SUPREME COURT
OF QUEENSLAND

**QUEENSLAND MAGISTRATES COURTS CONFERENCE**

**24 MAY 2023**

# CONTEMPT

**Chief Justice Helen Bowskill**[1]

[1] Very shortly after I was first appointed as a judge, I found myself on circuit in a regional town, presiding over a criminal trial in the District Court in which a local solicitor appeared for the defendant in the trial of a charge of grievous bodily harm. The complainant was a young man, who presented with the delightful combination of pyramid sized chip on his shoulder, defensiveness and fear of his assailant, the defendant. The cross-examination of him was lengthy and aggressive, at times emanating from both the solicitor and the witness. I intervened on a number of occasions, including to remind both solicitor and witness of the need to be courteous, polite and respectful in the courtroom, and at times to remind the witness to just answer the question and not argue with the solicitor. At some point, the solicitor demanded that I charge the witness with contempt. I was able to deflect him from this path, by suggesting (in the absence of the jury) that if I did that, I would have to charge him also and that did not seem a very efficient way to get the trial done. But in any event, that sent me off thinking that, in this new job of mine, I had better brush up on the law of contempt. In doing so, I prepared a paper to present to the annual conference of District Court judges in August 2015. I have adapted that paper for this presentation to you, the magistrates of Queensland.

[2] By way of disclaimer from the outset: this paper does not purport to be an academic treatise on the law of contempt, more a practical overview, with a collection of some interesting and relevant cases; the focus is largely on contempt in the face of the court; there are undoubtedly omissions, from what is a large body of case law; and my apologies to those of you for whom this is very well known.

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[1] With thanks to my associates, Daniel Welsh (2015), Lauren Dhu (2022) and Lucy Cornwell (2023), as well as the associate to Brown J, Trent Candy (2022) for their assistance in the preparation of this paper.

## Power to punish for contempt

[3] The power of a magistrate to punish for contempt is found in two places.

[4] First, s 40 of the *Justices Act 1886* (Qld), which provides:

> **"40 Penalty for insulting or interrupting justices**
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> (1) A person who –
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> (a) **wilfully insults** a justice or a witness or an officer of the court during his or her sitting as, or, as the case may be, attendance in a Magistrates Court or during his or her sitting or, as the case may be, attendance in any examination of witnesses in relation to an indictable offence or who is on his or her way to or from any such court or examination; or
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> (b) **wilfully misbehaves** himself or herself in such a court or in the place where such an examination is being held; or
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> (c) **wilfully interrupts** the proceedings of such a court or examination; or
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> (d) unlawfully assaults, or wilfully obstructs a person in attendance at such a court or examination; or
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> (e) without lawful excuse, **disobeys a lawful order or direction** of such court or justice;
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> may by oral order of such court or justice, be excluded from such court or examination and, whether the person is so excluded or not, may be summarily convicted by such court or justice of contempt.
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> (2) A person convicted under subsection (1) is liable to a maximum penalty of 84 penalty units or imprisonment for 1 year.
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> (3) A person referred to in subsection (1) –
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> (a) may be dealt with under this section without a complaint being made or a summons being issued in respect of the person; and
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> (b) may be taken into custody by a police officer on order of such court or justice and without further warrant; and

(c) may be called upon by such court or justice to show cause why the person should not be convicted of contempt under this section; and

(d) may be dealt with by such court or justice under this section upon the court's or justice's own view, or upon the evidence of a credible witness.

(4) A court or justice may, if it or the justice thinks fit, accept from any person convicted by it or the justice of contempt under this section, an apology for such contempt and may recommend that the Governor in Council remit or respite any fine or punishment imposed on such person in respect of such contempt."[2]

[5] This provision only applies where the court is dealing with a criminal proceeding to which the *Justices Act 1886* (Qld) applies.

[6] Second, s 50 of the *Magistrates Courts Act 1921* (Qld), which applies more generally.[3] Section 50 reads in part as follows:

"(1) A person is in contempt of a Magistrates Court if the person –

(a) without lawful excuse, **fails to comply with an order** of the court, other than an order mentioned in paragraph (e), or an undertaking given to the court; or

(b) **wilfully insults** a magistrate or registrar, bailiff, or other court officer during the person's sitting or attendance in court, or in going to or returning from the court; or

(c) **wilfully interrupts** the proceedings of the court or otherwise misbehaves himself or herself in court; or

(d) unlawfully **obstructs or assaults** someone in attendance in court; or

(e) without lawful excuse, **disobeys a lawful order or direction** of the court at the hearing of any proceeding; or

(f) commits **any other contempt** of the court.

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2 Emphasis added.

3 For the power of the District Court, see s 129 of the *District Court of Queensland Act 1967*. The jurisdiction of the Supreme Court to punish for contempt is both inherent, and provided for under Chapter 20, part 7 of the *Uniform Civil Procedure Rules 1999* (see generally *Lade & Co Pty Ltd v Black* [2006] 2 Qd R 531; [2006] QCA 294 at [55]-[85] per Keane JA).

> (2) A contempt under subsection (1) must be dealt with in the way prescribed under the rules.[4]
>
> (3) However –
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> (a) a contempt mentioned in subsection (1)(a) may be punished by a maximum penalty of 200 penalty units or 3 years imprisonment; and
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> (b) a contempt mentioned in subsection (1)(b) to (f) may be punished by a maximum penalty of 84 penalty units or 1 year's imprisonment."[5]

[7] That provision is to be read with Chapter 20, part 7 of the *Uniform Civil Procedure Rules 1999* (**UCPR**).

[8] The procedure under the UCPR does not apply where a magistrate proceeds under s 40 of the *Justices Act*. But that does not mean that there are no procedural requirements. I will return to this shortly.

## Basic principles

[9] The basic principle is that "conduct which tends to prejudice a fair trial [*whether criminal or civil*] or undermine public faith and confidence in the administration of justice may be punishable as contempt of court".[6]

[10] As the majority of the High Court said in *Gallagher v Durack* (1983) 152 CLR 238 at 243; [1983] HCA 2:

> "The law endeavours to reconcile two principles, each of which is of cardinal importance, but which, in some circumstances, appear to come in conflict. One principle is that speech should be free, so that everyone has the right to comment in good faith on matters of public importance, including the administration of justice, even if the comment is outspoken, mistaken or wrongheaded. The other principle is that 'it is necessary for the purpose of maintaining public confidence in the administration of law that there shall be some certain and immediate method of repressing imputations upon Courts of justice, which, if continued, are likely to impair their authority' … The **authority of the law rests on public confidence**, and it is important to the stability of society that the confidence of the public should not be shaken by baseless attacks on the integrity or impartiality of courts or judges. However, in many cases, **the**

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4 Under s 2 of the Act, "rules" means the *Uniform Civil Procedure Rules 1999.*

5 Emphasis added.

6 *Attorney-General for State of Queensland v Colin Lovitt QC* [2003] QSC 279 at [52] per Chesterman J.

> **good sense of the community will be a sufficient safeguard** against the scandalous disparagement of a court or judge, and the summary remedy of fine or imprisonment 'is applied only where the court is satisfied that it is necessary in the interests of the ordered and fearless administration of justice and where the attacks are unwarrantable'."[7]

[11] Importantly, the jurisdiction to punish for contempt of court:

> "… exists for the purpose of preventing interferences with the course of justice… The jurisdiction is not given for the purpose of protecting the Judges personally from imputations to which they may be exposed as individuals. It is not given for the purpose of restricting honest criticism based on rational grounds of the manner in which the Court performs its functions[8]… The jurisdiction exists in order that the authority of the law as administered in the Courts may be established and maintained."[9]

[12] As the High Court said in *Lewis v Ogden* (1984) 153 CLR 682 at 693; [1984] HCA 26:

> "the contempt power is exercised to vindicate the integrity of the court and of its proceedings; it is rarely, if ever, exercised to vindicate the personal dignity of a judge."

[13] It is a power that should be used with caution, sparingly and only when necessity demands.[10]

## Criminal and civil contempt

[14] Both s 40 of the *Justices Act* and s 50 of the *Magistrates Courts Act* include what are referred to under the general law as civil and criminal contempts. As McHugh J explained in *Witham v Holloway* (1995) 183 CLR 525 at 538-9; [1995] HCA 3:

> "**Criminal contempts are acts or omissions that have a tendency to interfere with or undermine the authority, performance or dignity of the courts of justice or those who participate in their proceedings**. Although criminal contempts take many forms, their characteristic attribute is an **interference with the due administration of justice** either in a particular case or as part of a continuing process. Defiance of the court or its procedures, publication of matters scandalising the court,

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7 References omitted. Emphasis added.

