

Contempt of Court

REPORT FEBRUARY 2020





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Contempt of Court

REPORT FEBRUARY 2020



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Preface

Having spent most of my working life in courtrooms, now, after 17 years as a barrister at the Victorian Bar and 23 years as a judge of the Federal Court of Australia, I have come to appreciate the genius of the system as it has evolved over time. Although the matters that come before a court are often highly charged with emotion, the system ensures that they are dealt with calmly and respectfully in an atmosphere of decorum and rational exchange. The rules about contempt of court have been developed by judges to ensure that people involved in a criminal or civil case can put forward their arguments without disruption or outside influence, and to ensure that only material which relates to the case is considered by the jury or the judge.

The work of law reform performed by the Commission asks whether the laws that it reviews are clear, accessible, just, and up to date. The law of contempt of court has not been examined by the Commission before, and this inquiry has established that some changes need to be made. The Commission's main recommendations include:

- The law of contempt should be placed in an Act of Parliament so that it can be found largely in one place instead of people having to find the law in a large number of separate decisions of judges in many cases.
- Conduct which will amount to contempt should be defined so that people know what is allowed or not allowed, instead of the present uncertainty about whether particular conduct amounts to contempt of court.
- The language of contempt of court should be modernised to be more readily understandable.
- The summary procedure by which a judge can witness a contempt, then prosecute, try, and sentence the accused should be replaced with a procedure by which another judge who has not had a direct involvement in the conduct will hear the case.
- The common law contempt of 'scandalising the court' is now too broad. Rather than prohibiting conduct which impairs public confidence in the courts, contempt should only be established if there is conduct which presents a serious risk to the integrity and authority of the courts.
- Rules developed in the era of the quill and the printing press are no longer adequate in the world of Facebook, Snapchat and Twitter. The Commission has investigated ways in which publication of material which would be in contempt of court can be regulated in the new communications environment.

The role of law reform is to keep an eye on the law, to ensure that it is fit for purpose and doing its job. Law reform commissions which provide independent reviews of the law are a vital element of a civilised society. Next year will be the 20th anniversary of the commencement of the *Victorian Law Reform Commission Act 2000*. The Commission has completed 40 inquiries covering a wide range of topics under that Act. This report demonstrates the qualities that make the Commission's

work worthwhile. It addresses a subject of fundamental importance in the legal system, and it identifies elements of the subject which require change in order to make the law of contempt more accessible, clear and up to date.

One special quality of the work of the Commission lies in its process of consultation with stakeholders as the basis of reform. For this inquiry, the Commission consulted with victim-survivors of sexual offences and victims' advocacy groups as well as representatives of the courts, the media and the legal profession, and experts on jury behaviour, many of whom also made written submissions. Their contributions lie at the very centre of the credibility of this report. The Commission acknowledges the prime importance of their involvement in the process.

The team of researchers and policy officers whose work is reflected in the report comprised the team leader, Anna Beesley; Helen Donovan, Joyce Chia, Leah Bloch and Octavian Simu. Special mention should be made of the heavy lifting done by Helen and Joyce.

In view of the importance and scope of this reference, the Division constituted under section 13 (1) of the Victorian Law Reform Commission Act comprised all the members of the Commission: Liana Buchanan, Bruce Gardner PSM, Dr Ian Hardingham QC, Professor Bernadette McSherry, Dan Nicholson, Alison O'Brien PSM, Gemma Varley PSM and, until October 2019, the Hon. Frank Vincent AO QC. The input of all members of the Commission has been valuable and the effort required to assimilate such a large report has been substantial. I thank them for their commitment to producing such a comprehensive and high quality report. The polish of the final report owes much to the efforts and experience of Nick Gadd and Gemma Walsh, and the smooth running of the Commission for the duration of the production of the report has been the result of the expertise and wisdom of the CEO, Merrin Mason.

Finally, I acknowledge the leadership of the Hon. Philip Cummins AM who was Chair of the Commission from the commencement of this reference until his death in February 2019. Bruce Gardner PSM took over as Acting Chair until 30 August 2019 when I was appointed Chair. The Commission has benefited from the leadership of Philip in setting the reference on the right track and of Bruce for guiding the reference through the process until the final stage.



The Hon. Anthony M. North QC

Chair, Victorian Law Reform Commission

February 2020

Terms of reference

[Referral to the Victorian Law Reform Commission pursuant to section 5(1)(a) of the *Victorian Law Reform Commission Act 2000* (Vic) on 12 October 2018.]

Contempt of court, *Judicial Proceedings Reports Act 1958* and enforcement processes

The Victorian Law Reform Commission is asked to review and report on the law relating to contempt of court, the possible reform of the *Judicial Proceedings Reports Act 1958* and the legal framework for enforcement of prohibitions or restrictions on the publication of information.

The Commission should consider whether, and how, the common law of contempt should be reformed, and whether and to what extent it should be replaced by statutory provisions.

The Commission should consider all types of contempt in its review, including:

- contempt in the face of the court;
- sub judice contempt;
- contempt by publication;
- juror contempt; and
- contempt by scandalising the court.

The Commission is asked to consider whether, and how, the *Judicial Proceedings Reports Act 1958* (JPRA) should be reformed, including whether the Act should be repealed and prohibitions against publication of certain information should instead be contained in subject-specific legislation or in the *Open Courts Act 2013*. As part of this review, the Commission should consider whether the JPRA, or alternative legislation, should be amended to temporarily restrict the publication of sensitive information in relation to alleged sexual or family violence criminal offences upon the laying of charges.

The Commission should also consider the underlying principles for enforcement of prohibitions or restrictions on the publication of information, with particular reference to the law relating to contempt, the JPRA and the Open Courts Act. It should recommend new procedural, administrative and legislative changes if appropriate to do so. The Commission should consider, in addition to any matters it considers relevant:

- the adequacy of existing penalties for breaches of orders;
- appropriateness of the fault elements that must be proven to establish an offence;
- relevant defences to the commission of an offence; and
- the process for bringing proceedings to enforce these laws, including who should be empowered to commence proceedings for breaches.

In considering enforcement of restrictions on the publication of information the Commission should also review and make recommendations in relation to existing suppression orders made before the commencement of the Open Courts Act which do not contain an end date.

In conducting this reference, the Commission should take into account the development of the internet and new media, and research on juror decision-making. It should also have regard to the recommendations of the Open Courts Act Review, published in March 2018.

The Commission is to report by 28 February 2020.

Glossary

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| Balance of probabilities | The standard of proof in civil proceedings. Often described as ‘more likely than not’ or ‘more probable than not’. This is a lesser standard than beyond reasonable doubt . |
| Beyond reasonable doubt | The standard of proof in criminal proceedings. This is a higher standard than the balance of probabilities . |
| Common law | Law that derives its authority from past decisions of the courts rather than from legislation. |
| Contemnor | The term traditionally used to describe a person who has been found to have committed a contempt of court . In this report the term is used only in the context of quotes from submissions. |
| Director of Public Prosecutions (DPP) | The official who makes decisions about whether to prosecute serious criminal matters and is independent of government. The Victorian Director of Public Prosecutions is responsible for the prosecution of most serious criminal offences under Victorian law. The Office of Public Prosecutions conducts criminal prosecutions on behalf of the Director of Public Prosecutions. |
| Indictable offences | Serious crimes which attract higher maximum penalties. Prosecuted by the Office of Public Prosecutions. Usually triable before a judge and jury. |
| Indictable offences triable summarily | Less serious indictable offences which can be heard before a magistrate. |
| Indictment | The charge or charges against the accused that the Director of Public Prosecutions has filed in the Supreme or County Court. |
| Inferior court | Any court which is not a superior court. At common law this includes both the County Court of Victoria and the Magistrates’ Court of Victoria. |
| Inherent jurisdiction | The authority to adjudicate vested in a court as a consequence of it being a court of a particular description, notably a superior court of unlimited jurisdiction. Inherent jurisdiction extends to matters necessary for proper administration of justice and includes the power to prevent abuse of process and to punish for contempt of court. |
| Judicial direction/jury direction | Instructions provided by the judge to the jury . These directions guide the conduct of jurors and provide instructions on what they need to consider in deciding the case. |

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| New media | The use of digital technologies for mass communication, such as online news, blogs and social media. New media are easily accessible to a worldwide audience, publish content instantly, are interactive, and are an alternative to traditional media such as hard-copy newspapers, television and radio broadcasts. |
| Office of Public Prosecutions (OPP) | The independent statutory authority that institutes, prepares and conducts criminal prosecutions in the County and Supreme Courts on behalf of the Director of Public Prosecutions . |
| Open justice | To maintain confidence in the integrity and independence of the courts the principle of open justice requires that the administration of justice take place in open court. |
| Order | A direction by a court or tribunal that is final and binding unless overturned on appeal. |
| Practice Direction | A procedural guideline issued by a judicial officer to guide the practice of a court or tribunal. |
| Prosecutorial body | Refers to either Victoria Police, which prosecutes less serious criminal offences (summary offences) or the Victorian Office of Public Prosecutions , which prosecutes more serious criminal offences (indictable offences). Others include the Environment Protection Authority, under the <i>Environment Protection Act 2017</i> (Vic), and WorkSafe Victoria, under the <i>Occupational Health and Safety Act 2004</i> (Vic) and other occupational health and safety laws and workers' compensation laws. |
| Prothonotary | The principal registrar and chief administrative officer of the Supreme Court of Victoria. |
| Sub judice | A Latin term meaning 'before a judge'. A matter that is still being considered by a court and is not yet decided. |
| Summary offences | Less serious offences heard by a magistrate without a jury. |
| Summary trial | A trial involving a judge or magistrate as the sole fact finder. Can also be described as a trial being heard 'summarily', that is without a jury. |
| Superior court | A higher court of record or general jurisdiction. The High Court of Australia and the Supreme Court of Victoria are both superior courts with inherent jurisdiction . |
| Take-down orders | An order made by a court requiring a person to remove material that has already been published, either in print or online. |
| Victorian Civil and Administrative Tribunal (VCAT) | The tribunal established under the <i>Victorian Civil and Administrative Tribunal Act 1998</i> (Vic) that hears civil and administrative matters in the State of Victoria. |

Executive summary

- 1 This report is about three related areas of law:
 - the law of contempt of court
 - the *Judicial Proceedings Reports Act 1958* (Vic)
 - the law about what people are allowed to publish about court proceedings, and what is restricted.

Contempt of court

What is contempt of court?

- 2 The role of the courts is to administer justice—fairly, efficiently and with authority. Contempt of court is any conduct that interferes with the ability of the courts to perform their role. This can include conduct inside a courtroom, such as a witness refusing to answer questions, or conduct outside a courtroom, such as publishing information about an accused person that has not been heard in court.
- 3 The law of contempt of court is not based on Acts of Parliament. It is based on a long-standing power of the Supreme Court to protect the work of the courts from interference. It has developed over centuries through decisions made by courts.

Need for reform

- 4 It is rare for people to be charged with contempt of court. However, the law of contempt of court is critical. It protects public confidence in the courts and is essential to the rule of law. But it needs reform.
- 5 The law should be fairer, clearer, and more certain. A person should be able to know in advance what behaviour can be punished as a contempt of court. They should know what needs to be proved, who will judge them, what the process will be, and what punishment they could receive. A person should be able to understand the language of the law of contempt of court. This is not the case today.
- 6 The scope of contempt of court is also too broad. People have a right to freedom of expression and courts should be open. People who publish information about court proceedings should not be punished for contempt of court if they have taken reasonable care to do the right thing. It should only be a contempt of court in limited circumstances to make statements that undermine public confidence in judges and the courts.
- 7 The procedure for contempt of court is a confusing mix of civil law and criminal law. The procedure can be unfair. When a contempt of court happens in court during a trial, the same person – a judge or magistrate – can act as a witness, prosecutor and judge. When a person disobeys a court order, and is charged with contempt of court, it is not clear whether this is a criminal matter or not.

- 8 There are many new challenges. Online publishing and social media have changed the way people access and share information. The law of contempt of court has not kept up and needs to change.

How to reform the law

- 9 There should be a Contempt of Court Act that states clearly what the law is. This would make the law fairer, more certain and accessible for everyone.
- 10 The proposed Act should not simply convert the law of contempt into a series of criminal offences. The new Act should reflect that the courts' contempt powers come from its inherent power to protect the administration of justice. However, the new Act should better define exactly when and how the courts can use that power.
- 11 The new Act should define the scope of the contempt powers of the Supreme Court. Lower courts (the County Court, Magistrates' Court and Children's Court) should have more limited contempt powers than the Supreme Court. They should be able to refer contempt matters to the Supreme Court.
- 12 The new Act should define the conduct that fits within the following common categories of contempt of court. Those categories should be renamed:
- *contempt by conduct that interferes with a court proceeding*—this includes disruptive and abusive behaviour in court, and witnesses refusing to answer questions. (Now known as contempt in the face of the court.)
 - *contempt by non-compliance with a court order or undertaking*—this involves disobeying orders made by a court or undertakings given to a court. (Now known as disobedience contempt.)
 - *contempt by publishing material prejudicial to legal proceedings*— this includes publishing material that could make a trial unfair, for example by publishing information not before the court that may influence a juror to believe the accused was guilty. (Now known as sub judice contempt.)
 - *contempt by publishing material undermining public confidence in the judiciary or courts*—this includes publishing material that makes false claims about the integrity of a judge or magistrate. (Now known as scandalising contempt.)
 - *interferences with and reprisals against those involved with a court proceeding*—this includes threatening or harassing people involved in court proceedings to influence the proceedings, or punishing them for what they do or say in court.
- 13 The new Act should also include a general category of contempt that includes any other conduct that interferes with, or has a substantial risk of interfering with, the proper administration of justice. This would give courts power to deal with unusual forms of contempt.
- 14 The new Act should set out how a contempt of court should be dealt with, including who can start the process, and which general laws should apply. To ensure a fair trial, the procedure should be consistent with the Charter of Human Rights and Responsibilities. This will mean ending the special procedure for 'contempt in the face of the court' that currently allows a judge or magistrate to act as the witness, prosecutor and judge in a contempt case.
- 15 The proposed Act should set out maximum penalties for each of the categories of contempt. The maximum prison terms (with equivalent fines) should be:
- six months to 12 months for contempt by conduct that interferes with a court proceeding (depending on the court)
 - two years for contempt by publishing material that prejudices a legal proceeding or undermines public confidence in the judiciary or courts

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- five years for non-compliance with a court order or undertaking
 - ten years for other conduct amounting to contempt.

The Judicial Proceedings Reports Act

- 16 The *Judicial Proceedings Reports Act 1958* (Vic) should be modernised. It includes two restrictions on publishing information that are out of date and should be repealed. These are:
- a. publishing material about indecent matters
 - b. publishing material about divorce and related proceedings.
- 17 The restriction on reporting directions hearings and sentence indications should be retained, because it protects a person's right to a fair trial.
- 18 The law should continue to restrict the publication of material that identifies victims of sexual offences, and increase the maximum penalty for this offence to six months imprisonment. This should not, however, automatically apply to victims who have died, although family members should be able to request that a victim's identity continue to be suppressed.
- 19 Although the identification of victims in sexual offence cases is restricted, victims who wish to tell their story should be able to do so. The law should be amended to make it clear that an adult victim can agree to be identified at any time, including prior to charge, post-charge and/or at trial, without requiring the court's permission.
- 20 There should not be any further temporary restriction on reporting on the sensitive details of family violence and sexual offence cases. Instead, victims should be given advice and support to apply for suppression orders and judicial officers should be required to ask whether a suppression order is needed in these cases.

Enforcing restrictions on publication

- 21 It is difficult to enforce restrictions on publication today, because information can be published and shared on the internet instantly. The law needs to adapt to online publishing.
- 22 In general, publishers should not be punished for hosting or facilitating content written by other people, such as comments on a web page. However, the Open Courts Act should be amended to enable the courts to order publications be taken down, and to specify the procedure for take-down orders, including in urgent cases.
- 23 The law should also apply to material published overseas or interstate if there is a sufficient link to Victoria, although national cooperation and reforms are needed to make this effective.
- 24 The maximum penalty for breaching most restrictions on publications, including suppression orders, should be two years imprisonment. This would mean reducing the current penalty for breaching a suppression order, to be more consistent with similar offences elsewhere in Australia.
- 25 The courts should improve access to suppression orders so that people are aware of them. There should be more community education about why publications are sometimes restricted. Victim survivors should be supported to report breaches of the law.
- 26 There should be an audit of suppression orders that do not contain an end date. If a suppression order is no longer needed, there should be an application process to have it cancelled.

Recommendations

Chapter 2: Contempt of court and the need for reform

- 1 For the purpose of ensuring clarity, certainty and accessibility, the common law of contempt of court should be restated in legislation in a new Act, the Contempt of Court Act.

Chapter 3: How to reform the law of contempt of court

- 2 The proposed Act should provide an exhaustive statutory framework for the exercise of the inherent power to deal with all persons for contempt of court.
- 3 The proposed Act should provide that an application to deal with a person for contempt of court may only be made under the Act and that a person may only be dealt with for contempt of court in accordance with the proposed Act.
- 4 The overarching purpose of the proposed Act should be to promote and protect the proper administration of justice in a way that is compatible with the Charter of Human Rights and Responsibilities Act and other statutory, constitutional and common law rights or principles.
- 5 The proposed Act should provide that in exercising any of its powers under the proposed Act, a court must seek to give effect to the overarching purpose and, in doing so, must have regard to the following principles:
 - that the independence, integrity and impartiality of the judiciary should be protected
 - that all persons should have unhindered access to the court system to determine their legal rights and liabilities
 - that all cases should be determined in accordance with the rule of law and that the right to a fair hearing should be upheld
 - that the public and media should be able to access and report on both court proceedings and court documents unless otherwise provided by law
 - that all cases should be heard in an orderly and efficient manner, free from disruption and outside influence, and should be decided based only on the evidence properly admitted and proved
 - that for decisions to be made on the best evidence, witnesses should be able to be compelled to attend and give evidence
 - that jury verdicts should be based only on evidence properly admitted and proved after free, frank and confidential jury discussions, and that the finality of verdicts should be protected

- that those with duties to perform in the court, including judges, witnesses, jurors and legal practitioners, should do so fairly and honestly, in accordance with the directions of the court and any undertakings given to the court, and in a safe environment, free from interference and harassment
- that orders made by the courts should be complied with and enforced.

Chapter 4: Defining contempt of court in legislation

- 6 The proposed Act should define the conduct liable to punishment as a contempt of court by listing the more common categories of contempt and defining in clear and accessible language the elements of each category.
- 7 The categories of contempt defined as conduct liable to punishment as contempt under the proposed Act should include the following, as set out in subsequent recommendations:
- conduct that occurs in or near to the courtroom and that interferes with a court proceeding
 - witness misconduct
 - non-compliance with court orders or undertakings
 - publication of material that prejudices a person’s right to a fair trial
 - publication of material undermining public confidence in the judiciary or courts.
- 8 The proposed Act should also recognise as a distinct category of conduct liable to punishment as contempt interferences with and reprisals against those involved with a court proceeding, including judges, witnesses, jurors, legal practitioners, officers of the court, parties and potential parties to a proceeding.
- 9 The definition of conduct liable to punishment as a contempt under the proposed Act should include a general category of contempt which:
- is defined as conduct that has a substantial risk of interfering with the proper administration of justice where the person who engages in the conduct intends to create or is reckless as to the risk of that interference
 - excludes conduct covered by the more common categories of contempt which are separately listed and defined.
- 10 The proposed Act should include provisions which:
- define liability for an attempt, incitement, conspiracy and involvement in the commission of a contempt
 - provide for the defence of duress.
- The effect of these provisions should be subject to Recommendation 53 that requires that before a person is liable for a contempt by conduct that interferes with a court proceeding actual interference with, or undermining of, the conduct of the proceeding must be proved.
- 11 The definition of conduct liable to punishment as contempt under the proposed Act should include any conduct that:
- is deemed by legislation to be a contempt of court
 - the court is empowered by legislation to deal with as though it were a contempt of court.

Chapter 5: Procedure and penalties for contempt of court

- 12 The proposed Act should provide for contempt of court to be tried by summary procedure.
- 13 The proposed Act should provide that proceedings to deal with a contempt of court must be commenced by application to the court and that the application must:
 - include a statement of charge that clearly specifies the alleged contempt, so the accused knows the case to be met
 - be accompanied by the affidavits on which the person making the charge intends to rely.
- 14 In recognition of the criminal nature of contempt proceedings and to ensure procedural fairness, the summary procedure should include the following safeguards:
 - the person charged must be served personally with the application unless an order for substituted service has been made
 - the person must be given adequate opportunity to consider the charge, seek legal advice and prepare a defence
 - subject to the Evidence Act, the person charged must have the opportunity to cross-examine witnesses, file affidavits in answer to the charge, give oral evidence and call witnesses to give oral evidence
 - in accordance with section 141 of the Evidence Act, the applicable standard of proof is beyond reasonable doubt
 - the privileges against self-incrimination and against self-exposure to penalty apply.
- 15 The proposed Act should specify the circumstances in which a person against whom contempt proceedings have been commenced can be arrested and remanded either on bail or in custody pending the hearing of a charge.
- 16 The proposed Act should clarify how procedural laws apply to contempt proceedings as if contempt of court were an ordinary criminal offence, and contempt proceedings were criminal proceedings for the prosecution of an offence. This includes the following legislation:
 - Criminal Procedure Act
 - Civil Procedure Rules
 - Evidence Act
 - Crimes (Mental Impairment and Unfitness to be Tried) Act
 - Bail Act
 - Evidence (Miscellaneous Provisions) Act
 - Prisoners (Interstate Transfer) Act
 - Service and Execution of Process Act
 - Confiscation Act.
- 17 The proposed Act should provide that the procedure for commencing and conducting proceedings for a contempt that interferes with the conduct of a court proceeding (as defined in Chapter 7) should be the same summary procedure as for all other types of contempt of court, except as modified by Recommendations 18 and 19.
- 18 The proposed Act should provide that the judicial officer before whom the alleged contempt occurred cannot adjudicate the alleged contempt they witnessed.

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- 19 The proposed Act should provide that where there is an alleged contempt that interferes with a court proceeding the presiding judicial officer may adopt the following procedure:
- formulate the charge and particularise the conduct giving rise to the alleged contempt
 - refer the alleged contempt to another judicial officer for hearing.
- 20 The proposed Act should provide that:
- a party to a proceeding may apply to the Supreme Court to deal with a contempt arising from that proceeding
 - a person in whose favour an order or undertaking has been made can apply to the Supreme Court to deal with a contempt arising from non-compliance with the order or undertaking
 - any person with sufficient interest can apply to the Supreme Court for an order directing the Prothonotary to commence a contempt proceeding.
- 21 The proposed Act and the Public Prosecutions Act should provide that the Director of Public Prosecutions may take over and conduct any contempt proceedings including for the purpose of discontinuing the proceeding. This should not apply to a contempt proceeding commenced by the Attorney-General or the Court.
- 22 The proposed Act should provide that an application to the Supreme Court to deal with a contempt of court can be made by the Attorney-General.
- 23 The proposed Act should provide that the Director of Public Prosecutions may apply to the Supreme Court to deal with a contempt of court where the contempt arises in relation to:
- a criminal proceeding (whether pending or otherwise)
 - any matter being conducted by the DPP in accordance with the functions conferred by the Public Prosecutions Act.
- 24 The proposed Act should provide that the Supreme Court can order the Prothonotary to make an application to deal with a contempt of court. The Prothonotary may seek further directions from the Court before proceeding with the application. The Prothonotary must proceed as directed.
- 25 The proposed Act should not regulate the use of contempt warnings. This should remain a matter for judicial discretion. Guidance should be given to judicial officers through the Judicial College on the appropriate use of warnings.
- 26 The proposed Act should set out the role of apologies in contempt proceedings, and should provide that the court may, at its discretion, accept an apology and:
- determine that no proceeding should be commenced to deal with the alleged contempt
 - determine that a proceeding already commenced should be discontinued
 - determine that, although the contempt has been proved, no conviction should be recorded and/or penalty imposed, or
 - take the apology into account in determining what penalty should be imposed.
- 27 The proposed Act should provide that in determining whether to commence a contempt proceeding or to continue a contempt proceeding commenced by another party, the Supreme Court should consider the extent to which other procedures to deal with the conduct are available.
- 28 The proposed Act should provide that if an act or omission constitutes both a contempt of court under the proposed Act and a criminal offence under another Act or the general common law, the person may be either charged with the offence or dealt with for contempt, or both, but may not be punished more than once for the same act or omission.

