IN-CONFIDENCE

Parliamentary Commission of Inquiry
G.P.O. Box 5218,
Sydney, N.S.W. 2001.

FILE No. C52/

ARCHIVAL ACTION

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FILE No. C52

MEMORANDUM RE MATTERS NUMBERED 4, 5, 7, 8, 9, 10, 12, 17, 19, 21, 22, 28, 29, 30, 31, 32, 34, 35, 37, 38, 41.

Matters Raised with Counsel Assisting but not Drawn as Specific Allegations in Precise Terms.

This memorandum deals with 21 matters which in the opinion of those assisting the Commission could not or, after investigation, did not give rise to a prima facie case of misbehaviour within the meaning of Section 72 of the Constitution. It is therefore proposed that these matters not be drawn as specific allegations in precise terms and that there be no further inquiry into them.

Matter No.4 - Sala

This matter involves an allegation that the Judge, whilst Attorney-General, wrongfully or improperly ordered the return to one Ramon Sala of a passport and his release from custody.

All the relevant Departmental files have been examined as also has been the official report of Mr A.C. Menzies.

The available evidence supports the conclusion of Mr Menzies that there was no evidence of any impropriety on the Judge's part. While it is true to say that there was room for disagreement about the directions given by the Judge and that the Australian Federal Police objected to the course taken, the action by the Judge could not constitute misbehaviour within the meaning of Section 72 of the Constitution. We recommend that the matter be taken no further.

Matter No.5 - Saffron surveillance

This matter consisted of an allegation that the Judge, whilst Attorney-General and Minister for Customs and Excise, directed that Customs surveillance of Mr A.G. Saffron be downgraded. The gravamen of the complaint was that the Judge had exercised his Ministerial powers for an improper purpose.

This matter was the subject of a Report of Permanent Heads on Allegations in the National Times of 10 August 1984. That Report pointed out, as an examination of the files of the relevant agencies confirms to be the case, that apart from one document entitled "Note for File" prepared by a Sergeant Martin

on 30 January 1975 there was no record of any Ministerial direction or involvement in the matter. That note for file attributed to a Kevin Wilson the statement that the A-G had directed that Saffron was not to receive a baggage search. When interviewed by the Permanent Heads Committee, Mr Wilson said that in all his dealings with the matter he believed that the direction came from the Comptroller-General. The conclusions of the Report of Permanent Heads appear at paras 45 and 46. Those conclusions were that the decision to reduce the Customs surveillance of Saffron to providing advice and travel details was reasonable and appropriate and that it was more probable than not that the decision to vary the surveillance of Saffron was made by the then Comptroller-General. This, it was concluded, did not rule out the possibility that the Minister spoke to the Comptroller-General who may have reflected the Minister's views when speaking to a Mr O'Connor, the officer in the Department who passed on the directions to the police.

It is recommended that the Commission proceed in accordance with Section 5(3) of the Parliamentary Commission of Inquiry Act and, having regard to the conclusions of the Permanent Heads Inquiry, take the matter no further.

Matter No.7 - Ethiopian Airlines

This matter was the subject of questions in the Senate in late 1974 and 1975. The contention was that the Judge, whilst Attorney-General, behaved improperly by accepting free or discounted overseas air travel as a result of his wife's employment with Ethiopian Airlines. Investigation revealed nothing improper in the appointment of Mrs. Murphy as a public relations consultant nor in the fact that in lieu of salary she acquired and exercised entitlements to free or discounted travel for herself and her family.

Whatever view one may take as to the propriety of a law officer accepting free or discounted travel in the circumstances set out above, the facts disclosed could not, in our view, amount to misbehaviour within the meaning of Section 72 of the Constitution and accordingly we recommend the matter be taken no further.

Matters No.8 and 30 Mrs Murphy's diamond; Quartermaine - Moll tax evasion.

These matters were the subject, in late 1984, of questions in

the Senate. It was alleged that the Judge had been involved, at some stage during or prior to 1979, in a tax avoidance scheme in Western Australia involving one Christo Moll, Murray Quartermaine and others and that Mrs Murphy had either purchased or been given a diamond by Moll.

Material was provided to the Commission in support of these claims and consisted of two diamond valuation certificates, a cheque butt of Moll's with the name Mrs L Murphy and a letter dated 18 June 1979 allegedly written by a Dr Tiller, one of the participants in the scheme, to Quartermaine, implicating the Judge in their activities.

These matters were investigated by the Commission and those investigations confirmed the conclusion to which the Australian Federal Police had earlier come that the documentation provided in relation to the alleged diamond was unreliable and in all likelihood false and that the letter from Dr Tiller was probably false and possibly written by Moll to discredit Quartermaine.

In the light of these circumstances it is in our view impossible to conclude that there is any prima facie evidence

of misbehaviour within the meaning of Section 72 of the Constitution and we recommend that the matters be taken no further.

Matter No.9 - Soviet espionage

Two individuals jointly made the claim that the Judge was a Soviet spy and a member of a Soviet spy ring operating in Canberra. This allegation was supported by no evidence whatever and rested in mere assertion of a purely speculative kind.

We recommend that the Commission should make no inquiry into this matter.

Matter No.10 - Stephen Bazley

Information was given to those assisting the Commission that Stephen Bazley had alleged criminal conduct on the part of the Judge. The allegation was made in a taped interview with a member of the Australian Federal Police and was that the Judge wanted Bazley to "knock out" George Freeman. Bazley said that the request had been passed on to him by a named barrister on an occasion when, according to Bazley, he and the barrister went to the Judge's home in Sydney.