8 As to this point, see *Gallagher v Durack* (1983) 152 CLR 238 at 243 per Gibbs CJ, Mason, Wilson and Brennan JJ.

9 *R v Dunbabin; Ex parte Williams* (1935) 53 CLR 434 at 442-443 per Rich J.

10 *Bradshaw v Attorney-General* [2000] 2 Qd R 7 at 16; [1998] QCA 224 at 12-13 per Thomas JA; *Re Colina: Ex parte Torney* (1999) 200 CLR 386 at 391; [1999] HCA 57.

> actions calculated to prejudice the fair trial of a pending case, threats to parties or witnesses and misconduct within the court are examples of criminal contempts. **Civil contempts**, on the other hand, are concerned with **failures to comply with judgments or orders of the courts**. But civil and criminal contempt overlap. Thus, disobedience to the order of a court constitutes criminal contempt when the disobedience is contumacious. Defiance of the court's order renders criminal what would be otherwise civil contempt. Where non-compliance with a judgment or order goes beyond mere breach and involves misconduct, civil contempt also has 'a penal or disciplinary jurisdiction [that is] exercised by the court in the public interest'".[11]

## Failure to comply with court orders

[15] The most common form of contempt outside the court is breach of an order or undertaking. This topic is not the focus of my paper, but I include the following brief discussion.

[16] The rationale for a distinction between criminal and civil contempt was, traditionally, that civil contempts were considered to affect only the parties to the proceeding, whereas criminal contempts affect the community. It was for that reason that there was a distinction in terms of the penalty which could be imposed. So, although it seems anomalous, a person could be imprisoned for civil contempt, because the purpose of the proceeding was to coerce the contemnor to comply with the order or fulfil the undertaking; but traditionally, they could not be *fined* unless the conduct was defiant or contumacious.[12]

[17] As the law developed, that dichotomy began to break down, and as Keane JA explained in *Lade & Co Pty Ltd v Black* [2006] 2 Qd R 531; [2006] QCA 294 at [60]:

> "A central theme of the breakdown of the historical dichotomy between civil and criminal contempts has been the development of the view that a punitive order, such as a fine, might be imposed even when there was not contumacious or defiant disregard of orders or undertakings because, even in what have been regarded as cases of 'civil contempt', there is a public interest in vindicating the authority of the court. This appreciation of the pervasive public interest in the vindication of the authority of the court led Stamp J, in *Steiner Products Ltd v Willy Steiner Ltd* (in a passage specifically approved by Gibbs CJ, Mason, Wilson and Deane JJ in *AMIEU v Mudginberri Station Pty Ltd*) to hold that any 'disobedience

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11 References omitted. Emphasis added.

12 *Witham v Holloway* at 539 and 541; *Lade & Co Pty Ltd v Black* [2006] 2 Qd R 531; [2006] QCA 294 at [57].

> which was worse than casual, accidental or unintentional must be regarded as wilful' so as to constitute a contempt punishable by fine."[13]

[18] But as Keane JA also said, at [63]:

> "…there must, of course, be **actual disobedience**. There cannot be disobedience if the alleged contemnor does not know of the order which he or she is alleged to have breached. Nor could there be disobedience where the breach of the order occurs by reason of circumstances outside the control of the alleged contemnor. But if the facts of the case enable one fairly to conclude that the alleged contemnor has disobeyed the order or undertaking then that is sufficient to constitute a contempt. The question under the general law then was whether the circumstances of the disobedience were such as to warrant an order in the nature of a punishment as opposed to a vindication of the rights of the other party to the litigation".[14]

[19] Although for some time there seemed to remain a view that a court was not empowered to impose a fine for a civil contempt, in the absence of statutory authority, in *Lade v Black* Keane JA said, at [64]:

> "… reference to more recent decisions of the High Court shows that, at common law, there is now recognised a power to punish, by fine or imprisonment, disobedience of an order or undertaking which might previously have been regarded as constituting only 'civil contempt'".

[20] But that is of academic interest only, because there is in Queensland a statutory basis for the imposition of a fine for contempt, which does not require that the breach of the order or undertaking was wilful or accompanied by any specific intention: namely, r 930 UCPR;[15] and likewise s 40(1)(e) and s 40(2) of the *Justices Act*.

[21] To prove contempt on the basis of breach of a court order or undertaking, when the Court is exercising the statutory power, it is not necessary to prove that the person wilfully did so.

[22] There is a tension in the authorities as to whether, at general law, this was a requirement. Keane JA in *Lade v Black* considered that "if the facts of the case enable one fairly to conclude that the alleged contemnor has disobeyed the order or undertaking then that is sufficient to constitute a contempt" (at [63] and [65]; Jones J agreeing, at [109] and [110]; Jerrard JA, in the same case, disagreed, at [2]). Earlier, Atkinson J in *Bakir v Doueihi*

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13 References omitted.

14 Emphasis added.

15 The word "contempt" in r 930 is to be given its well understood general meaning, including both contempts previously referred to as criminal and civil contempts: *Lade v Black* at [67]-[71] per Keane JA. See also *O'Connor v Hough (No 2)* [2017] QSC 68 at [24]-[25] per Burns J.

[2001] QSC 414 at [13] said there would be no contempt unless the disobedience was wilful (see also her Honour's decision in *Emmanuel College v Rowe* [2014] QSC 238 at [24]). But Keane JA expressly disagreed with her Honour in that regard (*Lade v Black* at [76]-[77]). My research has not revealed an authoritative resolution of this tension – but it is unnecessary to address it further here, given the focus is not on breach of court orders; and given the fact that any proceeding will take place under the available statutory provisions.

[23] And in any event, as Gordon J (then of the Federal Court) said in *Ali v Collection Point Pty Ltd (No 2)* [2010] FCA 1125 at [13], having just made the point at [12] that to prove contempt it is not necessary to prove any subjective intent to deliberately disobey the order:

> "As soon as orders are issued the person bound by that order becomes responsible for taking *adequate and continuing steps* (*Lade & Co Pty Ltd v Black* [2006] 2 Qd R 531 at [106]) or *all possible steps* (*Heatons Transport (St Helens) Ltd v Transport and General Workers' Union* [1973] AC 15 at 113) to comply with the order. If a person bound by an order fails to take such steps to comply with the order, it cannot be said that the conduct was *casual, accidental or unintentional*."

[24] Where the disobedience is *not* deliberate, that would affect (mitigate) any penalty that might be imposed.[16]

[25] Examples of applications to punish for contempt comprising failure to comply with an order are *Bundaberg Regional Council v Lammi* [2015] QPELR 111; [2014] QPEC 52 (Horneman-Wren SC DCJ); *Beech Ovens Pty Ltd v Style Global Pty Ltd* [2015] QDC 153 (Devereaux SC DCJ, as his Honour then was) and *Burton v Spencer* [2015] QSC 187 (Henry J). An example of a proceeding for contempt on the basis of breach of undertakings contained in an order is *O'Connor v Hough* [2016] 2 Qd R 543; [2016] QSC 4; and *O'Connor v Hough (No 2)* [2017] QSC 68 (Burns J). A recent example of a proceeding for contempt in relation to breach of a consent order is *Freeman v Montgomery* [2021] QDC 210 (Porter KC DCJ).

[26] An important consideration where an allegation of contempt for failure to comply with a court order is made is whether the order is articulated in clear and unambiguous terms. Ambiguity in the order may prevent a finding of contempt.[17]

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16 *Lade v Black* at [62], [66].

17 See, for example, *Inserve Australia Ltd v Kinane* [2017] QDC 92 (in which the order prohibited publication "to the general public", a term which raised uncertainty – in terms of whether limited communication through social media posts and LinkedIn constituted publication "to the general public"). See also *O'Connor v Hough (No 2)* [2017] QSC 68 at [23]. For a summary of the principles and authorities, see *White IT Pty Ltd v Heywood* [2019] QSC 215 at [11]-[13]; referred to in *Leigh v Bruder Expedition Pty Ltd* [2022] QCA 267 at [26].

[27] After that discussion about what does not need to be "wilful", I turn to conduct that does need to be, if it is to constitute contempt.

## Wilfully insulting a magistrate or interrupting proceedings

### *Meaning of "wilful"*

[28] As to the meaning of "wilful" in this context, the High Court in *Lewis v Ogden* (1984) 153 CLR 682 at 688 said:[18]

> "…the word 'wilfully' means 'intentionally', or 'deliberately', in the sense that what is said or done **is intended as an insult**, threat etc. Its presence does more than negative the notion of 'inadvertently' or 'unconsciously'. The mere voluntary utterance of words is not enough. **'Wilfully' imports the notion of purpose**."[19]

[29] The Court went on to observe (at 689) that:

> "…a person who wilfully insults a judge in the course of proceedings in court does something which necessarily interferes, or tends to interfere, with the course of justice."