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- 29 The proposed Act should specify that a court may award costs at its discretion.
- 30 The proposed Act should fix a maximum penalty for contempt of court. Different maximum penalties should apply for different categories of contempt as set out in subsequent recommendations. The maximum penalty for the general category of contempt should be for an individual 10 years imprisonment or 1200 penalty units.
- 31 The proposed Act should provide for maximum penalties for bodies corporate that are five times those that can be imposed on a natural person.
- 32 To ensure the availability of the full range of sentencing orders and to provide a consistent framework for the making of sentencing orders, the proposed Act should provide that:
- the Sentencing Act applies to the sentencing of an adult for contempt of court
 - the Children, Youth and Families Act applies to the sentencing of a child for contempt of court.
- 33 To retain flexibility, the proposed Act should provide that the Supreme Court retains the discretion to order early discharge from a sentence of imprisonment or other sentencing order, an accruing fine up to a set maximum, and/or sequestration.

Chapter 6: Contempt powers of lower courts

- 34 The contempt provisions in the County Court Act should be repealed and the proposed Act should confer on the County Court the same power to deal with a person for contempt as the Supreme Court except that the County Court should not have the power to punish:
- contempt of any other court
 - contempt by publication of material undermining public confidence in the judiciary or courts (scandalising contempt).
- 35 The contempt provisions in the Magistrates' Court Act should be repealed and the proposed Act should confer on the Magistrates' Court power to punish as a contempt witness misconduct and conduct that occurs in or near the courtroom and that interferes with a court proceeding. (This type of contempt is defined in Chapter 7.)
- 36 The contempt provisions in the Children, Youth and Families Act should be repealed and the proposed Act should confer on the Children's Court the power to punish as a contempt witness misconduct and conduct that occurs in or near the courtroom and that interferes with a court proceeding. (This type of contempt is defined in Chapter 7.)
- 37 The proposed Act should provide that any court should consider transferring an application to punish a child for contempt to the Children's Court provided that:
- the child consents
 - the court considers that it is appropriate for the charge to be determined by the Children's Court.
- 38 The proposed Act should confer jurisdiction on the Children's Court to deal with a matter transferred in this way.
- 39 The proposed Act should provide that in any contempt proceeding against a child the procedural requirements and sentencing principles of the Children, Youth and Families Act should apply.
- 40 The contempt provisions in the Coroners Act should be repealed and the proposed Act should confer on the Coroners Court the power to punish as a contempt witness misconduct and conduct that occurs in or near the courtroom and that interferes with a court proceeding. (This type of contempt is defined in Chapter 7.)

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- 41 The proposed Act should provide that the Supreme Court has jurisdiction to punish a contempt of a lower court.
- 42 The proposed Act should provide for the County Court to use the same procedure for dealing with contempt as the Supreme Court. The same penalties should apply.
- 43 The proposed Act should specify the procedure for contempt proceedings in the Magistrates' Court, Children's Court and Coroners Court. It should provide that the judicial officer before whom the alleged contempt occurred cannot adjudicate the alleged contempt and must:
- formulate the charge and particularise the conduct giving rise to the alleged contempt
 - refer the alleged contempt to another judicial officer for hearing according to the ordinary summary procedure set out in Chapter 5.
- 44 The processes necessary to support this procedure, including in regional areas, should be developed in close consultation with the Magistrates' Court, Children's Court and Coroners Court.
- 45 The proposed Act should provide that where it is alleged, or appears to the County Court, Magistrates' Court, Children's Court or Coroners Court on its own view, that a person has committed contempt of court, the Court may refer the matter to the Supreme Court for consideration. On receiving a referral, the Prothonotary should obtain and act on legal advice about whether to commence a contempt proceeding, subject to the direction of the Court. The County Court, Magistrates' Court, Children's Court and Coroners Court may make such a referral regardless of whether the court has jurisdiction to deal with the contempt itself.

Chapter 7: Dealing with disruptive behaviour: contempt 'in the face of the court'

- 46 The proposed Act should recognise 'contempt in the face of the court' as a distinct category of contempt and redefine it as 'contempt by conduct that interferes with a court proceeding'.
- 47 The proposed Act should provide that 'contempt by conduct that interferes with a court proceeding' is limited to conduct that occurs in or near the courtroom.
- 48 The proposed Act should provide that a person may be dealt with by a court for 'contempt by conduct that interferes with a court proceeding' where a person:
- disrupts or interrupts a proceeding
 - obstructs, threatens, abuses or assaults any person in or near a court
 - seeks to improperly influence any person in or near a court
 - disobeys an order or direction made by a judicial officer at and in relation to the hearing of a proceeding
 - makes an unauthorised recording of a proceeding, including by taking photographs, filming or other recording
 - engages in any other insulting behaviour, and
 - the conduct undermines or interferes with the conduct of the proceeding.
- 49 The proposed Act should provide that for a person to be liable for 'contempt by conduct that interferes with a court proceeding' the court must be satisfied that the person's conduct was intentional.

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- 50 The proposed Act should not include a defence of reasonable excuse for contempt by conduct that interferes with a court proceeding.
- 51 The proposed Act should provide that in determining whether to exercise its discretion to deal with a person for contempt by conduct that interferes with a court proceeding, or in determining what penalty should be imposed, the court must consider:
- the personal circumstances of the person that may affect their culpability and degree of responsibility for the conduct, including (but not limited to) age and/or any mental or cognitive impairment or other condition or disability
 - whether the conduct is calculated or planned to interfere with the proceeding, is repeated or sustained, or is threatening.
- 52 Further education should be made available to judicial officers on how to identify and assist particular groups of people who may need assistance during court proceedings.
- 53 The proposed Act should provide that actual interference with, or undermining of, the conduct of a proceeding is required to constitute contempt by conduct that interferes with a court proceeding. A risk of interference is not sufficient.
- 54 The proposed Act should provide that any person can commit a contempt that interferes with a court proceeding including, but not limited to, a party to the proceeding, an accused, a legal practitioner, a witness, a juror or a member of the public.
- 55 The proposed Act should provide that witness misconduct constituting a contempt is limited to a person:
- failing to comply, without lawful excuse, with a summons or subpoena to produce documents or things, or to attend to give evidence or to attend to give evidence and produce documents or things
 - when summoned or subpoenaed, refusing to be sworn or affirmed, or refusing to answer any lawful question
 - when being examined as a witness or being present in court and required to give evidence, refusing to be sworn or affirmed, or refusing to answer any lawful question, or, without sufficient excuse, refusing to produce any documents or things that the person is required to produce
 - when attending court to give evidence, refusing to leave the court and remain outside and beyond the hearing of the court until required to give evidence contrary to an order to that effect
 - who, in the opinion of the judicial officer, is guilty of wilful prevarication, that is, evading answering questions.
- 56 The proposed Act should include maximum penalties for contempt by conduct that interferes with a court proceeding and witness misconduct, as follows:
- for the Magistrates' Court, Children's Court and Coroners Court: six months imprisonment and/or a fine of 25 penalty units
 - for the Supreme and County Courts for the making of an unauthorised recording of a proceeding, including by taking photographs, filming or other recording; insulting behaviour; disrupting or interrupting a proceeding; or for defying an order or direction made by a judicial officer at and in relation to the hearing of the proceeding: 12 months imprisonment and/or a fine of 120 penalty units
 - for the Supreme and County Courts for obstructing, threatening, abusing, assaulting or seeking to improperly influence any person in or near the court, or for witness misconduct: five years imprisonment and/or a fine of 600 penalty units.
- 57 The Commission's recommendations for contempt by conduct that interferes with a court proceeding should apply to all Victorian courts.

Chapter 8: Disobedience contempt: non-compliance with court orders and undertakings

- 58 The proposed Act should recognise ‘disobedience contempt’ as a distinct category of contempt and redefine it as ‘contempt by non-compliance with a court order or undertaking’.
- 59 The distinction between civil and criminal contempt should not be retained.
- 60 The proposed Act should provide that a person may be dealt with by a court for contempt by non-compliance with a court order or undertaking where:
- an order was made by a court, or an undertaking was given to a court
 - the terms of the order or undertaking were clear, unambiguous and capable of being complied with
 - in the case of an order made by the court, the order was properly served on the person in accordance with the rules and/or that service was excused in the circumstances, or dispensed with pursuant to the rules of the court
 - the person had knowledge of the terms of the order or undertaking, and
 - the person breached the order or undertaking.
- 61 The proposed Act should provide that in determining whether to exercise its discretion to deal with a person for contempt by non-compliance with a court order or undertaking, and in fixing the appropriate penalty, the court must consider:
- the extent to which other mechanisms to enforce the law are available
 - the impact of the failure to comply with the order or undertaking on specific persons or the community more generally
 - the attitude of the person, and whether they were deliberately defiant.
- 62 The proposed Act should provide that a person who is to be dealt with for contempt by non-compliance with a court order or undertaking has the right to have the matter heard by a judicial officer who did not make the original order.
- 63 The proposed Act should provide that the maximum penalty for contempt by non-compliance with a court order or undertaking for an individual is five years imprisonment and/or a fine of 600 penalty units.
- 64 The proposed Act should provide that the maximum penalty for contempt by non-compliance with a court order or undertaking for a body corporate is:
- 3000 penalty units, or
 - if the court can determine the value of the benefit obtained because of the non-compliance by the body corporate (and any related bodies corporate), three times the value of the benefit, or
 - if the court cannot determine the value of the benefit because of the non-compliance by the body corporate (and any related bodies corporate), 10 per cent of the annual turnover of the body corporate in the year the offending occurred.
- 65 The Victorian Government should conduct a review of the adequacy and effectiveness of the enforcement of orders in civil proceedings, including proceedings in the Children’s Court and the Victorian Civil and Administrative Tribunal.

Chapter 9: Juror contempt

- 66 The Supreme Court of Victoria and the County Court of Victoria should continue to be able to deal with jurors for contempt where a juror's conduct satisfies any category of contempt specified in the proposed Act.
- 67 Sections 67, 71(1) and 71(3) of the Juries Act should be restated as offences punishable by fine imposed by infringement notice.
- 68 The penalty for breach of section 78A of the Juries Act should be amended to align with the penalties for breach of sections 77 and 78 of the Act, with the effect that the maximum penalty for breach of section 78A should be increased to 600 penalty units or five years imprisonment.
- 69 The Juries Act should be amended to expressly state who can investigate and bring a prosecution for juror offences under the Act, and to require that, where an investigation by Victoria Police is requested, Victoria Police must report to the requesting agency the outcome of their investigation.
- 70 Section 77 of the Juries Act should be amended to expressly prohibit jurors (including persons called for jury service but not empanelled and released, and persons who have previously attended for jury service or served as a juror) from self-publishing information about or images of themselves that can identify them as a person attending for jury service.
- 71 The wording of the juror oath and affirmation in the Juries Act should be amended to specify that jurors should not independently conduct trial-related research or disclose information about deliberations.
- 72 The Juries Act should be amended to expressly enable the jury foreperson to ask questions in writing of the presiding judge on behalf of a juror or jurors.
- 73 The Judicial College of Victoria should develop further guidance materials and, in consultation with the courts, provide specific training for judicial officers on:
- how and when to prompt a jury to ask questions of the presiding judge during a trial
 - how to encourage jurors to ask questions more often, including examples of the types of question on which juries may seek answers.
- 74 The Judicial College of Victoria and the Juries Commissioner should develop further training and guidance for judges and jurors on the use and potentially negative impacts of social media on the administration of justice.

Chapter 10: Sub judice contempt: restricting the publication of prejudicial information

- 75 The courts should develop procedures to identify and manage the risks of jurors being exposed to prejudicial material before or during a trial, including through:
- the use of juror questionnaires
 - questions to be put in the excuse process
 - jurors answering written questions about their potential exposure.

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- 76 The proposed Act should recognise ‘sub judice contempt’ as a distinct category of contempt and redefine it as ‘contempt by publishing material prejudicial to legal proceedings’.
- 77 The proposed Act should provide that a person may be dealt with by a court for contempt by publishing material prejudicial to legal proceedings when a person publishes material, while proceedings are pending, that creates a substantial risk that jurors or witnesses (or potential jurors or witnesses) will:
- become aware of the material, and
 - recall the material at the time of the proceeding.
- 78 The proposed Act should include the factors a court must consider in determining whether the published material creates a substantial risk of prejudicing a person’s right to a fair hearing. This list should include:
- the medium in which the publication is presented and its potential accessibility and durability
 - the content of the publication
 - the character of the publication, including the language and tone used in it
 - any other relevant circumstances relating to the likely effect of the publication.
- 79 The proposed Act should provide that it is a contempt of court to publish material, once a trial has commenced and remains pending, that was heard in the absence of the jury or was held to be inadmissible by the court.
- 80 The proposed Act should provide that for a person to be liable for contempt by publishing material prejudicial to legal proceedings, the court must be satisfied that the person intended to publish the material.
- 81 The proposed Act should provide that it is a defence to this form of contempt if at the time of publication, and after taking all reasonable care, the person:
- did not know, or could not reasonably have known, of a fact that caused the publication to be in contempt, or
 - reasonably relied on another person to take such reasonable care before publishing the material.
- 82 The proposed Act should provide that liability for contempt by publishing material prejudicial to legal proceedings only arises where the legal proceeding is ‘pending’ at the time of publication.
- 83 For criminal proceedings, the proposed Act should provide that a proceeding is ‘pending’:
- from the date on which an arrest or charge is made until the date on which either the verdict is delivered or the criminal proceeding ends otherwise, and
 - recommences from the date on which a retrial is ordered until the date on which the retrial concludes.
- 84 For other legal proceedings, the proposed Act should provide that a proceeding is ‘pending’ from the date on which the initiating process is filed until the date on which a final decision is delivered, or when the proceeding ends otherwise.
- 85 The proposed Act should provide that a person is not liable to contempt for publishing material prejudicial to legal proceedings if the extent of prejudice is outweighed by the competing public interest in publication, including the effect of restricting publication on freedom of expression and on the principle of open justice.

- 86 The proposed Act should include the relevant factors a court must consider in determining the balance between the competing interests. These should include the extent to which the publication:
- refers to specific court proceedings
 - refers to the guilt or innocence of the accused
 - refers to the offending material, in the context of the publication as a whole
 - raises an issue of significant public concern
 - is relevant to public discussion at the time it is published
 - contributes to public debate including through the extent of any research or investigation and the tone of the publication
 - contributes to the effective and fair working of the criminal justice process.
- 87 Subject to Recommendation 79, the proposed Act should provide that it is not a contempt of court to publish in good faith a fair and accurate report of a court proceeding, including where a report is published in sections or as a series.
- 88 The proposed Act should provide that contempt by publishing material prejudicial to legal proceedings applies in civil proceedings where there is a jury and that:
- the nature of the proceeding is a relevant factor in determining the risk to a fair hearing
 - the prejudgment principle does not apply.

Chapter 11: Scandalising the court

- 89 The proposed Act should recognise ‘scandalising contempt’ as a distinct category of contempt and redefine it as ‘contempt by publishing material undermining public confidence in the judiciary or courts’.
- 90 The proposed Act should provide that a person may be dealt with by a court for contempt by publishing material undermining public confidence in the judiciary or courts where a person publishes a false statement about a judge or court and intended or was reckless as to whether the publication created a serious risk of undermining public confidence in the independence, integrity, impartiality or authority of the judiciary.
- 91 The proposed Act should provide that only the Attorney-General, Director of Public Prosecutions and the Supreme Court can bring proceedings to deal with contempt by publishing material undermining public confidence in the judiciary or courts.
- 92 The proposed Act should provide that the Supreme Court should continue to have power to deal with contempt in respect of publications made about other courts or judges in those courts.

Chapter 12: The Judicial Proceedings Reports Act

- 93 The prohibition in section 3(1)(a) of the Judicial Proceedings Reports Act on the publication of indecent matter and indecent medical, surgical or physiological details in relation to any judicial proceedings should be repealed.
- 94 Section 3(1)(b) of the Judicial Proceedings Reports Act, prohibiting the publication of details of divorce and related proceedings, should be repealed, and transitional provisions should be enacted to continue protections for proceedings which predate the Family Law Act.
- 95 The Supreme Court should make rules to address requests for access to historical court files relating to divorce and other proceedings.

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- 96 The restriction on the publication of details of directions hearings and sentence indication hearings set out in section 3(1)(c) of the Judicial Proceedings Reports Act should be retained and re-enacted in the Open Courts Act, together with its attendant provisions, subject to the amendments recommended below.
- 97 The proposed provision should be amended to:
- remove witnesses' addresses from the list of matters that may be published
 - allow reasons for an adjournment to be published
 - require notice to be placed on the courtroom doors to indicate it is a hearing to which the provision applies.
- 98 The proposed provision should not extend to other preliminary hearings (such as bail hearings or committal proceedings).
- 99 The prohibition in section 4(1A) of the Judicial Proceedings Reports Act on publishing any particulars likely to lead to the identification of a person against whom a sexual offence is alleged to have been committed should be retained and re-enacted in the Open Courts Act, together with its attendant provisions, subject to the later recommendations in this report relating to consent to publication, penalties and the definition of 'publish'.
- 100 The provision should be amended to clarify that the provision ceases to apply where a victim has died, with interested parties able to apply to continue the prohibition where the public interest in disclosure is outweighed by the ongoing privacy interests of the deceased or other persons.
- 101 Prosecution for the offence under the provision should continue to require the consent of the Director of Public Prosecutions.
- 102 As a consequence of the above recommendations relating to the substantive provisions of the Judicial Proceedings Reports Act, the Act is no longer required and should be repealed.
- 103 The prohibition in what is currently section 4 of the Judicial Proceedings Reports Act should be amended to provide that it is a defence to a charge under section 4(1A), including when proceedings are pending, to prove that:
- the matter was published with the consent of the victim, if the victim consents in writing and is an adult, and is not otherwise incapable of giving informed consent, or
 - the court authorised the publication, on its own motion or on application.
- 104 This defence should not apply where the publication of the identifying particulars of a consenting victim is likely to lead to identification of a non-consenting victim.
- 105 The prohibition in what is currently section 4 of the Judicial Proceedings Reports Act should be amended to provide that where the victim is a child, the court has the power to authorise publication of identifying particulars on application or on its own motion.
- 106 There should not be a new temporary, automatic reporting restriction where an accused has been charged with a sexual or family violence offence. However, where charges have been filed in relation to sexual or family violence offences there should be a requirement, reflected in appropriate legislation, that at the first court mention of the matter the court inquire into the victim's position on suppression orders.
- 107 Victoria Police should be responsible for providing victims and child witnesses with initial information about the operation of automatic publication restrictions and referral to advice and support services to assist with suppression orders and engagement with the media.

- 108 As recommended by the Commission in the report on the Role of Victims of Crime in the Criminal Trial Process, a service for victims should be funded to provide legal advice and assistance in relation to:
- substantive legal entitlements connected with the criminal trial process
 - asserting a human right, or protecting vulnerable individuals, in exceptional circumstances.

Chapter 13: Enforcement in the online age

- 109 The Victorian Government should raise the issue of the enforcement of restrictions on publications in any national regulatory reforms with respect to take-down orders and other regulation of digital platforms, including the issue of identifying publishers online.
- 110 The Open Courts Act and the Commission's proposed Contempt of Court Act should provide that a publisher is not liable, other than under the proposed take-down order scheme, if:
- at the time the material was first made available, the material did not breach the relevant provisions, and
 - the publisher has not since taken any steps to republish the material.
- 111 The definitions of 'publish' and 'publication' in the Open Courts Act should be amended to include a list of factors the court may have regard to in determining whether the material has been disseminated to 'the public or a section of the public'. This list should include:
- whether there is any established relationship between the parties
 - the nature of any relationship between the parties
 - the size of the audience
 - the ease with which a person unknown to the publisher can access the communication.
- 112 The definition of 'publication' in the Open Courts Act should be amended to provide that the publication of online material occurs only if the material has been downloaded or accessed by a third party.
- 113 For consistency, the definitions of 'publish' and 'publication' in the Open Courts Act should be reflected in the Commission's proposed Contempt of Court Act.
- 114 Online intermediaries and the owners of public websites should be excluded from liability for third-party content under the Commission's proposed Contempt of Court Act and the Open Courts Act (including those offences that should be moved from the Judicial Proceedings Reports Act). This exclusion should not apply where online intermediaries and the owners of public websites:
- have been given notice of a court order requiring that the material should not be published, and have had a reasonable time to comply with that notice
 - are 'involved in the commission of the offence' as defined in Part II Division 1 of the Crimes Act.

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- 115 The offences in the Open Courts Act, including offences currently in the Judicial Proceedings Report Act, and the scandalising and sub judice provisions of the proposed Contempt of Court Act, should be expressed to apply extra-territorially both within and outside Australia, where any of the following apply:
- a significant part of the conduct, for example, the writing or the uploading of material, occurred in Victoria
 - the publication was made with the intention to cause harm in Victoria, and did cause such harm
 - the publisher was aware of a significant risk that the material would circulate in Victoria in such a way as to defeat the purpose of the restriction and did not take reasonably available steps to restrict this circulation.

Chapter 14: Take-down orders

- 116 The Open Courts Act should be amended to provide that the court can order material to be taken down by a publisher, an online intermediary or the owner of a public website, including where the online platform enables a third party to make comment, where the court is satisfied:
- the grounds specified in sections 18 and 26 of the Open Courts Act are met, or
 - the material breaches a restriction on publication in the Open Courts Act, the proposed Contempt of Court Act or those in the Judicial Proceedings Reports Act that should be retained, and
 - the order can reasonably be complied with.
- 117 The Open Courts Act should also be amended to provide that a failure to comply with a take-down order within a reasonable time is an offence with a maximum penalty of two years imprisonment and/or 240 penalty units for an individual, and 1200 penalty units for a body corporate.
- 118 The Open Courts Act should be amended to provide that a court or tribunal may make a take-down order:
- on application by a party to a proceeding or any other person considered by the court or tribunal to have a sufficient interest in the making of a take-down order, or
 - by the court or tribunal of its own motion.
- 119 The Open Courts Act should also be amended to provide that if an application for a take-down order is made, the court or tribunal may make an interim take-down order.
- 120 The Open Courts Act should be amended to provide that the court may make:
- a final take-down order after hearing from both parties
 - an interim take-down order without notice to the parties, in urgent cases.

Chapter 15: Penalties for breaches of restrictions on publication

- 121 The maximum penalty for breach of a suppression order under the Open Courts Act should be reduced for an individual from five years imprisonment to two years imprisonment or 240 penalty units, or both, and for bodies corporate there should be a maximum penalty of 1200 penalty units.
- 122 The Open Courts Act should be amended to specify a maximum penalty for breach of a common law suppression order or pseudonym order for an individual of two years imprisonment or 240 penalty units, or both, and for bodies corporate there should be a maximum penalty of 1200 penalty units.

