Contempt of Court—Summary of the Consultation Paper

Introduction

1 The Attorney-General has asked the Victorian Law Reform Commission (the Commission) to report by 31 December 2019 on whether the law of contempt of court, and some related legislation that affects access to information about court proceedings, need to be changed.

2 The Commission has prepared a consultation paper which:

- explains the current laws
- considers the purposes that they are designed to serve
- considers options for reform, including relevant reforms which have been recommended or introduced in other jurisdictions
- poses questions about whether the laws need to be changed and, if so, what changes are necessary.

3 This paper provides a summary of the issues identified in the consultation paper and the related questions that the Commission has asked, to assist people and organisations with an interest in the review to prepare a written submission in response. **The deadline for submissions is 28 June 2019.**

4 It is not necessary to respond to every question that the consultation paper contains. The Commission is keen to encourage people to contribute to the consultation process, even if their interest or experience is confined to only a few of the issues or questions raised.

5 It is important to note that this is a summary only. You should refer to the consultation paper for more detail about any specific areas of law and the options for reform. The consultation paper also contains more information about the review, how to make a submission and how your submission will be used.

6 Access to the consultation paper, an online form for making a submission, the terms of reference for the review, and other information, is available on the Commission's website: https://www.lawreform.vic.gov.au/all-projects/contempt.

The laws under review

7 The scope and timing of the review are determined by the terms of reference that the Commission received from the Attorney-General. In summary, the review covers three related areas of law:

- **The law of contempt of court**. Contempt law gives the courts powers to deal with and punish conduct which might undermine or obstruct their ability to do their work fairly and effectively
- **The *Judicial Proceedings Reports Act 1958* (Vic)**. This Act restricts what can be lawfully published about certain court proceedings.
- **The legal framework for giving effect to prohibitions and restrictions on the publication of information about court proceedings**. The Commission is reviewing the legal framework for enforcing prohibitions and restrictions on publication in the modern age, particularly under the law of contempt, the *Judicial Proceedings Reports Act 1958* (Vic) and the *Open Courts Act 2013* (Vic).

8 Specific issues and questions about these laws are summarised later in this paper. The next section explains the key issues and principles that need to be taken into account when considering whether these laws should change and, if so, how.

Key issues and principles

9 The terms of reference require consideration of a wide and diverse range of issues, such as how the law can most appropriately:

- deal with disruptive behaviour in the courtroom
- ensure that jurors make decisions based solely on the evidence put before them in court and not on the basis of irrelevant, prejudicial information that they have sought out or been exposed to outside the courtroom
- protect witnesses from interference or harassment, while also ensuring that they fulfil their obligations to the court
- enforce compliance with court orders, including in civil proceeding
- safeguard public confidence in the authority of the courts in the face of allegations against judges and courts which are false or abusive
- protect the safety, dignity and privacy of victims while also affording them appropriate agency to identify themselves and speak about their experiences
- monitor and regulate the full gamut of online publications which seek to report and comment on matters before the courts and on the work of the courts more generally.

10 Given the nature and range of the issues raised, the terms of reference also require consideration of a number of rights and principles and how the law can most appropriately achieve an accommodation between those rights and principles, which include:

- the need to safeguard the proper administration of justice, which requires that all people have unhindered access to a fair, effective and efficient court system and that there is public confidence in and respect for the authority of that system.
- the right of a person charged with a criminal offence to a fair trial before a competent, independent and impartial court or tribunal.
- the importance of open justice, which requires that the administration of justice takes place in open court and can be reported on by those present in order to maintain confidence in the integrity, competence and independence of the courts

- the right to freedom of expression which includes the freedom to seek, receive and impart information and ideas of all kinds.
- the right of victims to be protected from unnecessary trauma, intimidation and distress, and unjustified interference with their privacy.
- the right of every child to such protection as is in their best interests and is needed by them by reason of being a child.

Question

1 What other principles of law, if any, are relevant to the Commission's consideration of the laws the subject of this review?

The law of contempt of court

11 The law of contempt empowers courts to prevent or punish conduct which interferes with the administration of justice, either in a particular case or more generally as a continuing process. It is a significant power which allows the court to fine or imprison a person. It is a power which case law says the courts should use sparingly, but whenever necessary to protect the effectiveness of the court system and public confidence in it.

12 Although a charge of contempt may result in conviction and fine or imprisonment, contempt matters are dealt with by a judge alone, rather than by a judge and jury, and do not follow the ordinary criminal process.

13 There is no simple definition of contempt of court. It has been said that it can assume an almost infinite diversity of forms.

14 Case law and academic texts list and describe general categories of contempt of court. Although they are neither discrete nor exhaustive, these categories provide a useful way of conceptualising, in general terms, the types of conduct which might be considered contempt of court.

15 The Commission's focus is on the most common types of contempt, namely:

- **Contempt in or near the courtroom: contempt in the face of the court**
- **Contempt by jurors**
- **Non-compliance with court orders or undertakings: disobedience contempt**
- **Contempt by publication: sub judice contempt**. This type of contempt concerns publications that interfere with or prejudice pending proceedings.
- **Contempt by publication: contempt by scandalising the court**. This type of contempt concerns publications that interfere with the administration of justice as an ongoing process.

General issues with the law of contempt

Uncertainty of scope

16 The power of the courts to punish for contempt is not limited to specific classes of conduct. It is a power directed towards safeguarding the proper administration of justice rather than prohibiting any precisely identified mischief.

17 Victorian courts have, in general terms, held that:

- The offence of contempt will be established if it can be proved beyond reasonable doubt that a person wilfully engaged in conduct and that conduct had a tendency to interfere with the administration of justice.
- It is not necessary to prove that the person had an intention to interfere with the administration of justice.
- It is not necessary to prove that the conduct did in fact interfere with the administration of justice.

18 The lack of precision in defining the offence of contempt affords the court the flexibility to deal with any conduct, however unforeseen or novel, which interferes with or has a tendency to interfere with the due administration of justice. In effect, the courts are able to take an approach of 'we will know it when we see it' to defining contempt of court.

19 The price of this flexibility is a lack of certainty about the type and scope of conduct which will attract conviction and punishment.