The New South Wales Police had investigated this allegation in 1985 and the staff of the Commission was given access to the relevant New South Wales Police records.

Those records showed that the conclusion of the police investigation was that the allegation was 'a complete fabrication' and that further enquiries would be a 'complete waste of time'. These conclusions were based on Bazley's lack of credibility, his refusal to assist the New South Wales Police in their inquiry into this allegation, his refusal to adopt the statement he had made to the Australian Federal Police and the clear and comprehensive denial by the barrister in a signed statement that he had or would have spoken to Bazley in the terms alleged. Indeed the barrister said that he had met Bazley only twice, once when he had acted for him and once when Bazley had approached him in public and the barrister had walked away.

There being no material which might amount to prima facie evidence of misbehaviour within the meaning of Section 72 of the Constitution we recommend the matter be taken no further.

Matter No.12 - Illegal immigration

It was alleged that the Judge had been involved in an organisation for the illegal immigration into Australia of Filipinos and Koreans. It was not made clear in the allegation whether the conduct was said to have taken place before or after the Judge's appointment to the High Court. No evidence was provided in support of the allegation.

Those assisting the Commission asked the Department of Immigration for all its files relevant to the allegation. Examination of the files provided to the Commission revealed nothing to support the allegation; neither did inquiries made of the New South Wales Police which had made some investigations into the question of the involvement of Ryan or Saffron in such a scheme.

There being no material which might amount to prima facie evidence of misbehaviour within the meaning of Section 72 of the Constitution we recommend the matter be taken no further.

Matter No.17 - Non-disclosure of dinner party

This matter involved an assertion that the Judge should have come forward to reveal the fact that he had been present at a dinner attended by Messrs Ryan, Farquhar and Wood once it was alleged that there was a conspiracy between Ryan, Farquhar and Wood. It was not suggested that what occurred at the dinner was connected with the alleged conspiracy; neither was there evidence of a public denial by any of Messrs Ryan, Farquhar and Wood of the fact that they knew each other.

In the absence of such suggestion or denial there would be no impropriety in the Judge not coming forward to disclose the knowledge that he had of such an association. The absence of action by the Judge could not constitute misbehaviour within the meaning of Section 72 and we recommend that the Commission should do no more than note that the claim was made.

Matter No.19 - Paris Theatre reference, Matter No.21 - Lusher reference, Matter No.22 - Pinball machines reference

These matters came to the notice of the Commission by way of

the so-called Age Tapes transcripts (Volume T1A, p.22 - 20 March 1979, Volume T1B, pps. 107-108, 7 February 1980). On the hypothesis that the transcripts could be proved, there were several conversations between the Judge and Morgan Ryan which included observations by the Judge first, that there was something in the newspaper about the Paris Theatre and that Ryan should know "what's bloody well on"; second, a conversation in which a discussion occurs about "every little breeze" and "the Lush or is it going to be the three board of ..."; and, third, a conversation where Ryan asked the Judge not to forget those " pinball machines ... ".

These three matters, to the extent they suggest a continuing and close relationship between the Judge and Ryan are covered by Allegation No.40.

These conversations could also lead to the inference that the Judge was involved in various kinds of sinister activities with Ryan. However, since they consist only of cryptic references not capable of investigation as allegations of substance, it is recommended that, except as part of Allegation No.40, these matters should merely be noted by the Commission but not investigated further.

Matter No.28 - Statement after trial

This matter was referred to in the House of Representatives (see pages 3447-8 of House of Representatives Hansard of 8 May 1986).

It was suggested that the Judge's comments, made immediately after his acquittal, that the trial was politically motivated constituted misbehaviour.

We submit that the conduct alleged could not on any view constitute misbehaviour within the meaning of Section 72 of the Constitution and that the Commission should merely note that the matter was brought to its attention.

Matter No.29 - Stewart letter

This matter was referred to in the House of Representatives (see p. 3448 of the House of Representatives Hansard of 8 May 1986).

Mr. Justice Stewart, in the course of the Royal Commission of

Inquiry into Alleged Telephone Interceptions, sent a letter to the Judge which contained seven questions. The letter was sent to the Judge in March 1986 shortly before the Judge was due to be re-tried. It was suggested that the Judge's failure to respond to that letter constituted misbehaviour.

The view has been expressed (Shetreet, Judges on Trial, p 371) that the invocation by a judge of the right to remain silent "was an indication that his conscience was not clear and he had something to conceal. Such a judge could not properly continue to perform his judicial functions without a cloud of suspicion." Nevertheless, we submit that in the particular circumstances of this case the conduct alleged did not constitute misbehaviour within the meaning of Section 72 of the Constitution and that the Commission should merely note that the matter was brought to its attention.

Matter No.31 - Public Housing for Miss Morosi

It was alleged that in 1974 the Judge requested the Minister for the Capital Territory to arrange for Miss Morosi to be given priority in the provision of public housing.

We submit that the conduct alleged could not on any view constitute misbehaviour within the meaning of Section 72 of the Constitution and that the Commission should merely note that the matter was brought to its attention.

Matter No.32 - Connor view of the Briese matter

(See attached memorandum of M. Weinberg and A. Robertson dated 16 July 1986).