### *Balance between permissible criticism and contempt*

[30] The concept of contempt is something that necessarily evolves to reflect contemporary society's attitudes and standards of behaviour.[20] The matter must be judged by contemporary Australian standards.[21]

[31] It is necessary to balance the right of free speech – which incorporates the right to comment in good faith on matters of public importance, including the administration of justice, even if the comment is "outspoken, mistaken or wrong-headed"[22] – with the need to maintain public confidence in the administration of the law. Where that balance will tip in favour of finding contempt may be:

(a) where criticism constitutes scurrilous abuse (although note Hope JA's comment in *Attorney General (NSW) v Mundey* [1972] 2 NSWLR 887 at 910 that the charge would have to be a very strong one to justify contempt proceedings); or

(b) criticism which "excites misgivings as to the integrity, propriety and impartiality brought to the exercise of the judicial office", such as "unjustified allegations that

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18 In relation to the word "wilfully" where it appeared in a relevantly equivalent provision, s 54A of the *County Court Act 1958 (Vic)*.

19 Emphasis added. References omitted.

20 Annotations to *Uniform Civil Procedure Rules (Qld)* at [r 921.5].

21 *Anissa Pty Ltd v Parsons* [1999] VSC 430 at [22].

22 *Gallagher v Durack* (1983) 152 CLR 238 at 243.

> a judge has been affected by some personal bias against a party, or has acted mala fide, or has failed to act with the impartiality required of the judicial office".

But the use of strong language does not convert permissible criticism into contempt, unless it is "so wild and violent or outrageous as to be liable in a real sense to affect the administration of justice".[23]

[32] Mere abuse, without more, is unlikely to constitute contempt. So, for example, in *Anissa Pty Ltd v Parsons* [1999] VSC 430 at [22] Cummins J held that while offensive, it is not contempt of court for a person to describe a judge as, effectively, a wanker. In this case, the words were said out of court, in circumstances where a solicitor for the opposing party to proceedings concerning the defendant was endeavouring to communicate to the defendant the terms of an ex parte injunction granted against the defendant (a solicitor himself). As his Honour said:

> "The words spoken by the defendant do not undermine confidence in the administration of justice. They undermine confidence in the persona of the solicitor who spoke them."

[33] An appeal from Cummins J's decision was unsuccessful.[24] The Court of Appeal (Phillips, Charles and Buchanan JJA) agreed the conduct was not contempt of court, noting that the **context** in which the words were spoken was very important (that is, to a small audience, out of court; where they were not calculated to attract any further publication;[25] and where it was the solicitor for the opposing party, to whom the words were spoken, who initiated the suggestion of telling the judge what was said). Phillips JA (with whom Charles and Buchanan JJA agreed) said (at [10]):

> "The words spoken were an emotional response to the communication being made and there was nothing in them, I think, of intimidation or defiance; just vulgar abuse."

### *Solicitors and counsel*

[34] In so far as counsel or solicitors are concerned, caution is required. In *Lewis v Ogden* (1984) 153 CLR 682 the High Court made reference to the responsibility of counsel, in presenting his or her client's case, to do so fearlessly and with vigour and determination, but noting also that counsel has an overriding duty to the court to contribute to the orderly, proper and expeditious trial of causes in our courts (at 689). In this context, reference was made to the observation that "courage and courtesy should go hand in hand". But, the Court went on to say (at 689-690):

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23 *Attorney General (NSW) v Mundey* [1972] 2 NSWLR 887 at 910 per Hope JA.

24 *Saltalamacchia v Parsons* [2000] VSCA 83.

25 Cf *Attorney-General for State of Queensland v Colin Lovitt QC* [2003] QSC 279, discussed below.

> "However, mere discourtesy falls well short of insulting conduct, let alone wilfully insulting conduct which is the hallmark of contempt. The freedom and the responsibility which counsel has to present his client's case are so important to the administration of justice, that a court should be slow to hold that remarks made during the course of counsel's address to the jury amount to a wilful insult to the judge, when the remarks may be seen to be relevant to the case which counsel is presenting to the jury on behalf of his client. This is not to say that comments made in counsel's address, apparently relevant to the client's case, may not constitute a contempt. Counsel might wilfully insult a judge 'under colour of addressing the jury', to use the words of Blackburn J. Or he might yield to the temptation of seeking to divert the jury's attention away from the issues by promoti[ng] a dispute with the judge, in the belief that this tactic would advantage his client. A deliberate manoeuvre of this kind, calculated to interfere with the due course of the trial, could amount to a contempt, even if it involves no insult to the judge…
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> But when the remarks which are said to be wilfully insulting are relevant to the issues to be determined by the jury and are germane to the client's case, the context in which they are to be found is, generally speaking, unlikely to stamp them with the imprint of a deliberately insulting message."

[35] In *Lewis v Ogden,* counsel for a defendant in a criminal trial made certain comments in his address to the jury (to the effect that the judge had plainly formed a view about the facts of the case, adverse to his client, but that the jury were not bound by that, only by the judge's directions on the law), which the trial judge took as a wilful insult to the court.[26] But the High Court found that, whilst the barrister's conduct was "extremely discourteous, perhaps offensive, and deserving of rebuke by his Honour" (at 693), the remarks fell within a "legitimate framework", as matters relevant to the proper presentation of the client's case (at 692) and could not be said to constitute contempt.

[36] Another Queensland case involving a barrister that made its way to the High Court is *MacGroarty v Clauson* (1989) 167 CLR 251; [1989] HCA 34. The exchange between MacGroarty and the judge is set out at p 253. It arose during his cross-examination of a prosecution witness, which the judge seemed to think had been "going round and round and not getting down to the issues", and seemed to make a ruling, inferentially, that he could not continue. There was a bit of a heated exchange (including: "Judge: Will you keep quiet while I am speaking? MacGroarty: No, I won't", which was the basis for the judge charging MacGroarty with contempt, dealing with that charge summarily).

[37] The High Court overturned his conviction, on the basis that the judge had failed to identify the particular offence alleged against MacGroarty with the result that he had not

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[26] The relevant passage is set out at 153 CLR 682 at 690.

been properly charged with a particular identified offence and was not accorded an adequate opportunity of defending himself. The High Court commented, at 257, that the failure to specify the particular offence made it impossible, "even at this stage", to identify what the particular offence was, from which I infer that the High Court did not consider the conduct to, self-evidently, amount to wilful insult, wilful interruption, or misbehaviour (within s 129(1)(b) or (c) of the *District Court of Queensland Act 1967*).

[38] Another Queensland case involving a barrister charged with the offence of wilfully insulting a judge of the District Court is *Bradshaw v Attorney-General* [2000] 2 Qd R 7; [1998] QCA 224. The conduct is described at pp 12-13, and included an exchange, after the judge had ruled a particular line of questioning irrelevant, in which the barrister said things like "It's well known Your Honour's animosity to me and you should not present that to this jury" and "I ask for this trial to be aborted… The Crown come along here because White DCJ is on the bench and they chuck up this nonsense. Let them dare present this sort of case in front of any other Judge...". The barrister was then charged under s 129(1) of the *District Court Act* with wilfully insulting a judge. He was dealt with summarily, and fined $500. On appeal, although all members of the court described the conduct as wilfully insulting, a majority (Pincus and Davies JJA) set aside the conviction on the ground that the barrister was not afforded natural justice (on the basis that the judge should not have proceeded to deal with the contempt charge immediately, but rather should have adjourned the matter in order to give the barrister a fair opportunity to put his case in response).