- 123 The maximum penalty for breach of the prohibitions on the publishing of information about directions hearings and sentence indications, or information likely to lead to the identification of a victim of a sexual offence, currently provided for in the Judicial Proceedings Reports Act should be increased to six months imprisonment and/or 60 penalty units for an individual, and 300 penalty units for a body corporate.
- 124 The proposed Act should provide that the maximum penalty for a sub judice contempt or a scandalising contempt is, for an individual, two years imprisonment or 240 penalty units, or both, and for bodies corporate, a maximum penalty of 1200 penalty units.

Chapter 16: Promoting compliance with restrictions on publication

- 125 The courts should, in consultation with the DPP and representatives of the media, improve the current system of email notifications of suppression orders so that there is broader access to such notifications.
- 126 The courts should ensure, in developing their central database of suppression orders, that the database can facilitate public access to information about existing suppression orders.
- 127 The database should permit the media, legal practitioners and the wider community to determine whether a suppression order exists in respect of a proceeding. However, the court may limit the extent of information available through the database, as well as provide access through a registration process.
- 128 To address evidentiary issues in proving knowledge or recklessness in relation to the existence of a suppression order under the Open Courts Act, the database should have the technical capacity to log activity by registered users and any applications to register as a user.
- 129 To help raise awareness of the existence and reasons for restrictions on publication, further education and training should be developed and provided to members of the media and the general public, and should be appropriately funded by the Victorian Government. Such education and training could be provided by court media teams as well as by victims' advocacy groups.
- 130 The Victims of Crime Commissioner should be given dedicated responsibility and adequate resourcing to act on behalf of victims in liaising with the media, DPP and police and in notifying authorities of potential breaches of suppression orders or other restrictions on publication.
- 131 A 'DPP consent' provision should be introduced to the Open Courts Act for prosecutions for breach of suppression orders made under that Act.

Chapter 17: Legacy suppression orders

- 132 The courts should be resourced by the Victorian Government to conduct an audit of all existing legacy suppression orders.
- 133 The Open Courts Act should be amended to enable an interested party to apply to the court for the revocation or variation of a legacy suppression order made by that court.
- 134 The courts should develop processes allowing an applicant and the court to have access to materials providing evidence of the grounds on which a legacy suppression order was made.

PART ONE: THE COMMISSION'S PROCESS AND CONTEXT OF REVIEW

Introduction

- 2** Referral to the Commission
- 2** Scope of the reference
- 4** The approach of the Commission
- 4** Relevant reviews and reforms
- 6** Commission process
- 7** Report structure

1. Introduction

Referral to the Commission

- 1.1 By letter dated 12 October 2018, the then-Attorney-General, the Hon. Martin Pakula MP asked the Victorian Law Reform Commission (the Commission) to review and report on the law relating to contempt of court, the possible reform of the *Judicial Proceedings Reports Act 1958* (Vic) and the legal framework for enforcement of prohibitions or restrictions on the publication of information. In relation to this last issue, the terms of reference ask the Commission to consider the law relating to contempt of court, the *Judicial Proceedings Reports Act* and the *Open Courts Act 2013* (Vic).
- 1.2 The terms of reference are set out on page xiii.

Scope of the reference

- 1.3 The terms of reference cover three distinct but related areas of law:
 - the common law of contempt of court
 - the *Judicial Proceedings Reports Act*
 - the *Open Courts Act*.
- 1.4 Underpinning each of these areas of law and this report is a concern with how best to balance:
 - the need to safeguard the proper administration of justice
 - freedom of expression and freedom to criticise public institutions
 - the protection of a person's privacy and reputation.

Contempt of court

- 1.5 In considering the law of contempt of court, the Commission focuses on its most common forms:
 - disruptive behaviour in or near the courtroom—also known as contempt in the face of the court
 - contempt arising from non-compliance with court orders or undertakings—also known as disobedience contempt
 - juror contempt
 - contempt by publication that interferes with or prejudices pending proceedings—also known as sub judice contempt
 - contempt by publication that interferes with the administration of justice as a continuing process—also known as contempt by scandalising the court.

- 1.6 This inquiry does not consider contempt arising in other contexts, such as contempts of parliament, tribunals or commissions of inquiry which are outside the Commission's terms of reference.
- 1.7 However, tribunals are regularly confronted with issues of contempt, in particular, contempt in the face of the court and disobedience contempt. Tribunals are empowered to deal with contempt under their constituting legislation,¹ as are other bodies or persons with a quasi-judicial role, such as the Chief Examiner and the Independent Broad-Based Anti-Corruption Commission.²
- 1.8 Accordingly, the government will need to consider the broader implications of any reforms to the common law of contempt of court for Victoria's court system as a whole, including tribunals and other bodies with a quasi-judicial role, should it decide to implement the recommendations in this report.

The Judicial Proceedings Reports Act

- 1.9 The terms of reference asked the Commission to consider whether there is a need to retain the provisions of the Judicial Proceedings Reports Act and, if so, whether such provisions should be moved to subject-specific legislation or in the Open Courts Act.
- 1.10 The terms of reference also asked the Commission to consider the need for legislative change to temporarily restrict the publication of sensitive information when charges are laid in relation to alleged sexual or family violence offences.
- 1.11 In addition, the terms of reference asked the Commission to consider the Judicial Proceedings Reports Act in the context of the enforcement of prohibitions and restrictions on publication.

The Open Courts Act

- 1.12 The terms of reference specifically asked the Commission to consider the Open Courts Act when reviewing the enforcement of prohibitions and restrictions on the publication of information.
- 1.13 Accordingly, the Commission's consideration of the Open Courts Act was limited to the issues identified in the terms of reference, which included suppression orders made before the commencement of that Act that do not contain an end date.³
- 1.14 The report does not consider the Open Courts Act more broadly and does not consider other legislation with prohibitions or restrictions on the publication of information, except as may be required by way of comparison.

Assumptions

- 1.15 The Commission has assumed that existing laws will continue to apply. In particular, the Commission has assumed that the following will continue to apply:
- the laws of evidence, including when evidence is admissible and the protection of journalists from disclosure
 - the laws of criminal procedure, including the jury system
 - the laws in relation to family violence and sexual offences, including the treatment of victim survivors.

1 *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 137.

2 See *Major Crime (Investigative Powers) Act 2004* (Vic) s 49; *Independent Broad-based Anti-corruption Commission Act 2011* (Vic) ss 152–8.

3 Prior to the Open Courts Act end dates were optional whereas under the Open Courts Act end dates are mandatory. Hence there is a limited number of pre-Open Court Act orders with indefinite operation.

- 1.16 These laws are relevant to contempt law. For example, as stakeholders submitted, sub judice contempt disproportionately affects journalists,⁴ and the protection of a free press is a critical element of the principle of open justice as well as freedom of expression.⁵ The scope of sub judice contempt is also affected by the laws regulating the admissibility of evidence, as much of sub judice contempt concerns potentially prejudicial material, which is generally inadmissible at trial. While there is debate about the merits of this aspect of the law of evidence, the Commission has proceeded on the basis that the current position on the issue remains unchanged. The merits of this position are outside the scope of the current terms of reference.
- 1.17 The rationale for sub judice contempt also depends on the continuation of the jury system. In this context, the Commission notes that the Department of Justice and Community Safety is currently inquiring into the desirability of judge-alone trials.⁶ However, in undertaking this review, the Commission has assumed that jury trials will remain an essential feature of Victoria's legal system and will continue in their current form.
- 1.18 Victim survivors in consultations also raised broader issues concerning their protection by the law and from the media.⁷ These are relevant to the discussion in Chapter 12 about the operation of the Judicial Proceedings Reports Act.
- 1.19 While these issues affect the operation of the law of contempt and have been considered as part of the underlying context for the recommendations in this inquiry, the Commission has not made recommendations to change these laws. Such recommendations would extend beyond the terms of reference in this inquiry and have implications in other areas of the law that the Commission has not fully considered.

The approach of the Commission

- 1.20 The Commission adopted a principles-based approach to whether reform to the common law of contempt of court, the Judicial Proceedings Reports Act and the legal framework for enforcement of prohibitions or restrictions on publication is necessary. To this end, the Commission's consultation paper, discussed below, identified a number of key principles and sought stakeholders' views on whether other principles were relevant.⁸ These principles and views informed the Commission in reaching conclusions and making the recommendations in this report.

Relevant reviews and reforms

- 1.21 There have been many reviews of the law of contempt of court.⁹ These include reviews in Australia,¹⁰ the United Kingdom,¹¹ Ireland,¹² Canada¹³ and New Zealand.¹⁴

4 See, eg, Submissions 6 (Professors Mark Pearson, Patrick Keyzer, Anne Wallace and Associate Professor Jane Johnston), 17 (Dr Denis Muller); 23 (MinterEllison Media Group).

5 Human Rights Committee, *General Comment No. 34 (Article 19: Freedoms of opinion and expression)*, UN Doc CCPR/C/GC/34 (12 September 2011) [13]–[17].

6 Farrah Tomazin and Sumeyya Ilanbey, 'Andrews Government Considers "Judge-Only" Trials for Criminal Cases', *The Age* (online, 13 December 2018) <www.theage.com.au/national/victoria/andrews-government-considers-judge-only-trials-for-criminal-cases-20181213-p50m5u.html>.

7 Consultations 1 (Representatives of victims of crime support organisations), 3 (Representatives of victim survivors of family and sexual violence).

8 Victorian Law Reform Commission, *Contempt of Court* (Consultation Paper, May 2019) 3-6 [1.13]–[1.27], Question 1.

9 For a summary of these reviews and reforms see Victorian Law Reform Commission, *Contempt of Court* (Consultation Paper, May 2019) Appendix B.

10 Law Reform Commission of Western Australia, *Report on Review of the Law of Contempt* (Project No 93, June 2003); New South Wales Law Reform Commission, *Contempt by Publication* (Report No 100, June 2003); The Law Reform Commission, *Contempt* (Final Report No 35, December 1987).

11 Law Commission (England and Wales), *Contempt of Court (2): Court Reporting* (Report No 344, March 2014); Law Commission (England and Wales), *Contempt of Court (1): Juror Misconduct and Internet Publications* (Report No 340, 2013); Law Commission (England and Wales), *Contempt of Court* (Consultation Paper No 209, 2012); Committee on Contempt of Court (UK), *Report of the Committee on Contempt of Court* (Cmnd 5794, December 1974).

12 The Law Reform Commission Ireland, *Report on Contempt of Court* (Report No 46, September 1994); see also Law Reform Commission Ireland, *Contempt of Court and Other Offences and Torts Involving the Administration of Justice* (Issues Paper No 10, 2016).

13 Law Reform Commission of Canada, *Contempt of Court* (Report No 17, 1982).

14 Law Commission (New Zealand), *Reforming the Law of Contempt of Court: A Modern Statute* (Report No 140, May 2017).

1.22 As a result, there has been legislative change in the United Kingdom¹⁵ and New Zealand.¹⁶

Review of the Open Courts Act

- 1.23 In 2017, the Hon. Frank Vincent AO QC conducted a review of the Victorian Open Courts Act, making 18 recommendations.¹⁷
- 1.24 The Victorian Government has stated that it supports in full or in principle 17 of the 18 recommendations. As at the time of writing this report, one recommendation remains under consideration.¹⁸
- 1.25 In May 2019, as a first stage of the government’s response, the *Open Courts and Other Acts Amendment Act 2019* (Vic) was enacted. The Act amends the Open Courts Act and other existing laws to reinforce the presumption in favour of open justice and the disclosure of information in Victorian courts.
- 1.26 In particular, the amending Act requires courts to have regard to the primacy of the principle of open justice and the free communication and disclosure of information when making suppression and closed court orders.¹⁹ Relevantly to the Commission’s review, the Act amends the prohibition on identifying victims of sexual offences in the Judicial Proceedings Reports Act.²⁰ This amendment is discussed further in Chapter 12. This amendment will come into operation on 7 February 2020, unless proclaimed earlier.²¹
- 1.27 The terms of reference required the Commission to have regard to the recommendations of the Open Courts Act Review. Therefore, they are considered where relevant.

Other relevant reviews and reforms

- 1.28 A number of other reviews and reforms both in Australia and overseas are relevant and have implications for this review by the Commission. These include:
- the Victorian Department of Justice and Community Safety review currently underway into the use of judge-alone trials for criminal cases²²
 - the New South Wales Law Reform Commission review on the operation of legislative prohibitions on the disclosure or publication of New South Wales court and tribunal information, New South Wales court suppression and non-publication orders, and tribunal orders restricting disclosure of information, and access to information in New South Wales courts and tribunals, announced in February 2019²³
 - the Senate Select Inquiry on the Future of Public Interest Journalism report, tabled in the Australian Parliament in February 2018²⁴
 - the United Kingdom inquiry into online harms, which published a white paper in April 2019²⁵

15 *Contempt of Court Act 1981* (UK); *Crime and Courts Act 2013* (UK) s 33.

16 *Contempt of Court Act 2019* (NZ).

17 Frank Vincent, *Open Courts Act Review* (Report, September 2017) 9–11 <<https://engage.vic.gov.au/open-courts-act-review>>.

18 Victorian Government, *Open Courts Act Review Table of Recommendations* (March 2018) <<https://engage.vic.gov.au/open-courts-act-review>>.

19 *Open Courts and Other Acts Amendment Act 2019* (Vic) s 12, substituting s 28.

20 *Ibid* s 15.

21 *Ibid* s 2.

22 Farrah Tomazin and Sumeyya Ilanbey, ‘Andrews Government Considers “Judge-Only” Trials for Criminal Cases’, *The Age* (online, 13 December 2018) <www.theage.com.au/national/victoria/andrews-government-considers-judge-only-trials-for-criminal-cases-20181213-p50m5u.html>.

23 Department of Justice (NSW), ‘Open Justice Review’, *Justice—Law Reform Commission* (Web Page, 3 June 2019) <https://www.lawreform.justice.nsw.gov.au/Pages/Irc/Irc_current_projects/Courtinformation/Project_update.aspx>.

24 Public Interest Journalism Committee, Parliament of Australia, *Future of Public Interest Journalism* (Final Report, February 2018).

25 Her Majesty’s Government (UK), *Online Harms White Paper* (April 2019) <<https://www.gov.uk/government/consultations/online-harms-white-paper>>.

- the 2019 inquiry by the Australian Competition and Consumer Commission on the impact of digital platforms, including on the quality of news and journalism,²⁶ and the Australian Government's response, which includes creation of a new platform-neutral regulatory framework²⁷
- the current reference to the Tasmania Law Reform Institute on jurors' use of social media and other internet platforms during criminal trials²⁸
- the review of Model Defamation provisions currently being undertaken by the Council of Attorneys-General²⁹
- amendments to the *Sexual Offences Evidence and Procedure Act 1983* (NT), currently before the Northern Territory Parliament, to enable sexual offences victims to speak out in certain circumstances.³⁰

Commission process

Commission Chair

- 1.29 This reference commenced under the leadership of the Hon. Philip Cummins AM, who was Chair of the Commission from 1 September 2012 until his death on 24 February 2019.
- 1.30 On 4 March 2019 Mr Bruce Gardner PSM was appointed Acting Chair of the Commission. Mr Gardner led the conduct of the reference until the appointment of the Hon. Anthony North QC as the new Chair of the Commission on 30 August 2019.

The Division

- 1.31 In accordance with section 13(1)(b) of the *Victorian Law Reform Commission Act 2000* (Vic), a Division was constituted to guide and oversee the conduct of the reference. All members of the Commission were members of the Division.

Advisory committee

- 1.32 Committees of experts often assist the Commission in identifying issues and exploring options for reform, although they are not involved in developing or voting on the Commission's recommendations. They are a valuable source of advice and the Commission appreciates the time and expertise that the members contribute.
- 1.33 Given the nature of the reference, an advisory committee comprising experts on the law of contempt of court and in the understanding of juror decision making was formed.
- 1.34 The first meeting of the advisory committee was held on 21 February 2019 to assist the Commission in identifying key issues. A further meeting was held on 17 October 2019 to discuss reform options. The members of the advisory committee are listed at Appendix A.

26 Australian Competition & Consumer Commission, *Digital Platforms Inquiry* (Final Report, June 2019).

27 Treasury (Cth), *Regulating in the Digital Age: Government Response and Implementation Roadmap for the Digital Platforms Inquiry* (Report, 12 December 2019) <<https://treasury.gov.au/publication/p2019-41708>>.

28 Tasmania Law Reform Institute, *Jurors, Social Media and the Right of an Accused to a Fair Trial* (Issues Paper No 30, August 2019).

29 A Discussion Paper was released for comment in February 2019 and submissions closed on 30 April 2019: 'Review of Model Defamation Provisions', *Department of Communities and Justice (NSW)* (Web Page, 3 February 2020) <<https://www.justice.nsw.gov.au/defamationreview>>. Draft amendments to the Model Defamation Provisions together with a background paper were released for feedback in November 2019: Australasian Parliamentary Counsel's Committee, Council of Attorneys-General, Model Defamation Amendment Provisions (Report Draft d15, November 2019) <<https://www.justice.nsw.gov.au/justicepolicy/Documents/review-model-defamation-provisions/consultation-draft-of-mdaps.pdf>>. Council of Attorneys-General, Department of Communities and Justice (NSW), *Model Defamation Amendment Provisions 2020 (Consultation Draft)* (Background Paper, December 2019) <<https://www.justice.nsw.gov.au/justicepolicy/Documents/review-model-defamation-provisions/defamation-final-background-paper.pdf>>. Submissions are due by 24 January 2020.

30 Sexual Offences (Evidence and Procedure) Amendment Bill 2019 (NT). At the time of writing the Bill was before the legislative scrutiny committee which will report back to Parliament in March 2020. See also Lauren Roberts, 'Northern Territory Sexual Assault Survivors Will Be Able to Share Their Stories', *ABC News* (online, November 2019) <<https://www.abc.net.au/news/2019-11-28/northern-territory-sexual-assault-survivors-speak-out/11745112>>.

Consultation paper

- 1.35 In May 2019 the Commission published a consultation paper responding to the terms of reference.³¹
- 1.36 The consultation paper posed 59 questions for consideration and invited written submissions by 28 June 2019.

Submissions

- 1.37 A total of 34 written submissions were received (see Appendix B). Those which may be made public were published on the Commission’s website.

Consultations

- 1.38 In conducting the reference, the Commission consulted with a wide range of stakeholders, including representatives from the legal profession, the courts and judiciary, academics, and victims’ advocacy and support organisations.
- 1.39 Two stages of consultations were held. The first consisted of preliminary meetings with representatives from the courts, judiciary and academia to assist the Commission to understand some of the key issues and start identifying proposals and options for reform. This helped the development of the consultation paper.
- 1.40 The second consultation stage followed publication of the consultation paper and consisted of formal consultations with a range of stakeholders, interested organisations and individuals. Twenty-seven formal consultation meetings were held, with the Commission consulting some stakeholders more than once (see Appendix C).

Constitutional advice

- 1.41 To inform the review, the Commission obtained legal advice on the constitutional limits for reform of the common law of contempt. A copy of the advice from Peter Hanks QC and Thomas Wood, dated 3 September 2019, is included as Appendix D.

Report structure

- 1.42 This report is divided into four parts:
- Part One: Commission approach (this chapter)
 - Part Two: The law of contempt of court (Chapters 2–11)
 - Part Three: The Judicial Proceedings Reports Act (Chapter 12)
 - Part Four: Enforcing publication restrictions (Chapters 13–17).
- 1.43 Part Two addresses whether and how the common law of contempt should be reformed. This part sets out the Commission’s general approach to reform, including in Chapter 2 why the law needs to be reformed, and in Chapter 3 the form of the Contempt of Court Act that the Commission recommends. Chapter 4 discusses how contempt should be defined in the proposed Act, and Chapter 5 recommends the procedure and penalties that should apply. Chapter 6 discusses the contempt powers of lower courts. Part Two then considers how to reform some more common categories of contempt that should be defined in the proposed legislation:
- Chapter 7: contempt in the face of the court (interferences with the conduct of court proceedings)

- Chapter 8: disobedience contempt (non-compliance with court orders and undertakings)
 - Chapter 9: juror contempt
 - Chapter 10: sub judice contempt (restricting the publication of material that prejudices legal proceedings)
 - Chapter 11: scandalising the court (restricting the publication of material that undermines public confidence in the judiciary).
- 1.44 Part Three addresses whether and how the Judicial Proceedings Reports Act should be reformed. This includes the need for a temporary restriction on publishing sensitive information about sexual or family violence offences when charges are laid.
- 1.45 Part Four addresses how to improve enforcement of restrictions on publications. Chapter 13 discusses how to improve enforcement in the online age, and Chapter 14 the need for a statutory take-down order scheme. Chapter 15 addresses the consistency of penalties, and Chapter 16 recommends other measures to promote compliance with publication restrictions. Finally, Chapter 17 makes recommendations about how to deal with legacy suppression orders made before the commencement of the Open Courts Act.

PART TWO: THE LAW OF CONTEMPT OF COURT

Contempt of court and the need for reform

- 10** What is the law of contempt of court?
- 11** What is the purpose of the law of contempt?
- 12** Is legislative reform needed?
- 18** A Contempt of Court Act

2. Contempt of court and the need for reform

Overview

- The law of contempt of court empowers courts to deal with interferences with the proper administration of justice. It can include conduct inside and outside a courtroom. It can also include conduct that does not affect any particular legal proceeding.
- The law of contempt of court is a type of common law offence that is tried differently from other criminal offences.
- The Supreme Court of Victoria has inherent power to punish for contempt to maintain its authority and protect the administration of justice.
- The Commission recommends the common law of contempt of court be restated and reformed in legislation, in a new Contempt of Court Act. This is needed to define the scope of contempt law, so that it is clearer, more certain and more accessible.
- Some parts of the law of contempt require reform to limit liability and modernise its language. This can only be done by legislation.
- Legislation is needed to clarify the procedure for trying and punishing contempt and provide safeguards to ensure a fair trial.
- Legislation will also clarify the relationship between the law of contempt and other laws and limit the penalties imposed.

What is the law of contempt of court?

- 2.1 The law of contempt of court has a protective purpose, empowering the courts to deal with interferences with the proper administration of justice.
- 2.2 A 'contempt of court' is described as a type of common law offence.¹ It involves acts or words which interfere with the ability of the courts to administer justice fairly, efficiently and with authority.
- 2.3 Contempt of court can include conduct in the courtroom that disrupts the proceedings, such as abusing a witness or juror. It can include conduct outside the courtroom that could unfairly affect a proceeding, such as publishing information about the character of the accused that might influence a juror. It can include conduct that does not affect any particular proceeding but could undermine the community's confidence in the integrity and impartiality of the courts, such as publishing unfounded allegations about the judiciary.²

- 2.4 Failure to comply with an order made by a court or an undertaking given to a court may also be a contempt of court. A contempt of this type will not necessarily be classified as an offence, although it can still attract punishment.³
- 2.5 Contempt of court is unlike other criminal offences because the courts use a different procedure to try and punish a contempt of court.
- 2.6 In Victoria, the Supreme Court has the power to deal with a person for contempt of court as part of its inherent jurisdiction. It is not a power derived from legislation and given to the Supreme Court by Parliament.
- 2.7 Rather, it is a power the Supreme Court has as a superior court of unlimited jurisdiction that needs to maintain its own authority and protect its ability to administer justice.⁴
- 2.8 The Supreme Court also has a supervisory function to ensure justice is properly administered in the lower courts. Therefore, the Supreme Court has the power to deal with a contempt of itself as well as contempts of any lower court.⁵
- 2.9 In addition to the Supreme Court's inherent contempt jurisdiction, Parliament has conferred statutory powers on the lower courts to punish for contempt.⁶
- 2.10 The types of conduct that can be dealt with as a contempt of court and the procedures courts follow to prevent and punish such conduct are mostly defined by common law. Therefore, to understand the law of contempt of court, it is necessary to look to cases that have been decided by judges.
- 2.11 In Victoria, the common law is supplemented by legislation that deems certain behaviour to be a contempt of court,⁷ or provides that certain behaviour can be dealt with as a contempt of court.⁸

What is the purpose of the law of contempt?

