

## Explainer: why three government ministers might face contempt of court charges

Written by Lorraine Finlay, Lecturer in Law, Murdoch University

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Greg Hunt is one of three Turnbull government ministers ordered to appear before Victoria's Supreme Court on Friday. AAP/Lukas Coch

Victoria's Supreme Court [has ordered](#) three Turnbull government ministers to appear before it on Friday to explain why they should not be referred for prosecution for contempt of court. A journalist and newspaper editor who reported their remarks have also been ordered to attend.

The ministers – Greg Hunt, Alan Tudge and Michael Sukkar – [had made comments](#) critical of what they saw as Victorian judges' leniency when it came to sentencing terror offenders. Sukkar was quoted as claiming the judges' approach "has eroded any trust that remained in our legal system", and that:

Labor's continued appointment of hard-left activist judges has come back to bite Victorians.

Hunt was [reported as warning](#) that the courts:

... should not be places for ideological experiments in the face of global and local threats from Islamic extremism.

These comments were made in the context of Victoria's Court of Appeal hearing appeals last week against the leniency of sentences imposed on three men convicted of terror-related offences. This included an appeal against the ten-year jail sentence [imposed on Sevdet Besim](#), who was convicted of plotting to behead a police officer during the 2015 Anzac Day parade. The court had reserved its decision.

The judicial registrar, Ian Irving, [has said in a letter](#) to Attorney-General George Brandis that

the statements:

... appear to intend to bring the court into disrepute, to assert the judges have and will apply an ideologically based predisposition in deciding the case or cases and that the judges will not apply the law.

### What is contempt of court?

Contempt of court is an offence designed to protect the proper administration of justice and uphold the court's authority.

The power to punish contempt is part of the inherent jurisdiction of the state supreme courts. The [penalty for contempt](#) may be imprisonment and/or a fine. However, the offence is unusual in that no maximum penalty applies.

The reported comments appear to potentially be an example of contempt by publication. There are two types of contempt by publication – *sub judice* contempt and scandalising the court.

### Sub judice contempt

*Sub judice* contempt refers to publications that interfere with a specific proceeding that is currently before the court. This would apply in this case if the comments are viewed as referring to last week's Court of Appeal hearings.

For contempt to be found, the publication [has to have](#) :

... a real and definite tendency in practical reality to preclude or prejudice the fair and effective administration of justice.

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The Judicial Conference of Australia [has suggested](#) the ministerial remarks:

... could be misinterpreted as an attempt to influence the Court of Appeal in determining the CDPP's [Commonwealth Director of Public Prosecutions] appeal.

This needs to be weighed against two key factors.

The first is the recognised defence of public interest, which surely must be given great weight in this case when the topic of discussion is as important as terrorism and national security.

It may have been prudent for the ministers not to have commented until after the reserved decision had been handed down. But, the unfortunate reality is that terrorism-related prosecutions are almost a continuous feature of the modern Australian legal landscape.

Punishing general comments about sentences for terrorism-related offences as contempt risks seriously curtailing public discussion about one of the most important issues presently facing both Australia and the world.

The second factor is that the relevant court proceeding was an appeal before judges, and not a trial by jury. Judges are expected to put prejudicial material to one side, and are not considered to be at risk of improper influence to the same extent as jurors. To find *sub judice* contempt in such a case would be unusual.

### Scandalising the court

Scandalising the court is a more general form of contempt. It applies to publications seen as interfering with the continuing administration of justice by undermining public confidence in the courts.

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A publication may be held in contempt [if it](#) :

... aims at lowering the authority of the court as a whole or that of its judges and excites misgivings as to the integrity, propriety and impartiality brought to the exercise of the judicial office.

This is a jurisdiction that should only be exercised in exceptional cases. [It is recognised](#) that “the good sense of the community is ordinarily a sufficient safeguard” against improper judicial criticisms.

The general comments that were made about judicial appointments and “ideological experiments” arguably fall into this category. Justice Robert Beech-Jones [described the comments](#) as “a slur on the character of the Victorian judiciary”. He noted that:

... they should have never have been stated by any minister but especially by a minister in a government about a decision involving that government which is before the court.

Criticising the ministerial comments as being incorrect or unfounded is one thing. But this response seems to go further, and comes dangerously close to suggesting that any ministerial criticism of judicial appointments inevitably risks undermining public confidence in the judiciary.

Scandalising the court is a contempt that should only be applied in exceptional cases. Anything less than this results in the judiciary being perceived as effectively exempted from criticism, which itself runs the risk of undermining public confidence in the justice system.

### What’s at stake?

This case is extremely unusual. It is one thing to criticise the statements the ministers made – and the Judicial Conference of Australia was quick to do so. It is quite another for the court to

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threaten contempt proceedings.

It is obviously important to protect the institutional integrity and independence of the judiciary.

However, it is also important that the judiciary and judicial decisions are not immune from criticism – particularly when the issues concerned involve matters of such high public importance as Australia's response to terrorism.

*Lorraine Finlay is affiliated with the Liberal Party of Australia, being a member of the WA Division.*

*Joshua Forrester receives an Australian Postgraduate Award.*

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