[39] An example in which the charge of contempt was upheld is *Attorney-General for State of Queensland v Colin Lovitt QC* [2003] QSC 279. In that case, a barrister who, being dissatisfied with a ruling on admissibility of certain evidence, said, referring to the magistrate, "[t]his bloke's a complete cretin", and then later, "I take it back. He is not a complete cretin", was found guilty of contempt. The comments were made to, and in the hearing of, journalists in the court, in circumstances where Chesterman J found Lovitt knew publication of his comments in the media was a distinct possibility and that he was indifferent to that occurrence. Chesterman J found that Lovitt's statements were calculated to impair public confidence in the magistrate and thereby diminish his authority and the authority of the court. Lovitt's conduct was not dealt with as contempt in the face of the court, because the insult went unheard by the magistrate. It was instead dealt with as "scandalisation of the court", which may arise from publications which are "scurrilously abusive" or those which are intended to or are calculated to disparage the court or its judges so as to make the public lose confidence in the court and lessen its authority.[27]

[40] An example of a legal practitioner found to have been in contempt in the face of the court is *Attorney-General v Di Carlo* [2017] QSC 171. Mr Di Carlo appeared representing a client applying for bail. He sought to have the magistrate disqualify himself on the

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[27] See *Attorney-General for State of Queensland v Lovitt* [2003] QSC 279 at [52]-[56].

grounds of apprehended bias, apparently suggesting that his Honour's "dislike of him and some communication with a court staff member were such as to warrant" this (at [3]). The magistrate acceded to the application to recuse himself, but adjourned the matter to be dealt with by another magistrate two days later, a public holiday intervening. That led to the exchange found to amount to contempt. Mr Di Carlo preceded it by accusing the magistrate of being cranky and then proceeded to say, "And that's why you don't do things according to law". Holmes CJ found that was a contempt, saying "[t]here is a clear imputation that the magistrate did not apply the law and generally did not apply the law in accordance with his judicial oath" (at [4]). Her Honour also said (at [6] and [7]):

> "All lawyers experience frustration from time to time at judicial decisions. But their obligation is to behave with courtesy and respect. That is not inconsistent with powerful and determined advocacy. And the excuse of an emotional response is less compelling in the case of a barrister of the respondent's length of experience, which should have brought him the capacity to resist the temptation to react in such a way.
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> The significance of this contempt is not just that it was an unseemly insult to the individual judicial officer. It was an affront to the court which he represents..."

[41] Where a legal practitioner is concerned, disrespectful behaviour may also generate disciplinary consequences. So another, or alternative, course of action, where a legal practitioner engages in what you consider to be misconduct, may be to direct the registrar to provide a copy of the transcript to the Legal Services Commissioner.

### *Self-represented litigants*

[42] As all judicial officers know only too well, dealing with an unrepresented litigant presents many challenges, which unfortunately in some cases extends to insults and interruption of proceedings. Particular patience is called for.

[43] An early example is *Dow v Attorney-General* [1980] Qd R 58; [1979] QSCFC 70, in which the Full Court dismissed an appeal against the conviction of a self-represented person for contempt. Their conduct was described as displaying deliberate rudeness to the Court, being insulting and impertinent to the judge (the exchange is set out at pp 59-60). The contemnor in that case was convicted summarily to imprisonment with hard labour for 3 months, having said "[w]e are in a Court of law, I hope. I hope I have been brought before a Court of law" and raising his voice at the judge. It does not read as a particularly serious example of wilful insult – as opposed to rudeness, which may have been able to be managed by avoiding getting into an argument with the litigant concerned. It is hard to imagine this being dealt with as contempt nowadays. Certainly, the more recent decision in *Re Glew; Ex parte Attorney General (WA)* [2014] WASC 107 (discussed below) would suggest a different approach be taken.

[44] A more extreme example, in the District Court, saw an unrepresented person named Ogawa, who disrupted proceedings by "wilfully interrupt[ing] the proceedings of the Court in the course of [her] trial by physically struggling with the correctional officers and screaming constantly and continually while in Court," convicted of contempt, and sentenced to four months imprisonment.[28] The conviction, and the sentence, were upheld on appeal.

[45] Another example where serious abusive behaviour in court on the part of an unrepresented litigant led to proceedings for contempt is *R v Slaveski.*[29] Among other things, his conduct involved loudly and aggressively accusing the judge of being a party to a conspiracy to have him murdered; threatening the judge; and subjecting everyone to a display of aggression and fury.[30]

[46] A case which shows a restrained approach being taken by the court to disruptive behaviour is *Re Glew; Ex parte Attorney General (WA)*. In that case, a charge of contempt was brought by the Attorney General against an unrepresented (later declared vexatious) litigant as a result of his behaviour during a 9 minute hearing before the Court of Appeal, which the Attorney General described as having "crossed the dividing line separating maladroit incompetence and discourtesy from contempt".[31] The particulars of that behaviour appear at [15]-[18] of the decision, from which it is apparent the Court of Appeal invited Mr Glew on various occasions to make submissions addressing the grounds of his appeal, in response to which Glew said various things, including threatening to charge members of the Court with treason, and accusing them of treachery; culminating in raising his voice and speaking in an angry and aggressive manner towards one of the members of the Court, and engaging with members of the public (who it appears were his friends or supporters) in the public gallery causing them to make loud comments and laugh and speak loudly.

[47] Having invited Mr Glew to make such submissions as he wished to make on a number of occasions, one of the judges then politely said "Thank you, Mr Glew, for your submission. We will reserve our decision and the decision will be published in due course". They then began to leave the courtroom. As they did so, Mr Glew continued to shout, in an aggressive and intimidating manner, various things to the judges, about charging them with treachery; accusing them of being criminals and frauds. All the while, the members of the public gallery applauded.

[48] On the Attorney-General's application for an order punishing Mr Glew for contempt,[32] Heenan J observed at [37] that:

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28 *R v Ogawa* [2011] 2 Qd R 350; [2009] QCA 307 at [2], [3], [58]-[59], [63] and [177].

29 [2011] VSC 643 (judgment following trial) and [2012] VSC 7 (sentence).

30 [2012] VSC 7 at [20].

31 Referring to *Re Perkins; Mesto v Galpin* [1998] 4 VR 505 at 511; [1998] VSC 265 per Brooking JA.

32 Heenan J noting that the judges of the Court of Appeal did not themselves exercise the power they indisputably possessed to charge Mr Glew "then and there" with contempt; although they did recommend

> "In the particular circumstances of that case, the due administration of justice was not obstructed or interfered with by Mr Glew's crass and objectionable conduct. The judges of the Court of Appeal heard his application for leave to appeal with attention, dignity and patience, even if possibly mixed with controlled resignation. The brief hearing began, continued and was completed without physical interruption..."

[49] His Honour described Glew's behaviour as "singularly inappropriate and disrespectful" (at [58]) and the reference to the judges as criminals, and one of them as a fraud, as constituting "not only a gross insult to the judges or judge but it also constitutes a denigration of the dignity and authority of the court and has the capacity to diminish the respect for the court, judges and the administration of justice" (at [62]). But his Honour also said (at [63]):

> "The course taken by the court was entirely in accordance with the due administration of justice, that is, of terminating the submissions once the point had been reached where the hearing was not being continued constructively and then to decide the case with due consideration and to give a reasoned decision at a later time, as was done. The actual course of justice was not impeded and, despite his bad behaviour, Mr Glew was not actually an obstacle or an impediment to the administration of justice in his own case or generally."

[50] Although finding that Mr Glew's conduct was such as **could** amount to contempt of court, ultimately Heenan J decided that it did not because, he said (at [65]):

> "…I do not see how any reasonable observer present and seeing, or reading of, Mr Glew's deplorable conduct, could for a moment attach any degree of doubt or lack of confidence in the court or any of the judges because of this man's railings… Despite how Mr Glew behaved, there is no reason to suppose that the dignity, reputation, authority or integrity of the court was in any way endangered by what occurred. Rather, to the contrary, the dignified, restrained manner in which the court dealt with Mr Glew can be regarded as a demonstration of even-handedness and dispassionate attention to matters in hand, however unmeritorious they might be".

[51] This is an important point to keep in mind in this context. A person who is behaving badly in court, even swearing or carrying on, is unlikely to be having any impact at all on the proper authority and dignity of the court. You may need to take steps to remove them from the court, so that you can get on to the next matter. But it is worth taking some time, and "cooling off", rather than hastening quickly to a charge of contempt.

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that the papers be referred to the Attorney General with a view to an application being made against Mr Glew under the *Vexatious Proceedings Restriction Act.*

[52] By analogy – because it involved conduct out of court, rather than in court – is the case of *Attorney-General (Qld) v Mathews* (2020) A Crim R 415; [2020] QSC 258. The charge of contempt in this case was brought on the basis of signs Mr Mathews displayed outside his home, purporting to refer to Justice Morrison of the Court of Appeal and Magistrate MacCallum, and claiming they were corrupt. Jackson J said there was no doubt the statements were capable of constituting contempt by scandalising the court (at [46]). The use of the words "are corrupt" and "is likely corrupt", objectively viewed, was said to be an attack on the integrity or impartiality of the court and judges concerned. His Honour found that publishing the signs constituted contempt by scandalising the court. But his Honour also observed that it was unfortunate a proceeding (for contempt) was necessary, given the unlikelihood that anyone who knew of Mr Mathews' reasons for displaying the signs – his dissatisfaction with adverse decisions – would take his statements seriously, let alone that they would have a real risk of undermining public confidence in the administration of justice or lower the authority of the court (at [54], [55] and [64]). His Honour accepted that the proceeding was justified, because that explanation did not appear on the signs. But the important point for present purposes is the reminder to think not only about whether the statement made constitutes a wilful insult to the judicial officer, but also whether there is any likelihood that it would have any impact on public confidence in the courts.