- 2.12 The purpose of the law of contempt is to protect the proper administration of justice. This concept is important but difficult to define. It requires that:
- People have unhindered access to an independent, impartial and competent court system to determine their legal rights and liabilities.
 - The courts determine cases in accordance with the rule of law and uphold the right to a fair hearing.
 - There is public confidence in, and respect for, the authority of that system.⁹
- 2.13 This in turn requires that:
- The independence, integrity and impartiality of the judiciary are protected.
 - Except in unusual cases where the law restricts access to the court or restricts the reporting of proceedings, the court is open to the public and news media,¹⁰ including access to court files and written submissions.
 - Cases are heard in an orderly and efficient manner, free from disruption.¹¹
 - Cases are decided on the basis of the evidence before the court and free from outside influence.¹²

3 *Construction, Forestry, Mining and Energy Union v Boral Resources (Vic) Pty Ltd* [2015] HCA 256 [65] (Nettle J).

4 *Broken Hill Proprietary Co Ltd v Dagi* [1996] 2 VR 117, 125, 193.

5 *John Fairfax & Sons Pty Ltd v McRae* (1955) 93 CLR 351, 360; *Supreme Court (General Civil Procedure) Rules 2015* (Vic) r 75.05(1)(c).

6 *Coroners Act 2008* (Vic) s 103; *Children, Youth and Families Act 2005* (Vic) s 528(2)–(3); *Magistrates' Court Act 1989* (Vic) ss 133–4; *County Court Act 1958* (Vic) s 54.

7 See, eg, *Supreme Court Act 1986* (Vic) s 125; *Civil Procedure Act 2010* (Vic) s 27(2).

8 See, eg, *Independent Broad-based Anti-corruption Commission Act 2011* (Vic) s 157; *Victorian Inspectorate Act 2011* (Vic) s 76; *Major Crime (Investigative Powers) Act 2004* (Vic) s 49(10); *Casino Control Act 1991* (Vic) s 27(2)(b); *Local Government Act 1989* (Vic) s 223C.

9 *A-G (UK) v Times Newspapers Ltd* [1974] AC 273, 309.

10 See generally Frank Vincent, *Open Courts Act Review* (Report, September 2017) Ch 6 <<https://engage.vic.gov.au/open-courts-act-review>>.

11 See, eg, *R v Slavski* [2011] VSC 643 [23]; *Balogh v St Albans Crown Court* [1975] 1 QB 73, 85–6; *Morris v Crown Office* [1970] 2 QB 114.

12 See, eg, *Dupas v The Queen* [2010] HCA 20 [29], (2010) 241 CLR 237.

- Witnesses are able to be compelled to attend and give evidence so decisions can be made on the best evidence.¹³
 - Jury verdicts are based only on properly adduced evidence after free, frank, and confidential jury discussions, and the finality of verdicts is protected.¹⁴
 - Those with duties to perform in the court, including witnesses, jurors and legal practitioners, perform those duties in a safe environment and free from interference and harassment,¹⁵ and do so fairly and honestly and in accordance with the directions of the court and any undertakings given to the court.¹⁶
 - Orders made by the courts are complied with and enforced.¹⁷
- 2.14 Stakeholders emphasised the importance of the law of contempt to the proper functioning of the court system and the rule of law more generally.¹⁸ They submitted that the Supreme Court’s inherent power to punish for contempt secures the independence of the judiciary from the other arms of government, and is the backstop to all powers exercised by the courts. The Supreme Court submitted that ‘For all the jurisdiction and powers invested in the Court, ultimately it is the law of contempt which is the end point of the Court’s authority.’¹⁹
- 2.15 To fulfil its protective purpose, the law of contempt must be consistent with the proper administration of justice in both scope and application. If the law of contempt is arbitrary or unfair, ‘proceedings intended to uphold the authority of the court would be seen to diminish that authority so that the process would, at best, be self-defeating.’²⁰

Is legislative reform needed?

- 2.16 The consultation paper identified several key issues with the law of contempt and asked:
- whether the scope and elements of contempt of court are too broad and discretionary to enable people to know what conduct might be subject to punishment²¹
 - whether the safeguards that apply to contempt proceedings are sufficiently clear and robust given the punitive nature of such proceedings²²
- 2.17 This section of the report considers stakeholder responses and whether they demonstrate a need to reform the law of contempt and replace it with legislative provisions.

Uncertain scope

- 2.18 There is no legislative definition of contempt of court.
- 2.19 At common law, the definition of contempt of court is any conduct that interferes with or has a tendency to interfere with administration of justice.²³ It is not necessary to prove an intent to interfere with the administration of justice or that such interference did occur.²⁴
- 2.20 This definition captures diverse conduct which is often grouped into categories:
- *Contempt in the face of the court*—includes misconduct in or near the courtroom that directly disrupts or interferes with the proceedings

13 See, eg, *Allen v The Queen* (2013) 36 VR 565, 574–5.

14 *Re Matthews & Ford* [1973] VR 199, 212–3; *R v Gallagher* [1986] VR 219, 249.

15 See, eg, *DPP (Vic) v Johnson* [2002] VSC 583 [13].

16 See, eg, *R v Witt (No 2)* [2016] VSC 142.

17 See, eg, *Law Institute of Victoria v Nagle* [2005] VSC 47 [5].

18 Submissions 29 (Supreme Court of Victoria), 31 (County Court of Victoria), 32 (International Commission of Jurists, Victoria); Consultation 13 (Fiona K Forsyth QC John Langmead QC).

19 Submission 29 (Supreme Court of Victoria).

20 *Clampett v A-G (Cth)* [2009] FCAFC 151 [39] (Black CJ), (2009) 181 FCR 473.

21 Victorian Law Reform Commission, *Contempt of Court* (Consultation Paper, May 2019) 24–6 [3.6]–[3.19], Question 2.

22 *Ibid* 26–8 [3.20–3.32], Question 3.

23 *Re Dunn* [1906] VLR 493, 497; approved in *Lane v The Registrar of the Supreme Court of New South Wales (Equity Division)* (1981) 148 CLR 245, 257.

24 *A-G (NSW) v Dean* (1990) 20 NSWLR 650, 655–6; *Registrar of the Court of Appeal v Willesee* (1985) 3 NSWLR 650, 673–6; *Harkianakis v Skalkos* (1997) 42 NSWLR 22, 28–9; see also *DPP v Johnson & Yahoo!* [2016] VSC 699 [24]; *R v Vasiliou* [2012] VSC 216 [13]–[20]; *R v Slaveski* [2011] VSC 643 [17]–[20]; *R v The Age Co Ltd* [2006] VSC 479; *DPP (Vic) v Johnson* [2002] VSC 583 [7]–[9].

- *Contempt by publication*—includes publishing material that tends to prejudice pending proceedings or unduly impair public confidence in the impartiality and integrity of the courts
- *Contempt by disobedience to court orders*—includes failures or refusals to comply with an order of the court or an undertaking given to the court
- *Contempt by interference with a person connected with court proceedings*—includes improper interference with a witness, judicial officer, juror, party or other person with a role or potential role in court proceedings
- *Contempt by breach of duty by a person connected with court proceedings*—occurs when those with a special obligation to the court or a special role in court proceedings (for example, a legal practitioner, witness or juror) acts or fails to act in a way which breaches their duty to the court
- *Abuse of process*—includes the preparation and filing of court documents for purposes which are deceptive, dishonest or in some other way improper.

- 2.21 Conduct which constitutes contempt of court may fit within multiple categories, or it may not fit within any established category but still be regarded as contempt. The different categories of contempt do not represent distinct contempt offences; they are all examples of the broad offence.
- 2.22 This broad definition means that the courts have wide discretion to determine whether conduct constitutes contempt of court and whether a person should be punished for contempt.
- 2.23 The courts' power to punish for contempt overlaps with the ordinary criminal law. The same misconduct that may be dealt with as a contempt of court can often be prosecuted by way of ordinary criminal charge and prosecution in accordance with the *Criminal Procedure Act 2009* (Vic). This overlap adds to confusion about the role and reach of contempt law.²⁵
- 2.24 Further, the definition of contempt of court is complicated by a distinction between civil and criminal contempt. Most forms of contempt are classified as criminal contempts. However, a contempt arising from a failure to comply with a court order or undertaking, especially in civil proceedings, has traditionally been classified as a civil contempt.²⁶ This means even the statement that contempt of court is a common law offence must be qualified.

Responses

- 2.25 The consultation paper asked whether the contempt power needed to be more precisely defined, and whether the law should specify the conduct subject to sanction.²⁷ Competing themes emerged from stakeholders' responses.

Need for flexibility

- 2.26 Many stakeholders said that the law of contempt needs to address a broad range of conduct and potentially novel threats. Therefore, contempt of court must be defined flexibly.²⁸ Stakeholders observed that only a flexible definition can accommodate the competing considerations at stake.²⁹

²⁵ Victorian Law Reform Commission, *Contempt of Court* (Consultation Paper, May 2019) 29–31 [3.33]–[3.42].

²⁶ Ibid 17–18 [2.34]–[2.38]; 74–5 [6.26]–[6.32].

²⁷ Ibid 26, Question 2.

²⁸ Submissions 18 (Commercial Bar Association Media Law Section Working Group), 26 (Chief Examiner, Victoria), 31 (County Court of Victoria); Consultations 13 (Fiona K Forsyth QC, John Langmead QC), 22 (The Victorian Civil and Administrative Tribunal), 26 (Supreme Court of Victoria).

²⁹ Submission 32 (International Commission of Jurists Victoria).

- 2.27 For these reasons, some stakeholders submitted that contempt of court should not be defined in legislation, and instead remain defined by the common law.³⁰
- 2.28 For example, in relation to sub judice contempt, media lawyers and academics preferred to retain the flexibility of the common law because it was more responsive to a rapidly changing world.³¹ They considered it ‘difficult or impossible to formulate a statutory test capable of covering all relevant situations without giving rise to unintended consequences’.³² In their view, the common law is already clear and well-known.
- 2.29 The Director of Public Prosecutions (DPP) submitted that, while the areas of the law that can be easily restated in legislation are not problematic, the more vexed areas would always be context-specific and difficult to define. The DPP also observed that retaining the common law might allow the law to develop more consistently across Australia.³³

Need for clarity, certainty and accessibility

- 2.30 On the other hand, stakeholders highlighted the need for a more certain and accessible definition of contempt. The Supreme Court noted that ‘it is fundamental to the rule of law that those affected by a law—especially one which carries penalties for breach—should be able to ascertain its terms and understand what compliance requires’. The Supreme Court stated that there is ‘undoubtedly scope for the law of contempt to be made clearer and more certain’.³⁴
- 2.31 The Supreme Court also noted that clearer guidance in legislation should improve compliance. It identified sub judice contempt as an area that would most benefit from legislation, as this was the area where breaches were most likely to be negligent or inadvertent.³⁵
- 2.32 The County Court agreed that the law is ‘fragmented and opaque’, and supported codifying the various kinds of contempt in the common law to improve the certainty and clarity of the law.³⁶
- 2.33 Similarly, the Law Institute of Victoria’s (LIV) view was that the law inappropriately privileges flexibility over consistency and certainty. In its view, the common law of contempt should be replaced by statutory provisions ‘specifying the type of conduct that may be subject to sanction’.³⁷

Need to clarify fault element

- 2.34 Many stakeholders submitted that liability for contempt is too broad under the common law.³⁸ They were concerned that there is no requirement to prove that a person intended to interfere with the administration of justice or was reckless as to the risk of interference. For example, Australia’s Right to Know coalition (ARTK) submitted that ‘conduct that does not intend to interfere with the administration of justice and is not reckless as to the potential to interfere should not be subject to penalties and punishment’.³⁹
- 2.35 Stakeholders expressed different views on the appropriate fault element in relation to different types of contempt, as discussed in Chapters 7 to 11. Importantly, stakeholders

30 Submissions 18 (Commercial Bar Association Media Law Section Working Group), 23 (MinterEllison Media Group), 32 (International Commission of Jurists, Victoria); Consultation 5 (Media lawyers and academics on contempt by publication). The International Commission of Jurists submitted that it was not clear that better definition could be provided through statute rather than the common law, and that no change to the law should be made in the absence of a compelling case.

31 Submissions 18 (Commercial Bar Association Media Law Section Working Group), 23 (MinterEllison Media Group); Consultation 5 (Media lawyers and academics on contempt by publication). These stakeholders did support some form of change to the existing law, as discussed later in this chapter.

32 Submission 18 (Commercial Bar Association Media Law Section Working Group).

33 Submission 28 (Director of Public Prosecutions).

34 Submission 29 (Supreme Court of Victoria).

35 Ibid. Professor Rolph also indicated that suppression orders may be used more often because of the perceived uncertainty of the law of sub judice contempt: Consultation 12 (Professor David Rolph).

36 Submission 31 (County Court of Victoria).

37 Submission 22 (Law Institute of Victoria).

38 Submissions 18 (Commercial Bar Association Media Law Section Working Group), 22 (Law Institute of Victoria), 23 (MinterEllison Media Group), 27 (Australia’s Right to Know coalition).

39 Submission 27 (Australia’s Right to Know coalition).

commonly identified a need to clarify or reform the fault element of the contempt of court, even though some of them opposed codification of the common law.⁴⁰ Legislation would be needed to clarify or reform this aspect of the law.

Need to remove distinction between civil and criminal contempt

- 2.36 The Supreme and County Courts supported the removal of the distinction between civil and criminal contempt. The Supreme Court stated:

The Court’s experience accords with the body of judicial commentary about the illusory and unhelpful nature of attempts to distinguish civil and criminal contempt. Formal abolition of the distinction would seem desirable.⁴¹

- 2.37 The Commission considers this distinction in Chapter 8 and whether it should be clarified or abolished. Any clarification or modification of the distinction would require legislation.

Need to clarify and modernise language

- 2.38 The language describing the law of contempt is confusing. Terms such as ‘in the face of the court’ or ‘sub judice’ have technical legal meanings but these terms do not tell the community much about the purpose or nature of the restrictions. The term contempt by ‘scandalising the court’ attracted particular criticism from stakeholders. It was described as archaic and misleading.⁴²

- 2.39 The New Zealand Law Commission found that ‘the language of contempt is antiquated and inappropriate in modern society’,⁴³ and concluded that ‘the time has come for the old jargon of the law to be replaced with understandable modern language’.⁴⁴

- 2.40 Legislation would be required to modernise the language of contempt in this way.

Commission’s conclusions: legislate to make contempt law clear, certain and accessible

- 2.41 Significant sanctions can be imposed for contempt of court. A person may be convicted and fined or imprisoned for an indeterminate period.⁴⁵ However, the Commission has established that the scope of the power to deal with a person for contempt is uncertain, except to legal practitioners who work in this area.
- 2.42 The rule of law requires, and the community expects, that people should know with reasonable certainty what type of conduct will expose them to punishment. People must be able to access and understand the law to comply with it.
- 2.43 Further, since the law of contempt imposes limitations on rights and freedoms, particularly on freedom of expression and the principle of open justice, it is important these limitations are clearly stated and understood by the community.
- 2.44 The law must be clear, certain and accessible. In the Commission’s view, the current law of contempt is not. The Commission considers that legislation should define the type of conduct that can be dealt with as a contempt of court.
- 2.45 A diverse range of conduct can threaten the administration of justice. Legislation that defines contempt of court must accommodate this through careful drafting. The Commission has concluded that legislative reform can be achieved without compromising the ability of the court to protect itself and its proceedings from interference.

40 Submissions 6 (Professors Mark Pearson, Patrick Keyzer, Anne Wallace and Associate Professor Jane Johnston), 18 (Commercial Bar Association Media Law Section Working Group), 20 (Criminal Bar Association), 22 (Law Institute of Victoria), 23 (MinterEllison Media Group), 27 (Australia’s Right to Know coalition), 29 (Supreme Court of Victoria).

41 Submission 29 (Supreme Court of Victoria).

42 Ibid; Consultation 13 (Fiona K Forsyth QC, John Langmead QC).

43 Law Commission (New Zealand), *Reforming the Law of Contempt of Court: A Modern Statute* (Report No 140, May 2017) 3 [9].

44 Ibid 27 [1.47].

45 *Supreme Court (General Civil Procedure) Rules 2015* (Vic) r 75.11; *County Court Civil Procedure Rules 2018* (Vic) r 75.11.

- 2.46 In subsequent chapters, the Commission recommends substantive reforms to particular types of contempt. The reforms are designed to limit the scope of liability and to better accommodate competing rights and principles.
- 2.47 These reforms would require legislation in any event. It promotes clarity and accessibility to set out fully the scope of the conduct that can be dealt with as contempt, rather than rely on the community to understand both the common law and the changes made in legislation.
- 2.48 In subsequent chapters, the Commission also recommends simplifying and modernising the language defining contempt, thereby clarifying not just the purpose of the law but the conduct and circumstances that might cause someone to be in breach. These reforms require the law to be restated in legislation.

Uncertain procedural safeguards

- 2.49 Although a person found guilty of contempt may be convicted and imprisoned or fined, contempt is not tried under the usual criminal procedure in the Criminal Procedure Act. A contempt proceeding does not commence with police or another public official filing a charge in the Magistrates' Court or with the DPP filing a direct indictment with the County or Supreme Court. There is no committal proceeding to determine if the person should stand trial. There is no criminal trial with a jury to consider the evidence and deliver a verdict.
- 2.50 Instead, a contempt of court is tried and punished using a summary, judge-alone procedure. There are two ways the courts' contempt power can be invoked:
- The judge before whom a contempt occurs can directly charge, try and punish the accused themselves. In effect, this judge may assume the roles of victim, witness, prosecutor and judge. This is referred to in the consultation paper as the 'special summary procedure'.⁴⁶
 - An application to punish the contempt can be made under the Civil Procedure Rules, either by the Prothonotary or registrar on the direction of the court, the Attorney-General, the DPP or by a third party.⁴⁷
- 2.51 In both cases, legislation does not provide much guidance about the procedures that must be followed. The procedural status of contempt proceedings is ambiguous.⁴⁸
- 2.52 Decisions by the High Court indicate that:
- All proceedings for contempt must 'realistically be seen as criminal in nature'.⁴⁹
 - However, a proceeding to punish a contempt is not a criminal proceeding.⁵⁰
 - Although a proceeding for contempt of court is a civil proceeding, some of the safeguards applicable to criminal proceedings also apply to a civil proceeding for criminal contempt.⁵¹
- 2.53 It has not always been clear which safeguards apply to contempt proceedings. Over time, the courts have resolved some of this uncertainty but there is still doubt about how contempt proceedings interact with other laws governing matters such as rules of evidence, appeals, sentencing and fitness to plead.⁵²

46 *Supreme Court (General Civil Procedure) Rules 2015* (Vic) rr 75.02–75.04; *County Court Civil Procedure Rules 2018* (Vic) rr 75.02–75.04; *Magistrates' Court Act 1989* (Vic) ss 133–4; *Coroners Act 2008* (Vic) s 103.

47 *Supreme Court (General Civil Procedure) Rules 2015* (Vic) rr 75.05–75.07; *County Court Civil Procedure Rules 2018* (Vic) rr 75.05–75.07.

48 Victorian Law Reform Commission, *Contempt of Court* (Consultation Paper, May 2019) 26–8 [3.20]–[3.32].

49 *Witham v Holloway* (1995) 183 CLR 525, 534; quoting *Hinch v A-G* (Vic) (1987) 164 CLR 15, 49 (Deane J).

50 *Hinch v A-G* (Vic) (1987) 164 CLR 15, 89.

51 *Doyle v Commonwealth* (1985) 516 CLR 510, 516.

52 *Construction, Forestry, Mining and Energy Union v Grocon Constructors (Victoria) Pty Ltd* [2014] VSCA 261 [191]–[231], (2014) 47 VR 527; Victorian Law Reform Commission, *Contempt of Court* (Consultation Paper, May 2019) 27–8 [3.26]–[3.30].

- 2.54 Legal practitioners told the Commission that, even for those experienced in the field, it is time-consuming and difficult to navigate the contempt procedure provided for in the Civil Procedure Rules.⁵³ Similarly, in consultations members of the Magistrates' Court said magistrates rarely used their contempt powers, because the procedure was unclear.⁵⁴ The Coroners Court also requested greater guidance about the procedure for informing and charging a person with contempt.⁵⁵

Responses

- 2.55 The consultation paper asked whether the procedure for filing and prosecuting a charge of contempt of court should be the same as for criminal offences. If not, the consultation paper asked why contempt of court needed a different procedure and what the features of that procedure should be.⁵⁶
- 2.56 Stakeholders all agreed that, whatever procedures and rules govern contempt proceedings, procedural fairness and the right to a fair hearing must apply in a manner consistent with the punitive nature of the proceeding.⁵⁷
- 2.57 The LIV and Victorian Legal Aid (VLA) submitted that to achieve this and to ensure transparency, consistency and fairness, the procedure for filing and prosecuting a charge of contempt of court should be the same as that used for criminal offences.⁵⁸
- 2.58 The Supreme Court submitted that 'the procedure for contempt is different from that which applies to other offences because it derives from a very different basis and serves a particular purpose'.⁵⁹
- 2.59 The Supreme Court, County Court and the Chief Examiner did not consider that the summary procedure was unfair or problematic.⁶⁰ Nonetheless, the Supreme and County Courts would prefer legislation to set out the summary procedure in more detail and clarity, to provide more direction to courts and ensure consistency.⁶¹
- 2.60 The LIV was especially concerned that the special summary procedure conflicted with the fair trial rights set out in the *Charter of Human Rights and Responsibilities Act 2006* (Vic). It noted that this procedure arguably reverses the onus of proof and 'may lead to a public perception of injustice, and thus diminish the authority of the court'. The LIV submitted that, although the court must have the power to deal with immediate threats and disruptions in the courtroom, the procedure, including safeguards already established by cases, should be set out in legislation.⁶²

Commission's conclusions: legislate to reform procedure

- 2.61 Over time, the common law has provided guidance on the procedure, including safeguards, for trying a person for contempt but elements of the process remain unclear. This creates a risk of inconsistency and a risk that the rights of the accused are not secured in a way that reflects the punitive nature of the proceedings.
- 2.62 The Commission acknowledges a need for flexibility, immediacy and judicial discretion in responding to contempts of court. However, this should not outweigh the need for procedural fairness. The rule of law requires, and the community expects, that a person

53 Consultations 9 (Victorian Government Solicitor's Office), 13 (Fiona K Forsyth QC, John Langmead QC).

54 Consultation 25 (Magistrates' Court of Victoria).

55 Submission 21 (Coroners Court of Victoria).

56 Victorian Law Reform Commission, *Contempt of Court* (Consultation Paper, May 2019) 29, Question 3.

57 Submissions 11 (Victoria Legal Aid), 14 (Children's Court of Victoria), 20 (Criminal Bar Association), 22 (Law Institute of Victoria), 26 (Chief Examiner, Victoria), 29 (Supreme Court of Victoria), 31 (County Court of Victoria); Consultations 12 (Professor David Rolph), 13 (Fiona K Forsyth QC, John Langmead QC), 20 (Victorian Equal Opportunity and Human Rights Commission).