Question

2 **Do the courts need a general power to punish any conduct that has a tendency to interfere with the proper administration of justice? Alternatively, should the law specify the conduct subject to sanction? If so, should only conduct that is intended to interfere with the administration of justice be subject to punishment?**

Procedural safeguards

20 The right of an accused person to a fair trial is a central pillar of the criminal justice system. This is reflected in the *Charter of Human Rights and Responsibilities Act 2006* (Vic) which establishes a framework for the protection and promotion of human rights in Victoria.

21 Although a person found guilty of contempt of court may be convicted and imprisoned or fined, contempt proceedings are not conducted as criminal proceedings. Contempt proceedings are heard by a judge sitting alone, under the court rules which govern civil proceedings.

22 The unusual nature of contempt proceedings has given rise to considerable uncertainty about the laws, principles and procedures that apply. It has also raised concerns about whether the current procedure guarantees an alleged contemnor, faced with the serious prospect of imprisonment and/or a fine, a fair process which incorporates the procedural safeguards normally expected in judicial proceedings of a criminal nature.

Question

3 Should the procedure for filing and prosecuting a charge of contempt of court be the same as for other criminal offences? If not, what are the reasons necessitating a different procedure for contempt of court and what should be the features of that procedure?

Overlap with criminal law

23 Increasingly, conduct which may constitute contempt of court is also criminalised under specific statutory offence provisions. These provisions provide greater clarity and certainty about the type of conduct which will attract criminal sanction and the penalty that will apply. However, these provisions do not necessarily oust the broader contempt jurisdiction of the court. This adds to the potential confusion and complexity of this area of law.

24 There are also several common law offences which overlap and have a strong correlation with the law of contempt.

25 The intersection between statutory and common law offences and the courts' power to punish for contempt provides options for dealing with an alleged contempt. This in turn gives rise to the risk of inconsistency and unfairness. A person charged under a statutory offence provision or with a common law criminal offence will have the benefit of all the procedural safeguards which ordinarily apply to criminal proceedings.

26 However, there is limited guidance on when a person should be prosecuted for a statutory or common law offence rather than being dealt with under the law of contempt.

Question

4 Is there a need for statutory guidance on when the court may exercise its power to punish for contempt of court in circumstances where the conduct is also a statutory offence? If so, what guidance should be provided?

Penalties

27 Statutory limits are placed on the penalties that the Magistrates' Court, Children's Court and Coroners Court may impose for contempt of court. There is no statutory limit on the maximum penalty that may be imposed for contempt of court by the County or Supreme Courts.

28 Punishment for contempt in the County and Supreme Courts is regulated by the court rules which govern civil proceedings. Those rules do not distinguish between types of contempt and afford the court considerable discretion to determine whether a punishment should be imposed for contempt and what form it should take.

29 It is uncertain and has not been clearly resolved by the courts whether and what provisions of the *Sentencing Act 1991* (Vic) are relevant to contempt proceedings, and on what legal basis.

30 Apologies can play an important role in contempt proceedings. An apology may not only mitigate the punishment imposed, it may be regarded as 'purging' the contempt so that it is no longer necessary to impose any penalty or even commence contempt proceedings.

Questions

5 Should there be a statutory maximum penalty for contempt of court? If so:

(a) What penalties should apply?

(b) Should different penalties apply for different manifestations of contempt?

6 What weight, if any, should be given to apologies in determining whether and what penalty is imposed for contempt of court?

7 Should the *Sentencing Act 1991* (Vic) apply to contempt proceedings?

Warnings

31 Contempt warnings play an important, although informal, role in addressing perceived or potential interferences with the proper administration of justice.

32 Contempt warnings allow the courts to assert their authority without actual recourse to their considerable punitive powers.

33 The use of contempt warnings demonstrates the highly discretionary nature of the courts' contempt power. However, because contempt warnings do not represent a formal procedural step, they may also give rise to procedural uncertainty and even, in some circumstances, procedural unfairness.

Questions

8 In what circumstances do the courts give warnings for contempt?

9 When should contempt warnings be given?

10 Is there a need for guidance to the courts on the use of contempt warnings? If so, should such guidance be set out in statutory provisions?

11 Is there a need for greater clarity as to whether, when a court gives a contempt warning, there has been a finding that a contempt has in fact been committed and, if so, the status or effect of such a finding?

Contempt in or near the courtroom: contempt in the face of the court

34 All Victorian courts have power to punish 'contempt in the face of the court', which is essentially behaviour in the courtroom, or in the vicinity of the courtroom, which interferes with or tends to interfere with the proper administration of justice.

35 This power to punish contempt in the face of the court is one of the mechanisms that judicial officers use to control proceedings before them and, in particular, to address disruptive behaviour or refusals to comply with lawful directions. The power of judicial officers to maintain order and authority in the courtroom, both in fact and appearance, is important to the efficient and fair conduct of proceedings and to public confidence in those proceedings. It is also important in ensuring that witnesses, jurors and others with duties to the court are able to perform those duties effectively and without fear or intimidation.

36 Contempt in the face of the court is an offence that can be committed in a multitude of ways including:

- assaulting or threating the presiding judicial officer, a witness, a juror, counsel or other officers of the court
- insulting or behaving disrespectfully towards the court or presiding judicial officer including by swearing
- disrupting proceedings, including by yelling or protesting, engaging in outbursts of anger or abuse, or repeatedly interrupting
- refusing, as a witness, to be sworn or answer a question or engaging in prevarication
- making an unauthorised recording of proceedings by taking photographs or filming.

37 There is no exhaustive statutory definition as to what constitutes the offence of contempt in the face of the court. This allows the court the flexibility to respond to varied and changing circumstances. However, it also gives rise to a lack of clarity about the type of conduct which might attract punishment for contempt. Issues arise about whether the power to punish contempt in the face of the court should encompass:

- conduct which is insulting or disrespectful but does not disrupt proceedings
- conduct which is already covered by other statutory criminal offences
- conduct which is not directly seen or heard by the presiding judicial officer.

38 The power to punish contempt in the face of the court is an exceptional and very significant power because it allows a presiding judicial officer, where it appears to them that a contempt in the face of the court has been committed, to directly charge, summarily try and sentence the alleged contemnor themselves. This summary procedure enables the court to deal with a contempt in the face of the court swiftly and decisively by allowing the presiding judicial officer to effectively place themselves in the position of prosecutor, witness, jury and judge.