[53] The recent decision in *May v Queensland Police Service* [2022] QCA 121 is an important reminder of the need for caution. In this case, Ms May and her husband had been charged with stealing. The charge was listed for trial, and they were appearing for themselves. They sought an adjournment, which was opposed by the prosecution. There was an exchange between the acting magistrate who was presiding and Ms May, with the acting magistrate telling Ms May to sit down, and follow their instructions, and that Ms May was complicating the process by persisting in speaking over the acting magistrate. Ms May protested that she was being interrupted and not being given a fair chance to present her submissions, following which the acting magistrate said "all right. Take the defendant into custody. When she's prepared to comply with my requirements…." The police prosecutor then attempted to comply with the acting magistrate's direction to detain Ms May, who had a "heightened reaction" to being told she was to be arrested. Ms May was charged with obstructing a police officer as a result. Her arrest on that charge lead to the cancellation of her visa and her being held in immigration detention – consequences it is to be assumed the acting magistrate had not turned their mind to at the time of order her arrest. Unfortunately for Ms May, the obstruct police charge stood – because it was not for the prosecutor to question the acting magistrate's direction. He had not acted unlawfully in arresting Ms May, upon the acting magistrate's direction, which was lawful until set aside. Although the acting magistrate made an order, in effect under s 40(3)(b) of the *Justices Act*, for the arrest of Ms May, the acting magistrate did not in fact charge Ms May with, let alone convict her of, contempt. The proceedings made their way to the Court of Appeal, by way of challenge to the obstruct police offence. However, Mullins P sounded an important note of caution at the end of her Honour's reasons (at [37]):

> "The power conferred on a magistrate under s 40 of the Act is an important provision to enable a magistrate to exercise full control over the proceeding in the courtroom, when a person in the courtroom behaves in a way that does not show proper respect for the institution of the court or for the magistrate, such as behaving in an insulting manner towards the magistrate or another person in the courtroom, interrupting the proceeding or disobeying a lawful order or direction of the magistrate. There are many occasions when a magistrate may feel frustrated by the conduct of a litigant in person, a party, a witness or even a lawyer, but a magistrate should be cautious about recourse to s 40 of the Act in order to avoid unanticipated consequences, such as occurred in this matter for the immigration status of Ms May."

[54] On the other side of the coin, it is important always to keep in mind the great disadvantage that a self-represented person has, both in terms of lack of legal skill, knowledge and ability, as well as objectivity. Ensuring a self-represented person has equal access to justice may require the judicial officer to provide some assistance to them, in terms of understanding the process and procedures of the court,[33] and calls for considerable patience, in terms of their conduct. Taking a deep breath and cooling off is very important where a self-represented person is concerned – as opposed to reacting too quickly to what may at first be perceived to be inappropriate conduct in the court room.

## Witnesses

[55] A person who deliberately fails to comply with a subpoena, by refusing to attend court and give evidence, commits contempt.[34] More generally, a person who is properly before a court to give evidence, and refuses to be sworn or to give evidence when they should, is prima facie guilty of contempt. The offence is "the failure to discharge the obligation which the person owes as a member of the community or because he is within it".[35] Since it may affect the conduct, and potentially the outcome of a trial, and also "has the effect, or potential effect, of eroding public confidence in the criminal justice system" it is considered a very serious matter.[36]

[56] This is reflected in the penalties that are imposed.[37]

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33 See *Ross v Hallam* [2011] QCA 92 at [12] and [13] per McMurdo P and at [20]-[21] per Chesterman JA.

34 See s 644D of the *Criminal Code* (failure to comply with a subpoena without lawful excuse is contempt of court); and UCPR r 458 (a person who contravenes a subpoena issued by a registrar is guilty of contempt of court, unless the person has a reasonable excuse).

35 *Registrar of the Court of Appeal v Gilby* [1991] NSWCA 235 at 1 per Mahoney JA, Priestley and Clarke JJA; see also *Allen v The Queen* (2013) 36 VR 565; [2013] VSCA 44 at [67] and the authorities there referred to.

36 *R v El Kholed* [2009] QSC 335 at 3 per Margaret Wilson J;. See also *Allen v The Queen* (2013) 36 VR 565 at [56].

37 For example, 14 months' imprisonment in *R v El Kholed* [2009] QSC 335.

[57] A sentence of 8 months imprisonment imposed by a judge of the County Court of Victoria on a person who refused to give evidence in a criminal proceeding (in which he was one of the complainants),[38] the effect of which was that the prosecution case was "substantially weakened", was upheld by the Court of Appeal: *Allen v The Queen* (2013) 36 VR 565; [2013] VSCA 44 at [55]-[61]. In that case, Priest JA (with whom Maxwell P and Weinberg JA agreed) noted that "[t]he vice of the … contempt was its capacity to frustrate the due and orderly administration of criminal justice" (at [55]). His Honour referred with approval to the following observation by Watkins LJ in *R v Phillips* (1983) 78 Cr App R 88 at 94:

> "The witness who refuses to testify may have at his disposal evidence of great importance, the absence of which from a trial may be a serious interference with the administration of justice. It may even defeat it … It is of the utmost importance that everyone called upon to testify in our courts recognises that he or she is under a duty to do so and that a refusal or neglect to perform that duty may have dire consequences for the proper administration of justice and for that person."

[58] A witness who otherwise attends, and takes an oath or makes an affirmation but then refuses to answer particular questions, other than in circumstances where a claim of privilege is made, may also be charged with contempt. An example of this is *Director of Public Prosecutions v Green* [2013] VSCA 78.[39]

[59] But an allegation of perjury cannot support a finding of contempt. As Keane JA (as his Honour then was) said in *Croll v Reeves* [2005] QCA 77 (at pp 4-5):

> "A person accused of perjury is entitled to the protections afforded an accused charged with an indictable offence, not the least of which is the benefit of trial by jury in accordance with the provisions of the *Criminal Code*. These provisions and the protections they afford should not be circumvented by bringing a charge of perjury in the form of a proceeding for contempt, save in the rare class of case of a palpably false answer calculated to frustrate the processes of the Court before whom the evidence given".[40]

[60] Interfering with a witness in a proceeding could also amount to contempt (see s 40(1)(d) of the *Justices Act*), but depending on the circumstances would constitute an offence under, for example, ss 127 (corruption of witness); 128 (deceiving witness); 130

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38 The circumstances are described in the Court of Appeal's decision in *Allen v The Queen* (2013) 36 VR 565 at [21]-[31].

39 Although note that in that case the court was concerned with a statutory offence created by s 134 of the *Magistrates Court Act 1989 (Vic)*, for refusal "to be sworn or to answer any lawful questions".

40 Referring to *Keeley v Mr Justice Brooking* (1979) 143 CLR 162 at 169-170; [1979] HCA 28 and *McGoldrick v Citicorp Finance Pty Ltd* [1990] VR 503 at 507 and *Re Bride; Ex parte Stewart* (1995) 60 FCR 569 at 570-571; [1996] FCA 27.

(preventing witness from attending); or 140 (attempting to pervert the course of justice) of the *Criminal Code.*

[61] An interesting example where contempt was found, in the conduct of a party ***after*** the conclusion of proceedings, is *Tate v Duncan-Strelec* [2014] NSWSC 1125. In that case, a private party brought proceedings seeking an order that the defendant be found guilty of contempt of Court, on the basis of publication of material on the internet by the defendant, to exact a reprisal against the plaintiff for successfully defending earlier proceedings brought by the defendant. In what sounds a bit like an episode from the TV show "Grass Roots", or maybe Bob Jelly in "Sea Change", the plaintiff in the contempt proceedings was the Mayor of the Gold Coast. The defendant had served on the Albury local council, including two terms as Mayor; and had been the plaintiff's campaign manager at an earlier time. They became involved in a joint venture to develop land at Lavington in NSW. As Bergin CJ in Eq put it, "[t]hings went awry and the relationship soured very badly". The previous proceedings involved that failed joint venture.

[62] There is a useful analysis of various authorities in relation to the application of the law of contempt to the protection of witnesses, whether before, during or after they have given their evidence (at [105]-[140]), with Bergin CJ concluding at [138] that:

> "If it is contempt of Court to victimise or punish, or exact a reprisal against, a witness because that witness had given evidence in a case that is concluded, it is difficult to understand why such conduct in respect of a party in a case (who has also been a witness) that is concluded should not also be a contempt of Court. If the Court were to allow parties to victimise or exact reprisals on other parties because they have been successful in their litigation, other prospective parties may be deterred from bringing, or defending, actions in the Courts. However it is imperative to weigh this factor in the balance against the fundamental right to freedom of speech. There will of course be cases where the appropriate remedy is an action for defamation and the particular conduct may not amount to contempt. It will all depend on the circumstances of the case."