Matter No.34 - Wood shares

This matter consisted of an allegation that in the late 1960s the Judge, whilst a Senator, was given a large parcel of shares by another Senator, Senator Wood. The inference the Commission was asked to draw was that there was something improper in the transaction.

The allegation was supported by no evidence whatever. As the former Senator who allegedly gave the Judge the shares is now dead and the shares cannot be identified, we recommend that the Commission should do no more than note that the claim was made.

Matter No.35 - Soliciting a bribe

It was alleged that in 1972 or 1973 the Judge, whilst Minister for Customs and Excise, solicited a bribe from Trevor Reginald Williams. Williams was at the time involved in defending a customs prosecution and he asserted that the Judge offered to "fix up" the charges in return for the payment of $2000.00.

Williams was interviewed but the facts as related by him did not, in the view of those assisting the Commission, provide any evidence to support the claim.

There being no material which might amount to prima facie evidence of misbehaviour within the meaning of Section 72 of the Constitution we recommend the matter be taken no further.

Matter No.37 - Direction concerning importation of pornography

There were two allegations concerning the same conduct of the Judge whilst he was Attorney-General and Minister for Customs and Excise.

The allegations were that in 1973 the Judge had issued a direction that Regulation 4A of the Customs (Prohibited Imports) Regulations, as they then stood, should be ignored with the result that pornography was imported without any written permission and thereby contrary to the regulations.

Investigations showed that the direction emanated from a meeting in June 1973 between the then Senator Murphy and senior officials of his Departments, the Attorney-General's Department and the Department of Customs and Excise. The direction given was under the hand of a G E Sheen for the Comptroller-General and was in terms that "customs resources engaged in screening imported goods should be primarily concerned with the detection of prohibited imports other than material which offends Regulation 4A ... For the time being there are to be no prosecutions under the Customs Act for offences involving pornography."

The direction resulted from the Attorney-General agreeing with proposals in a departmental paper on censorship policy. At that time it was proposed by the Government that the regulations be amended to correspond with Government policy.

It was noted in the Minutes of the meeting in June 1973 that the Attorney-General agreed that it would be necessary to compromise in the implementation of policy in order to meet the requirements of the current law.

The direction was continued until the amendments to the legislation were made in February 1984.

We submit that there is no conduct disclosed which could amount to misbehaviour within the meaning of Section 72 of the Constitution. We recommend that the matter be taken no further.

Matter No.38 - Dissenting judgments

A citizen alleged that the Judge through "continued persistence in dissenting for whatever reason, can engender towards him such disrespect as to rank his performance to be that of proved misbehaviour".

We submit that the conduct alleged could not on any view constitute misbehaviour within the meaning of Section 72 of the Constitution and that the Commission make no inquiry into this matter.

Matter No.41 - Comment of Judge concerning Chamberlain committal

In answer to questions put to him in cross-examination during the Judge's second trial, Mr Briese SM gave evidence that the Judge had commented on the Chamberlain case. The context of the comment was that a second coroner had, that day or recently, decided to commit Mr and Mrs Chamberlain for trial on charges relating to the death of their daughter. The Judge's remark was to the effect that the decision by the Coroner was astonishing.

It was suggested that this conduct by the Judge might amount to misbehaviour in that it was a comment upon a matter which might, as it did, come before the Judge in his judicial capacity: it was therefore, so it was said, improper for the Judge to make known to Mr Briese his view of the decision to commit for trial.

We submit that the Chamberlain case was a matter of general notoriety and discussion, that the Judge's comments were very

general in their terms and that therefore the Judge's conduct could not amount to misbehaviour within the meaning of Section 72. We recommend that the matter be taken no further.

[redacted]

S.Charles

M. Weinberg [redacted]

A. Robertson [redacted]

D. Durack [redacted]

P. Sharp

[redacted]

A. Phelan

21 August 1986

MEMORANDUM RE ALLEGATION NO 32

We have been invited to draft an allegation based upon the views of Mr Xavier Connor in his report to the second Senate Committee in 1984. In that report, Mr Connor suggested that even if it could not be shown that the Judge intended that Briese approach Jones with a view to inducing Jones to act otherwise than in accordance with his duty, the mere act of inviting Briese to make enquiry of Jones as to how the case against Morgan Ryan was progressing might amount to misbehavour within the meaning of Section 72 of the Constitution. The difficulty which we have in drafting an allegation along those lines arises from Section 5 (4) of the Parliamentary Commission of Inquiry Act 1986. That sub section provides the Commission shall not consider -

á) the issues dealt with in the trials leading to the acquittal of the Honourable Lionel Keith Murphy of certain criminal charges on 5 July 1985 and 28 April 1986 and, in particular, the issue of the Honourable Lionel Keith Murphy's guilt or innocence of those charges; or

b) whether the conduct to which those charges related was such as to constitute proved misbehaviour within the meaning of Section 72 of the Constitution except to the extent that the Commission considers necessary for the proper examination of other issues arising in the course of the Commission's inquiry.

