmania and Western Australia the defence (available to newspapers and broadcasters) is qualified in that it must be shown that the defamatory material was published in good faith and for the information of the public.[33]

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[28] See *Magistrates' Court Act 1958* (Vic) s 11.
[29] *Defamation Act 1889* (Qld) s 15; *Defamation Act 1957* (Tas) s 15; *Defamation Act 1901* (ACT) s 6.
[30] Section 15. Compare *Criminal Code* (WA) s 356: 'It is lawful to publish defamatory matter if the matter is true, and if it is for the public benefit for the publication complained of should be made.'
[31] [2002] VSC 174.
[32] *Wrongs Act 1936* (SA) s 6; *Wrongs Act 1958* (Vic) s 4.
[33] *Defamation Act 1889* (Qld) s 13(1)(c); *Criminal Code* (WA) s 354(3); *Defamation Act 1957* (Tas) s 13(1)(c); see also *Defamation Act 1974* (NSW) s 26; *Defamation (Amendment) Act 1909* (ACT) s 5(d). For legislation which specifies when publication is made in good faith and for information of the public see: *Defamation Act 1889* (Qld) s 13(2); *Criminal Code* (WA) s 354; *Defamation Act 1957* (Tas) s 13(2)(a); *Defamation (Amendment) Act 1909* (ACT) s 5.

Fair Comment on Matters of Public Interest

This defence is clearly available when the matter which is the subject of comment is court proceedings. That such proceedings are to be regarded as matters of public interest is made clear by statutes in Queensland, Western Australia, Tasmania and the Northern Territory.[34] Elsewhere the question of whether the matter which is the subject of comment is one of public interest is one for judges to decide.[35] But in all Australian jurisdictions, the law requires that in defamation actions tried before judge and jury, the fairness of the comment be judged by the jury.[36]

In *Popovic*[37] the judge determined that the article concerning the conduct of the plaintiff judicial officer, acting in a judicial capacity, concerned a matter of public interest. But the jury determined that the article was not by way of fair comment.

Comment on the conduct of judges may, of course, extend beyond comment on their actions in exercise of judicial functions. Comment may be made on their conduct in extra-judicial, but nevertheless in official capacities — say as Royal Commissioners. Comment which is prima facie defamatory may also be made in respect of the uses which a judge has made of services available to judges to assist them in the discharge of their judicial functions — such as use of government cars.[38] Comment on the activities of judicial officers may sometimes extend to activities which pertain to their private lives. Nonetheless defendants who rely on the fair comment defence may sometimes argue that matters concerning judges' private lives are ones of public

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[34] *Defamation Act 1889* (Qld) s 14(1)(d); *Criminal Code* (WA) s 355(4); *Defamation Act 1957* (Tas) s 14(1)(d); *Defamation Act 1994* (NT) s 6A(d). Compare the defence of fair comment provided for by ss 29–34 of the *Defamation Act 1974* (NSW).

[35] The common law defence of fair comment is available in the ACT, NT, SA, Vic and WA (in the NT and WA, both the common law and statutory defences are available). This defence is only available when the comments concern matters of public interest: *Bellino v Australian Broadcasting Corporation* (1996) 185 CLR 183, 215. For a discussion of the test of what constitutes 'matters of public interest' at common law, see Michael Gillooly, *The Law of Defamation in Australia and New Zealand* (1998) 128–9.

[36] The jury also decides what is fact and what is comment. At common law, it is for the jury to decide whether what has been published is a statement of fact or an expression of opinion: *Pervan v North Queensland Newspaper Co Ltd* (1993) 178 CLR 309, 317. See also: *Defamation Act 1889* (Qld) s 14(2); *Criminal Code* (WA) s 355; *Defamation Act 1957* (Tas) s 14(3).

[37] [2002] VSC 174.

[38] In March 2002 a Senator alleged, under parliamentary privilege, that a Justice of the High Court had made improper use of Comcars, but he later conceded that the evidence on which he relied was false. See Campbell and Groves, above n 4.

interest in so far as they bear on a judge's fitness to remain in office, or else to sit in adjudication of certain cases.

