Contempt Drama May Spur Reform Of Outdated Law

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Taxpayers are entitled to engage in public debate, including to criticise those whose salaries they fund: politicians, bureaucrats, judges.

The time has come to reform contempt of court laws to better protect freedom of speech.

Earlier this month, three ministers in the Turnbull government — Greg Hunt, Michael Sukkar, and Alan Tudge — came remarkably close to becoming defendants in a contempt of court trial.

The conduct that triggered the Victorian Court of Appeal into action involved comments made by the three Victorian members of federal parliament — which were published in a news report in this newspaper — on the adequacy of sentencing in terrorism cases in their home state.

According to the court, such a trial would have proceeded but for an apology and retraction by the ministers concerned.

The decision to summon the three ministers at a hearing into the matter was an extraordinary step. Direct clashes between the three arms of government are rare in Australia. But this was an example of a clear conflict between the judiciary and the executive.

Victorian Chief Justice Marilyn Warren explicitly acknowledged this when she said the ministers' conduct equated to a failure "to respect the doctrine of separation of powers".

Such a claim — that robust public criticism of the sentencing habits of the judiciary by ministers of the crown amounts to a breach of the doctrine of the separation of powers — is a big call.

Frankly, I disagree with the assertion that mere words could put our system of government at risk. But putting that to one side, the case is likely to cause ongoing ramifications.

In demanding an explanation from the three ministers, the Court of Appeal may have unwittingly set in train a process leading to the reform of the law of contempt of court.

The case certainly raises a number of legitimate concerns. Chief among these is the threat it represents to freedom of expression.

The judgment, handed down by Chief Justice Warren on June 23, is troubling for those that believe strongly in the principle of free speech.

That the court took steps to schedule a mention hearing in this matter is frightening enough. But the idea that the court had formed the view that the conduct of the ministers, as well as this newspaper, amounted to a breach of the sub judice rule is even more alarming.

The decision in this case has also been used as an unequivocal warning against other members of the government from acting in the same way: "The court states in the strongest terms that it is expected there will be no repetition of this type of appalling behaviour. It was fundamentally wrong. It would be a grave matter for the administration of justice if it were to re-occur."

This is fiery language from the judiciary, which tends to go out of its way to use sober language. The judgment is an attempt to narrow parameters of debate around the court, and coupled with the decision to commence these proceedings in the first place it may be successful in the short term.

However, in the long term it's likely that this will be used as an example of the need for reform.

South Australian senator Nick Xenophon's call this week for a parliamentary inquiry is the start of that process. The initiative is a very good one.

Given the recent raw experience of the Coalition it will be inclined to support the inquiry, as will senator Derryn Hinch, as well as others on the crossbench who believe in free speech, such as the LDP's senator David Leyonhjelm.

Senator Xenophon said he intended to pursue an inquiry along the lines of terms of reference used in previous contempt of court inquiries conducted by the Australian Law Reform Commission and the NSW Law Reform Commission.

Both inquiries recommended changes to the law.

Those inquiries also show the existence of reforms that ought to garner broad support, such as the peculiarity of the process used in contempt cases.

The great US Supreme Court judge Hugo Black called for reform to the unusual mode of trial involved in contempt of court proceedings in his dissenting judgment in United States v Barnett: "… one person has concentrated in himself the power to charge a man with a crime, prosecute him for it, conduct his trial, and then find him guilty". Those words were written in 1964. Surely now the time has come for reform.

A parliamentary inquiry into the crime of contempt of court will allow for the problems in this area of law to be uncovered.

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