## Other behaviour in the courtroom

[63] It is not a "contempt" case, but in this context it is interesting to note the decision of the former Chief Justice de Jersey in *Leismann v Cornack* [2011] QSC 410, which was an application to review a decision of a magistrate not to disqualify herself, after she made various comments about the behaviour of the defendant, during the complainant's (his ex-partner) evidence, in the context of a trial of the defendant on a charge of assault occasioning bodily harm.[41] Chief Justice de Jersey found that the magistrate's comments were not confined to the defendant's physical conduct, but bore on his character (describing him as a rude and patronising person, bent on creating a hostile environment,

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41 See at [9].

putting undue pressure on the complainant and demeaning her); and consequently, that a fair-minded lay observer might reasonably apprehend that she might not bring an impartial mind to the matter.[42] His Honour had the following sage advice, at [31], [32] and [35]:

> "The magistrate quite properly referred to her power to control the courtroom. It is clearly important that if a judicial officer notices inappropriate conduct which could prejudice the integrity of the process, steps be taken to put a stop to it at once.
>
> It will often be effective to ask the offending participant to leave the courtroom, and ask the current witness to leave, then calmly report to the relevant legal representatives what is occurring, allowing a break so the matter can be taken up with the person said to be at fault.
> …
> Judicial officers are human beings and not expected to be paragons of restraint, but … the expectation … is they will come close to that ideal…"

## Standard of proof

[64] Proceedings for contempt belong to the civil jurisdiction of the court.[43] However, because the sanction for any contempt is inevitably to some extent punitive, all proceedings for contempt "must realistically be seen as essentially criminal in nature"[44] and consequently, all charges of contempt must be proved beyond reasonable doubt.[45]

[65] As Burns J said in *O'Connor v Hough* [2016] 2 Qd R 543 at [12]:

> "Because the liberty of the subject is potentially at stake, it is well established that **strict compliance with the rules of procedure** is required in a proceeding for contempt. It is equally well established, and for the same reason, that **nothing short of proof to the criminal standard will suffice** in order to make out such a case."[46]

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42 See at [28]-[30].

43 *Hinch v Attorney-General (Vic)* (1987) 164 CLR 15 at 89; [1987] HCA 56; *CFMEU v Boral Resources (Vic) Pty Ltd* (2015) 256 CLR 375; [2015] HCA 21 at [40]-[43] (plurality) and [65] (Nettle J).

44 *Hinch v Attorney-General (Vic)* (1987) 164 CLR 15 at 49; [1987] HCA 56 per Deane J.

45 *Witham v Holloway* (1995) 183 CLR 525 at 530-534 and 538-542; *AMIEU v Mudginberri Station Pty Ltd* (1986) 161 CLR 98 at 106-113; [1986] HCA 46.

46 Emphasis added. References omitted.

## Procedure

[66] The discussion of procedure here is limited to the procedure where the Court proposes to deal with someone for contempt (as opposed to a party bringing such an application, for example, for another's failure to comply with an order[47]).

[67] Before convicting someone of contempt – whether you are proceeding under s 40 of the *Justices Act* or s 50 of the *Magistrates Courts Act* – it is necessary to do **two** things: [48]

(a) First – **sufficiently articulate the charge of contempt**. This requires:

(i) identification of the particular statutory offence with which the alleged contemnor is charged – i.e. the relevant sub-section of s 50(1) MCA or s 40(1) JA;[49] and

(ii) identification of the conduct which is said to have given rise to that offence.[50]

**and**

(b) Second – give **a reasonable opportunity to be heard** in relation to the charge (that is, before a finding of contempt is made, as opposed to in relation to penalty[51]).

[68] As to the second – giving a reasonable opportunity to be heard – what that might entail will depend on the circumstances.

[69] The High Court in *MacGroarty v Clauson* (1989) 167 CLR 251 at 256 commented that there can be discerned in the provisions of the predecessor to s 129(1) and(4) of the *District Court Act* [which is in essentially the same terms as s 50(1) and (6) of the *Magistrates Courts Act*] a legislative intent that the ability of the Court to deal promptly and effectively with the statutory offences which the section creates "should not be unduly impeded by formal procedural requirements". But that is not at the cost of "the "fundamental requirement that a person should not be punished for a statutory offence of contempt of court unless the particular offence charged has been distinctly identified and [they have] been given an adequate opportunity of answering the charge".

[70] There are two possible ways to proceed:

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47 As to which, see UCPR r 926.

48 *MacGroarty v Clauson* (1989) 167 CLR 251 at 255 and 256; *Barmettler v Greer & Timms* [2007] QCA 170 at [29].

49 In *R v Ogawa* [2011] 2 Qd R 350 at [185] the Court of Appeal held that the trial judge, by referring generally to s 129 of the *District Court Act*, and using the words of s 129(1)(c) in charging the appellant, necessarily implied that his Honour was charging the appellant pursuant to s 129(1)(c) and therefore sufficiently particularised the charge as required by *MacGroarty*.

50 *Lewis v Ogden* (1984) 153 CLR 682 at 693.

51 *Director of Public Prosecutions v Green* [2013] VSCA 78 at [73].

(a) immediately, summarily; or

(b) later, by conducting a separate inquiry (perhaps involving a different judicial officer).

### *Immediate summary procedure*

[71] That immediate action may be taken is contemplated by s 50(4), (5), (6)(a) and (7) of the *Magistrates Courts Act*, which provide as follows:

> "(4) Without limiting the court's power to punish for contempt, the court may order a person committing a contempt to be excluded from the room or other place in which the court is sitting.
>
> (5) A bailiff or other court officer acting under the court's order may, using necessary and reasonable help and force, take the person into custody and detain the person until the court rises.
>
> (6) Before the court rises, the court may –
>
> (a) ask the person to explain why the person should not be punished; or
>
> (b) adjourn the matter to be dealt with on a stated date.
>
> (7) If the court acts under subsection (6)(a), the court may deal with the person immediately."

[72] See also UCPR rr 922 (arrest), 923 (custody) and 924 (hearing). As to the latter, r 924 provides that if a respondent (that is, a person alleged to be guilty of contempt of court) is brought before the court, the court must:

(a) cause the respondent to be orally informed of the contempt charged; and

(b) ask the respondent to show cause why punishment should not be imposed for contempt of court; and

(c) after hearing the respondent, decide the matter of the charge in any way it considers appropriate; and

(d) make an order for the respondent's punishment or discharge.

[73] Likewise, s 40 of the *Justices Act* provides for the possibility of an immediate, summary procedure. But the principles above apply equally if proceeding under s 40 – that is, you must not do so at the cost of affording the person the fundamental right of having the charge properly articulated to them, in a way that identifies the gravamen of the

complaint and giving the person a reasonable opportunity to be heard before determining whether or not they are guilty.

[74] In terms of the adequacy of having the charge properly explained to a defendant, in *Re Fellows; Ex parte Stewart* [1972] 2 NSWLR 317 it was held to be insufficient for a magistrate merely to say:

> "Madame, you have been brought back and placed in the custody of the Court because of your behaviour whilst in Court. You are charged with contempt of Court. Unless you apologise and purge your contempt you will be dealt with accordingly. Do you wish to apologise to the Court?"

[75] A reasonable opportunity of being heard in defence of a charge of contempt means a reasonable opportunity of placing before the court any explanation or amplification of their evidence and any submissions of fact or law, which the contemnor may wish the court to consider as bearing either upon the charge itself or upon the question of punishment.[52]

[76] Immediate action may be required where it is "urgent and imperative to act immediately"[53], where "the **authority of the court** needs to be asserted promptly and decisively to preserve the proceedings from progressive deterioration or dissolution".[54] I have emphasised "authority of the court", to reinforce that this is not about defending the personal honour of the judicial officer; it is about protecting the authority of the law as administered in the courts.

[77] Both s 40(1) JA and s 50(4) MCA give a magistrate the power to order that someone be removed from the courtroom, rather than proceeding to dealing with them summarily for contempt. This could be a useful "circuit-breaker" for a person who is being disruptive or difficult. So too is an adjournment – which gives everyone a chance to calm down.

[78] Importantly, the power to proceed summarily, immediately, to punish for contempt is one to be exercised sparingly, with great caution[55] and scrupulous care,[56] and only in

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52 *Coward v Stapleton* (1953) 90 CLR 573 at 580; [1953] HCA 48 per Williams ACJ, Kitto and Taylor JJ.