The defence of fair comment is a qualified defence in the sense that it is available only if the comment is based on true facts[39] (or under New South Wales and Tasmanian statutes, facts which are substantially true).[40] The [82] defence is also qualified in that it is not available if the plaintiff establishes that the publisher of the comment was actuated by malice.[41]

Qualified Privilege

The defence of qualified privilege to actions for defamation is one recognised under common law and under statutes.[42] Broadly speaking, this defence is available to publishers of defamatory material on proof that the publisher had an interest in communicating the material to a recipient (or even a duty to do so), and the recipient(s) of the communication had a corresponding interest in receiving the communication or a duty to receive it.[43] At common law this defence is negatived on proof of malice on the part of the publisher. So far as communications concerning judges are concerned, this defence will probably be available to defendants whose defamatory remarks have been communicated only to persons or bodies which have responsibilities in relation to investigation of complaints against judges, or who have powers to take disciplinary actions against judges — perhaps to the point of their suspension or removal from office.[44]

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[39] The common law defence of fair comment requires the defendant to show that the comment is based on true facts, although the defence still applies to comment on privileged but erroneous statement of facts: *Pervan v North Queensland Newspaper Co Ltd* (1993) 178 CLR 309, 320–1.

[40] *Defamation Act 1974* (NSW) s 30(2); *Defamation Act 1957* (Tas) s 14(2).

[41] At common law, if the plaintiff proves the comment was actuated by malice, then the defence cannot be relied upon: *Thomas v Bradbury, Agnew & Co* [1906] 2 KB 627, 638, 642; *Peterson v Advertiser Newspapers* (1995) 64 SASR 152, 161. Under s 32 of the *Defamation Act 1974* (NSW) it is sufficient that the comment is honest.

[42] The common law defence of qualified privilege is available in all Australian jurisdictions except Queensland and Tasmania; in NSW, the common law defence is still available (*Defamation Act 1974* (NSW) ss 4, 11), as well as there being a statutory defence too (*Defamation Act 1974* (NSW) ss 20–2. See: *Defamation Act 1889* (Qld) s 16(1); *Defamation Act 1957* (Tas) s 16(1); *Criminal Code* (WA) s 357.

[43] Gillooly, above 35, 171–3.

[44] See *Judicial Officers Act 1986* (NSW) s 48(2): 'In proceedings for defamation in relation to a complaint or in relation to any hearing or other matter connected with a complaint, there is a defence of absolute privilege for a publication to or by the Commission or Conduct Division or to any member or officer of the Commission or Division, as such a member or officer.'

The Extended Defence of Qualified Privilege

With one notable exception,[45] courts have taken the view that the defence of qualified privilege does not, under the common law, extend to defamatory material which is published to the world at large by newspapers and other media of mass communication. In a series of cases, culminating in *Lange*,[46] the High Court of Australia held that the implied constitutional freedom of political communication requires that the defence of qualified privilege be extended to political communications to the public at large. But the extended defence would not be available if the publisher had acted unreasonably. 'Whether the making of a publication was reasonable', the High Court said,

> … must depend upon all the circumstances of the case. But, as a general rule, a defendant's conduct in publishing material giving rise to a defamatory imputation will not be reasonable unless the defendant had reasonable grounds for believing that the imputation was true, took proper steps, so far as they were reasonably open, to verify the accuracy of the material and did not believe the imputation to be untrue. Furthermore, the defendant's conduct will not be reasonable unless the defendant has sought a response from the person defamed and published the response made (if any) except in cases where the seeking or publication of a response was not practicable or it was unnecessary to give the plaintiff an opportunity to respond.[47]

The onus of proof of reasonableness is on the defendant, and whether or not the publication was, in [83] the circumstances, reasonable involves determination of questions of fact.