39 However, issues arise about whether there is an appropriate balance between empowering the court to deal promptly and effectively with courtroom disruptions and the requirement to afford alleged contemnors a fair and consistent process. Further, issues arise about whether the current law and procedure may disproportionately or unfairly impact on particular groups, such as unrepresented litigants or people with mental health issues.

Questions

12 Is there a need to retain the law of contempt in the face of the court?

13 If the law of contempt in the face of the court is to be retained, should the common law be replaced by statutory provisions? If so, how should it be defined and what fault elements, if any, should be required?

14 If the law of contempt in the face of the court is to be replaced by statutory provisions, should insulting or disrespectful behaviour be included within the scope of the offence?

15 If the law of contempt in the face of the court is to be replaced by statutory provisions, should it be limited to conduct which is directly seen or heard by the presiding judicial officer? In other words, should the underlying test be whether the judicial officer can decide the contempt on the basis of their own observations, without the need to receive evidence from other witnesses?

16 Should conduct covered by other criminal offences be excluded from any statutory offence of contempt in the face of the court?

17 Should the procedure for initiating, trying and punishing a charge of contempt in the face of the court be set out in statutory provisions? If so, what should the procedure be? In particular:

(a) Is there a need to preserve the power of the courts to deal with contempt in the face of the court summarily?

(b) Should the process for dealing with a disruption to proceedings be separated from the process for trying and punishing the disruptive behaviour?

(c) Who should try the offence? Should the offence be able to be tried by the judicial officer before whom the offence was committed?

18 What measures, if any, are required to ensure there is a consistent approach by judicial officers to disruptive behaviour in the courtroom?

19 Under the current law, does the actual or threatened use of the power to punish for contempt in the face of the court affect certain groups of people unfairly? If so, how should this be addressed?

Contempt by jurors

40 Juries play a critical role in the administration of justice in Victoria, particularly in the criminal justice system. Trial by jury helps to ensure that an accused person receives a fair trial according to law and that members of the community are directly involved in the judicial process. Jury trials help to safeguard the rights of the accused by limiting the power of the state, and to ensure that justice is administered in accordance with community standards.

41 The Victorian jury system is maintained and protected by statute, the law of contempt of court and other common law offences.

42 The fundamental purpose of these laws is to preserve the integrity of the trial process by ensuring on the one hand that jury members are not interfered with, and on the other that jurors make decisions based solely on the evidence put before them in court. A suite of laws have developed to ensure that jurors are 'shielded' or 'quarantined' from extraneous information or improper influence.

43 The two main statutes which regulate juries in Victoria are:

- *the Juries Act 2000* (Vic), which regulates the system of trial by jury
- *the Jury Directions Act 2015* (Vic), which regulates the instructions, known as 'directions', given to juries during trials.

44 Under the Juries Act it is an offence for a juror to, among other things:

- fail to answer questions, fail to produce a document or to give an answer that is false or misleading
- fail to inform the Juries Commissioner of their disqualification or ineligibility for service
- supply false or misleading information
- fail to attend for jury service
- refuse to be sworn or make affirmation
- make enquiries about trial matters
- disclose their deliberations.

45 Much of this conduct could equally be categorised as a contempt of court and the Juries Act specifically preserves the power of the court to deal with and punish such conduct as a contempt. However, there have been few Victorian cases involving contempt by jurors.

46 Jurors take an oath to faithfully and impartially try the issues before them and to give a true verdict according to the evidence presented in the trial which has been found to be admissible. There is nevertheless a risk that jurors may independently access information about trials and may make decisions based on information that was not presented and tested in court.

47 The internet has exacerbated existing difficulties with preventing juror research and exposure to prejudicial, and potentially inaccurate, material. Jurors can readily search for information about cases, and courts can struggle to shield jurors from material that is now so easy to access and share. Jurors may seek information about trials, or be unwittingly exposed to prejudicial material.

48 Section 78A of the Juries Act provides that a juror must not make an enquiry for the purpose of obtaining information about a party to the trial or any matter relevant to the trial, except in the proper exercise of their functions as a juror.

49 Jurors are also prohibited from disclosing information about deliberations to people outside of the jury. Contravention of this restriction is not a new concern, however, the internet, social media networks and modern technologies such as the smartphone expand the reach and impact of juror communications.

50 Under the Juries Act, it is an offence for a juror, or former juror, to disclose statements made, opinions expressed, arguments advanced or votes cast in jury deliberations if they have reason to believe the information will, or is likely to, be published to the public.

51 It is unclear whether disclosure by jurors of deliberations after a trial in Victoria constitutes contempt of court, although the courts have expressed disapproval of such actions.

Questions

20 Does the *Juries Act 2000* (Vic) adequately regulate the conduct of jurors and potential jurors? If not, what amendments to the *Juries Act 2000* (Vic) should be made?

21 To the extent courts have the power to deal with juror contempt at common law, is there a need to retain this power?

22 If the law of juror contempt is to be retained, should the common law be replaced by statutory provisions? If so:

(a) How should it be defined?

(b) What fault elements, if any, should be required?

(c) Should conduct already covered by other statutory offence provisions be excluded?

23 Do current jury directions adequately instruct juries about determining cases only on the evidence, prohibitions on research and disclosure and asking questions of the trial judge? If not, what reforms are required?

24 How well are jurors and potential jurors currently educated about their functions and duties during the selection and empanelment process? How should they be educated about, and assisted in performing, their functions and duties?

Non-compliance with court orders or undertakings: disobedience contempt

52 The ability of courts to enforce their orders is of critical importance to the rule of law and to ensuring that our system of civil dispute resolution is efficient and commands the respect of the community.

53 Disobedience contempt arises when a person fails or refuses to comply with an order of the court or an undertaking given to the court. In these circumstances, commencing contempt proceedings against the person is one mechanism by which to compel compliance. Contempt proceedings may also provide a mechanism to punish the non-compliance, particularly where it involves deliberate defiance of the court or where compliance is no longer possible.

54 Contempt proceedings arising from non-compliance with court orders are generally commenced by the party for whose benefit the order was made. However, disobedience contempt serves two interconnected purposes:

- coercing compliance with court orders and undertakings for the benefit of the party in whose favour the order was made
- punishing non-compliance with court orders and undertakings in order to safeguard the authority of the court and ensure that the public has confidence in the fact that court orders cannot be disobeyed without consequence.