58 Submissions 11 (Victoria Legal Aid), 22 (Law Institute of Victoria). The Criminal Bar Association submitted that, other than the 'special summary procedure', the procedures should be the same as for criminal offences: Submission 20 (Criminal Bar Association).

59 Submission 29 (Supreme Court of Victoria).

60 Submissions 26 (Chief Examiner, Victoria), 29 (Supreme Court of Victoria), 31 (County Court of Victoria).

61 Submissions 29 (Supreme Court of Victoria), 31 (County Court of Victoria).

62 Submission 22 (Law Institute of Victoria).

will not be exposed to punishment without a fair trial. This is a right protected by the Charter of Human Rights and Responsibilities Act.⁶³

- 2.63 Legislative reform is required to clarify the procedure for contempt and the procedural protections afforded accused persons. The Commission discusses options for procedural reforms and makes recommendations in Chapter 5 and, where relevant to specific categories of contempt, elsewhere in Part Two.

A Contempt of Court Act

- 2.64 The Commission has found little evidence that Victorian courts overuse or misuse their contempt powers. On the contrary, all the evidence suggests that Victorian courts invoke and use these powers sparingly.
- 2.65 The Commission also found little evidence that the protection of the proper administration of justice is compromised by deficiencies in the law of contempt.⁶⁴
- 2.66 Further, although contempt is rarely used and ordinary criminal offences address much of the same conduct, stakeholders told the Commission the law of contempt continues to serve a purpose.⁶⁵ None submitted it should be abolished completely.⁶⁶
- 2.67 While courts exercise their contempt powers rarely, the law of contempt affects people even when they are not punished for contempt. When witnesses are required to produce documents or attend court, they are told they can be punished for contempt if they fail to comply.⁶⁷ Those served with court orders are told the same thing.⁶⁸ Anyone who publishes material about courts is constrained by the law of contempt.
- 2.68 These examples show the impact of the law of contempt, and why the community must be able to understand the law and have confidence that it operates fairly and transparently. Legislation is needed to:
- define the type of conduct that may expose a person to punishment for contempt
 - modernise the language of the law
 - limit the extent to which contempt restricts rights and freedoms
 - clarify the procedure for trying and punishing contempt and rights of appeal
 - clarify safeguards to ensure a fair trial
 - clarify the relationship between the law of contempt and other laws
 - limit the penalties that can be imposed on a person found guilty of contempt.
- 2.69 The Commission therefore recommends that the law of contempt should be restated and reformed in legislation, in a new Contempt of Court Act. The form and scope of this proposed Act is discussed in Chapters 3–11.

Recommendation

- 1 For the purpose of ensuring clarity, certainty and accessibility, the common law of contempt of court should be restated in legislation in a new Act, the Contempt of Court Act.**

63 *Charter of Human Rights and Responsibilities Act 2006 (Vic)* ss 24–5.

64 However, as discussed in Chapters 9–11, changes in technology and the way and speed with which information is accessed and shared present challenges to the effectiveness of law of contempt.

65 See Chapters 7–11.

66 However, as discussed in Chapter 11, many stakeholders submitted that scandalising contempt should be abolished.

67 See, eg, *Supreme Court (General Civil Procedure) Rules 2015 (Vic)* sch 3 Form 42A–C.

68 See, eg, *ibid* r 66.10(3).

How to reform the law of contempt of court

- 20** Approach to legislative reform
- 21** Recognising the source and purpose of the contempt power
- 22** Should contempt be recast as statutory criminal offences?
- 25** A statutory framework for exercising the contempt power
- 26** Power must give effect to the overarching purpose

3. How to reform the law of contempt of court

Overview

- The source and purpose of the law of contempt are different from those of the ordinary criminal law. The court's power to deal with any person or organisation for contempt exists so that the courts can protect the administration of justice.
- The proposed Act should recognise that the law of contempt is at its heart a judicial power rather than a series of offences.
- The proposed Act should comprehensively define when and how the courts can exercise their contempt powers to protect the administration of justice. This should include specifying the conduct that can be dealt with as a contempt of court.
- The proposed Act should specify the scope of the existing powers of courts to deal with contempt rather than conferring new powers on the courts or creating parallel offences.
- The overarching purpose of the proposed Act should be to protect the administration of justice. To guide the community and those interpreting the proposed Act, the proposed Act should also explain what is meant by the administration of justice.

Approach to legislative reform

- 3.1 Most stakeholders submitted that the law of contempt should be restated in legislation but views diverged on the appropriate form of statutory intervention. Many submissions supported statutory clarification or codification without detailing how to achieve it.
- 3.2 Some stakeholders emphasised that legislative reforms must respect the role of the law of contempt in maintaining the integrity and authority of the court system. The Law Institute of Victoria (LIV) submitted that:
- pains should be taken to ensure such reforms reflect the unique nature of this area of law, including the need for judicial officers to be able to maintain the orderly administration of justice.¹
- 3.3 This section of the report considers the options for legislative reform with respect to:
- the source and purpose of the contempt power
 - whether the proposed Act should recast the law of contempt as a series of statutory offences

- whether the proposed Act should operate as a conferral of statutory jurisdiction or recognise the Supreme Court’s existing inherent jurisdiction as the source of the Court’s contempt power
- how the proposed Act could provide a statutory framework for the exercise of the contempt power.

Recognising the source and purpose of the contempt power

- 3.4 Under the doctrine of the separation of powers, the courts have power to interpret and apply the law independently of the other arms of government. The courts impartially adjudicate disputes about the law and determine parties’ rights and liabilities under the law. However, the law of contempt is not just another law interpreted and applied by the courts. The law of contempt is fundamental to the function of the courts.² It secures the courts’ authority and ability to interpret and apply all other laws independently and fairly. It does this by empowering the court to protect itself and its processes from interference, including from other arms of government, and to compel compliance with its orders.
- 3.5 The separation of judicial power from executive and legislative power would be ineffective if the courts were given the function of administering justice according to law but had no attendant power to protect against conduct that undermined their ability to do so.³ The High Court has therefore described the power to deal with a person for contempt as ‘a power of self-protection or a power incidental to the function of superintending the administration of justice’.⁴ This means that because the Supreme Court is the institution responsible for managing and overseeing the administration of justice in Victoria, it must have this power to fulfil its institutional role. It is an inherent power, derived from the Supreme Court’s function as a superior court, and not from Parliament.⁵ It is a jurisdiction that must be controlled and administered by the Supreme Court itself so that the Court can protect its authority to exercise judicial power independently of the other arms of government.
- 3.6 Although there is no binding separation of judicial power under the constitutions of the states, including Victoria,⁶ the principles of independence and impartiality that flow from the observance of this doctrine in Victoria support the rule of law and public confidence in the judicial process.⁷ Laws which serve this doctrine have an important function at state level.
- 3.7 Further, there are Commonwealth constitutional limitations on the legislative power of the Victorian Parliament to remove power from or confer power on state courts.⁸ These limitations protect aspects of the Supreme Court’s jurisdiction from legislative erosion. The Commission has received legal advice that the Supreme Court’s power to punish for contempt may be a ‘defining characteristic’ of the Court as a state Supreme Court and, therefore, a constitutionally protected power. If so, the Victorian Parliament could validly pass legislation which had the effect only of regulating the exercise of the power, rather than removing it. The Victorian Parliament could not remove the Supreme Court’s power to deal with a contempt of court on its own motion.⁹
- 3.8 For these reasons, the law of contempt differs from ordinary criminal law, even though the exercise of the contempt power often involves the imposition of punishment.¹⁰ It is not just procedurally different. The court’s power to deal with a person for contempt derives from a different source and is exercised for a different purpose than the powers the court exercises in its criminal jurisdiction. When a court deals with a person for

2 Submission 32 (International Commission of Jurists, Victoria).

3 *Ahnee v DPP* [1999] 2 AC 294, 303; cited in *Re Colina; Ex Parte Torney* [1999] HCA 57 [17], (1999) 200 CLR 386.

4 *Porter v The King; Ex parte Yee* (1926) 37 CLR 432, 443 (Isaacs J).

5 *R v Forbes; Ex parte Bevan* (1972) 127 CLR 1, 7 (Menzies J). Ultimately, the general jurisdiction of the Supreme Court as Victoria’s superior court with unlimited jurisdiction is conferred by section 85 of the *Constitution Act 1975* (Vic).

6 *City of Collingwood v Victoria* [1994] 1 VR 652.

7 *The Herald & Weekly Times Ltd v Popovic* [2003] VSCA 161, (2003) 9 VR 1 [507].

8 *Kirk v Industrial Relations Commission (NSW)* [2010] HCA 1; *Kable v DPP (NSW)* (1996) 189 CLR 51.

9 See Appendix D.

10 *Re Colina; Ex Parte Torney* [1999] HCA 57 [109] (Hayne J).

contempt, it acts to protect its ability to administer justice according to law, and punishment is in aid of that purpose.¹¹

- 3.9 The Commission considers that the unique source and purpose of the contempt power should be reflected in the framing of the proposed Act.

Should contempt be recast as statutory criminal offences?

- 3.10 The aim of legislative reform is to clarify the conduct that can attract punishment for contempt and the procedures that must be followed to deal with a person for contempt. This could be achieved by reframing the law of contempt as a series of statutory offences, albeit with variations to the usual criminal procedure, to allow the court a direct role in instituting and prosecuting proceedings.

- 3.11 The contempt power may be a judicial power, exercised for a protective purpose, but it still operates on conduct. The law of contempt creates obligations and liabilities. If these rules are breached they expose a person to punishment and in that sense such breaches can be characterised as 'offences'. The proposed Act could focus on defining these offences.

- 3.12 Taking contempt in the face of the court as an example, if it were to be expressed as a statutory offence the legislation would provide as follows:

Provision A

A person who intentionally engages in conduct that disrupts a proceeding commits an offence.

OR

A person must not intentionally engage in conduct that disrupts a proceeding.

Penalty: X months imprisonment.

- 3.13 But would that properly recognise the unique source and purpose of the law of contempt?
- 3.14 Alternatively, the legislation could recognise the inherent contempt jurisdiction as the source of the judicial power but regulate the exercise of the power by setting out the circumstances and procedures of its application.
- 3.15 The difference in approach would be captured in the way the legislation was expressed.
- 3.16 If the proposed Act is expressed to deal with the exercise of the inherent power, it would provide, in the case of contempt in the face of the court, as follows:

Provision B

The Court may deal with a person for contempt if they engage in conduct that disrupts proceedings.

- 3.17 The difference in expression reflects the differing conceptual foundations of the legislation. Provision A is concerned with regulating and criminalising conduct that interferes with the administration of justice. Provision B is concerned with defining when it may be necessary, and therefore permissible, for the court to exercise its powers, including its punitive powers, to protect the proper administration of justice.

- 3.18 Several stakeholders supported an approach to reform that would recast the courts' power to punish for contempt into more standard statutory offences, like hypothetical Provision A. These stakeholders submitted that bringing the law of contempt into line with the ordinary criminal law—by defining the elements of the offence and the procedure for trying the offence—would improve transparency, certainty, predictability and fairness.¹²
- 3.19 Recasting the law of contempt as statutory offences would ensure proceedings for contempt were clearly designated as criminal proceedings and the established criminal procedures and safeguards would apply. A person dealt with for contempt would no longer be in a different position from a person dealt with under the ordinary criminal procedure.
- 3.20 The offences would apply and be enforced uniformly regardless of the court before which the conduct occurred.
- 3.21 The offences would be investigated and charged by police and then prosecuted by the police or the Office of Public Prosecutions (OPP). However, as with the offence of perjury, special provision could be made in the Criminal Procedure Act for the court to direct that a person be tried for the offences.¹³ This would ensure that the court was not dependent on the prosecutorial discretion of an external agency to have a person charged with a contempt offence.
- 3.22 Other law reform commissions have recommended that the law of contempt be reformed and restated as statutory offences.
- 3.23 The Law Reform Commission of Western Australia recommended that the law of contempt of court be codified and replaced by a series of new statutory criminal offences to be inserted in the Criminal Code.¹⁴
- 3.24 The Australian Law Reform Commission (ALRC) recommended that the law of contempt, except for civil contempt, be recast as statutory criminal offences. For the offences replacing contempt in the face of the court, the ALRC recommended a summary mode of trial. For the other replacement offences, the ALRC recommended that the normal procedures for the trial of criminal offences should apply.¹⁵
- 3.25 In New Zealand, the *Contempt of Court Act 2019* (NZ) replaces some categories of contempt with statutory criminal offences to be prosecuted, with minor adjustments, in the usual way.
- 3.26 There are limitations to this approach. Any list of discrete criminal offences will not capture all the ways that a person may interfere with administration of justice. To address these gaps would require one of the following:
- the current inherent power to deal with a person for contempt to be partially preserved to cover these unforeseen circumstances¹⁶
 - a general statutory contempt offence to be enacted
 - Parliament to supplement the statutory contempt offences with other legislative provisions or offences as the need arises.¹⁷

12 Submissions 11 (Victoria Legal Aid), 22 (Law Institute of Victoria), 27 (Australia's Right to Know coalition). The Criminal Bar Association also supported the introduction of statutory offences to cover much of the conduct currently punishable as contempt of court. The Association drew a distinction between use of the contempt power to prevent or stop an ongoing contempt and the use of the power to punish a past contempt. It submitted that the ordinary criminal procedure should apply only where the purpose is to punish past behaviour: Submission 20 (Criminal Bar Association).

13 *Criminal Procedure Act 2009* (Vic) s 415.

14 Law Reform Commission of Western Australia, *Report on Review of the Law of Contempt* (Project No 93, June 2003).

15 The Law Reform Commission, *Contempt* (Final Report No 35, December 1987) [17].

16 Both the Law Institute of Victoria and Victoria Legal Aid told the Commission that it was important to preserve the Supreme Court's inherent jurisdiction in order to address unforeseen circumstances. They submitted that a statutory contempt regime should sit alongside the Court's inherent contempt powers, albeit with the latter only relied on where there is a statutory gap: Submission 11 (Victoria Legal Aid); Consultation 8 (Law Institute of Victoria). This was the approach adopted in the *Contempt of Court Act 2019* (NZ) s 26.

17 See Law Reform Commission of Western Australia, *Report on Review of the Law of Contempt* (Project No 93, June 2003) 117–18.

- 3.27 Currently, the court's flexible exercise of its contempt powers is governed by how the protective purpose of the law of contempt can best be achieved. This allows a special role for warnings, apologies, purging of conduct and flexible punishments. It means the power is used with restraint and only when necessary. If the law is restated as criminal offences, the focus would shift to an assessment of whether an offence had been committed and whether it was in the public interest to prosecute it. This process may be less flexible and less adapted to the purpose of the law of contempt.
- 3.28 The ordinary criminal procedure can be slow, and delay may undermine the effectiveness of the law in dealing with conduct that interferes with proceedings.¹⁸ The directions and warnings issued by the courts may lack impact if the courts do not have a swift means to deal with misconduct.¹⁹
- 3.29 If the law is recast as criminal offences, prosecutorial discretion would shift to the police and/or the DPP. In some cases, this might be seen to improve the formality, transparency and perceived impartiality of the process.²⁰ However, stakeholders submitted that, in relation to some types of contempt, the police might lack the necessary expertise or insight into the proceedings to assess whether a contempt has been committed or whether a prosecution is necessary.
- 3.30 Stakeholders submitted that the independence of the courts would be undermined if they were dependent on an executive agency to commence contempt proceedings. If prosecution agencies, who are parties before the courts, were the sole authority to instigate prosecutions for contempt, other parties coming before the court might consider that they were not approaching the court on equal terms.²¹
- 3.31 Creating new statutory criminal offences that must be enforced by executive agencies would have resource implications. Adding new offences to the statute book without tasking and resourcing an agency to enforce them will create a prosecutorial gap. This was noted by the New Zealand Law Commission when it recommended the enactment of several offences to replace aspects of the common law of contempt. The New Zealand Commission observed that 'the success of our various recommendations will depend at least in part on those responsible for enforcing the new offences having the resources and willingness to do so'.²²

Commission's conclusions: the law of contempt is more than a collection of offences

- 3.32 The proposed Act should not reformulate the law of contempt as statutory offences. The required improvements to the law can be achieved without detracting from the character of the contempt power as an 'exercise of judicial power *by the courts*, to protect the due administration of justice'.²³
- 3.33 It is preferable that the proposed Act recognise the unique source and purpose of the law of contempt. To state the law as a series of statutory offences would change the law into a series of prohibitions defined by Parliament and enforced by the courts. The focus of the law would shift from the courts exercising power, where necessary, to protect their integrity and independence, to Parliament criminalising specified conduct and prescribing a procedure to try and punish it.
- 3.34 The Commission accepts that the law could be recast as statutory offences with a direct role preserved for the court in instituting a prosecution for those offences. However, even with a special role for the courts of this kind, reforms that reduce the law of contempt to

18 Submission 29 (Supreme Court of Victoria).

19 Submission 26 (Chief Examiner, Victoria).

20 It is noted that the Supreme Court submitted that the show cause process the Court often uses 'is a very transparent process' and is at least as transparent as the exercise of prosecutorial discretion: Submission 29 (Supreme Court of Victoria).

21 Submission 29 (Supreme Court of Victoria); Consultation 24 (County Court of Victoria).

22 Law Commission (New Zealand), *Reforming the Law of Contempt of Court: A Modern Statute* (Report No 140, May 2017) 35 [1.94].

23 *Re Colina; Ex Parte Torney* [1999] HCA 57 [112] (Hayne J).

statutory offences fail to recognise the importance of the contempt power belonging to and being controlled by the courts themselves. The proposed Act must recognise the importance of the courts' discretion in determining whether it is necessary to exercise the contempt power. Recasting the law of contempt as statutory offences might confine the court's discretion to determining whether and what punishment should be imposed for conduct proscribed by Parliament.

- 3.35 The Commission has heard that the law of contempt needs to be clarified, redefined to better accommodate competing rights, and made more procedurally certain and fair. The Commission has not heard that the proper administration of justice is undermined because of deficiencies in the law of contempt.²⁴ Therefore, the Commission is not satisfied that it is necessary to change the fundamental foundations of the law.
- 3.36 Consequently, rather than prohibiting certain conduct or defining certain conduct as an offence, the proposed Act should define the conduct which the court may deal with as a contempt, if the court considers it necessary to protect the proper administration of justice.

A statutory framework for exercising the contempt power

- 3.37 The following chapters in this Part consider how the proposed Act should provide for and regulate the exercise of the courts' contempt powers.
- 3.38 Order 75 of the Civil Procedure Rules already regulates the exercise of the Supreme Court's contempt jurisdiction.²⁵ However, these Rules provide minimal procedural guidance or guidance on what conduct may be dealt with as a contempt. The proposed Act would replace Order 75 with a more complete statutory framework for the exercise of Supreme Court's inherent contempt jurisdiction.
- 3.39 The statutory framework provided for in the proposed Act would address:
- when the courts' contempt jurisdiction can be exercised by defining what conduct may be dealt with by the court as a contempt
 - the procedures for invoking the courts' contempt jurisdiction, including specifying who has standing to invoke the jurisdiction
 - the procedures governing the conduct of proceedings
 - the purpose for which the courts' power to punish contempt may be exercised
 - discretionary factors that should be considered before deciding to deal with a person for contempt rather than using alternative procedures to address their conduct
 - the penalties that may be imposed on a person, including a body corporate, found guilty of contempt.
- 3.40 As discussed further in Chapter 6, the proposed Act would also confer on and regulate contempt powers of other courts, replacing existing statutory provisions.
- 3.41 The proposed Act should be exhaustive and should deal with all types of contempt. It should not be limited to certain types of contempt.²⁶ To reflect this, the proposed Act should provide that a person may only be dealt with for contempt, and application be made to punish a contempt, in accordance with the Act.

²⁴ Even an organisation such as the Law Council of Australia, which broadly supports the codification of the law, states that 'the law of contempt as it currently stands operates satisfactorily': Law Council of Australia, Submission No 6 to the Senate and Legal Constitutional Affairs References Committee, *Law of Contempt* (13 November 2017) [6].

²⁵ *Supreme Court (General Civil Procedure) Rules 2015* (Vic). The County Court's contempt jurisdiction is regulated by *County Court Civil Procedure Rules 2018* (Vic). These mirror the Supreme Court Rules.

²⁶ This is the approach adopted by the *Contempt of Court Act 2019* (NZ).

- 3.42 Stakeholders told the Commission that the courts' contempt powers were rarely used and only as a last resort. In that context, the Commission considers that a new legislative regime which does not exhaustively govern the courts' contempt powers would be of limited value. A partial approach, where only certain types of contempts are dealt with under the proposed Act, while others remain to be dealt with under existing law, may further complicate the law of contempt.

Recommendations

- 2 The proposed Act should provide an exhaustive statutory framework for the exercise of the inherent power to deal with all persons for contempt of court.
- 3 The proposed Act should provide that an application to deal with a person for contempt of court may only be made under the Act and that a person may only be dealt with for contempt of court in accordance with the proposed Act.

Power must give effect to the overarching purpose

- 3.43 It is standard for Victorian Acts to include a provision that outlines the underlying purpose or objects of the legislation, which can be drawn on to interpret the provisions of the Act.²⁷ Many Acts also provide that decisions made or powers exercised in accordance with the Act should seek to give effect to such overarching purpose.²⁸
- 3.44 For example, the *Civil Procedure Act 2010* (Vic) provides that the overarching purpose of that Act is 'to facilitate the just, efficient, timely and cost-effective resolution of the real issues in dispute'.²⁹ The Act also provides that a court must give effect to the overarching purpose in the exercise of any of its inherent or statutory powers and provides for how this can be achieved.³⁰
- 3.45 The proposed Act should include a similar overarching provision which explains that:
- the purpose of the proposed Act is to promote and protect the proper administration of justice
 - the courts, in exercising the power to deal with a person for contempt under the proposed Act, must seek to give effect to this overarching purpose.
- 3.46 As discussed in Chapter 2, the term 'proper administration of justice' is not easily defined. Instead, the concept is best explained by identifying the requirements of an effective system of justice, as set out in Chapter 2. These requirements should be expressly restated as principles a court must have regard to in seeking to give effect to the overarching purpose of the proposed Act.
- 3.47 As discussed in the consultation paper,³¹ the protection of the proper administration of justice is not absolute and must be provided for in a way compatible with human rights as recognised at common law and under the *Charter of Human Rights and Responsibilities Act 2006* (Vic). Accordingly, the proposed Act should clarify that the proper administration of justice must be promoted and protected in a way that is compatible with human rights.

27 *Interpretation of Legislation Act 1984* (Vic) s 35.

28 See, eg, *Guardianship and Administration Act 2019* (Vic) ss 7–9 (not yet in force); *Civil Procedure Act 2010* (Vic) ss 7–9; *Coroners Act 2008* (Vic) ss 6–9.

29 *Civil Procedure Act 2010* (Vic) s 7.

30 *Ibid* ss 8–9.