In defamation actions tried before judge and jury, questions of fact are determined by the jury. But after the evidence has been heard, the trial judge may rule that the evidence relating to an issue is not sufficient to warrant the issue being placed before the jury. Where the defendant has relied on the extended defence of qualified privilege, the judge may rule that the issue of reasonableness not be put to the jury

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[45] *Adam v Ward* [1917] AC 309.
[46] (1977) 189 CLR 520.
[47] Ibid 574.

because there is no evidence on which the jury could properly find that the defendant's action in publishing the offending material was reasonable.[48]

In the case of *Popovic*[49] the issue of reasonableness was put to the jury and the jury determined that the conduct of the defendants in publishing the offending article was, in all the circumstances, reasonable and not actuated by malice. But, at the conclusion of the case for the defence, the judge granted the parties leave to move, after the jury's verdict, for entry of judgment *non obstante veredicto*. After verdict the defendants so moved and, in relation to the defendants' reliance on the extended defence of qualified privilege, the judge ruled that there was no evidence on which the jury could have found the defendants to have acted reasonably.[50]

The evidence adduced by the defendants on this issue was by testimony of the author of the offending article.[51] His testimony went to his state of mind at the time the article was published and to why a response had not been sought from the plaintiff prior to publication. He disputed the contention that his article suggested that the plaintiff be removed from office. And he declared that he did not believe that the plaintiff had been guilty of conduct which would warrant her removal from judicial office.[52] Nevertheless, on the basis of this uncontroverted evidence, Bongiorno J concluded that the author of the article 'did not care whether the article conveyed the defamatory imputation or not'.[53] That was, he said, the 'only reasonable inference' to be drawn from the oral evidence. There was 'no evidence either that he [the author] believed the imputation to be true…or that he did not believe it was false…'[54] Accordingly, on that aspect of reasonableness, the defence failed.

The defendants in *Popovic* clearly recognised that their defence to the action, based on the extended defence of qualified privilege, could not succeed unless they could show why it was impracticable or unnecessary for them to seek a response from the

[48] In *Popovic*, Bongiorno J relied on the statement of principle by Starke J in *Shepherd v Felt & Textiles of Australia Ltd* (1931) 45 CLR 359, 373: see [2002] VSC 174, [47].
[49] [2002] VSC 174.
[50] Ibid [65].
[51] A journalist, Andrew Bolt.
[52] [2002] VSC 174, [54].
[53] Ibid [55].
[54] Ibid [55].

plaintiff before publication. The only reasons given for the failure to seek a response were those offered by the author of the article. They were as follows:

> One, a magistrate's decision in open court must stand for itself, must speak for itself, and I quoted that — her comments at length. Secondly, there is a view by, as I understand, held by many judges and magistrates in all the time I have known, that you don't ask them to account for what they just did in court. You don't go behind the scenes and say 'Hey, why did you do that?' And I actually happen to believe that that is not proper, I agree with that point of view. I would have thought it was improper to do that.[55]

Bongiorno J, however, ruled that this explanation was not sufficient to demonstrate that it was either impracticable or unnecessary to seek a response from the plaintiff judicial officer. His Honour acknowledged that the situation might have been different if the article in question had 'contained a [84] bare report of a court proceeding'.[56] In that event it might have been unnecessary to seek a response. But the article was admitted to be an 'opinion piece'. And, said the judge: 'Those opinions were not any part of what happened in Court'.[57]

This aspect of the case of *Popovic* is likely to leave representatives of the mass media in considerable doubt about what material, critical of judicial officers, they may safely publish and, in defence of actions for defamation, rely on the extended defence of qualified privilege.

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[55] Ibid [59]. On judicial conventions see Enid Campbell and HP Lee, *The Australian Judiciary* (2001) 133, 251–3.

[56] Ibid [63].

[57] In *Popovic*, the trial judge determined that it was appropriate for him, rather than the jury, to determine the damages payable to the successful plaintiff. There was a further hearing on the matter of damages. The judge awarded a total of $246 500: $210 000 by way of compensatory damages and $25 000 as exemplary damages. The further sum of $115 000 was awarded by way of interest. The compensatory award included an allowance for what was adjudged to be aggravated damages. The award of aggravated compensatory damages was based partly on the defendants' conduct after publication of the offending article and during the trial, and partly on the fact that, after the jury's verdict on the question of liability had been delivered, the author of the article had made remarks (reported in the media) which suggested that the defendants had won the case. The award of exemplary damages was based solely on the defendant's conduct post verdict.