55 The different contexts in which disobedience contempt arises, and the different purposes for which disobedience contempt proceedings are initiated, have led to uncertainty about the nature of the proceedings and the procedures that should be adopted. In particular, those differences have led to an ambiguous distinction between:

- civil contempt which serves the purpose of *compelling obedience* with court orders, and
- criminal contempt which serves the purpose of *punishing disobedience*.

56 The High Court has described the distinction between civil and criminal contempts as illusory and unsatisfactory. The courts have at the same time noted that the significance of the distinction has become less relevant to the procedures adopted, the standard of proof required and the penalties available.

57 Nonetheless, the courts in practice continue to make this distinction. The case law shows that categorisation of a contempt as civil or criminal is often determined at the penalty stage of proceedings and is closely linked to the question of whether or not a conviction should be recorded.

58 Case law also indicates that disobedience contempt proceedings should not be commenced lightly, particularly when other more appropriate civil remedies are available to enforce an order of the court. In practice, there are many alternative mechanisms which a party may use to enforce a court order made in their favour or an undertaking given to the court. Further, where court orders are made under a statutory regime, the relevant Act may specifically provide for enforcement powers and procedures and also include statutory offences in relation to non-compliance.

59 In view of the range of alternative enforcement options, it is arguable that it is no longer necessary for parties to have recourse to contempt proceedings as a means to compel compliance with court orders.

Questions

25 Is there a need to retain the law of disobedience contempt?

26 If the law of disobedience contempt is to be retained:

(a) What benefit does the distinction between civil and criminal contempt provide? Should this distinction be maintained?

(b) Should the common law of disobedience contempt be replaced by statutory provisions? If so, should it be replaced by statutory offence provisions and/or a statutory procedure for civil enforcement of court orders and undertakings? In either case,

i. Who should be responsible for and/or be able to commence proceedings?

ii. What should the party commencing proceedings be required to establish and to what standard of proof?

iii. What penalties should apply?

Contempt by publication: sub judice contempt

60 The common law of sub judice contempt operates to restrict the publication of material which has, as a matter of practical reality, a real and definite tendency to prejudice legal proceedings pending in court at the time of publication. Sub judice means 'under judicial consideration'. Sub judice contempt aims to ensure a fair trial by quarantining jurors from extraneous information.

61 The law of sub judice contempt is underpinned by the following assumptions:

- Media publicity can influence jurors by diverting them from the evidence before them, contributing to preconceptions which will make them partial and unreliable when deliberating.
- These preconceptions and prejudices will survive the length of a trial and deliberations despite judicial directions.
- The public accesses news information through traditional media such as newspapers, television and radio broadcasts and such news information can be controlled, 'taken-down' or prevented from being published.

62 There are conflicting views as to the validity of these assumptions in the 21st century, with conflicting judicial opinion and research about the influence of media publicity on jurors and their decision-making capabilities.

The tendency test

63 The existence of different formulations of the 'tendency' test have been criticised for being uncertain and creating a broad scope of liability. In particular, there are issues surrounding how likely it must be that jurors or witnesses will be exposed to and recall the publication and that the publication will prejudice an accused's right to a fair trial.

64 Case law appears to indicate that directions given to a jury to ignore media publicity are not considered by courts to be a relevant consideration when determining the tendency of a publication to prejudice an accused's right to a fair trial. This is despite the 'overwhelming judicial experience' that juries follow such directions.

The definition of 'publication'

65 An act of 'publication' must occur for there to be a sub judice contempt. The courts have held that the act of publication occurs when the information 'is made available to the general public' or to 'a section of the public which is likely to comprise those having a connection with the case'.

66 It is unclear whether a social media post communicated to an individual or private group of people would satisfy the definition of publication, as well as whether new forms of media are captured, such as YouTube videos.

67 There is increasing support for the view that the publication of information online occurs for as long as the information is available, regardless of whether or not the material is accessed.

68 This definition of 'publication' as a continuing act means that online publishers could be liable for archived material published before legal proceedings have commenced as well as material published after legal proceedings have concluded if the accused person is charged with another crime or there is an appeal.

When are proceedings 'under judicial consideration'?

69 Sub judice contempt only operates to restrict publication while legal proceedings are 'pending'.

70 There is some uncertainty about when criminal proceedings are considered to commence and conclude for this purpose.

71 Proceedings continue to be pending until all avenues of appeal have been exhausted or an appeal judgment has been handed down.

72 This definition of when proceedings have concluded also gives rise to uncertainty, for example about whether or not the law operates to prevent publicity from impacting a judicial officer who may be delivering the sentence after the verdict or presiding over an appeal, well after any jury involvement has ceased.

The strict liability standard

73 Liability for sub judice contempt falls on any person found to be 'responsible' for the contents, production, distribution or broadcasting of a publication regardless of their knowledge of the material. No intention to interfere with the administration of justice is required.

74 Given the criminal nature of contempt and the 'extraordinary procedures and punishments available', it has been suggested that strict liability whereby no intention to prejudice is required, is inconsistent with the approach taken in relations to other criminal offences and tilts the balance away from freedom of expression.

75 Accordingly, a number of alternatives to the current strict liability approach have been proposed.

76 However, the purpose of sub judice contempt is to protect the administration of justice and ensure a fair trial. Consequently, there may be justifications for the retention of the strict liability approach.

The public interest principle

77 Although a publication may be found to have a tendency to prejudice legal proceedings, a contempt will not arise if the publication was a fair and accurate report of proceedings or the publication relates to a matter of public interest.

78 There is uncertainty around the scope and application of this principle. The effect is that publishers may err on the side of caution and not publish material even if the subject is of significant public interest. Alternatively, some other publishers may 'dress up' the material as being in the public interest, as a means of discussing specific legal proceedings.

Can jurors be shielded from prejudicial information in today's media landscape and do they need to be?

79 The law of sub judice contempt operates as a preventative means of shielding jurors from publicity that is irrelevant or may affect their impartiality.

80 However, the media landscape and the way people consume and share information is changing. The internet has caused significant change in the way news is produced, disseminated and accessed, with enormous volumes of material being made available immediately and permanently. Traditional media outlets and journalists are no longer the sole publishers responsible for potentially prejudicial publications. Content can now be published and shared across different media and platforms by a wider range of individuals within and outside the jurisdiction. These changes have given rise to a growing number of examples which demonstrate that restricting and controlling news about legal proceedings has become more complicated and in some circumstances may be impossible.