It is plain that there is a difference between the version given by Briese of the relevant conversation and that given by the Judge. That difference was fully explored during the course of the Judge's trials. It is impossible to know whether the jury which acquitted the Judge at his second trial did so merely because they were not satisfied that he had the requisite intent to pervert the course of justice, or because they were not satisfied that Briese's version of the conversation was correct. On any view the content of that conversation is central to the charge as laid against the Judge and ultimately disposed of by his acquittal. It seems to us that to raise this matter as a specific allegation in precise terms is to breach Section 5 (4) in that the matter in question is "an issue dealt with in the trial leading to the acquittal" of the Judge in the relevant sense, and to consider it would be

to consider "whether the conduct to which those charges related" was misbehaviour. We consider that the Commission is not empowered to consider the Connor view of the Briese matter except to the extent that it considers it necessary to do so for the proper examination of other issues arising in the course of the inquiry. We recommend that Allegation No 32 not proceed.

[redacted]

M Weinberg

[redacted]

A Robertson

16 July 1986

Mr D G Harper
P O Box 85
North Balwyn Vic 3104

Dear Mr Harper,

This is to acknowledge receipt of your letter of 30 June 1986.

Yours sincerely,

J F THomson
Secretary

2 July 1986

The Secretary.
Parliamentary Comm.r of Enquiry.
5th Floor. ADC House.
99 Elizabeth St. Sydney. NSW 2000.

[redacted]

D - 2 JUL

30-6-86.

RECEIVED - 2 JUL 1986

Dear Sir.

Re: Conduct of the Hon Lionel Keith Murphy

A company, Ascot Investments Pty Ltd, of which I was Chairman of directors and a shareholder, appeared before the Full Bench of the High Court of Australia in late 1980, and that court's decision was delivered on 10th February 1981 in a 6-1 majority judgment upholding an appeal by the aforesaid company against the Family Court of Australia.

The one dissenting judge was the Hon Mr Justice Lionel Murphy, and whilst there would be nothing normally wrong with that, as the right of dissention is something that, in a democracy, all people should wish to respect, but that right exercised to an unreasonable extent runs the risk of engendering a disrespect, and it is this aspect that should usher in concern in any consideration of the Conduct of the Hon Mr Justice Lionel Murphy.

I remember meeting a Melbourne businessman a couple of days following the High Court decision, and he said, 'Well, front page news in The Age has told us that 'Ascot' won the appeal', and I said 'Yes, there

1. Mr Durack to see pls
2 Mr Lot
for ack. please.
JF.

was only one dissention, that of Mr Justice Murphy", and the businessman replied "That's par for the course for him", and I had the last word, and said "Yes. I believe so. I know so."

What I put to the Commission of Inquiry to consider is the thought, that if the dissention in the 'Ascot' case is not just an isolated example, but rather just one of many in a prominently extended pattern of dissenting decisions by the Hon Mr Justice Lionel Murphy, — by that, I mean dissenting from the majority findings and judgments of his brother judges, — then surely one must accept that those brother judges cannot be wrong all the time, or nearly all the time, especially bearing in mind that it should be expected, that the judges of the ultimate Court are expected to be right all of the time, and that in shouldering the responsibility to be right all of the time, have always been accorded the utmost respect from the people of Australia.

If it is so, that a pronounced pattern of dissention by the Hon Mr Justice Lionel Murphy does exist, and the Commission has power presumably to determine that from High Court records, then I suggest that the decisions of the

Hon Mr Justice Lionel Murphy cannot be respected as being judicially sound, and that the continued persistance in dissenting, for whatever reason, can engender towards him such disrespect as to rank his performance to be that of proved misbehaviour.

Persons, who wish to carry their own brand of politics into the performance of their duties upon being appointed to the bench of any judiciary; are quite frankly unfit to serve on any judiciary, as to assert their political will into their decisions must be deemed to be so unacceptable, as to amount to proved misbehaviour.

It is accepted, that the members of the judiciary have often a burdonsome responsibility in administering the law of the land, as judges must at all times be mindful that they serve no other purpose than that of giving expression to the will of the legislature, which is representative of the will of the people of Australia and can serve no other will in the performance of their duties.

Enclosed are copies of my submission to the Chesterman Committee and Summary of case.

Yours Faithfully,

[redacted]

DOUGLAS GRAHAM HARPER.

ADDRESS OF SUBMISSIONS
TO
COMMITTEE OF LAW ON CONTEMPT
OF
THE LAW REFORM COMMISSION

Mr. Chairman and Members of the Committee,

I am DOUGLAS GRAHAM HARPER.

My address is c/o Alwyn Samuel & Associates, 39 Wellington St., Windsor, Victoria, 3181.

I have read your booklet 'Contempt: Summary of Reform Proposals' and also the Notice of Schedule of Hearings and the reference to the range of issues being considered thereon, and I shall commence by commenting upon those issues in the sequence you have set out which I will number 1 to 5. I will then deal with the three Discussion Papers on Contempt published by the Commission, but I will do so in reverse order to which such appear on your notice, and despite the overlap in the three categories such will be dealt with by actual case examples. I will then conclude my address of submissions.

Now, to begin with the five issues.

1. The extent, if any, to which media publicity relating to current or forthcoming court cases should be restricted by Contempt law in order to ensure a fair trial?

I believe that the media should be able to report only the details of trials and hearings whilst the proceedings are in progress, but must be expected to report as accurately as possible so that nothing can be taken out of context in such a way that the true facts could be misconstrued in any way. After the trial and providing that sub-judice rules do not apply, the media must be free to express whatever it desires and do so knowing that it remains vulnerable to civil or criminal action, which is the normal risk to it at any time, but the charge of Contempt should not then apply, as such should be only applicable during the course of trials and

hearings, and in situation of sub-judice.