Contempt of Court

Publications which are defamatory of individual judges may also be ones which have a tendency to bring the court, of which a judge is a member, into disrepute or are calculated to lower the dignity and authority of the court. In that case the publisher may be adjudged guilty of contempt of court and punished by fine or imprisonment.[58] Publications which may attract these sanctions include ones which make baseless accusations of incompetence, bias, improper motives or susceptibility to improper influences.[59] A publication which misrepresents court proceedings in such a way as to suggest an intention to bring ridicule upon a court or judge may also be adjudged in contempt.[60]

At common law only superior courts have power to deal with this form of contempt (known as scandalising a court) and they may do so on their own motion.[61] Proceedings may also be initiated by an Attorney-General.

Proceedings for scandalising a court are nowadays rare and courts have stressed a need both for self restraint on their part in the exercise of their summary jurisdiction to try and punish the offence[62] and a need for the offence to be narrowly defined.[63] Courts have also recognised that fair comment on judicial activities, when made in good faith, must be tolerated.[64] What is not clear is the extent to which the law of contempt of court is affected by the implied constitutional freedom of political communication.

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[58] The Australian law on contempt of court was reviewed in: Australian Law Reform Commission, *Contempt of Court*, Report No 35 (1987). See also: *The Australian Digest* (3rd ed), 67.7666–7700; *Halsbury's Laws of Australia* (1993) [105–10] to [105–330].
[59] See Campbell and Lee, above n 55, 183, 248–9. See also *R v Hoser and Kotabi Pty Ltd* [2001] VSC 443, [45]–[57], [204]–[225].
[60] Ibid, 183.
[61] Superior courts with a contempt jurisdiction have power to deal with contempts of inferior courts within the same judicial hierarchy.
[62] Campbell and Lee, above n 55, 182. See also *R v Hoser and Kotabi Pty Ltd* [2001] VSC 443, [56], [226]–[236].
[63] *Ahnee v Director of Public Prosecutions* [1999] 2 AC 294.
[64] Campbell and Lee, above n 55, 182–3. See also *R v Hoser and Kotabi Pty Ltd* [2001] VSC 443, [66], [67], [73]–[82], [178]. In Australia truth too is accepted as a defence: ibid [58], [183].

In *Ahnee v Director of Public Prosecutions*[65] the Judicial Committee of the Privy Council held that the [85] power of the Supreme Court of Mauritius to punish scandals of the court had not been diminished by a constitutional guarantee of freedom of expression. But at the same time the Judicial Committee emphasised that the constitutional guarantee meant that the scope of the offence was limited.

To date the only case to come before the High Court of Australia which may be regarded as having a bearing on the impact of the implied constitutional freedom of political communication on contempt of court is *Nationwide News Pty Ltd v Wills*.[66] The issue in that case was the validity of Commonwealth legislation which prohibited every written or oral use of words calculated to bring into disrepute either the Australian Industrial Relations Commission or any member of the Commission.[67] The Commission was not a court of law. It had been established pursuant to the power given to the federal Parliament by s 51(xxxv) of the Constitution to make laws with respect to 'Conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State'. It was contended that the law in dispute was supported by this head of legislative power. The Court rejected this contention and held the law invalid. The view of the Court was that, while the implied incidental power attaching to s 51(xxxv) of the Constitution might support legislation to protect the Commission and its members against speech and writing calculated to bring them into disrepute, the law in question went too far in that it imposed an unqualified prohibition, and did not allow defences which might be raised in proceedings for contempt of court.[68] Three of the seven Justices relied on the implied constitutional freedom of political communication.[69]

There are several points to be made about this case. The first is that it was not necessary for the Court to decide what kinds of communications concerning the Industrial Relations Commission and its members could be regarded as political