53 *Balogh v St Albans Crown Court* [1975] QB 73 at 85, referred to by Pincus JA in *Bradshaw v Attorney General* [2000] 2 Qd R 7 at 10.

54 *Bradshaw v Attorney General* [2000] 2 Qd R 7 at 17 per Thomas JA.

55 Ibid, at 11 per Davies JA.

56 *Balogh v St Albans Crown Court* [1975] QB 73 at 85.

serious cases.[57] This is not least because the judicial officer may be at once both the witness and the victim of the contempt,[58] as well as then the prosecutor and the judge.[59]

[79] An example where the situation was so extreme as to justify the judge ordering the immediate arrest of the alleged contemnor, before dealing summarily with the charge, is *Wilkinson v S* [2003] 1 WLR 1254; [2003] EWCA Civ 95, a case in which the party became violent, threatening and abusive while judgment was being delivered and had to be remanded in custody.

[80] But the more recent cases show a general trend away from that, with the preferred course of action being to adjourn, allow everyone to cool off, and then deal with the alleged contempt. That is reflected in the decision of the majority of the Court of Appeal in *Bradshaw v Attorney-General* [2000] 2 Qd R 7, with both Pincus and Davies JJA expressing the view that there was no urgency, and that the matter ought to have been adjourned.

[81] A recent example of the inappropriateness of acting immediately, rather than in a measured and considered way, on a successful appeal from a decision of this Court, is *YTL v The Attorney-General for the State of Queensland* [2020] QDC 44. This case is a salutary reminder of the need to slow down, cool down and exercise caution before proceeding summarily in relation to a perceived, or alleged, contempt.

[82] In this case, the self-represented party (YTL) arrived late to a scheduled court hearing. He could not speak English and required an interpreter. The hearing had commenced in his absence. Upon his arrival, the magistrate questioned him about why he was late, and pressed him to answer a question as to the identity of the person who had driven him to the court. YTL declined to answer that question – and it was that refusal that was said to form the basis of a charge of contempt, under s 50(1)(e), of disobeying a lawful order of the court.

[83] Before that charge had been articulated, however, and only about 5 minutes after YTL arrived at the court, the magistrate ordered that he be taken into custody so that he could "think about this" and said "[i]f you don't want to answer my question, I'll hold you in contempt…". He was taken into custody, in handcuffs, without any suggestion of violent or disruptive behaviour and without an opportunity to make any submissions about it.

[84] After about half an hour, court resumed and there was a further exchange between the magistrate and YTL, with the magistrate insisting he was required to answer the question put to him, about who had driven him to the court, and YTL declining to do so, "because this has nothing to do with the case" (he was there to answer a summary charge of

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57 *Lewis v Ogden* (1984) 153 CLR 682 at 693.

58 *Bradshaw v Attorney General* [2000] 2 Qd R 7 at 9 per Pincus JA. See also *Director of Public Prosecutions v Green* [2013] VSCA 78 at [52]; and *Wilkinson v S* [2003] 1 WLR 1254 at 1263; [2003] EWCA Civ 95 at [24].

59 *The Queen v Allen* (2013) 36 VR 565 at [70].

contravening a domestic violence order). The magistrate directed the person to answer the question and said if he did not, he would be held in contempt. When the person refused, the magistrate said he was charged, under s 50(1)(e) (without lawful excuse, disobeying a lawful order, "namely to answer my question at the hearing in this proceeding").

[85] The magistrate moved directly to finding the person guilty – again, giving no proper opportunity for the person to address the charge – and was about to impose punishment when the person said he would like to have a lawyer. The magistrate agreed to adjourn for half an hour. The person was remanded in custody and told that he could speak to the duty lawyer and "get his advice about it before I proceed to punishment", saying "I'm likely to send him to jail for it".[60] When Court resumed just over an hour later, a duty lawyer did appear. The magistrate proceeded to impose a fine of $900, with a conviction recorded.

[86] The decision was overturned on appeal; the District Court (Rosengren DCJ) finding both that the conduct did not amount to contempt and that the magistrate had substantially failed to afford procedural fairness. As to whether the conduct amount to contempt, Rosengren DCJ observed that whilst contempt arising from a refusal by a witness to answer questions in court is one of the most common forms of criminal contempt, the circumstances of this case were very different – YTL was not a sworn witness, he was a party to the proceedings, addressing the court from the bar table; the identity of who had driven him to court was not relevant to whether he was guilty of the charge of contravening a domestic violence order, nor was it relevant to any punishment which might follow; there was no general power in a judicial officer to demand answers to questions from a person at the bar table; and far from the conduct having a tendency to interfere with or obstruct the administration of justice, the refusal to answer the question was "proper and based on rational grounds" (at [38] and [39]).

[87] As to the process adopted – her Honour found there was a substantial failure to afford procedural fairness, including by failing to adjourn the matter for a time, or at least offer YTL an adjournment before he was called on to answer the charge, or to refer the matter to another magistrate, bearing in mind the great caution required given the magistrate had placed himself in the position of witness, prosecutor and judge. Judge Rosengren concluded at [36] that the magistrate:

> "… did not exercise the caution necessary, indeed vital, in the circumstances. Aspects of procedural fairness, fundamental to ensuring a fair trial were ignored, with the result that the appellant was improperly convicted of a serious charge and a conviction was recorded. I have reached this conclusion having taken into account the haste with which the decision to charge him with contempt was made, the nature of the

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60 In this regard, mixing up speaking directly to the interpreter, and directly to the person himself – the latter being the appropriate way to address a person assisted by an interpreter.

> proceedings and the absence of any explanation by the magistrate of the reasons for taking the course he did. The absence of any reason is a strong indicator of error where the balancing of competing considerations, including the fact that a period of imprisonment was in contemplation, pointed in favour of referring the hearing to another magistrate."

[88] As a practical matter, if it becomes necessary to detain someone immediately, although s 50(5) of the *Magistrates Courts Act* contemplates "a bailiff or other court officer" doing this, in fact the practical step is to call court security (either by using the duress button, or asking the bailiff or associate to telephone them) so that a security officer, or corrective services officer, can attend and detain the person. Section 40(3)(b) of the *Justices Act* contemplates a person being taken into custody by a police officer – which may be practicable in some courts where you are sitting.

### *Adjourn and cool off*

[89] I reiterate the cautionary note sounded by Mullins P in *May v Queensland Police Service* [2022] QCA 121 at [37] (referred to in paragraph [53] above).

[90] That message, to be cautious before having recourse to the power to deal with someone for contempt, has been consistently expressed.

[91] For example, notwithstanding his dissent in the result, Thomas JA observed in *Bradshaw v Attorney General* that "[i]t may well be that it is in general desirable to allow a cooling down period, as this is more likely to lead to a temperate conclusion than an immediate determination".

[92] To similar effect are the comments of Moses LJ in *R v Huggins* [2007] 2 Cr App R 108 at 110 [18]:[61]

> "In the heat of the moment there may be a perception in the judge of the need for speedy action and condign punishment, but the **importance of the time for reflection** is that it **presents an opportunity to consider whether a less stringent course may be taken**. Indeed, that time for reflection may itself avoid the need for any further action at all."[62]

[93] Thomas JA in *Bradshaw* also commented on the general desirability of adjourning and advising the alleged offender to take legal advice, referring (at 18) to the following as "sound general advice":

> "Justice does not require a contemnor in the face of the court to have a right to legal advice. But if the circumstances are such that it is possible

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61 Referred to as revealing "a deal of wisdom" by the Court of Appeal in *Allen v The Queen* (2013) 36 VR 565 at [72].

62 Emphasis added.

> for the contemnor to have advice, he should be given an opportunity of having it. In practice what usually happens is that somebody gives the contemnor advice. He takes it, apologises to the court and that is the end of the matter. Giving a contemnor an opportunity to apologise is one of the most important aspects of this summary procedure…"[63]

### *If you decide to proceed*

[94] Having adjourned and cooled off, but nonetheless decided that it is appropriate to proceed, the options are:

(a) to bring the contemnor before the Court, and (yourself) proceed in accordance with s 50(6)(b) MCA and UCPR r 924 or s 40 JA; or

(b) by order, direct the Registrar to apply to the court for the person to be punished by contempt: UCPR r 928(1).[64] The decision of *Attorney-General v Di Carlo* [2017] QSC 171, referred to above, is a demonstration of this.

[95] Perhaps representing a fairly extreme example (because of the length of the eventual trial), in the matter of *R v Slaveski,* referred to above, the trial judge, before whom Slaveski behaved so appallingly (Kyrou J), finished the trial, but then ordered that proceedings for contempt be commenced (under the equivalent of r 928), which were heard by a different judge (Whelan J) over the course of an 8 day trial.