31 Victorian Law Reform Commission, *Contempt of Court* (Consultation Paper, May 2019) 3–6 [1.13]–[1.27].

Recommendations

- 4 The overarching purpose of the proposed Act should be to promote and protect the proper administration of justice in a way that is compatible with the Charter of Human Rights and Responsibilities Act and other statutory, constitutional and common law rights or principles.
- 5 The proposed Act should provide that in exercising any of its powers under the proposed Act, a court must seek to give effect to the overarching purpose and, in doing so, must have regard to the following principles:
 - that the independence, integrity and impartiality of the judiciary should be protected
 - that all persons should have unhindered access to the court system to determine their legal rights and liabilities
 - that all cases should be determined in accordance with the rule of law and that the right to a fair hearing should be upheld
 - that the public and media should be able to access and report on both court proceedings and court documents unless otherwise provided by law
 - that all cases should be heard in an orderly and efficient manner, free from disruption and outside influence, and should be decided based only on the evidence properly admitted and proved
 - that for decisions to be made on the best evidence, witnesses should be able to be compelled to attend and give evidence
 - that jury verdicts should be based only on evidence properly admitted and proved after free, frank and confidential jury discussions, and that the finality of verdicts should be protected
 - that those with duties to perform in the court, including judges, witnesses, jurors and legal practitioners, should do so fairly and honestly, in accordance with the directions of the court and any undertakings given to the court, and in a safe environment, free from interference and harassment
 - that orders made by the courts should be complied with and enforced.

Defining contempt of court in legislation

- 30** Conduct that can be dealt with as a contempt
- 31** Categories of contempt
- 32** A 'general' category of contempt
- 33** Tendency test
- 34** Fault element
- 36** Crimes Act provisions
- 37** Conduct deemed a contempt or able to be dealt with as a contempt

4. Defining contempt of court in legislation

Overview

- The proposed Act should define the kinds of conduct that may be dealt with as contempt of court.
- This should include the more common categories of contempt of court defined in other chapters of this report.
- The proposed Act should also recognise interferences with and reprisals against those involved with a court proceeding as distinct categories of conduct that may be dealt with as contempt.
- The proposed Act should include a general category of contempt that covers any other conduct that creates a substantial risk of interference with the administration of justice.
- For this general category of contempt, the person must intend to create a substantial risk of interference with the administration of justice or be reckless towards this risk.
- The definition of conduct that can be dealt with as a contempt of court should include conduct that under other legislation is deemed to be a contempt of court or can be dealt with as a contempt of court.

Conduct that can be dealt with as a contempt

- 4.1 This chapter considers how the proposed Act should define what conduct can be dealt with as a contempt of court.
- 4.2 There are many ways to interfere with the administration of justice, and so the common law definition of contempt of court is broad. Most explanations of the law describe, rather than define, contempt of court by grouping different kinds of conduct into thematic categories.¹
- 4.3 Some stakeholders have therefore submitted that contempt of court should be defined by identifying and describing these more common categories of contempt.² The Commission agrees with this proposal.

Categories of contempt

- 4.4 The more difficult question is which categories should be included in the proposed Act. In Chapters 7 to 11, the Commission makes recommendations for defining and, in some cases, renaming the following categories of contempt of court:³
- conduct that occurs in or near the courtroom and interferes with a court proceeding (replacing what is now known as contempt in the face of the court)
 - witness misconduct
 - non-compliance with court orders or undertakings (replacing what is now known as disobedience contempt)
 - publication of material that prejudices a person’s right to a fair trial (replacing what is now known as sub judice contempt)
 - publication of material undermining public confidence in the judiciary or courts (replacing what is now known as scandalising the court).
- 4.5 In its consultation paper, the Commission focused on these categories, which was reflected in the feedback it received. Stakeholders have not expressed views on whether or how other categories of conduct should be included in any proposed Act.
- 4.6 However, other kinds of contempt occur often enough to be included in the proposed Act. In particular, the Commission considers that the proposed Act should also recognise as a distinct category of contempt:
- conduct that interferes with witnesses, jurors, legal practitioners, judges, officers of the court, parties and potential parties to a proceeding
 - reprisals against those people after proceedings.
- 4.7 Interference or reprisals may take many forms including assaults, threats, harassment, inducements and improper pressure.⁴
- 4.8 The existing law is unclear about the required fault element for this category of contempt.⁵ The law is also unclear about when pressure placed on a party or potential party will be regarded as improper.⁶ If the proposed Act includes this category of contempt, these matters should be clarified.

Recommendation

- 6** The proposed Act should define the conduct liable to punishment as a contempt of court by listing the more common categories of contempt and defining in clear and accessible language the elements of each category.

3 The Commission does not recommend recognising juror contempt as a specific category: see Ch 9.

4 See, eg, *R v Bonacci* [2015] VSC 121; *R v Vasiliou* [2012] VSC 216; *Prothonotary of the Supreme Court of New South Wales v Katelaris* [2008] NSWSC 389; *Farahbakht v Midas Australia Pty Ltd* [2006] NSWSC 1322; *Bhagat v Global Custodians Ltd* [2002] NSWCA 160; *Clarkson v Mandarin Club Ltd* (1998) 90 FCR 354; *R v McLachlan* [1998] 2 VR 55; *R v Macdonald* [1994] 1 VR 414; *R v Wright* (No 1) [1968] VR 164.

5 *R v Taylor* [1999] 3 VR 657; *Gregory v Phillip Morris Ltd* (1987) 74 ALR 300.

6 *Ulman v Live Group Pty Ltd* [2018] NSWCA 338 [72]–[84]; *Melbourne University Student Union Inc (in liq) v Ray* [2006] VSC 205 [14]–[16].

Recommendations

- 7 The categories of contempt defined as conduct liable to punishment as contempt under the proposed Act should include the following, as set out in subsequent recommendations:
- conduct that occurs in or near to the courtroom and that interferes with a court proceeding
 - witness misconduct
 - non-compliance with court orders or undertakings
 - publication of material that prejudices a person's right to a fair trial
 - publication of material undermining public confidence in the judiciary or courts.
- 8 The proposed Act should also recognise as a distinct category of conduct liable to punishment as contempt interferences with and reprisals against those involved with a court proceeding, including judges, witnesses, jurors, legal practitioners, officers of the court, parties and potential parties to a proceeding.

A 'general' category of contempt

- 4.9 No definition of contempt of court can comprehensively define all the kinds of conduct that might interfere with the administration of justice.⁷ This means that the proposed Act must provide flexibility for the courts to recognise and respond to new or other forms of conduct liable to punishment as contempt.
- 4.10 There are two options to accommodate this need for flexibility. The proposed Act could set out:
- a non-exhaustive list of conduct, making it clear it is only listing *some* of the conduct that might amount to contempt, or
 - an exhaustive list of conduct, including in the list a general category of contempt that captures any other conduct with a tendency to interfere with the administration of justice.
- 4.11 Either approach may undermine the goals of providing certainty and clarity. If a general category of contempt is included, it could be argued that conduct that does not fall within the more precisely defined categories still falls within the general category. This would undermine the purpose of defining those more common categories.
- 4.12 The Law Reform Commission of Western Australia's recommendations did not include a general offence of contempt when it recommended replacing contempt law with specific offences. It concluded that this would be inconsistent with the objective of providing greater certainty about the basis for liability and clearer guidance to participants in judicial proceedings.⁸
- 4.13 The Australian Law Reform Commission's recommendations for reform comprehensively set out the offences required to replace the common law of contempt and did not include a general offence provision to cover possible gaps.⁹

7 Submissions 29 (Supreme Court of Victoria), 31 (County Court of Victoria); Consultations 12 (Professor David Rolph), 13 (Fiona K Forsyth QC, John Langmead QC).

8 Law Reform Commission of Western Australia, *Report on Review of the Law of Contempt* (Project No 93, June 2003) 113–14, 118.

9 The Law Reform Commission, *Contempt* (Final Report No 35, December 1987).

- 4.14 On the other hand, the New Zealand Law Commission (NZ Commission) was told by stakeholders that defining the law of contempt comprehensively in legislation ‘risked missing some conduct’.¹⁰ The NZ Commission therefore recommended that the courts should retain inherent jurisdiction to address circumstances not covered by legislative reforms.¹¹ This recommendation is reflected in the *Contempt of Court Act 2019* (NZ).¹²

Responses

- 4.15 The County Court submitted that any proposed Act should leave room for ‘novel or unforeseen conduct’.¹³
- 4.16 The Supreme Court submitted that ‘it is not possible in advance to identify every form of behaviour which may have a tendency to interfere with the proper administration of justice’.¹⁴ Professor David Rolph similarly doubted whether the conduct that might amount to contempt of court could be comprehensively specified in legislation.¹⁵
- 4.17 Victoria Legal Aid (VLA) and the Law Institute of Victoria (LIV) supported recasting some or all of the law of contempt into ordinary criminal offences. However, they also supported preserving the inherent powers of the courts to deal with contempt to address unforeseen conduct and circumstances.¹⁶
- 4.18 Some stakeholders cautioned that a comprehensive definition of contempt of court may encourage people to identify and exploit gaps in the law.¹⁷

Commission’s conclusions: include a general category of contempt

- 4.19 The law of contempt currently favours flexibility at the expense of certainty. This balance should be adjusted by defining the more common categories of contempt.
- 4.20 The need for certainty does not mean that all conduct capable of constituting contempt must be explicitly defined. This could undermine the protective purpose of the law and deprive the court of the ability to respond to interferences with the administration of justice.
- 4.21 Certainty and flexibility should be balanced. The proposed Act should exhaustively define the conduct that can be dealt with as a contempt. However, the defined conduct should include a general category of contempt covering any other conduct, not otherwise described, that substantially risks interfering with the proper administration of justice.
- 4.22 The Commission is satisfied the scope of this general category of contempt will be sufficiently constrained by:
- the exclusion of conduct covered by the more common and defined categories of contempt
 - the fault element required to establish a contempt within this category (discussed below)
 - the statement of principle to be included in the proposed Act that will explain the purpose for which the court can exercise its power to punish for contempt.¹⁸

Tendency test

- 4.23 Under the common law, conduct may be dealt with as a contempt if it interferes with or has a tendency to interfere with the proper administration of justice.

10 Law Commission (New Zealand), *Reforming the Law of Contempt of Court: A Modern Statute* (Report No 140, May 2017) 131 [7.16].
 11 Ibid 133 [7.21].
 12 *Contempt of Court Act 2019* (NZ) s 26.
 13 Consultation 24 (County Court of Victoria).
 14 Submission 29 (Supreme Court of Victoria).
 15 Consultation 12 (Professor David Rolph).
 16 Submission 11 (Victoria Legal Aid), Consultation 8 (Law Institute of Victoria).
 17 Consultation 13 (Fiona K Forsyth QC, John Langmead QC).
 18 See Ch 3.

- 4.24 As discussed in Chapter 10 and in the consultation paper,¹⁹ this test of liability has been expressed by the courts in different ways. It has been described as requiring ‘a real and definite tendency as a matter of practical reality to interfere with the due administration of justice’,²⁰ that interference is ‘likely’,²¹ or that there is a ‘substantial risk of serious interference’.²²
- 4.25 The differences between these expressions of the test have been discussed in relation to sub judge contempt.²³ The law reform commissions of New South Wales and Western Australia favoured the ‘substantial risk’ formulation for sub judge contempt.²⁴
- 4.26 As discussed in Chapter 10, the Commission also prefers a test of ‘substantial risk’ of interference. The Commission considers that the language of ‘risk’ rather than ‘tendency’ is clearer, and the required degree of risk should be stated, although, in practice, it may be no stricter than the current common law test.²⁵

Fault element

- 4.27 As discussed in the consultation paper, a person does not need to intend to interfere with the administration of justice before they are found guilty of contempt. In this way, contempt is framed differently from typical criminal offences, and is often described as a strict liability offence.
- 4.28 While many summary offences are strict liability, most indictable offences require a person to have a specified state of mind to be found guilty. This is known as the ‘fault element’.²⁶
- 4.29 For Commonwealth offences, the default position is if an offence imposes liability for producing a result, a person is only liable if they intended that result or were reckless about causing that result.²⁷
- 4.30 The Commission considers that the appropriate fault element for conduct liable to be dealt with as contempt of court should vary depending on the category of contempt. Chapters 7 to 11 make recommendations about how to define the fault element for different types of contempt.
- 4.31 This section considers what the fault element should be for the general category of contempt.²⁸

Responses

- 4.32 Stakeholders divided on this issue. Some, such as the County Court and Director of Public Prosecutions (DPP), opposed changing the fault element in contempt law.
- 4.33 The County Court submitted that:
- codification of the various manifestations of contempt should closely mirror the principles that currently exist at common law. Any attempt to restrict these provisions, or to include additional elements, would stand as an obstacle to the courts utilising contempt as a tool to maintain the effective administration of justice.²⁹
- 4.34 The DPP cautioned against introducing fault elements because in many cases it would be impossible to prove contempt. The DPP submitted that ‘Factors relevant to fault and intention should remain the domain of penalty’.³⁰

19 Victorian Law Reform Commission, *Contempt of Court* (Consultation Paper, May 2019) 86 [7.24]–[7.26].

20 See, eg, *R v Vasilou* [2012] VSC 216 [15].

21 *Bell v Stewart* (1920) 28 CLR 419, 432 (Isaacs and Rich JJ); *Davis v Baillie* [1946] VLR 486, 492.

22 *Hinch v A-G (Vic)* (1987) 164 CLR 15, 27–8 (Mason CJ).

23 New South Wales Law Reform Commission, *Contempt by Publication* (Report No 100, 2003) 67–72 [4.10]–[4.18].

24 *Ibid* 72 [4.18]; Law Reform Commission of Western Australia, *Report on Review of the Law of Contempt* (Project No 93, June 2003) 28–9.

25 See New South Wales Law Reform Commission, *Contempt by Publication* (Report No 100, 2003) 68 [4.11].

26 It is also called the ‘mental element’ or mens rea.

27 *Criminal Code Act 1995* (Cth) sch 1 s 5.6(2).

28 See Appendix E for recommended fault elements for all categories of contempt included in the proposed Contempt of Court Act.

29 Submission 31 (County Court of Victoria).

30 Submission 28 (Director of Public Prosecutions).

- 4.35 Legal practitioners experienced in contempt proceedings told the Commission that requiring proof of specific intent would dramatically confine the law of contempt. It would mean that people could be careless about their conduct and not consider whether this conduct might prejudice proceedings.³¹
- 4.36 The Supreme Court submitted that the mental element for each category of contempt should be specified in any legislation. However, the Supreme Court did not specify the mental element that should apply, other than for sub judge contempt.³²
- 4.37 On the other hand, many stakeholders supported introducing a fault element, either for certain categories of contempt or for contempt more generally.
- 4.38 Professor Mark Pearson et al stated that they ‘favour reforms that emphasise the need for an intention component to provide alleged contemnors with the opportunity to lead evidence relating to intention’. They noted there may be some cases where a person’s mental health issues affect their culpability.³³
- 4.39 The Children’s Court suggested that both intention and reckless disregard be considered as the relevant fault elements.³⁴
- 4.40 Australia’s Right to Know coalition noted the serious penalties that apply for contempt and submitted:
- It is necessary to bring any offence of contempt in line with other criminal offences. Where an allegation of contempt is made, the prosecution should be required to establish the fault element of the offence.³⁵
- 4.41 In supporting the introduction of a fault element for contempt in the face of the court, the LIV observed more generally that it considered a fault element ‘an essential component of a finding of criminal liability’.³⁶
- 4.42 The VLA suggested that different fault elements (intention, recklessness or negligence) could apply, and different penalties could be imposed depending on the fault element.³⁷

Commission’s conclusions: intention or recklessness needed for general category of contempt

- 4.43 As discussed in Chapters 7, 8 and 10, there are circumstances when it will be justifiable to attach strict liability to the consequences of a person’s actions. For example, it may be necessary to put a person on notice that when they undertake a particular activity (such as publishing information about a pending criminal proceeding) or are in a particular place (a courtroom conducting proceedings), they are under an obligation to take care to avoid interfering with the administration of justice.
- 4.44 However, it is difficult to justify strict liability for the general category of contempt. In this category, the conduct that will constitute contempt is not specified. Conduct will fall within this category simply because of the risk it creates to the administration of justice.
- 4.45 The Commission considers that, in these circumstances, a person should not be found liable and punished unless they were at least reckless. This means that the person proceeded with the relevant conduct despite being aware of a substantial risk of interference with the administration of justice.

31 Consultation 13 (Fiona K Forsyth QC, John Langmead QC).

32 Submission 29 (Supreme Court of Victoria).

33 Submission 6 (Professors Mark Pearson, Patrick Keyzer, Anne Wallace and Associate Professor Jane Johnston).

34 Submission 14 (Children’s Court of Victoria).

35 Submission 27 (Australia’s Right to Know coalition).

36 Submission 22 (Law Institute of Victoria).

37 Submission 11 (Victoria Legal Aid).

- 4.46 The Commission therefore concludes that, for the general category of contempt, both of the following must be proved:
- a person intended to do the act that is the subject of the charge
 - a person intended or was at least reckless that this would create a substantial risk of interference with the proper administration of justice.
- 4.47 This is a higher level of fault than currently required under the common law. However, it is consistent with the general premise that it is neither in the interests of fairness nor useful as a deterrent to subject people to criminal punishment for the unforeseen consequences of their actions unless these resulted from an unjustified risk.³⁸
- 4.48 Further, warnings are often given before a contempt proceeding is commenced.³⁹ Such warnings are likely to assist in proving the required fault element.

Recommendation

- 9 The definition of conduct liable to punishment as a contempt under the proposed Act should include a general category of contempt which:
- is defined as conduct that has a substantial risk of interfering with the proper administration of justice where the person who engages in the conduct intends to create or is reckless as to the risk of that interference
 - excludes conduct covered by the more common categories of contempt which are separately listed and defined.

Crimes Act provisions

- 4.49 The *Crimes Act 1958* (Vic) contains provisions which extend liability for certain criminal offences to include:
- attempting to commit the offence⁴⁰
 - inciting any other person to pursue a course of conduct which will involve the commission of the offence⁴¹
 - agreeing with any other person that a course of conduct shall be pursued which will involve the commission of the offence by a party to the agreement⁴²
 - being involved in the commission of the offence.⁴³
- 4.50 The Commission did not ask how these provisions should apply to contempt and no stakeholders addressed this issue.
- 4.51 However, the Commission considers that the proposed Act should include similar provisions. This would make it clear when a person can be dealt with for contempt where they have been involved in conduct that risks interfering with the administration of justice, but have not committed the conduct itself, or where they have tried but failed to interfere with the administration of justice.⁴⁴

38 Attorney General's Department (Cth), *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (Report, September 2011) 22 <<https://www.ag.gov.au/Publications/Documents/GuidetoFramingCommonwealthOffencesInfringementNoticesandEnforcementPowers/A%20Guide%20to%20Framing%20Cth%20Offences.pdf>>.

39 Submission 29 (Supreme Court of Victoria); Consultation 24 (County Court of Victoria).

40 *Crimes Act 1958* (Vic) Pt 1 Div 12

41 *Crimes Act 1958* (Vic) Pt 1 Div 11

42 *Crimes Act 1958* (Vic) Pt 1 Div 10

43 *Crimes Act 1958* (Vic) Pt 2 s 324

44 See, eg, *Balogh v St Albans Crown Court* [1975] 1 QB 73

- 4.52 An exception is needed for contempt in the face of the court as renamed and redefined in Chapter 7. In that chapter, the Commission recommends that a person can only be liable for that kind of contempt if the person has in fact interfered with, or undermined, the conduct of a proceeding. This limitation on liability would be ineffective if a person could be dealt with for an attempted contempt.
- 4.53 For other categories of contempt, these provisions will rarely be needed. In most cases, the definition of contempt requires only that a person creates some kind of risk of interference with the administration of justice. This will often be broad enough to cover attempts and the incitement of another person to interfere with the administration of justice, without the need for extra provisions which extend liability.
- 4.54 Further, the power to deal with a person for contempt will only be exercised sparingly, where it is necessary to protect the proper administration of justice. If a person tries to interfere with the administration of justice but their efforts are frustrated, the court may decide that no further action is needed.
- 4.55 The Crimes Act also provides that a person is not guilty of an offence if the conduct is carried out under duress.⁴⁵ The Supreme Court has stated that duress may be a defence to contempt of court where a witness refuses to testify.⁴⁶ A similar defence of duress should be included in the proposed Act.

Recommendations

10 The proposed Act should include provisions which:

- define liability for an attempt, incitement, conspiracy and involvement in the commission of a contempt
- provide for the defence of duress.

The effect of these provisions should be subject to Recommendation 53 that requires that before a person is liable for a contempt by conduct that interferes with a court proceeding actual interference with, or undermining of, the conduct of the proceeding must be proved.

Conduct deemed a contempt or able to be dealt with as a contempt

- 4.56 Some Victorian legislation deems certain conduct to be a contempt of court,⁴⁷ or provides that certain conduct may be dealt with by the Supreme Court as if it were a contempt of court.⁴⁸
- 4.57 For example, section 49 of the *Major Crime (Investigative Powers) Act 2004* (Vic) provides for the Supreme Court to deal with a contempt of the Chief Examiner as if it were a contempt of an inferior court.
- 4.58 It is beyond the scope of this inquiry to consider each of these provisions and whether it is appropriate for the specified conduct to be defined as a contempt of court or punishable by the Supreme Court as if it were a contempt of court. The Commission's recommendations are not intended to interfere with such legislation.

45 *Crimes Act 1958* (Vic) Pt 1C Div 3

46 *R v Garde-Wilson* [2005] VSC 441, [32] citing *R v K* (1984) 78 Cr. App. Rep. 82. (C.A.)

47 See, eg, *Civil Procedure Act 2010* (Vic) s 27(2) (using information and documents disclosed in civil proceedings for a purpose other than in connection with the civil proceeding); *Supreme Court Act 1986* (Vic) s 125 (extortion by and impersonation of court officials); *Unauthorized Documents Act 1958* (Vic) s 4(2) (sending or delivering false process).

48 See, eg, *Independent Broad-based Anti-corruption Commission Act 2011* (Vic) s 157; *Victorian Inspectorate Act 2011* (Vic) s 76; *Major Crime (Investigative Powers) Act 2004* (Vic) s 49(10); *Casino Control Act 1991* (Vic) s 27(2)(b); *Local Government Act 1989* (Vic) s 223C.

- 4.59 To avoid interfering with these provisions, the proposed Act could provide that conduct that can be dealt with as contempt of court includes any conduct that, in other legislation, is deemed to be a contempt of court or capable of being dealt with as a contempt of court.
- 4.60 Alternatively, the proposed Act could provide that conduct that can be dealt with as a contempt of court includes any conduct listed in a schedule to the proposed Act. The schedule could list all of the relevant legislative provisions. This would make the scope of the court's contempt jurisdiction more transparent and accessible.

Recommendation

- 11 The definition of conduct liable to punishment as contempt under the proposed Act should include any conduct that:
- is deemed by legislation to be a contempt of court
 - the court is empowered by legislation to deal with as though it were a contempt of court.