[65] [1999] 2 AC 294, 306: The 'offence is narrowly defined … It exists solely to protect the administration of justice rather than the feelings of the judges. There must be a real risk of undermining public confidence in the administration of justice.'
[66] (1992) 177 CLR 1.
[67] *Industrial Relations Act 1988* (Cth) s 299(1)(d)(ii); (1992) 177 CLR 1, 65 (Deane and Toohey JJ).
[68] Laws enacted in reliance on implied incidental powers must pass a test of proportionality: see *Leask v Commonwealth* (1996) 187 CLR 579.
[69] (1992) 177 CLR 1, 50–3 (Brennan J), 72–7 (Deane and Toohey JJ).

communications, though some of the Justices clearly accepted that some communications of the kind prohibited by the legislation in issue could be of that nature. The second point is that, by statute, members of the Commission had been accorded the same security of tenure as is accorded to judges of federal courts by s 72 of the Constitution. Though appointed by the Governor-General, they could not be removed from office except on an address to the Governor-General by both houses of the federal Parliament, praying for removal on the ground of proved misbehaviour or incapacity. The involvement of the federal executive in both the appointment and removal of both judges of federal courts and members of the Commission would seem to suggest that communications which advocate removal of officers of either federal courts or the Commission from office may be regarded as of a political character.

A third point is that, although in *Nationwide News Pty Ltd v Wills,* the High Court was concerned only with the constitutional validity of a provision in a federal statute, in subsequent cases the Court has made it clear that the implied constitutional freedom of political communication also controls Australian common law.[70] If it controls the common law of defamation, it must equally control the common law relating to contempt of court. If issues arise concerning the consistency of the common law regarding contempt of court with the implied constitutional freedom, two questions must, according to the test enunciated by the High Court in *Lange*, be answered. They are:

> First, does the law effectively burden freedom of communication about government or political matters either in its terms, operation or effect…? Second, if the law effectively burdens that freedom, is the law reasonably appropriate and adapted to serve a legitimate end the fulfilment of which is compatible with the maintenance of [86] the constitutionally prescribed system of representative and responsible government and the procedure prescribed by s 128 [of the federal Constitution] for submitting a proposed amendment of the Constitution to the informed decision of the people … If the first question is answered 'yes' and the second is answered 'no', the law is invalid.[71]

[70] See *Lange v Australia Broadcasting Corporation* (1997) 189 CLR 520.

The common law regarding contempt of court clearly burdens freedom of communication about matters of government. So far as it creates the offence of scandalising courts, and also establishes defences to charges of that offence, it may also be regarded as reasonably adapted and appropriate to serve a legitimate end. That end is the protection of judicial institutions against unjustifiable attacks upon them which have a tendency to undermine public confidence in the ability of courts to discharge their functions competently, independently and in accordance with law. The fulfilment of that end cannot be said to be incompatible 'with the maintenance of the constitutionally prescribed system of representative and responsible government…'[72]

Sedition

The crime of sedition was, like the offence of scandalising courts, created originally by courts in England. The crime so created covered publications which were published with seditious intent. In his *Digest of the Criminal Law*, Sir James Fitzjames Stephen summarised the common law regarding the crime of sedition and did so in terms which suggested that persons might be adjudged guilty of sedition if they published material with the intention to bring into hatred or contempt, or to excite disaffection against, institutions charged with the administration of justice.[73]

In some Australian jurisdictions the crime of sedition has been converted into a statutory offence, though not always with specific reference to criticisms directed to the judicial arms of government.[74] Tasmania's *Criminal Code* is one exception in this regard. It makes it a criminal offence for a person to conspire with another to carry into execution a seditious intention, or to publish, knowingly words or writing expressive of a seditious intent.[75] The term 'seditious intention' is defined to include an intention to excite disaffection against the administration of justice.[76]

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[71] Ibid 567–8.