### *Two other procedural points*

[96] The application of the UCPR more generally to a contempt proceeding depends on whether the respondent is a natural person or a corporation. A natural person is entitled to assert the privilege against self-incrimination and the privilege against self-exposure to penalty, and so a rule authorising the making of an order for disclosure could be resisted by an individual.[65] But because a corporation cannot invoke those privileges, it could not resist an order for disclosure.[66]

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63 *R v Moran* (1985) 81 Cr App R 51 at 53 per Lawton LJ and Cantley J.

64 See *Mills v Townsville City Council (No 2)* [2003] QPELR 548; [2003] QPEC 18 (no contempt was found, but Wall QC DCJ indicated this is the procedure he would have adopted).

65 *CFMEU v Boral Resources (Vic) Pty Ltd* [2013] VSCA 378 at [10]; *CFMEU v Boral Resources (Vic) Pty Ltd* (2015) 256 CLR 375 at [2] and [67].

66 *CFMEU v Boral Resources (Vic) Pty Ltd* (2015) 256 CLR 375 at [2], [28]-[34] (plurality) and [56] (Nettle J). The High Court's analysis of the contrary argument in this case involved reinforcement of the principle that contempt proceedings are civil, not criminal (notwithstanding that the standard of proof is beyond reasonable doubt). Accordingly, the "companion principle", to the fundamental principle that in criminal proceedings the prosecution must prove the guilt of an accused person – that is, that an accused person cannot be required to testify – does not apply to contempt proceedings. But as already noted, that does not mean an individual loses the right to assert fundamental privileges, such as the privilege against self-incrimination or the privilege against self-exposure to a penalty. See also *R v Herald & Weekly Times Pty Ltd (No 1)* [2020] VSC 616 (applying *CFMEU*, in the context of contempt proceedings involving journalists and their employers arising out of the Pell trial).

[97] There is also authority that the rule in *Jones v Dunkel* does not apply – so in proceedings for contempt of court, there is no scope for the proposition that an unexplained refusal by a party to call evidence or witnesses may entitle the tribunal of fact to draw an inference that the uncalled evidence would not have assisted that party's case.[67] That seems to apply to both individual and corporate respondents.[68]

## Punishment

[98] Section 40(2) of the *Justices Act* contemplates a person convicted of contempt being punished either by a fine or a term of imprisonment.

[99] An individual convicted of contempt under s 50 of the *Magistrates Courts Act* may be punished by making an order that can be made under the *Penalties and Sentences Act 1992:* UCPR r 930(2). A corporation may be punished by seizing property or a fine: UCPR r 930(3).

[100] Even where contempt is found, the court has a discretion not to convict, or not to impose any penalty. As has been observed, the power of punishing for contempt "is a power which a court must of necessity possess; its usefulness depends upon the wisdom and restraint with which it is exercised …": *Parashuram Detaram Shamdasani v King Emperor* [1945] AC 264 per Lord Goddard CJ at 270.

[101] Alternatives to proceeding to conviction for contempt would include:

(a) giving a warning to the person about their conduct, and indicating a charge could be brought if the warning is ignored;

(b) expelling the person from court, even if that person is the accused;[69]

(c) where the person is a legal practitioner, referring the matter to the Legal Services Commissioner.

[102] An apology to the court is a factor in mitigation of the sentence to be considered;[70] but the genuineness, and timing of it is significant. An expression of contrition which is not made until submissions on penalty will not result in the same credit as might be given to a person who apologises or expresses regret at an earlier stage. And, as in the case of

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67 *Jones v Australian Competition and Consumer Commission* (2010) 189 FCR 390; [2010] FCAFC 136 at [34] (Full Federal Court).

68 *Jones* (ibid) involved an individual contemnor; but in *CFMEU v Grocon Constructors (Victoria) Pty Ltd (No 2)* (2014) 47 VR 527; [2014] VSCA 261 at [231] it appears to have been held applicable in the case of corporate respondents also. This issue is not referred to in the High Court's recent decision - (2015) 256 CLR 375.

69 As occurred initially in the matter of *Ogawa* (see [2011] 2 Qd R 350 at [51]-[64]), although the persistence of that person's conduct justifiably led to her being dealt with for contempt at the end of the trial in any event.

70 *R v Ogawa* [2011] 2 Qd R 350 at [202]-[204].

*Ogawa*, an apology accompanied by the same kind of conduct which was found to be contemptuous is no apology at all.[71]

[103] Relevant factors to be taken into account in deciding on the penalty are set out in *ASIC v Michalik* (2004) 52 ACSR 115 at [29], adopted by Mullins J (as her Honour then was) in *Buckby v Wharton* [2012] QSC 416 at [80], as follows:

(i) the seriousness of the contempt proved;
(ii) whether the contemnor was aware of the consequences to themselves of what they proposed to do;
(iii) the actual or potential consequences of the contempt on the proceedings in which the contempt was committed;
(iv) whether the contempt was committed in the context of a proceeding alleging crime or conduct seriously prejudicial to the public interest: see, for example, *Von Doussa v Owens (No 3)* (1982) 31 SASR 116;
(v) the reason or motive for the contempt;
(vi) whether the contemnor has received, or sought to receive, a benefit or gain from the contempt;
(vii) whether there has been any expression of genuine contrition by the contemnor;
(viii) the character and antecedents of the contemnor;
(ix) what punishment is required to deter the contemnor and others of like mind from similar disobedience to the orders of the court;
(x) what punishment is required to express the court's denunciation of the contempt.

[104] Obviously, the extent to which those factors are relevant in a particular case will vary greatly. The appropriate sanction, where a person has been convicted of contempt, will very much depend on the particular circumstances of the case and the person.

## Costs

[105] The costs of a proceeding for punishment for contempt are within the court's discretion, whether a specific punishment is imposed or not: UCPR r 932.

[106] In *Hinch v Attorney-General (Vic)* (1987) 164 CLR 15 at 89; [1987] HCA 56 the High Court observed that:

> "Notwithstanding that a contempt may be described as a criminal offence, the proceedings do not attract the criminal jurisdiction of the court to which the application is made. On the contrary, they proceed in the civil

[71] *R v Ogawa* [2011] 2 Qd R 350 at [179] and [204]. See also *R v Slaveski* [2012] VSC 7 at [17].

> jurisdiction and attract the rule that ordinarily applies in that jurisdiction, namely, that costs follow the event."

[107] But the Court nonetheless reiterated that in every case it comes to down to discretion.

[108] In *Bruder Expeditions Pty Ltd v Leigh* [2020] QCA 67 at p4-5 Sofronoff P made some observations about the appropriateness of a costs order in the context of contempt proceedings (arising from breach of an order) which are between parties engaged in civil litigation.

[109] However, the considerations where the court deals with a person for contempt in the face of the court, or refers that matter to the Registrar, may well be different.

[110] In some cases, it has been said that an award of costs against the contemnor may be a sufficient order to "mark the disapproval of the court" in the absence of any other order by way of punishment, whether by committal or fine. This is how the contempt was dealt with in *Attorney-General (Qld) v Mathews* [2020] QSC 258 at [73].

## Concluding remarks

[111] In concluding, I emphasise the following points:

(a) The power to punish for contempt of court exists to prevent interferences with the course of justice; to vindicate the integrity of the court and its proceedings and maintain the authority of the law – not to vindicate the personal dignity of the judicial officer.

(b) It is an important power, to enable a judicial officer to exercise full control over the proceedings in the courtroom.

(c) But the power to punish for contempt should be used with caution; sparingly and only when necessity demands.

(d) In many situations, the "good sense of the community" will be a sufficient safeguard against the scandalous disparagement of a court or judicial officer. Take a moment to think about whether a person's insulting or interrupting behaviour is actually having any impact on the integrity of the court (or merely reflecting poorly on them).

(e) Take the time to "cool off" and "calm down", before exercising the power to charge someone with contempt. Consider whether warning the person, or ejecting the person from the court (even temporarily) or adjourning the court might be a sufficient "circuit-breaker".

(f) If you decide it is appropriate to proceed – remember, as in everything we do, the person must be afforded procedural fairness. This requires:

(i) that you sufficiently articulate the charge of contempt, by identifying the particular statutory provision under which the person is charged and identifying the conduct which is said to have given rise to that charge; and

(ii) giving the person a reasonable opportunity to be heard in relation to the charge, before a conclusion is reached about guilt and in relation to any penalty.

(g) Although the power exists to proceed, immediately, summarily – think about whether this is really necessary. Or whether the integrity of the court can be vindicated by a proceeding taken later, instigated by the Registrar, and in respect of which you would not find yourself in the position of prosecutor, witness and judicial officer.

Helen Bowskill
Chief Justice
24 May 2023