81 Relevantly, these changes to how people access and consume information have also affected how jurors comprehend evidence and directions within the courtroom. People who make up juries today are accustomed to daily news, engaging footage, concise and quick information and a level of control over what information they consume.

82 Together, these changes suggest that not only is the task of protecting jurors from prejudicial publicity becoming more complicated, but also that restrictions such as sub judice contempt may not be adequately adapted to, or appropriate for, the 21st century jury.

83 Moreover, there are contradictory and inconsistent views among the judiciary and in research about the extent to which jurors need to be protected from prejudicial publicity. Modern courts are increasingly rejecting the assumption that jurors are exceptionally fragile and prone to prejudice. Instead, the courts often assume that juries can follow judicial directions and make decisions based only on the evidence presented and tested in court, even if they may have been exposed to irrelevant or prejudicial material.

Questions

27 Is there a need to retain the law of sub judice contempt?

28 If the law of sub judice contempt is to be retained, should the common law be replaced by statutory provisions? If so:

- (a) How should the law and its constituent elements be defined, including:
  - i. The 'tendency' test
  - ii. The definition of 'publication'
  - iii. The beginning and end of the 'pending' period?
- (b) Should fault be an element, or alternatively should there be a defence to cover the absence of fault?
- (c) Should the public interest test be expressly stated?
- (d) Should upper limits for fines and imprisonment be set?

29 Is there a need for greater use of remedial options, for example jury directions or trial postponement? If so:

- (a) How should this be facilitated?
- (b) Are other mechanisms, for example pre-trial questioning of jurors, also required?

30 Is there a need for education about the impact of social media on the administration of justice and sub judice contempt to be targeted to particular groups, for example, judicial officers and jurors?

31 What other reforms should be made, if any, to this area of the law of contempt of court?

Contempt by publication: scandalising the court

84 The type of contempt known as 'contempt by scandalising the court' and 'scandalising contempt' concerns acts or publications which are found to impair public confidence in the judiciary. The offence is aimed at protecting the administration of justice as an ongoing process, meaning the scope of this law is not limited to publications that comment on a specific trial. Rather, the offence covers publications which comment on the courts and judges generally.

Uncertainty about what constitutes scandalising contempt

85 A number of cases have described the test for establishing scandalising contempt as an 'inherent tendency' to interfere with the administration of justice.

86 Similarly to sub judice contempt, the 'inherent tendency' test has been criticised for being imprecise, broad and as setting a low threshold, thereby impacting on freedom of expression.

Balancing scandalising contempt and fair criticism

87 The courts have recognised that there is a delicate balance between protecting the public's confidence in the judiciary and allowing for fair criticism and that in fact fair criticism is a necessary component of the administration of justice.

88 It remains unclear, however, when allegations of partiality or impropriety may be properly distinguished from fair or 'intemperate, yet permissible, criticism'.

Truth as a defence

89 According to case law, it appears that criticism that is based on fact or is justifiable may not constitute scandalising the court. However, it is unclear whether truth operates as a complete defence as it does in defamation.

90 An identified problem with having a defence of truth is that it could have the effect of putting the judge on trial and expose the judge's conduct to external scrutiny.

Prosecution of high-profile individuals

91 The relevance of the status and influence of an individual when prosecuting for scandalising contempt has been criticised, particularly when an accused is prosecuted to the exclusion of the media outlets which published the statement.

92 The ALRC also noted that the effect of selective prosecution of influential speakers and writers can become, at worst, 'an overt political weapon used against prominent individuals who "challenge the system"'.

Apologies and retractions

93 Apologies can work to either prevent a prosecution or mitigate a sentence in any case of contempt. However, there is uncertainty around when and how an apology should be made for contempt and how it may affect a prosecution or sentencing for scandalising contempt.

Is the law adaptable and relevant?

94 The law of scandalising contempt is based on the assumption that public confidence in the judiciary must be maintained to ensure the proper administration of justice. The evidence behind this assumption is lacking and requires testing.

95 Judicial officers have acknowledged that they should be robust to criticism, and that being criticised is part of the job of a judicial officer.

96 The assumptions underlying scandalising contempt have been questioned given:

- the nature of criticism of the judiciary today, acceptance of greater scrutiny of the courts and the impact of online and social media
- the global shift towards freedom of speech and the impact of the implied freedom of political communication
- alternative avenues for dealing with criticism of the court today and whether they provide a more appropriate balance between maintaining the integrity and authority of the court and freedom of speech.

Questions

32 Is there a need to retain the law of scandalising contempt?

33 If the law of scandalising contempt is to be retained, should the common law be replaced by statutory provisions? If so:

(a) How should the law and its constituent elements be described, including:

i. The 'tendency' test

ii. What constitutes 'fair comment'?

(b) Should truth be a defence?

(c) What fault elements, if any, should be required?

(d) What weight, if any, should be given to an apology?

34 In stakeholders' experience, is criticism of the judiciary on social media a problem that should be dealt with by a law such as scandalising contempt or is it best managed outside of the law?

35 What other reforms, if any, should be made to this area of law?

Judicial Proceedings Reports Act

97 The restrictions in the *Judicial Proceedings Reports Act 1958* (Vic) are a product of unrelated amendments over time and there is no unifying subject matter or purpose to them. In relation to reporting on judicial proceedings, the Act restricts:

- publication of indecent material designed to injure public morals;
- publication of the details of divorce and related proceedings
- publication of the details of directions and sentence indication hearings in the County and Supreme Court
- publication of particulars likely to lead to the identification of persons against whom a sexual offence is alleged to have been committed.

98 These restrictions apply automatically without the need for a court order and if a person contravenes the restrictions they can be charged with a criminal offence.

99 The prohibitions in the Act operate in addition to any discretionary suppression orders which might be made in a specific case, for example, under the *Open Courts Act 2013* (Vic).

100 The Act does not contain an exhaustive list of statutory prohibitions on publication of materials arising from judicial proceedings. There are other statutory prohibitions located across a number of other subject-specific Acts.

Indecent matters and public morals

101 Section 3(1)(a) of the Judicial Proceedings Reports Act provides that in relation to any judicial proceedings it is not lawful to print or publish, or to cause or procure to be printed or published:

> any indecent matter or indecent medical surgical or physiological details being matter or details the publication of which would be calculated to injure public morals.