2. Whether jury deliberations should remain secret even after the relevant trial is over?

I believe that jury deliberations must remain secret until the trial is over, but thereafter each member of the jury in respect to their own views must be free to express whatever they wish to express, providing that the situation is not remaining sub-judice because of further hearings of the case or of associated cases. However, each member of the jury must be bound to respect the confidentiality of the views of other members of the jury, and must in no way do or say anything that would in any way jeopardise any other member's right to the protection of their privacy.

3. Whether it should be contempt to make unfounded allegations of misconduct against judges or magistrates?

I think that freedom of expression as a right of every-one under Article 19 of the International Covenant of Civil and Political Rights must allow allegations of whatever nature to be expressed against judges and magistrates, but not during the course of a trial or hearing, or when a matter is the subject of a case that is sub-judice, and to which the allegations could be designed to influence. Beyond that, however, no prohibition should exist, save and except that those so choosing to express themselves should be as vulnerable to prosecution as when expressing themselves against anyone else, and certainly judges and magistrates should be afforded no privileged position in regard to the freedom of expression directed against them.

4. Whether a judge or magistrate presiding at a court hearing should have the power to punish summarily a person who disrupts the hearing?

Clearly, a judge has a responsibility to keep good order in a court and should naturally have the right to order the removal of people who would cause disruption. Beyond that, however, if a judge wishes that a person be punished, then in my view the judge must have charges laid and the person be properly tried, and the matter thereby be taken to a lawful conclusion.

5. The circumstances, if any, in which the Family Court should use penal sanctions, such as imprisonment against a husband or wife who disobeys an order made by the court: for example, a custody or access order, a maintenance order or an order prohibiting entry into the matrimonial home?

The answer is quite simply IN NO CIRCUMSTANCES, and the fact that it can and does use penal sanctions is an indictment against our system. As things stand, the situation boils down to a case of Caesar judging Caesar.

The courts should be able to indeed instruct that charges be brought against a party for non-compliance of Court Orders, and the matter then proceed in accordance with law, and under no circumstances should a fair trial be denied anyone, nor the courts be privileged in any way at all in dealing with offenders against their orders. All must be equal before the law and that includes the courts and the judges.

It must be accepted that a person cannot be guaranteed a fair trial by a court or be afforded balanced justice by a court when facing charges before a court, the orders of which the person is charged with having breached.

I shall now deal with the three Discussion Papers.

Firstly, A.L.R.C. D.P.27 - Contempt: Disruption, Disobedience and Deliberate Interference.

I wish to draw your attention to the case of Mr. P.J. Owens, a media executive of Adelaide, who was jailed indefinitely for Contempt of Court on 11th August, 1982, for refusing to name the parties for whom he claimed to have acted as agent/nominee in the purchase of shares in a public company, when ordered to do so by a Special Government-appointed Commissioner of Enquiry into the share dealings in that public company.

Mr. Owens appealed through to the Full Court of Appeal in South Australia, which ruled that the Special Commissioner was acting within power, and consequently the appeal was squashed.

On each day of the imprisonment, under orders of the Special Commissioner, the Prison Governor was to ask Mr. Owens as to whether he was prepared to purge the contempt and on each day the reply was "No". After seventy-one days, he was released - the Special Commissioner apparently seeing no purpose in continuing with the attempt at coersion.

I have chosen the case because it seems to me that had the charge of Contempt been heard by an independent tribunal or a jury, the conviction would have been most unlikely, bearing in mind the consideration that others would have placed on the need of confidentiality in the honourableness of relationships relied upon in the world of business.

Mr. Owens had broken no law, that was in evidence to my knowledge, in purchasing and holding the shares in the capacity as agent/nominee, and it was in my view an unjustified imposition that he was imprisoned. I do not doubt for a single moment that the Full Court of Appeal was correct in finding as it did, but that the Special Commissioner had that power and could act as he did, is the aspect that should be corrected in any reform of the law on Contempt.

Secondly, A.L.R.C. D.P.26 - Contempt and the Media.

To illustrate my thoughts, I will take a subject of the '60 Minutes' television program shown Australia-wide in 1985, which related to the experiences of an author and a co-author charged, tried and convicted in the Family Court of Australia for Criminal Contempt.

The co-author, Dawn Wade, was a lady who had been involved in litigation in the Family Court for a prolonged period in respect to custody over her children, and the story of her experiences in that court attracted the attention of an author, Brian Fall, with whom she was later to co-operate in having the story put to print to be possibly suitable for television. A brochure titled 'Contempt' was prepared for perusal by the television companies in Australia to assist those companies in deciding as to whether or not the story would be of interest to them. It was in this brochure that the words appeared - "And the fourth judge is influenced", and having

sighted the brochure and those words, the Family Court chose to charge the author and co-author with Criminal Contempt and by that court both were found guilty and sentenced to a two year $2,000 good behaviour bond and levied with all costs of the case.

The Family Court, in my view, could not be seen to be impartial in the handling of this case and I cannot believe that any independent tribunal or jury would have convicted in the circumstances, and would have levied all costs of the case against the Commonwealth. I say that because I am sure in my own mind that anyone with an ounce of common sense, and viewing the case impartially, would have realized that the words 'And the fourth judge is influenced' could have been capable of a wide range of interpretation, of which none could be considered to be contemptible and not just capable of the narrow interpretation, that the Family Court had placed obviously upon those words.