[72] Ibid 567. Several State courts have held that the common law regarding contempt by scandalising a court is consistent with the implied constitutional freedom: see also *R v Hoser and Kotabi Pty Ltd* [2001] VSC 443, [88] and [90].

[73] *Digest of the Criminal Law* (9th ed, 1950) art 114.

[74] See, eg, *Crimes Act 1914* (Cth) ss 24B, C & D.

[75] Sections 66 (1) (a) and 67 (1). See also Campbell and Lee, above n 55, 208–9 and above n 11–12.

[76] Section 10 of the *Criminal Code Act 1924* (Tas) preserves the jurisdiction of courts to punish contempts of court but it also provides that no person who has been so punished may be punished for the same act under the Code: see Campbell and Lee, above n 55, 182 and 209 and above n 12.

We have not discovered any Australian case in which someone was prosecuted for the crime of sedition on account of what they had said or written in relation to particular judicial officers, or in relation to particular courts, or courts in general. And there is no case in which the High Court has yet had occasion to consider whether the laws pertaining to the crime of sedition are consistent with the implied constitutional freedom of political communication. We imagine that if the High Court did have occasion to rule on such an issue, it would apply the same tests as it would apply in a case in which the impact of the implied freedom on the law of contempt of court was in issue.

Judges' Responses to Criticisms

Actions for defamation instituted by judicial officers are likely to be rare.[77] Nowadays proceedings for [87] contempt of court in respect of conduct which is alleged to be in contempt of court, under the head of scandalising a court, are equally likely to be rare. Arguably the publication which was the subject of the defamation suit in *Popovic* could have been the subject of proceedings for contempt of court, instituted before the Supreme Court of Victoria. We do not know whether such proceedings were even contemplated. There may be occasions, however, when actions for defamation or contempt of court may be viewed by judicial officers as inappropriate responses to attacks by their critics. In exceptional cases, the judges may issue a public statement to rebut the criticisms.

Legally, judges enjoy considerable freedom of speech, particularly in relation to what they may say in the course of judicial proceedings before them.[78] But, by convention, judges do not reply to criticisms of their decisions, even if they believe the criticisms to be unfair, ill-informed or quite unfounded. Occasions may, however, arise on which an individual judge considers it appropriate for him or her to respond, in a public way, to widely publicised statements concerning their conduct: for example statements which suggest that they are unfit to remain in judicial office or to adjudicate certain kinds of cases. The judge's response may simply be a denial of the truth of assertions about matters of fact.[79] There may also be circumstances in which

[77] See also *R v Hoser and Kotabi Pty Ltd* [2001] VSC 443, [230].
[78] See E Campbell, 'Judges' Freedom of Speech' (2002) 76 ALJ 499.
[79] In 2002 Kirby J issued a statement repudiating an attack on him made under parliamentary privilege. His statement is reproduced in Campbell and Groves, above n 4.

the chief judge of a court considers it appropriate to respond to unwarranted criticism of the court as a whole.[80]

We commenced the article by pointing out that when criticisms of judges have a tendency to undermine public confidence in judicial institutions judges have cause for concern. A point may be reached when the judges may feel that it is essential for them to translate their concern into a warning to their critics. Sometimes the whiff of a possibility of a contempt of court response can have a salutary effect on those who persist in attacking the judges. A recent highly publicised episode occurred on 3 June 2002 when Chief Justice Michael Black, with the concurrence of four other most senior members of the Full Court of the Federal Court of Australia, in the course of proceedings in a case before the court, sought an explanation from the federal Minister for Immigration, Multicultural and Indigenous Affairs, Philip Ruddock MP, regarding some comments the latter had made in a television program.[81] The statement of the Chief Justice has been construed as ‘a thinly veiled suggestion that Ruddock could face contempt proceedings’.[82]

In responding to a question put to him by the compare of the Channel 9 Today program, the Minister had said:

> … and what we are finding is that, notwithstanding that legislation, the courts are finding a variety of ways and means of dealing themselves back into the review game.[83]

The Minister was referring to legislation passed by the Commonwealth Parliament in 2001 which sought to preclude, as far as was possible, judicial review of decisions of the Immigration Review Tribunal and the Refugee Review Tribunal. The scope and constitutional validity of the privative clause became a major question in a number of cases which were before the Full Federal Court, at the time the Minister made his comments.