102 The prohibition was originally enacted in 1929 and community attitudes and regulatory approaches to restricting publication have altered significantly over that time. It appears that there is limited awareness of the provision and that it may be an outdated anomaly.

Question

36 **Should the prohibition in section 3(1)(a) of the *Judicial Proceedings Reports Act 1958* (Vic) on the publication of indecent matter and indecent medical, surgical or physiological details in relation to any judicial proceedings be repealed?**

Divorce and related proceedings

103 The reporting prohibition in Section 3(1)(b) of the Judicial Proceedings Reports Act was also originally enacted in 1929. It restricts the details that may be reported about four types of family law proceeding, two of which have since been abolished by Commonwealth statute. Publication of reports on the two remaining types of family law proceeding is regulated by a Commonwealth statutory provision - section 121 of the *Family Law Act 1975* (Cth).

104 Therefore, to a large extent section 3(1)(b) has no operative effect and is effectively a dead letter.

Question

37 **Should the prohibition in section 3(1)(b) of the *Judicial Proceedings Reports Act 1958* (Vic) on the publication of the details of divorce and related proceedings be repealed?**

Directions hearings and sentence indications

105 Section 3(1)(c) of the Judicial Proceedings Reports Act restricts the matters that may be printed or published about a directions hearing held under Part 5.5 of the *Criminal Procedure Act 2009* (Vic) or a sentence indication hearing held under Part 5.6 of that Act.

106 The restriction is qualified in two important ways:

- The restriction on publication is temporary and only remains in place until the conclusion of the trial of the person charged, or of the last of the persons charged.
- On application by an accused person, the court may order that the restriction does not apply.

107 Through section 3(1)(c), the legislature has struck a balance in relation to criminal directions hearings and sentence indications held in the County Court and Supreme Court. The statutory approach adopted allows directions hearings and sentence indications to be held in open court and attended by the public without requiring:

- the parties to be diligent in identifying and anticipating what potentially prejudicial information might be reported from the proceedings and to seek a suppression order accordingly
- the presiding judicial officer to evaluate the potentially prejudicial effect of matters discussed and the necessity of suppression orders.

108 The result of the restrictions, however, is that only the most rudimentary contemporaneous reporting on directions hearings or sentence indications is allowed.

109 The restrictions in section 3(1)(c) are also unusual in that there are no equivalent default statutory prohibitions in Victoria in relation to other preliminary hearings, such as bail or committal proceedings.

110 The Commission's preliminary research suggests that awareness of section 3(1)(c) of the Judicial Proceedings Reports Act is limited.

Questions

38 Are the statutory prohibitions in section 3(1)(c) of the *Judicial Proceedings Reports Act 1958* (Vic) on the reporting of criminal directions hearings and sentence indication hearings necessary? If so:

(a) What should be the scope of such prohibitions?

(b) Where should such prohibitions be located to optimise awareness of their existence and operation?

(c) Should other pre-trial hearings, such as bail hearings or committal proceedings also be subject to statutory reporting restrictions?

Victims of sexual offences

111 Section 4(1A) of the Judicial Proceedings Reports Act prohibits the publication of any matter that contains any particulars likely to lead to the identification of a person against whom a sexual offence is alleged to have been committed. The prohibition in section 4(1A) is not restricted to reporting on judicial proceedings. It applies before proceedings commence and continues after proceedings have concluded.

112 The prohibition in section 4(1A) is not limited to listed particulars about a victim and includes any particulars 'likely to lead to the identification' of the person against whom the offence is alleged to have been committed. This means that the precise scope of information captured by the prohibition cannot be easily defined.

113 The basis for the prohibition in section 4(1A) stems from an acknowledgment that significant distress, shame, embarrassment and social stigma are still experienced by many sexual assault victims. Further, the nature of the evidence in such cases can cover sensitive and acutely personal matters. Where an accused is charged with sexual offences, ensuring a fair trial for all participants requires particular vigilance to safeguard the privacy rights of the victim and to ensure that the justice ultimately delivered by the courts is not undermined by the trauma endured to achieve it.

114 The anonymity of a person accused of a committing a sexual offence is not protected by the Judicial Proceedings Reports Act. However, sometimes the relationship between the accused and the victim is such that publishing the identity of the accused would likely lead to the identification of the victim. In these circumstances, the accused also benefits from the protection of section 4(1A) and does not have to endure the publicity of criminal proceedings and, where relevant, conviction, in the ordinary way.

115 The prohibition on identifying victims in section 4(1A) of the Judicial Proceedings Reports Act operates as an automatic statutory prohibition. It does not rely on a victim being sufficiently informed and empowered to proactively seek a suppression order from the court. However, the imposition of mandatory anonymity on sexual assault victims arguably has the potential to remove a victim's agency and affirm and perpetuate the stigma it is designed to address.

116 It this context, it necessary to ensure that statutory provisions which are designed to protect victims of sexual offences do not also deny them the ability to talk about their experiences.

Question

39 Should the statutory prohibition on identifying victims of sexual offences under section 4(1A) of the *Judicial Proceedings Reports Act 1958* (Vic) continue to apply automatically from the time of complaint, throughout proceedings and after proceedings have concluded? If so:

- (a) What further legislative guidance should be provided about the scope of the prohibition?
- (b) Should the prohibition continue to be located in the *Judicial Proceedings Reports Act 1958* (Vic) or is the provision more appropriately located in other legislation?

40 How should the law accommodate a victim's ability to speak?

41 When should a victim be able to consent to publication of identifying material?

- (a) Should the court's supervision and permission also be required?
- (b) What, if any, special provision should be made for child victims?

Temporary restrictions—sex offences and family violence

117 As part of its review of the Judicial Proceedings Reports Act, the Commission has been asked to consider whether a further statutory prohibition on publication should be introduced which would temporarily restrict the publication of sensitive information in relation to alleged sexual and family violence criminal matters upon the laying of charges.

118 There are a number of statutory provisions which may be relied upon to protect the identity, safety and wellbeing of victims of sexual or family violence at the early stages of criminal proceedings. However, some of these statutory provisions require an application for a suppression order to be made. Anecdotal evidence suggests that, by the time a proper assessment is made of whether an order is necessary and an appropriate application made it may be too late, with private and distressing information about the victim and the circumstances of the offending already reported in the public domain.