Procedure and penalties for contempt of court

- 41** Mode of trial
- 43** Procedural safeguards
- 45** Interaction with other laws
- 46** Procedure for contempts in or near the courtroom
- 53** Standing to commence proceedings
- 59** Warnings
- 61** Apologies
- 63** When can the power be exercised?
- 65** Costs
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5. Procedure and penalties for contempt of court

Overview

- Contempt of court should continue to be tried by summary procedure.
- The proposed Act should specify the procedure, including safeguards to ensure that the person charged:
 - knows the details of the case against him or her, including any evidence that will be relied upon
 - is served personally and given the opportunity to consider the charge, seek legal advice, and prepare a defence
 - has the right to provide and contest evidence to the extent permitted by the Evidence Act
 - has the right not to incriminate themselves or expose themselves to a penalty
 - is only convicted if the charge is proved beyond reasonable doubt.
- The proposed Act should specify when a person can be arrested and detained pending a contempt proceeding, and how other laws governing court proceedings apply to contempt proceedings.
- If a contempt is committed in or near a courtroom and interferes with a proceeding, the judicial officer may charge the person, including stating the facts alleged to amount to contempt, and must refer the charge to another judicial officer to be heard.
- The Attorney-General, the Director of Public Prosecutions, as well as any party in a proceeding or person who has the benefit of a court order, should be able to commence contempt proceedings. The Supreme Court should be able to direct the Prothonotary to commence contempt proceedings, and any party with a sufficient interest should be able to apply to the Court for such a direction.
- The proposed Act should specify that a court may consider an apology in deciding whether to commence or continue proceedings or determining any penalty.
- A court should consider the appropriateness of other procedures to deal with the alleged conduct before using its contempt power.
- There should be a maximum penalty for the general category of contempt of 10 years. The principles under relevant sentencing laws should apply. If a court imposes a penalty to compel a person to do something, it should still be able to reduce this penalty if the person complies, including early release from prison.

Mode of trial

- 5.1 This chapter considers how the proposed Act should regulate the commencement and trial of contempt proceedings and the penalties that may be imposed for contempt of court.
- 5.2 The proposed Act will replace the regulation of contempt proceedings in the *Supreme Court (General Civil Procedure) Rules 2015 (Vic)* (Civil Procedure Rules) with a more tailored procedure. This will protect fair trial rights in a way that reflects the criminal nature of contempt proceedings.
- 5.3 The first significant procedural issue is what mode of trial should be adopted for a contempt of court.
- 5.4 As discussed in Chapter 2, the current contempt procedure differs from ordinary criminal procedure. A contempt of court is tried by a judge-alone procedure provided for under Order 75 of the Civil Procedure Rules.
- 5.5 Order 75 of the Civil Procedure Rules provides that:
- Application for punishment for the contempt shall be by summons in the proceedings, where the contempt is committed by a party in relation to a proceeding in the court, or by originating motion in other circumstances.¹
 - The court itself can commence a contempt proceeding by directing that the Prothonotary (in the Supreme Court) apply to the Court to deal with the contempt.²
 - The summons or originating motion shall specify the contempt with which the respondent is charged.³
 - The summons or originating motion and a copy of every affidavit shall be served personally on the respondent, unless the court otherwise orders.⁴
- 5.6 Order 75 also makes provision for:
- the arrest and detention of a person pending hearing of a charge of contempt⁵
 - the imposition of certain punishments upon the contempt being proved⁶
 - the award of costs at the discretion of the court.⁷
- 5.7 However, Order 75 is silent on many procedural matters.
- 5.8 This silence has been filled by the common law and by the application of other general provisions of the Civil Procedure Rules. In *Construction, Forestry, Mining and Energy Union v Boral Resources (Vic) Pty Ltd*, the High Court confirmed that contempt proceedings commenced under Order 75 of the Civil Procedure Rules are civil proceedings. They are not the equivalent of a criminal trial. The High Court confirmed that Order 75 does not stand outside the Civil Procedure Rules and that contempt proceedings are within the ordinary application of those Rules.⁸
- 5.9 Order 75 also provides for a second procedure for commencing and determining a charge for a contempt committed in the face of the court.⁹ Under this special summary procedure, the presiding judge can directly charge, try and punish the person accused of contempt. The need to retain this special summary procedure is discussed separately below.

1 *Supreme Court (General Civil Procedure) Rules 2015 (Vic)* r 75.06(1)–(2).

2 *Ibid* r 75.07.

3 *Ibid* r 75.06(4).

4 *Ibid* r 75.06(5).

5 *Ibid* r 75.08.

6 *Ibid* r 75.11.

7 *Ibid* r 75.14.

8 *Construction, Forestry, Mining and Energy Union v Boral Resources (Vic) Pty Ltd* [2015] HCA 21.

9 *Supreme Court (General Civil Procedure) Rules 2015 (Vic)* rr 75.02–75.04.

Responses

- 5.10 Stakeholders such as the Law Institute of Victoria (LIV), Victorian Legal Aid (VLA) and the Criminal Bar Association submitted that, for transparency, consistency and fairness, the procedure for filing and prosecuting a charge of contempt of court should be the same as that which applies to criminal offences.¹⁰ The LIV and the Criminal Bar Association considered that different procedures might be required for contempts arising during proceedings that need an immediate response.¹¹ The LIV submitted that contempts from non-compliance with orders should be dealt with under a new statutory civil proceeding.¹²
- 5.11 The main objection of stakeholders to the summary procedure was that it did not adequately safeguard the rights of a person facing conviction and imprisonment. The LIV, for example, was concerned about the presumption of innocence, the appearance of bias or partiality, the time and facilities to adequately prepare a defence or communicate with a lawyer, the right to examine witnesses, or have witnesses examined, and the right to not be compelled to testify against oneself.¹³
- 5.12 The Supreme Court, County Court and the Chief Examiner submitted that, although the summary procedure differed from a criminal trial, it did include safeguards. In their view, the summary procedure was more efficient and flexible in dealing with contempt than ordinary criminal procedure and better served the protective purpose of contempt.¹⁴

Commission's conclusions: retain the summary procedure

- 5.13 Although contempt proceedings are punitive, they are distinct from an ordinary prosecution for a criminal offence. As discussed in this chapter, different parties can apply to a court to exercise its contempt powers. Further, the court has a broad discretion in dealing with the matter. For these reasons, the Commission considers it appropriate to try contempts through a summary procedure commenced by an application supported by affidavit evidence.
- 5.14 Often the focus of contempt proceedings will be on:
- the characterisation of the relevant conduct and whether it poses a substantial risk to the proper administration of justice
 - the accused's attitude towards the court and the proceedings, any demonstration of remorse, and how these bear on the matter.
- 5.15 The summary mode of trial is thus effective and efficient in identifying and resolving the issue. The Commission considers that contempt should continue to be tried by a summary procedure under the proposed Act.
- 5.16 The Commission acknowledges the gravity of a contempt charge and the fundamental importance of the right to a fair hearing as enshrined in the *Charter of Human Rights and Responsibilities Act 2006* (Vic).¹⁵ However, there are ways of protecting this right other than through the ordinary criminal procedure.
- 5.17 The proposed Act will remove the regulation of contempt proceedings from the Civil Procedure Rules and make specific provision for the conduct of contempt proceedings. The Commission considers that procedural safeguards can be included in the proposed Act to ensure the proceedings protect the accused's rights, without adopting the procedure of an ordinary criminal trial.

10 Submissions 11 (Victoria Legal Aid), 20 (Criminal Bar Association), 22 (Law Institute of Victoria).

11 Submissions 20 (Criminal Bar Association), 22 (Law Institute of Victoria).

12 Submission 22 (Law Institute of Victoria).

13 Ibid.

14 Submissions 26 (Chief Examiner, Victoria), 29 (Supreme Court of Victoria), 31 (County Court of Victoria).

15 *Charter of Human Rights and Responsibilities Act 2006* (Vic) ss 23–5.

Recommendation

- 12 The proposed Act should provide for contempt of court to be tried by summary procedure.

Procedural safeguards

- 5.18 Under the common law, certain fundamental principles already apply to contempt proceedings because of these proceedings' punitive nature:
- All charges of contempt must be proved beyond reasonable doubt.¹⁶
 - In the case of a natural person, the privilege against self-incrimination and the privilege against self-exposure to penalty apply.¹⁷
 - No person should be punished for contempt of court unless the specific charge against them has been distinctly stated and an opportunity of answering it given to them.¹⁸
- 5.19 Order 75 also includes safeguards reflecting the punitive nature of the proceedings. For example, the application to deal with the contempt must specify the charge of contempt and be served personally on the accused together with the affidavit evidence relied on in support.
- 5.20 The proposed Act should specify these safeguards. To ensure the procedure complies with the rights to a fair trial, the proposed Act should address:
- when a contempt may be tried in the absence of the accused
 - the accused's right to apply for the hearing of the charge to proceed by way of oral evidence or to cross-examine the witnesses who have sworn affidavit evidence relied on in support of the charge
 - the accused's right to call evidence in defence of the charge, including to file affidavit evidence, give oral evidence or call witnesses to give oral evidence
 - the timing and content of any obligations that the accused may have to file a response to the charge and to give notice of the evidence they intend to lead
 - the disclosure obligations of the parties, including orders to compel or produce evidence
 - the accused's right to an interpreter or communication assistance
 - the accused's rights to seek review or appeal of the court's decision and any penalty imposed
 - the circumstances in which a person may be arrested on a charge of contempt and detained pending hearing of the charge.
- 5.21 Some of these matters could be addressed in the proposed Act by clarifying how existing procedural laws apply to contempt proceedings. This is discussed below.
- 5.22 An important procedural safeguard is an accused's right to seek legal assistance and to be legally represented. This extends to the right to legal aid where a person is eligible, and the interests of justice require it.¹⁹

16 *Witham v Holloway* (1995) 183 CLR 525.
 17 *Construction, Forestry, Mining and Energy Union v Boral Resources (Vic) Pty Ltd* [2015] HCA 256 [67] (Nettle J).
 18 *Coward v Stapleton* (1953) 90 CLR 573.
 19 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 25(2)(d)–(f).

- 5.23 It is uncertain whether a person accused of contempt is eligible for legal aid, because contempt proceedings are not conducted through the usual criminal procedure.²⁰ The Commission considers that, given the gravity of contempt proceedings, eligibility for legal aid should be assessed as if a contempt proceeding is the equivalent of a criminal trial. However, as this is outside the scope of this inquiry, the Commission makes no recommendation.
- 5.24 Another important procedural safeguard in relation to the special summary procedure is the right to be tried before an impartial tribunal. This is discussed below.

Recommendations

- 13 The proposed Act should provide that proceedings to deal with a contempt of court must be commenced by application to the court and that the application must:
- include a statement of charge that clearly specifies the alleged contempt, so the accused knows the case to be met
 - be accompanied by the affidavits on which the person making the charge intends to rely.
- 14 In recognition of the criminal nature of contempt proceedings and to ensure procedural fairness, the summary procedure should include the following safeguards:
- the person charged must be served personally with the application unless an order for substituted service has been made
 - the person must be given adequate opportunity to consider the charge, seek legal advice and prepare a defence
 - subject to the Evidence Act, the person charged must have the opportunity to cross-examine witnesses, file affidavits in answer to the charge, give oral evidence and call witnesses to give oral evidence
 - in accordance with section 141 of the Evidence Act, the applicable standard of proof is beyond reasonable doubt
 - the privileges against self-incrimination and against self-exposure to penalty apply.
- 15 The proposed Act should specify the circumstances in which a person against whom contempt proceedings have been commenced can be arrested and remanded either on bail or in custody pending the hearing of a charge.

Interaction with other laws

- 5.25 Often, whether and how a procedural law applies to a proceeding will turn on whether it is a ‘criminal proceeding’ or ‘civil proceeding’, or whether it can be characterised as a ‘prosecution for an offence’. As contempt proceedings are civil proceedings that are ‘criminal in nature’, the application of laws relying on such classifications is unclear.²¹
- 5.26 For example, there is still confusion whether:
- the *Evidence Act 2008* (Vic) applies to contempt proceedings as though they are civil or criminal proceedings²²
 - the *Criminal Procedure Act 2009* (Vic) applies to interlocutory or final appeals from contempt proceedings²³
 - the Civil Procedure Rules apply to the discretion to proceed with the trial in the absence of the person charged with contempt²⁴
 - the Civil Procedure Rules apply so that a court may order a person charged with contempt to make discovery of documents or answer interrogatories²⁵
 - the Civil Procedure Rules apply so that a party can be joined to contempt proceedings²⁶
 - the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) applies to contempt so that the Act governs whether a person is unfit to stand trial or may plead a defence of mental impairment.²⁷
- 5.27 There are many other laws that might apply differently to contempt proceedings depending on whether the proceedings are classified as criminal or civil or whether contempt is an ‘offence’. These include the: *Bail Act 1977* (Vic), *Evidence (Miscellaneous Provisions) Act 1958* (Vic), *Charter of Human Rights and Responsibilities Act 2006* (Vic), *Confiscation Act 1997* (Vic), the *Sentencing Act 1991* (Vic), *Children, Youth and Families Act 2005* (Vic), *Prisoners (Interstate Transfer) Act 1983* (Vic) and *Service and Execution of Process Act 1992* (Vic).

Responses

- 5.28 The Supreme Court and County Court both identified a need to clarify whether and how such general procedural laws applied to contempt proceedings.
- 5.29 The Supreme Court submitted that legislation could make clear the applicable rules of evidence and procedure, standard of proof, and avenues of appeal in contempt proceedings.²⁸ The County Court submitted that the proposed Act ‘could make it clear that contempt is criminal in nature, and indicate the ways in which contempt proceedings engage’ with the Evidence Act, Criminal Procedure Act and Sentencing Act.²⁹
- 5.30 The LIV submitted that the law of contempt should be brought ‘within the operation of the codified criminal law’ to ‘ensure existing procedural safeguards apply and matters such as the alleged contemnor’s mental health and fitness to plead would be appropriately managed under existing legislative means’.³⁰

21 *Construction, Forestry, Mining and Energy Union v Grocon Constructors* (Victoria) Pty Ltd [2014] VSCA 261 [191]–[196], [208], [223], (2014) 47 VR 527.

22 *Ibid* [455]–[460].

23 *Ibid* [182]–[188].

24 *R v Slavieski* (Appln to set aside contempt orders) [2017] VSC 526 [65]–[71].

25 *Construction, Forestry, Mining and Energy Union v Boral Resources (Vic) Pty Ltd* [2015] HCA 256; *Construction, Forestry, Mining and Energy Union v Grocon Constructors* (Victoria) Pty Ltd [2014] VSCA 261 [462]–[477].

26 *Construction, Forestry, Mining and Energy Union v Boral Resources (Vic) Pty Ltd* [2013] VSCA 378.

27 *R v Slavieski* (Appln to set aside contempt orders) [2017] VSC 526 [97]–[99].

28 Submission 29 (Supreme Court of Victoria).

29 Submission 31 (County Court of Victoria).

30 Submission 22 (Law Institute of Victoria).

Commission's conclusions: clarify application of other procedural laws

- 5.31 There are good reasons for regulating contempt proceedings differently from ordinary criminal proceedings but they do not alter the fact that a person charged with contempt is faced with conviction and imprisonment. Therefore, the proposed Act should clarify that, except where otherwise provided for by the Act or where incompatible with the Act, a range of procedural laws should apply to contempt proceedings as though contempt of court were an ordinary criminal offence, and contempt proceedings were criminal proceedings for the prosecution of an offence. This includes laws governing:
- bail
 - the rules of evidence
 - disclosure
 - rights of appeal
 - extradition and prisoner transfer
 - the assessment of fitness to stand trial and mental impairment
 - the right to be present, legally represented and assisted by an interpreter.

Recommendation

- 16 The proposed Act should clarify how procedural laws apply to contempt proceedings as if contempt of court were an ordinary criminal offence, and contempt proceedings were criminal proceedings for the prosecution of an offence. This includes the following legislation:
- Criminal Procedure Act
 - Civil Procedure Rules
 - Evidence Act
 - Crimes (Mental Impairment and Unfitness to be Tried) Act
 - Bail Act
 - Evidence (Miscellaneous Provisions) Act
 - Prisoners (Interstate Transfer) Act
 - Service and Execution of Process Act
 - Confiscation Act.

Procedure for contempts in or near the courtroom

- 5.32 The recommendations above concern the ordinary procedure and mode of trial for contempt proceedings. Another issue is whether the proposed Act should include a special procedure for contempts committed in the face of the court.
- 5.33 A contempt committed in the face of the court is a contempt that disrupts or interferes with a particular court proceeding and which occurs in or near the courtroom. Chapter 7 discusses this category of contempt and how it should be defined in the proposed Act. This part of this chapter considers the procedure for contempts of this kind.

- 5.34 Currently, for this kind of contempt, the court may:
- order that the person be arrested and brought before the court
 - inform the person of the charge against them
 - adopt any procedure it ‘thinks fit’ in the circumstances to deal with the charge.³¹
- 5.35 This is described in this report as the ‘special summary procedure’. It enables the court to deal with a contempt in the face of the court swiftly and decisively. However, it is important that this does not come at the cost of an accused’s right to a fair hearing.
- 5.36 The next section of this chapter considers whether the special summary procedure is procedurally fair and whether it is necessary for a presiding judicial officer to be able to charge, try and punish a contempt which occurs before them.

Is the special summary procedure fair?

- 5.37 Although the court can adopt any procedure it thinks fit when directly trying a contempt in the face of the court, certain principles have been established for the proper conduct of proceedings:
- A charge for contempt in the face of the court must be set out orally or in writing.
 - The accused must be given the opportunity to consider the charge, and seek legal advice, an adjournment or details of the charge.
 - The accused must be permitted to plead guilty or not guilty.
 - If pleading not guilty, the accused must be permitted to present evidence and make submissions.
 - The judicial officer must carefully consider all of the evidence before deciding whether the court is satisfied beyond reasonable doubt that the accused is guilty, while recognising their unusual position as witness, prosecutor and judge.³²
- 5.38 These principles, if adhered to, provide important safeguards. However, they do not overcome the problem of the judicial officer assuming multiple roles in the proceeding.
- 5.39 Contempt in the face of the court, when dealt with under the special summary procedure, is unusual. It is concerned with conduct committed against the court, witnessed by the court, with proceedings brought by the court, and decided by the court. The conduct that constitutes the charge can involve a personal affront to the presiding judicial officer in the form of threats or verbal abuse. And yet it is the presiding judicial officer who assumes the key roles of witness, prosecutor and judge.
- 5.40 The multiple roles assumed by the presiding judicial officer challenge traditional safeguards to protect a fair trial:
- In an ordinary criminal proceeding, the prosecutor bears the burden of proving the charge. The special summary procedure effectively shifts this burden to the accused, who must defend the allegation made by the judicial officer.
 - In an ordinary criminal proceeding, the opposing side can test evidence. This is not possible where the evidence is the judicial officer’s own recollection and perception of events.

Responses

- 5.41 The VLA submitted that, in all contempt proceedings, the charges should be heard by a judicial officer who is not linked to either the alleged offending or the ongoing proceedings.³³

31 *Supreme Court (General Civil Procedure) Rules 2015* (Vic) rr 75.02–75.03.

32 Victorian Law Reform Commission, *Contempt of Court* (Consultation Paper, May 2019) 51 [4.54]; *Zukanovic v Magistrates’ Court of Victoria at Moorabbin* [2011] VSC 141 [41], (2011) 32 VR 216.

33 Submission 11 (Victoria Legal Aid).

- 5.42 Members of the Victorian Bar told the Commission that the special summary procedure should be abolished, because it was ‘unacceptable’ that a judicial officer was at the same time victim, witness, prosecutor and judge.³⁴ Representatives of Victoria Police also told the Commission it was not ideal for the presiding judge to deal directly with a contempt.³⁵
- 5.43 The LIV stated the procedure lacked ‘key safeguards’ and ‘may lead to a public perception of injustice, and thus diminish the authority of the court’. The LIV submitted that a charge arising from an alleged contempt in the face of the court should be heard by a different judicial officer unless both the accused and the judicial officer consent to the original judicial officer determining the charge. If they both agree, safeguards should be incorporated.³⁶
- 5.44 The Supreme Court submitted that, although the special summary procedure should be used rarely, it has a role and contains necessary safeguards. The Supreme Court stated that:

The law is clear that, while it is a summary procedure, both procedural fairness and fair hearing rights apply. Expressing the essential elements of the procedure in a legislative form will promote awareness and understanding and ensure consistency of application.³⁷

Commission’s conclusions: special summary procedure involves a conflict of interest

- 5.45 The Commission considers that procedural unfairness or the perception of it is inherent in the special summary procedure. The multiple roles played by the presiding judge create the appearance of partiality.
- 5.46 This is not necessarily remedied by properly informing the accused of the charge, providing an adjournment to seek legal advice, or affording an opportunity to present evidence and make submissions. For this reason, judges have often said the special summary procedure should be used sparingly and only when it is ‘urgent and imperative to act immediately’.³⁸
- 5.47 Use of the special summary procedure can undermine public confidence in the fairness of the court system. Therefore, the procedure should only be retained if needed to protect another aspect of the proper administration of justice. As discussed below, the Commission has concluded that it is not.

Is the special summary procedure necessary?

- 5.48 Stakeholders offered three main reasons why courts should continue to use the special summary procedure:
- The power to directly and immediately punish for contempt reinforces the authority of the court. Though rarely used, it helps to secure compliance with directions and ensure order and safety in the courtroom.
 - The power is needed to deal with urgent threats to proceedings that require an immediate response to ensure that proceedings are not derailed.
 - It would be impossible to prove some contempts committed in the face of the court without calling the judge before whom the alleged contempt occurred as a witness.

34 Consultation 17 (Victorian Bar).

35 Consultation 19 (Victoria Police).

36 Submission 22 (Law Institute of Victoria).

37 Submission 29 (Supreme Court of Victoria).

38 *Keeley v Brooking* (1979) 143 CLR 162, 174; Victorian Law Reform Commission, *Contempt of Court* (Consultation Paper, May 2019) 52 [4.59]–[4.61].

Order and safety in the courtroom

- 5.49 The maintenance of order in the courtroom allows proceedings to run efficiently. It allows victims, witnesses, parties, legal practitioners and court officers to attend and fulfil their duties to the court without feeling threatened or harassed.
- 5.50 In consultations with members of courts, the Commission was told that, even though the special summary procedure was rarely used, the existence of the power had ‘significant normative effect’ on behaviour in the courtroom.³⁹ A threat to refer a matter for future investigation and prosecution may not have the same impact.⁴⁰
- 5.51 However, courts have other tools to deal with disruptions and control the conduct of the proceedings. For example, the court can adjourn a matter, give directions about how a matter is to be conducted, and order that a person, including the accused, be removed from the courtroom.⁴¹
- 5.52 Authorised officers also have the power under the *Court Security Act 1980* (Vic) to:
- issue and enforce directions ‘for the purpose of maintaining or restoring the security, good order or management of the court premises’
 - remove a person from court premises if the authorised person reasonably believes the person is likely to adversely affect the security, good order or management of the court premises.⁴²
- 5.53 Police also attend at court and, like authorised officers, may exercise their usual powers of arrest under the *Crimes Act 1958*.⁴³ Representatives of Victoria Police reported that police routinely file and prosecute charges arising out of behaviour in and around the courtroom, including charges in relation to prohibited weapons and harassment of witnesses.⁴⁴
- 5.54 Police told the Commission that in the courtroom the police would not act to arrest, detain or remove someone unless the presiding judicial officer directed. Even without a direction, police file charges in relation to conduct that occurs in the courtroom after the person has left the courtroom.⁴⁵

Urgent cases

- 5.55 Several stakeholders told the Commission that the special summary procedure was required for those exceptional cases requiring an urgent response from the court.⁴⁶ The Supreme Court explained that the procedure ‘derives from the need in some cases to immediately identify and respond in a public and transparent manner to conduct which is impacting on proceedings’.⁴⁷
- 5.56 The LIV submitted that ‘there is a need to preserve the power of the courts to deal with contempt in the face of the court summarily in exceptional circumstances that require immediate action’. The LIV submitted that this should be limited to circumstances where:
- the alleged contemnor and the judicial officer consent, and
 - the facts are virtually indisputable, and it is urgent and imperative to act immediately.⁴⁸

39 Consultation 26 (Supreme Court of Victoria).

40 Consultations 15 (Children’s Court of Victoria), 24 (County Court of Victoria), 26 (Supreme Court of Victoria).

41 Victorian Law Reform Commission, *Contempt of Court* (Consultation Paper, May 2019) 55–6 [4.76]–[4.77]; *Roberts v Harkness* [2018] VSCA 215 [37], (2018) 57 VR 334; *Boros v O’Keefe* [2017] VSC 560 [18]–[19]; *Ex parte Tubman; Re Lucas* [1970] 3 NSW 41. The Magistrates’ Court noted that sometimes there are no appropriately empowered officers available to give effect to removal orders or to assist with security: Consultation 25 (Magistrates’ Court of Victoria). Practical arrangements of this kind are central to court security but where they are inadequate, this cannot be overcome by the existence or exercise of contempt powers.