The decision of the Family Court in this case becomes even more compounded in ludicracy, when you consider that the story presented for television consideration was in the nature of fiction and the names of the characters were different from the parties of the real life experience from which the story had its origin.

In my opinion, the Family Court had effected a gross invasion upon the right of the freedom of expression. Furthermore, I suggest that its attitude in the handling of this case displays the degree to which the Family Court has become possessed by an obsession with the power that is available to the court in the Law on Contempt, and this aspect became pronounced when the defendants made every effort to appease the concern of the court by offering to remove the offending segment and to remove the brochure from circulation - the Family Court, though, remained entrenched in the possession of its obsession with the power of the Law on Contempt and remained adamant to prosecute unwaiveringly to conviction.

There is no reasonably ~~unsaleable~~ unassailable right to freedom of expression for the media in this country and there never will be so long as the court continues to administer the law on Contempt, a matter, no doubt, of real concern to the media.

This case should serve to highlight that concern.

Thirdly, A.L.R.C. D.P.24 - Contempt and the Family Law.

Here, I shall use my own case.

I was sentenced to twelve months imprisonment by the Family Court for contempt in the face of the court on May 15th, 1979, and I was released just five months later on the 17th October, 1979. I had been brought before the Court under apprehension by Federal Police to face matters relating to examination of means on May 15th, 1979, and when answering 'No comment' to the question 'Where are the 7000 "A" Class Ascot Investment Pty. Ltd. shares?', I was thereupon at that sitting duly convicted of Contempt, sentenced and imprisoned that day for refusing to answer a question.

It seemed odd to me that a charge was not levied, a trial date set and hearings proceeded with in an orderly way, as would be the case of any other charge that could encumber a person with a substantial term of imprisonment. After five months had passed, however, the Court's own ordered investigations of the matter had found the pertinent shares and presumably the Court saw no further justification to continue the imprisonment and I was released. The Court had no co-operation from me as I remained quite silent behind the stone walls of Pentridge and I thought of what a vain attempt it was by the Court to coerce me into submission.

The Family Court had found itself a weapon which wielded in its hands would enable it to display the flexing of its muscles and the power that it could assert with the use of the law on Contempt. There was almost no limitation to the extent to which that power could be used for the Court could prosecute and be judge and jury, but as with many regimes throughout history that have fallen through the indiscreet and irresponsible use of almost unlimited power, the Family Court, too, in its use of power may have sown the seed to its own destruction, which may yet be to eventuate.

On the 11th August, 1982, I was imprisoned indefinitely by the Family Court. This event arose from a trial judgment brought down on the 7th April, 1982, in which I was found guilty by the Family Court for refusing to meet the orders of the Supreme

Court of Victoria dated 12th November, 1976, in relation to maintenance and gross sum payments pursuant to a divorce granted at that time. I do not wish to labour you with the details of the case in this submission as the matter has received considerable media attention in recent years, and in the light of public interest in the case, the Family Court has ordered the release of its judgments and findings for distribution and publication.

I stated in 1982 both before the trial Court and Full Court that in my view, the Family Court was wrong and I have done so before every Family Court hearing of the case since 1982, and I hold fast to that view today. I was to serve 1,076 days on this occasion before being released at the Court's volition, on suspension of sentence on the 24th July, 1985, and it was made clear that the Court may order my re-imprisonment at any time, and that is the way the position remains to this day.

I do not just mean that the Family Court was wrong in the extreme use of penal sanctions, because, of course, it was - and that would be beyond argument, but rather I mean that it was wrong in its guilty verdict and in its wider-ranging orders, and so blatantly wrong was it in my view that even 'Blind Freddie' could have seen it, and I can only suggest that the Family Court must have seen it, too, and if that were found to be so, then the Family Court must be seen to be unfit to serve the people of this nation in the administration of the law. It cannot be allowed to be seen to be a law unto itself.

There are, of course, always inherent dangers that can arise in the wake of power having been used indiscreetly, indiscriminately, inconsiderately or plain wrongly, as to do so can invariably be counter-productive. No-one would deny that the traumas experienced by the judges of the Family Court, in the light of bombings and protest, have not augured well for that Court, and have suggested in a sense that if the Family Court does at times feel weighted with what has been called 'the impossible jurisdiction', then its problems have only been compounded by treating well-meaning individuals as criminals,

and the Family Court has been enabled to do so by the use of the power available to it in the law on Contempt with which it has become obsessed.

All that as it may be, I suppose that reason might have resolved most things, had it not been for the findings, judgments and orders of the Family Court in the HARPER V HARPER EX PARTIE ASCOT INVESTMENTS PTY. LTD. CASE (47287/79) being suspect of knowingly being wrong by the Judges of the Family Court who presided in the hearings that led to my imprisonment in 1982 for Contempt of Court. I do not doubt that as the nature of the law on Contempt is such that it can be abused in its use, and legally one could not deny the Court the right to do so, even if one might find it to be morally wrong, so long as the law on Contempt remains in its present form. The inherent danger, though, is that if the Family Court found falsely, and in so doing convicted wrongly a person on the charge of Contempt, then that would amount to judicial fraud, and if the Full Court of the Family Court was to support a trial Court's verdict and orders on hearing an appeal, and did so knowing that such was wrong, then that would have to mean the end of the existence of the Family Court of Australia as that total Court would no longer be with honour wherever its jurisdiction rested in the Commonwealth of Australia.