119 At the same time, there is a significant public interest in raising awareness about the frequency, nature and circumstances of both sexual and family violence in the community. This must be balanced against the level of caution employed to ensure that existing protections for victims' privacy and dignity operate effectively.

Questions

42 Is a statutory prohibition required to temporarily restrict reporting in cases where an accused has been charged with a sexual or family violence criminal offence? If so:

(a) What information should be permitted to be published—should the court have discretion to order that additional or less information be published?

(b) When should the temporary prohibition apply?

(c) Should the temporary prohibition only apply to cases where the accused has been charged with a sexual or family violence criminal offence?

Enforcing laws that prohibit or restrict publication

120 The common law of contempt, the *Judicial Proceedings Reports Act 1958* (Vic) and the *Open Courts Act 2013* (Vic) are all sources of prohibitions and restrictions on publication. They apply in varying ways. The Commission considers whether procedural, administrative and legislative changes are required, and can be implemented, to ensure these laws are effectively, consistently and fairly enforced.

121 Courts apply and enforce prohibitions and restrictions on publication for a range of reasons, including protecting the identities of people involved in cases, such as child witnesses, or shielding jurors from prejudicial material about an accused person who is on trial. Effective enforcement is critical to securing fair trials for parties, witnesses, victims and the community.

122 The internet and other modern technologies challenge the courts' ability to enforce prohibitions and restrictions on publication. If prohibitions and restrictions are rendered futile, there may be significant implications for the maintenance of fair trials and public confidence in the court system.

123 The Commission focusses on a number of issues relevant to enforcing laws that prohibit and restrict publication, which are summarised below.

Online publications

124 Online publication of information raises legal and practical issues for courts seeking to enforce prohibitions and restrictions on publication. These issues include:

- how to define 'publication'
- the courts' power to enforce Victorian laws in other Australian states and territories and in foreign countries
- identifying the original publisher of information posted online when the information has been republished multiple times or was originally published anonymously
- how courts determine the liability of online intermediaries, such as internet service providers and social media companies
- how courts approach enforcement when prohibitions or restrictions on publication are rendered futile by subsequent events, such as the posting, sharing and discussion of suppressed information on social media networks like Facebook, Twitter and Instagram.

Questions

43 Should the terms 'publish' and 'publication' be defined consistently? If so, how should these terms be defined?

44 Are there any other issues arising out of the definitions of 'publish' and 'publication' that should also be addressed?

45 To what extent are potential reforms to the definition of the terms 'publish' and 'publication' affected or limited by Commonwealth law?

46 What reforms, if any, should be made to address the liability of online intermediaries for the publication of prohibited and restricted information?

Enforcing laws outside Victoria

125 Prohibitions and restrictions on publication of information vary in their applicability to jurisdictions outside Victoria.

126 In some circumstances the online publication of prohibited or restricted information about a court case may render the prohibition or restriction futile. An online distributor may be located outside Victoria, and there may not be a local distributor to hold liable. An online distributor may also be anonymous, making it difficult for courts to identify the original source of the publication so as to determine liability.

Question

47 Should the law seek to enforce prohibitions and restrictions on publication:

(a) in other Australian states and territories?

(b) in foreign jurisdictions?

If so, how should this be achieved?

Awareness of prohibitions and restrictions

127 The prohibitions and restrictions on publication under the Judicial Proceedings Reports Act apply automatically, without the need for a court order, so there are no procedures for notifying people of their application. The common law of sub judice contempt also applies automatically.

128 For the purposes of the offences under the Open Courts Act, a person will, in the absence of evidence to the contrary, be considered aware that a proceeding suppression order, interim order or broad suppression order is in force if a court or tribunal has 'electronically transmitted notice' of it to them.

129 There are a number of issues with the notification process. People cannot independently check whether a suppression order exists in a particular case, it is unclear how courts determine who is permitted to access suppression orders, and it is difficult to track who has been notified of orders and other data.

Question

48 What processes should be in place for notifying or reminding the media and the wider community of the existence of prohibitions and restrictions on publication, including court orders and the operation of automatic statutory provisions?

Monitoring compliance with the laws

130 Law enforcement agencies often become aware of alleged offences through reports to police or other agencies by the victims of alleged offending. By contrast, an alleged breach of a suppression order may have no direct victim whose complaint will trigger an investigation.

131 The Commission has limited information about how compliance with prohibitions and restrictions on publication is currently monitored by courts and other agencies. There appear to be no clear procedures for monitoring compliance.

132 Monitoring compliance with court-ordered prohibitions and restrictions on publication is challenging because there is a lack of:

- clarity around who is responsible for monitoring publications to ensure they are compliant
- public awareness of prohibitions and restrictions
- clear processes for monitoring compliance.

133 These issues contribute to an accountability gap and may result in the burden for monitoring compliance unduly falling on the people who are most directly affected by their breach, such as victims of crime.

Questions

49 **Should there be a system for monitoring compliance with prohibitions and restrictions on publication? If so:**

(a) How should such compliance be monitored?

(b) Who should be responsible for monitoring such compliance?

Responsibility for instituting proceedings

134 The responsibility for instituting proceedings for breaches of prohibitions and restrictions on publication varies across the law of contempt, the Judicial Proceedings Reports Act and the Open Courts Act. Further, offences under the Judicial Proceedings Reports Act require the prior written consent of the DPP before a charge can be filed. Most other offences have no such requirement.

135 In the Hon. Frank Vincent AO QC's *Open Courts Act Review*, former Chief Justice of Victoria Marilyn Warren expressed concern about a 'seeming reluctance to prosecute breaches' of statutory prohibitions or suppression orders, even where the courts have referred them. Criminal defence lawyers consulted through the Law Institute of Victoria agreed there was a 'prosecutorial gap'.

136 This 'prosecutorial gap' may be related to a lack of clarity around who is responsible for monitoring compliance with prohibitions and restrictions on publication and the processes for doing so.

Questions

50 **Who should be responsible for instituting proceedings for breach of prohibitions and restrictions on publication?**

51 **Should the 'DPP consent' requirements under the *Judicial Proceedings Reports Act 1958* (Vic) be retained?**

Level of fault needed to prove a breach

137 The common law of contempt of court, the Open Courts Act and the Judicial Proceedings Reports Act vary with respect to the level of knowledge or intention required to constitute a breach of the respective laws.