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[80] See Campbell and Lee, above n 55, 56–9.
[81] Darrin Farrant, ‘Judges hit back at Ruddock’, *The Age* (Melbourne), 4 June 2002, 1; Benjamin Haslem and Amanda Keenan, ‘Butt out, Ruddock tells judges’, *The Australian* (Sydney), 4 June 2002, 1.
[82] George Williams, ‘The Minister v the Judges’, *The Age* (Melbourne), 5 June 2002, 15.

Statements along similar lines had been made by the Minister on other previous occasions. Chief [88] Justice Black said:

> Despite these statements I have not previously responded to any of them publicly. The most recent statement however raises a new issue since it would appear that it could only refer to the issues before the Court on these appeals…[84]

It should be noted that the Minister was a party to these appeals. Addressing the Solicitor-General, Chief Justice Black said:

> You would of course know Mr Solicitor that the court is not amenable to external pressures from Ministers or from anyone else whomsoever, but we are concerned that members of the public might see the Minister's statements as an attempt to bring pressure on the Court in relation to these appeals to which he is a party.
>
> We are also concerned that members of the public might see the Court as amenable to such pressures, including pressure upon it in relation to the issues that are before us today.[85]

Chief Justice Black added that it was appropriate to afford the Minister an opportunity to respond 'in case we have misinterpreted his remarks or in case they have been reported incorrectly.' Chief Justice Black explained: 'what we are concerned about is the protection of the appearance, and the reality, of the integrity of the judicial process.'[86]

The Minister expressed his regrets that members of the public might misinterpret his statements. Through the Solicitor-General, he said that his comments were not intended to apply any kind of pressure upon the Court. The Solicitor-General proceeded to proffer the following explanation:

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[83] 'Statement by the Chief Justice of the Federal Court with the concurrence of other members of the Full Court in the course of proceedings in the matter of NAVV v MIMIA'.
[84] Ibid.
[85] Ibid.
[86] Ibid.

> [T]he Minister's remarks on that programme were not directed to the Court nor were they intended to have any reference to these proceedings. Minister Ruddock's comments were directed to the Opposition, foreshadowing that it may be necessary to legislate again if the privative clause is held not to operate as the Parliament intended…
>
> When the Minister stated that the Courts were 'dealing themselves back into the review game', he was referring to a trend and to a particular decision not presently before this Court.[87]

The explanation of the Minister seemed rather limp. While there was no threat that the Minister might be proceeded against for contempt of court, the statement by Chief Justice Black should have served as a warning to the Minister that he was not immune from the laws relating to contempt of court, and could not, in proceedings against him for that offence, be assured of protection against liability by reason of the implied constitutional freedom of political communication.

Conclusion

Under Australian laws people enjoy considerable freedom to express views about the activities of courts and judges. This freedom is underwritten by the implied constitutional freedom of political communication. However, the 'range of communications' protected by the implied freedom has yet to be defined with precision. Dicta of the High Court lend support to the view that the implied freedom applies to communications concerning the judiciary. Limitations on the freedom to criticise judges are [89] imposed by laws of defamation, contempt of court and sedition. Most of these laws would probably be held to be compatible with the implied freedom. The implied freedom provided the basis for the shaping of the common law to yield the extended defence of qualified privilege, a defence which extends the freedom of people to publish material which is *prima facie* defamatory. However, as *Popovic* illustrated, there are problems about the availability of the defence when the defamatory material relates to a judge. A query arises as to whether the defendant must always show that, before publication, the defendant sought a response from the judge. Finally, the excursus on the Federal Court's response to Ruddock's criticisms of the Court signals a change in the observance by judges of the

[87] 'Response to Chief Justice's Statement by Minister for Immigration and Multicultural Affairs'.

convention that they do not reply to criticisms, even if they are believed to be unfounded.