It must be appreciated that we live under the system of the rule of law and that any act that would undermine that system must be deemed to be tantamount to treason. The Judges are vested with enormous and independent power under the Constitution of the Commonwealth of Australia to administer the law. Any judge in the performance of his/her duty who acted in a way that would not be true to the law, would have to be considered as having committed an act of treason against the Constitution of the Commonwealth of Australia.

Judges and the Courts cannot be allowed to be considered to be above the law.

The law must prevail.

CONCLUSION

You will have observed that my submissions relate to what I consider to be matters of underlying principle, not the least of which is the requirement that must be met of Article 14 of the International Covenant on Civil and Political Rights to the effect that everyone shall, in the determination of any judicial proceedings, be entitled to a fair trial. This requirement has not been met, in my view, in many instances of the application of the law on Contempt, and the reason lies in the fact of the almost unlimited power afforded to the Courts by the very nature of the law on Contempt and that, coupled with the fact of the denial of impartial hearings being afforded to defendants, amounts to a potentially most dangerous weapon in the hands of an over-zealous or prejudiced Court, that could commit gross violation upon the right of a person to a fair trial.

In order that these problems can be overcome, my submissions suggest that consideration should be given to the establishment of independent tribunals or that the jury system be availed upon for the hearing of contempt charges, and that the need be considered for the establishment of independent sentencing tribunals in order that defendants be not only afforded a fair trial, but also balanced justice.

I have not concerned myself in commenting on matters of legal detail in the dissection of the law on Contempt, that in design might prevent its overuse, abuse and misuse, and nor have I concerned myself with what laws should be invoked in place of it to cater for varying situations in varying circumstances. I have not needed to do so because from my reading of your Summary of Reform Proposals, thoughts therein expressed appear to be quite sound.

Thank you,

[redacted]

DOUGLAS GRAHAM HARPER

18th June, 1986.

SUMMARY

HARPER V HARPER EX PARTE ASCOT INVESTMENTS PTY. LTD.
(FAMILY COURT OF AUSTRALIA)

Preparatory to the Case

In 1974, D.G. Harper was imprisoned for thirty days by the Magistrates Court for failure to pay $1,190 maintenance accrued following marital separation. On 18th November, 1974, income due to Ascot Investments Pty. Ltd. was ordered to be paid to the extent of $1,190 to the Court for Mrs. Harper and that order was duly met.

In 1975, D.G. Harper was imprisoned for six months by the Magistrates Court for failure to pay maintenance.

On the 29th September, 1975, the Supreme Court of Victoria placed restraining orders upon Ascot Investments Pty. Ltd. and a company in which it had an interest, and these orders were designed to prevent the transfer and registration of that interest, which was held by D.G. Harper in the capacity as nominee for Ascot Investments Pty. Ltd.

In 1976, D.G. Harper was on the 10th March held on remand in prison for ten days, whilst the Magistrates Court proceeded with investigations in respect to examination of means, and orders for seizure and sale of certain chattels were brought down, and Ascot Investments Pty. Ltd.'s bankers were ordered to pay all monies standing to the credit of its account, which was approximately $4,300, to the Court for Mrs. Harper in payment of maintenance accrued, and the bankers duly met that order. On 6th October, 1976, income due to Ascot Investments Pty. Ltd. to the extent of $7,413 was ordered to be paid to the Magistrates Court for Mrs. Harper for maintenance accrued, and the order was duly met.

In the aforesaid instances, the rights of an independent entity, Ascot Investments Pty. Ltd., which was not a party of the conflict, were being continually violated by the Courts, as the Courts' attention became directed to the association of D.G. Harper

with that Company. You will see as the case unfolds in this summation, that Ascot Investments Pty. Ltd. was to become ex parte to proceedings later in the Family Court, and Appellant before that Court and the High Court of Australia, as the Family Court's attention to the association became increasingly intense and the stage became set for the compounding of a folly, which may yet become ultimately to be seen as the Family Court's fatal mistake.

On the 12th November, 1976, divorce was granted by the Supreme Court of Victoria and orders were brought down for lump sum property settlement of $75,000 and maintenance of $120 per week with interest to be paid at 10% p.a. on arrears in default. It was further ordered that 7000 'A' Class shares in Ascot Investments Pty. Ltd., beneficially held by D.G. Harper in his own right, were to be taken and held by Mrs. Harper to better secure the ordered payments, and to have attached thereto a transfer signed by D.G. Harper as transferor, or failing him, then the Master of the Supreme Court of Victoria.

It could be presumed, in the view of D.G. Harper, that if the orders of payment were not met, then the 7000 'A' Class shares could be dealt with in satisfaction of the orders.

The Family Court enters the scene

The Case arose in the Family Court from the Supreme Court of Victoria orders in respect to lump sum property and maintenance payments pursuant to divorce granted 12th November, 1976, which became the responsibility of the Family Court of Australia to enforce under the Family Law Act 1975.

On the 15th May, 1979, D.G. Harper was brought before the Family Court under apprehension by Federal Police to face an examination of means and was on that day found guilty of Contempt in the face of the Court when answering 'No comment' to the question 'Where are the 7000 'A' Class Ascot Investment Pty. Ltd. shares?'. He was that day sentenced to twelve months imprisonment, but was released five months later on the 17th October, 1979, when the aforesaid shares were found in the course of Court-ordered investigations. In addition, he was restrained by orders from disposing of assets, and orders were made for the sequestration of his estate, and a Sequestor was duly appointed.