138 These differences have posed challenges for authorities seeking to enforce prohibitions and restrictions including:

- uncertainty about whether a person accused of breaching a prohibition or restriction had knowledge about its existence or scope
- difficulties with establishing knowledge and recklessness under Open Courts Act where a person was not on the email distribution list by which suppression orders are circulated to the media.

139 The courts' existing notification procedures for suppression and similar orders may make it more likely that a journalist or media organisation would be aware of prohibitions and restrictions on publication. However, a member of the public is unlikely to have notice of these orders unless they are on the courts' email list for notification, or happen to be in court when orders are issued.

140 There are questions about whether notification procedures can be improved to ensure better awareness of prohibitions and restrictions, and to monitor when a person or organisation has been notified.

Question

52 **Should liability arise where there is a lack of awareness of the relevant prohibition or restriction on publication?**

Defences and exceptions

141 The Commission is asked to consider defences which may be available to a person who has allegedly breached prohibitions or restrictions on publication under the law of sub judice contempt, a common law order, the Judicial Proceedings Reports Act and the Open Courts Act.

142 A key consideration is whether any restatement of the law of contempt should include the creation of a provision that expressly states whether contempt is a strict or absolute liability offence, thus clarifying whether a defence of honest and reasonable mistake of fact may be available.

143 The Commission has identified a number of potential additional defences and exceptions which might be desirable, including:

- where a victim has published, or has consented to the publication of, information that would otherwise constitute a breach of a prohibition or restriction on publication
- defences for online intermediaries such as internet service providers and content hosts where they had no control over prohibited or restricted information published on their platforms

- extending exceptions for certain agencies and individuals that are required to share information in a manner which might otherwise constitute a breach of a prohibition or restriction on publication (which exist in the Judicial Proceedings Reports Act and the Open Courts Act) *to any restatement of common law contempt in statute.* Reforms in this area require careful consideration of which agencies and individuals should be permitted to share information and how such information should be shared.

Questions

53 Are the existing exceptions for information-sharing agencies appropriate? Alternatively, do they inhibit information-sharing? If so, how should these barriers be addressed?

54 What defences, if any, should be available to people who have published information which is prohibited or restricted?

Penalties and remedies

144 The Commission has noted the fragmented nature of contempt-related offences, penalties and prosecution procedures, and is considering the adequacy of the various existing penalties, including:

- fines and imprisonment for breaches of orders made under the Open Courts Act
- fines and imprisonment for breaches of statutory prohibitions in the Judicial Proceedings Reports Act
- penalties and remedies for contempt for breach of common law orders made by the Supreme Court exercising its inherent jurisdiction
- penalties and remedies for contempt for breach of an injunction made by the County Court exercising the Supreme Court's inherent jurisdiction to grant an injunction in a criminal proceeding restraining a person from publishing any material, or doing any other thing, in order to ensure the fair and proper conduct of the proceeding
- penalties and remedies for contempt for breach of common law pseudonym orders.

Take-down orders

145 The Commission is also considering the powers of Victorian courts to order the removal of prohibited or restricted material that is published within Australia, including material published online before a trial. These orders, commonly called 'internet orders' or 'take-down orders', are a potential remedy for breaches of prohibitions and restrictions on publication.

146 Take-down orders have been considered an effective option to ensure the courts are doing all that they can to ensure a fair trial. On the other hand, they are criticised as being futile, incapable of holding back the 'tide of publications', and that the court should not slip into the role of 'King Canute.'

147 Accordingly, the courts' considerations when determining whether to make a take-down order include:

- when the original publication was published and the currency of the material
- whether the article is forced upon a visitor to the website
- the permanency of the publication and whether a cached version would remain available even if taken down
- if the material is taken down from a more reliable website subject to the take-down order, whether more obscure publications may be given greater prominence in a search result
- the likelihood that jurors, subject to criminal sanction, will not undertake research about the trial and will comply with jury directions
- the impossibility of identifying all websites which might have published the material, some of which would be unidentifiable or controlled from overseas.

Questions

55 **Are the existing penalties and remedies for breaches of prohibitions and restrictions on publication appropriate? If not, what penalties and remedies should be provided?**

56 **Should penalties for breaches of common law suppression orders and pseudonym orders be set out in statutory provisions?**

57 **Should a court be able to issue an order for internet materials to be taken down ('take-down order')? If so:**

(a) **Should the process for seeking and making such orders be embodied in legislation?**

(b) **Who should be responsible for monitoring the internet (and social media) for potential 'take-down' material?**

(c) **Who should be responsible for making applications for take-down orders?**

(d) **Should such applications be conducted on an adversarial or ex parte basis?**

Legacy suppression orders

148 Legacy suppression orders are those made prior to the commencement of the Open Courts Act under:

- provisions in statutes that have since been repealed
- the common law.

149 Under the Open Courts Act, courts must ensure a suppression order operates for no longer than reasonably necessary to achieve the purpose for which it is made, and must specify the duration of the order by reference to a fixed or ascertainable period or, alternatively, the occurrence of a specified future event. However, legacy suppression orders are not addressed in the Open Courts Act.

150 Suppression orders which are valid 'until further order' can remain in force indefinitely and long after the need for suppression has passed, causing difficulties for journalists who unwittingly breach an order by mentioning a case years after the order was made.

151 A process for reviewing and rescinding legacy suppression orders is necessary to address the legal and practical difficulties these orders can cause to courts, the media and other interested parties. To permit the ongoing existence of suppression orders which no longer fulfil a legitimate purpose tends to breach the principle of open justice.

Questions

58 How many legacy suppression orders with no end date issued by the Supreme, County and Magistrates' Courts are currently in force?

59 Should there be provisions in the *Open Courts Act 2013* (Vic), or another statute, which specify the duration of legacy suppression orders? If so:

(a) Should there be be a deeming provision in the *Open Courts Act 2013* (Vic), or another statute, which provides that legacy suppression orders are deemed to have been revoked from a particular date, subject only to applications from interested parties to:

i. vary the order?

ii. continue the order for a further specified time?

iii. revoke the order at an earlier date?

(b) Should there be provisions in the *Open Courts Act 2013* (Vic), or another statute, which specify procedures for notification of legacy suppression orders and applications for continuation or revocation of such orders?