On the 10th October, 1979, Mrs. Harper filed application before the Family Court seeking, inter alia, orders requiring Ascot Investments Pty. Ltd. and its directors to register the transfer to her of the 7000 'A' Class shares. The Family Court (Frederico J.) refused to grant the application, but the Full Court of the Family Court found on appeal that the Court could order the transfer. Ascot Investments Pty. Ltd. then sought injunction pending an appeal to the High Court of Australia, and the appeal was upheld on the 10th February, 1981, and the order against the company was set aside in a 6 to 1 majority decision of the Full Bench. (Refer The Australian Law Journal, Vol. 55 No. 4, April issue 1981 - Ascot Investments Pty. Ltd. V Harper and Anor).

In late 1981, the Family Court (Hase J. - Trial Judge) tried ~~charged~~ D.G. Harper with failing to meet the orders in respect of lump sum property and maintenance payments of the Supreme Court of Victoria dated 12th November, 1976, and on the 7th April, 1982 he was sentenced to imprisonment indefinitely. The imprisonment was stayed pending an appeal to the Full Court of the Family Court. Also, on the 7th April, 1982, orders were made restraining Ascot Investments Pty. Ltd. from dealing in its own affairs, and those orders were in force from that day, and were not stayed pending the appeal and remain in force to this day. The finding of the trial judge (Hase J.) of the Family Court dated 7th April, 1982, was that $137,215 was then outstanding under those orders, and he expressed a belief that D.G. Harper controlled considerable wealth through his influence that amounted to a control of Ascot Investments Pty. Ltd. and he had found that D.G. Harper had the means and the ability to have the payments met. The logic advanced by the judge was that the defendant "carries the keys of his prison in his own pocket" and by this statement he meant that the defendant need only pay the amounts outstanding and thereby secure his release.

D.G. Harper and Ascot Investments Pty Ltd each promptly appealed to the Full Court of the Family Court (presided by Simpson J., Evatt C.J. and Strauss J.) and on the 11th August, 1982, the appeals ~~was~~ were dismissed, and D.G. Harper was duly imprisoned that day where he remained for 1,076 days until the 24th July, 1985, on which date he was

released on suspension of sentence, which remains in force to this day, and it was made clear that the Court may re-imprison him at any time. The orders on Ascot Investments Pty Ltd remain in force.

It should be noted at this point that in the opinion of the trial judge and the Full Court of the Family Court in 1982, the value of the 7000 'A' Class Ascot Investment Pty. Ltd. shares was in the vicinity of $300,000 and such were held by Mrs. Harper's Solicitors then, and are still so held to this day in order to better secure the Supreme Court-ordered payments not being met.

On the 18th June, 1984, during the period of imprisonment, D.G. Harper was brought before the Family Court and invited to make application to be released, and in extending that invitation, the Honourable Mr. Justice Hase stated that all that D.G. Harper had to do to secure his release was to meet the Court-ordered payments, and the Judge further re-stated that the Court held that D.G. Harper had the means and ability to pay, as he had it within the resources of Ascot Investments Pty. Ltd., which he controlled, directed and used as he wished, and which could have been used to satisfy the whole of the amount owed to the wife and the children.

This statement by the Judge, of course, is an absolute contravention of the judgment of the High Court of Australia dated 10th February, 1981, which stated that the Company is an independent entity in law and as a third party, as such, cannot be considered to be a party of the conflict, and therefore cannot be imposed upon by orders of a Court in this matter, nor be expected to have to perform any duty or accept any responsibility that it would not have to perform or accept in the normal course of its business.

D.G. Harper had no wealth or income of any kind to meet the orders of payment in 1982 or at any time thereafter and no evidence was produced to show that any wealth or income existed. The Family Court chose in 1982 to disregard the High Court judgment of 10th February, 1981, and made orders restraining Ascot Investments Pty. Ltd., and found that it was controlled by D.G. Harper, contrary to the finding and judgments of the High Court of Australia of 10th February, 1981.

Section 107 of the Family Law Act states that no person is to be imprisoned as a result of the contravening of, or the failure to comply with, an order for payment of money. The Family Court, however, was to find that Section 108 of the Family Law Act did allow the Court to order imprisonment as punishment for Contempt for wilful disobedience of an order. Contravene means to obstruct, to violate, to oppose - where there lies sanctity in Section 107, when the Judges of the Family Court can assume almost unlimited power under Section 108 to convict on Contempt. A reading in full of the High Court judgment of 10th February, 1981, would suggest that the Family Court would have assumed beyond power, as the High Court seems to presume only consideration of Section 107 in such circumstances. And, for the Family Court to have acted as they did in this instance, where the defendant had no wealth to meet the ordered payments, and to have imprisoned him in a sheer gamble tantamount to ransom, that wealth might have been forthcoming from a source that the Family Court had found that he controlled, after the High Court of Australia had found that he did not control, and to have imposed orders on that source, Ascot Investments Pty. Ltd., when the High Court had ruled that orders in the matter could not be imposed upon it, should be reasonable grounds to indict the Family Court for judicial fraud, and the presiding judges in the Harper V Harper ex parte Ascot Investments Pty. Ltd. Case for treason against the Constitution of the Commonwealth of Australia.