42 *Court Security Act 1980* (Vic) s 3.

43 *Crimes Act 1958* (Vic) s 458. However, although a police member or protective services officer does have the power to remove a person, they are not routinely present at the Magistrates’ Court (unlike at the County and Supreme Courts): Consultation 25 (Magistrates’ Court of Victoria).

44 Consultation 19 (Victoria Police).

45 *Ibid.*

46 Submissions 29 (Supreme Court of Victoria), 31 (County Court of Victoria); Consultation 13 (Fiona K Forsyth QC, John Langmead QC).

47 Submission 29 (Supreme Court of Victoria).

48 Submission 22 (Law Institute of Victoria).

- 5.57 Stakeholders gave as an example of when this power might be needed the case of a witness refusing to give evidence at the beginning of a trial or committal proceeding, which may influence other witnesses to behave similarly.⁴⁹
- 5.58 However, members of the Magistrates' Court told the Commission there were other effective mechanisms for dealing with reluctant witnesses, such as issuing a certificate that prevents the evidence being used to incriminate the person in other proceedings under section 128 of the Evidence Act.⁵⁰
- 5.59 Previous cases show that non-cooperative witnesses can be promptly charged and dealt with under the ordinary summary procedure.⁵¹ Moreover, the ordinary summary procedure allows the court to deal with the contempt when in a better position to determine the seriousness of the failure to testify.⁵²
- 5.60 Another example of behaviour that might justify the use of the special summary procedure is the intimidation and harassment of a witness in or near the courtroom.⁵³ However, previous cases demonstrate that even the most serious contempts in or near the courtroom, involving assaults and threats to witnesses, counsel and jurors, can be successfully prosecuted under the ordinary summary procedure.⁵⁴

Evidential problems

- 5.61 The special summary procedure is used to try contempts witnessed directly by the presiding judicial officer. Judicial officers can rely on their perception and recollection of what they have observed.⁵⁵ In many cases, no further evidence will be needed to prove the charge.
- 5.62 Stakeholders cautioned that if a charge of contempt of court must be heard by another judicial officer, this will create evidential challenges and the transcript of the proceedings may not provide adequate evidence of the conduct.⁵⁶
- 5.63 The authority of judicial officers could also be undermined if they were compelled to be a witness and subject to cross-examination. The Evidence Act provides that 'person who is or was a judge in an Australian or overseas proceeding is not compellable to give evidence about that proceeding unless the court gives leave'.⁵⁷
- 5.64 Victoria Police told the Commission that, in relation to administration of justice offences, judicial officers are reluctant to take on the role of complainant. Victoria Police also told the Commission that other evidence including CCTV footage and witness testimony from those present in court, meant that charges could often be proved without judicial officers' testimony.⁵⁸
- 5.65 The prosecution of criminal offences such as perjury, and the prosecution of contempts under the ordinary summary procedure, often rely on the use of transcripts from earlier proceedings.

Commission's conclusions: abolish the special summary procedure

- 5.66 The proposed Act intends to regulate the contempt power in a way that gives the community confidence in the fairness and impartiality of the process. Under the special summary procedure, this fairness is compromised. There is no compelling justification for this.

49 Consultations 15 (Children's Court of Victoria), 24 (County Court of Victoria).
50 Consultation 25 (Magistrates' Court of Victoria).
51 *DPP (Vic) v Garde-Wilson* [2006] VSCA 295, (2006) 15 VR 640.
52 *Allen v The Queen* [2013] VSCA 44 [67]–[75], (2013) 36 VR 565.
53 Consultation 24 (County Court of Victoria).
54 See, eg, *DPP (Vic) v Johnson* [2002] VSC 583.
55 *Foley v Herald-Sun TV Pty Ltd* [1981] VR 315, 316.
56 Consultation 13 (Fiona K Forsyth QC, John Langmead QC).
57 *Evidence Act 2008* (Vic) s 16(2).
58 Consultation 19 (Victoria Police).

- 5.67 The proper administration of justice requires that courts control their own proceedings and maintain order in the courtroom. People who attend or work at the court should not be subject to intimidation, threats or abuse. Proceedings should be conducted efficiently and fairly, and those who have duties to fulfil should be required to do so as directed by the court. These aims can be achieved without the special summary procedure.
- 5.68 Stakeholders pointed to circumstances requiring an immediate response from the court but there are other ways to address threats and disruptions. The Commission considers that the presiding judicial officer must have the power to respond to a disruption, including directing a person be charged and tried for contempt. However, the presiding judicial officer does not need the power to act as witness, prosecutor and judge to address these threats.
- 5.69 The special summary procedure is used rarely and with caution in Victoria. The recommendation that it should be abolished is no criticism of its use by judicial officers in Victoria. However, as the Law Reform Commission of Ireland commented, ‘a theoretically unsound law cannot be saved simply because it is applied in moderation’.⁵⁹

An alternative approach

- 5.70 The abolition of the special summary procedure raises the question of whether a new or modified procedure is required to deal with contempts committed in or near the courtroom that interfere with a proceeding.

The New Zealand model

- 5.71 The *Contempt of Court Act 2019* (NZ) introduced a procedure for dealing with disruptive behaviour in the courtroom, which separates the steps taken to address a disruption from those taken to punish the conduct.
- 5.72 Under this Act, if a judicial officer believes a person is disrupting proceedings or disobeying any order or direction in the course of proceedings, they may order the person be excluded from court. They may also ‘cite’ the person for disruptive behaviour and order them to be detained until no later than the time the court rises for the day.⁶⁰
- 5.73 While in custody, the person must be given a reasonable opportunity to obtain legal advice and apologise to the court.⁶¹ Before the court rises for the day, the judicial officer must review the matter and, if further punishment is considered necessary, the judicial officer must provide a written statement of the behaviour believed to be disruptive,⁶² and set the matter down for hearing before a judge within seven days.⁶³
- 5.74 If the judicial officer is a judge, they must also consider whether there are exceptional circumstances for another judge to hear the matter.⁶⁴ If the person is found guilty, they can be sentenced to up to three months imprisonment or up to 200 hours of community work or fined up to \$10,000. However, they cannot be convicted.⁶⁵
- 5.75 The New Zealand model provides a clear process to address disruptive courtroom behaviour. The Act offers immediacy in providing for removal from the court and detention, as well as requiring any hearing to take place within seven days. The penalties are limited and no conviction can be recorded. The Act includes some of the safeguards of common law, such as requiring the charge to be particularised and providing an opportunity to obtain legal advice.

59 Law Reform Commission of Ireland, *Contempt of Court and Other Offences and Torts Involving the Administration of Justice* (Issues Paper No 10, 2016) 26 [3.02].

60 *Contempt of Court Act 2019* (NZ) s 10.

61 *Ibid* s 11(1).

62 *Ibid* s 11(2)(a).

63 *Ibid* s 11(2)(c).

64 *Ibid* s 11(2)(b).

65 *Ibid* s 11(5).

- 5.76 The New Zealand model still allows the judge before whom the conduct occurred to try and punish the conduct. Only where there are exceptional circumstances should the judge consider assigning the charge to another judicial officer for hearing.⁶⁶ Thus, the same judge who witnessed the conduct will often hear the matter. Therefore, this model does not overcome the perception of bias inherent in the special summary procedure.
- 5.77 Further, the model allows a judicial officer to cite a person for contempt and detain them for the rest of the day. This means a person may be imprisoned even when the judicial officer decides the conduct should not be punished.
- 5.78 For these reasons, the Commission has concluded that the New Zealand model is not appropriate for Victoria. To avoid perceptions of bias, the Commission prefers a model requiring a different judicial officer to hear the charge.

Modifying the ordinary summary procedure

- 5.79 The ordinary summary procedure should apply to all contempts, including contempts committed in or near the courtroom. However, the proposed Act should provide a modified procedure for charging a person immediately for a contempt that interferes with the court's ability to conduct a proceeding.
- 5.80 The proposed Act should provide for this modified procedure where it appears to the presiding judicial officer that a person is guilty of a contempt in or near the courtroom that interferes with a court proceeding, as defined in Chapter 7.
- 5.81 In this procedure, the presiding judicial officer must formulate a charge of contempt supported by particulars and order the person to be tried for the contempt before a different judicial officer. This would allow the presiding judicial officer to act more immediately than if they were limited to ordering that an officer of the court apply to the court to deal with the contempt.
- 5.82 This balances the competing aims discussed above:
- The judicial officer who witnessed the conduct is best placed to particularise the conduct that constitutes the alleged contempt.
 - This approach should still be immediate enough to deter poor behaviour in the court and reinforce the court's authority.
 - The contempt charge is determined by a different judicial officer, ensuring procedural fairness and avoiding the appearance of bias.
 - In most cases, the allegation of contempt can be supported by sources of evidence without requiring the judicial officer to give evidence, such as transcript, CCTV and the testimony of other witnesses.
- 5.83 If the Commission's recommendations are adopted, the proposed Act should specify how the contempt charge issued by one judicial officer will be brought before and tried by another judicial officer. The proposed Act should address:
- the form and content of the contempt charge and its evidential status
 - the power of either judicial officer to issue a warrant for the arrest and detention of the person pending the hearing of the contempt charge
 - which court officer will nominally prosecute the contempt before the second judicial officer, and in whose name the proceedings will be brought
 - the timetabling of the proceedings to allow the accused the opportunity to obtain legal advice and representation, enter a plea, consider the evidence in support of the contempt charge and, if relevant, defend the charge.

- 5.84 Elements of the procedure currently adopted by the Chief Examiner to commence and prosecute a contempt under the *Major Crime (Investigative Powers) Act 2004* (Vic) may provide a useful model.⁶⁷

Constitutional considerations

- 5.85 As discussed in Chapter 3, the legal advice provided to the Commission suggests that if the power to deal with a contempt is a defining characteristic of a state Supreme Court, Parliament could not pass a law that prohibited the Supreme Court from itself moving to deal with the contempt.⁶⁸
- 5.86 The Commission is recommending a limitation on the power of the Court to deal with a contempt. The effect of the Commission's recommendation will be that a judge can charge a person with contempt and direct that the Prothonotary (an officer of the Court) prosecute the charge before another judge of the Court.⁶⁹
- 5.87 This model will therefore mean that the courts still control the commencement and conduct of contempt proceedings. For that reason, the Commission considers this model unlikely to raise constitutional concerns.

Recommendations

- 17 The proposed Act should provide that the procedure for commencing and conducting proceedings for a contempt that interferes with the conduct of a court proceeding (as defined in Chapter 7) should be the same summary procedure as for all other types of contempt of court, except as modified by Recommendations 18 and 19.
- 18 The proposed Act should provide that the judicial officer before whom the alleged contempt occurred cannot adjudicate the alleged contempt they witnessed.
- 19 The proposed Act should provide that where there is an alleged contempt that interferes with a court proceeding the presiding judicial officer may adopt the following procedure:
- formulate the charge and particularise the conduct giving rise to the alleged contempt
 - refer the alleged contempt to another judicial officer for hearing.

Standing to commence proceedings

- 5.88 Under the common law, any person may apply to the court to punish a contempt.⁷⁰ Although the Civil Procedure Rules do not specify who can apply to the Supreme Court to punish a contempt, they provide that the court may exercise any power under the Rules on the application of a party or any person with a sufficient interest.⁷¹
- 5.89 The Civil Procedure Rules also provide for someone who is not a party to the proceedings but who obtains a judgment or in whose favour a judgment is made to enforce the judgment by the same means as if that person were a party.⁷²

67 Submission 26 (Chief Examiner, Victoria); *Major Crime (Investigative Powers) Act 2004* (Vic) s 49.

68 See Appendix D 14 [40].

69 The Commission makes recommendations in Chapter 6 about contempt powers and procedures in the lower courts. In those courts, the registrar would be responsible for prosecuting the contempt charge before another judge.

70 *Broken Hill Pty Co Ltd v Dagi* [1996] 2 VR 117, 137 (Brooking JA).

71 *Supreme Court (General Civil Procedure) Rules 2015* (Vic) r 1.14(2).

72 *Ibid* r 66.12(1).

- 5.90 In practice, a proceeding to deal with a contempt is usually commenced by:
- a party to the proceedings, where the contempt arises in the context of civil proceedings
 - the Attorney-General
 - the Director of Public Prosecutions (DPP), where the contempt arises in the context of criminal proceedings
 - the Court itself through the Prothonotary (Supreme Court).
- 5.91 The next section of this chapter considers whether the proposed Act should specify who can commence a contempt proceeding and any limits that should generally apply in relation to contempt proceedings. Chapter 11 further limits who can commence proceedings in the case of scandalising contempt.

Standing of parties to proceedings

- 5.92 Stakeholders questioned whether private parties (parties other than the Prothonotary, Attorney-General and DPP) should be able to commence contempt proceedings. The Commission was told that as the law of contempt exists to uphold and vindicate the court's authority it should be the court that determines whether contempt proceedings should be commenced. Private litigants should only be able to petition the court or request the Attorney-General or the DPP to commence a proceeding.⁷³
- 5.93 Representatives of the Magistrates' Court identified a risk that aggrieved private litigants could launch vexatious contempt proceedings.⁷⁴ Legal practitioners raised related concerns that such litigants could use contempt proceedings to pressure other litigants unfairly, especially if there was a serious imbalance in power between the parties.⁷⁵
- 5.94 Others submitted that private parties should not have to rely on third parties to invoke the contempt powers of the court, especially when someone had disobeyed a court order made for their benefit. In relation to disobedience contempt, the County Court submitted:
- Ensuring that parties need not engage with an independent prosecutorial body in order to seek relief is important. Parties are in the best position to assess whether or not it is necessary to seek injunctive relief through contempt proceedings.⁷⁶
- 5.95 Members of the County Court observed that this position was not different from that in ordinary criminal law, where a private party can also file a charge to commence a criminal prosecution.⁷⁷ However, this rarely occurs in practice.
- 5.96 Further, although a private party can commence a criminal prosecution, the DPP can 'take over and conduct any proceedings in respect of any summary or indictable offence',⁷⁸ including taking over and discontinuing a private prosecution. This power does not apply to contempt proceedings, despite a risk that private parties could misuse the law.
- 5.97 The Victorian Government Solicitor's Office (VGSO) suggested that the DPP or the Attorney-General could have a role in supervising or reviewing any contempt proceedings commenced by private parties. It was acknowledged that this may be impractical where the matter requires prompt intervention and the delay caused by any review could frustrate the purpose of the proceeding.⁷⁹
- 5.98 Professor David Rolph agreed that such delays could be unfair where people disobeyed court orders. However, such a role might be appropriate for other kinds of contempts, given the public interest purpose of the proceedings.⁸⁰

73 Consultations 13 (Fiona K Forsyth QC, John Langmead QC), 25 (Magistrates' Court of Victoria).
74 Consultation 25 (Magistrates' Court of Victoria).
75 Consultation 17 (Victorian Bar).
76 Submission 31 (County Court of Victoria).
77 Consultation 24 (County Court of Victoria).
78 *Public Prosecutions Act 1994* (Vic) s 22(1)(b)(ii).
79 Consultation 9 (Victorian Government Solicitor's Office).
80 Consultation 12 (Professor David Rolph).

Commission’s conclusions: parties should have standing

- 5.99 The purpose of the contempt power is to vindicate the authority of the court and to protect the administration of justice rather than to vindicate private rights and interests. However, these purposes intersect where orders have been disobeyed or a party’s ability to prosecute or defend civil proceedings has been interfered with. For this reason, private parties to a proceeding should be able to commence a contempt proceeding. This should include, but not be limited to, contempts arising from non-compliance with orders.⁸¹
- 5.100 If the contempt arises from non-compliance with an order or undertaking, both parties and non-parties who have obtained an order, or in whose favour an order has been made, should be able to apply to commence contempt proceedings. They should not be denied the benefit of a judgment or undertaking because of another party’s disregard for the authority of the court. Further, the person for whose benefit an order has been made is the most likely to be aware the order has not been complied with and that other methods of enforcement have been tried or are futile.
- 5.101 The Commission is satisfied there are protections against private parties abusing this right. These include the sanction of costs and the court’s power to strike out proceedings that are vexatious or an abuse of process, including if they are brought or continued for an extraneous purpose.⁸²
- 5.102 As an additional protection, the Commission considers that the DPP should be empowered to take over any contempt proceeding, other than one commenced by the Attorney-General or the court itself, including for the purpose of discontinuing the proceeding. According to prosecutorial guidelines, the DPP exercises the power to take over and discontinue a private prosecution where there is no reasonable prospect of a conviction or the prosecution is not in the public interest. The policy states that ‘a private prosecution will not be in the public interest if it is vexatious, malicious or an abuse of process’.⁸³ The Commission anticipates that this power will be exercised rarely because:
- The court itself has wide discretion to dismiss a contempt proceeding.
 - The DPP will often not be able to assess the merits of a contempt proceeding arising from civil litigation that it has not previously been involved with.
- 5.103 Conferring this power on the DPP introduces a risk that contempt proceedings will be discontinued even though the court considers the proceedings have merit and are necessary. In these circumstances, the court itself may direct the Prothonotary to apply to punish the contempt.
- 5.104 The proposed Act should provide another option so private parties need not commence contempt proceedings themselves. It should provide that any person with a sufficient interest may apply to the court for an order directing the Prothonotary to commence a contempt proceeding. This will:
- allow parties to bring alleged contempts to the court’s attention
 - provide an opportunity for the person alleged to have committed the contempt to apologise, and where possible remedy any breach
 - allow the court to ensure that a contempt proceeding is only commenced where the alleged conduct threatens or undermines the administration of justice and warrants punishment.

81 There are many examples in case law where witnesses, evidence or parties have been interfered with in civil proceedings and the contempt has been successfully prosecuted by a private party: see, eg, *Ulman v Live Group Pty Ltd* [2018] NSWCA 338; *Farahbakht v Midas Australia Pty Ltd* [2006] NSWSC 1322; *Bhagat v Global Custodians Ltd* [2002] NSWCA 160.

82 *European Bank A-G v Wentworth* (1986) 5 NSWLR 445, 460 (Kirby P).

83 Office of Public Prosecutions Victoria, *Policy of the Director of Public Prosecutions for Victoria* (17 December 2019) 19.

Recommendations

- 20 The proposed Act should provide that:
- a party to a proceeding may apply to the Supreme Court to deal with a contempt arising from that proceeding
 - a person in whose favour an order or undertaking has been made can apply to the Supreme Court to deal with a contempt arising from non-compliance with the order or undertaking
 - any person with sufficient interest can apply to the Supreme Court for an order directing the Prothonotary to commence a contempt proceeding.
- 21 The proposed Act and the Public Prosecutions Act should provide that the Director of Public Prosecutions may take over and conduct any contempt proceedings including for the purpose of discontinuing the proceeding. This should not apply to a contempt proceeding commenced by the Attorney-General or the Court.

Standing of the Attorney-General

- 5.105 The Attorney-General can apply to the court to punish a criminal contempt in both criminal and civil proceedings. It is less certain whether the Attorney-General has standing to apply to punish a civil contempt arising in civil proceedings.⁸⁴
- 5.106 In practice, contempt prosecutions arising out of civil proceedings generally commence on the application of a private party or the court.⁸⁵ One reason for this is that the Attorney-General has ‘no direct control over civil litigation and, unless informed by a party, could not be expected to know of interferences with such litigation’.⁸⁶
- 5.107 Representatives of the VGSO told the Commission that, in civil proceedings, there were often several ways to deal with a person who has not complied with court orders. They suggested that contempt proceedings would usually only be justified in the most serious of non-compliance cases and the parties and the court would be best placed to determine when they were justified.⁸⁷

Commission’s conclusions: Attorney-General should have standing

- 5.108 The Attorney-General should be able to apply to the Supreme Court to punish a contempt. The Attorney-General, as the first law officer, has a responsibility to protect the courts and to vindicate their authority.⁸⁸
- 5.109 As discussed in Chapter 8, the Commission is recommending that the distinction between civil and criminal contempt should be abolished. This makes irrelevant any ambiguity about the ability of the Attorney-General to commence proceedings to punish a contempt arising from non-compliance with an order in civil proceedings.

84 Digby J stated that ‘(a)lthough rarely exercised in the State of Victoria, the courts have accepted that an Attorney-General has the power to make an application that a person be punished for civil contempt’: *Boral Resources (Vic) Pty Ltd v Construction, Forestry, Mining and Energy Union* [2013] VSC 572 [15]. When the matter came before the Court of Appeal, that issue did not need to be decided but Beach JA remarked that ‘had it been necessary to determine, I would have determined that it is at least seriously arguable that the Attorney-General has similar standing to bring proceedings for civil contempts as he has to bring proceedings for criminal contempts’: *Construction, Forestry, Mining and Energy Union v Boral Resources (Vic) Pty Ltd* [2013] VSCA 378 [11].

85 *Construction, Forestry, Mining and Energy Union v Grocon Constructors (Victoria) Pty Ltd* [2014] VSCA 261 [131].

86 *Broken Hill Proprietary Co Ltd v Dagi* [1996] 2 VR 117, 124, 126.

87 Consultation 9 (Victorian Government Solicitor’s Office).

88 *Boral Resources (Vic) Pty Ltd v CFMEU* [2013] VSC 572 [12].

- 5.110 There is a risk that the Attorney-General might intervene in such cases where the affected party does not want to take that action. However, the Commission is satisfied that the court has ways to ensure that its processes are not abused, such as imposing costs and striking out proceedings.
- 5.111 The Commission also notes that the Attorney-General is not obliged to commence contempt proceedings at the request of a party.

Recommendation

- 22 The proposed Act should provide that an application to the Supreme Court to deal with a contempt of court can be made by the Attorney-General.

Standing of the DPP

- 5.112 Under the *Public Prosecutions Act 1994* (Vic), the DPP can commence contempt proceedings arising out of criminal proceedings. Contempts arising in other contexts may be referred to the Attorney-General.⁸⁹
- 5.113 The DPP submitted that the Director should continue to have the power to commence sub judge contempt proceedings, because the Director often requests the media to take down or not publish offending material. The DPP submitted that ‘a power to institute contempt proceedings remains important’ if such a request was not complied with.⁹⁰

Commission’s conclusions: DPP should have standing

- 5.114 The proposed Act should continue to provide that the DPP may, in accordance with the functions of the Director, apply to the Supreme Court to deal with a contempt.
- 5.115 Currently, the DPP may only apply to deal with a contempt in relation to a criminal proceeding (whether pending or otherwise). The DPP has the power to conduct some civil type proceedings, such as proceedings on an application under the *Confiscation Act 1997* (Vic). The Commission considers that the proposed Act should provide that the DPP may apply to punish a contempt arising in relation to any matter being conducted by the DPP in accordance with the functions conferred by the Public Prosecutions Act.
- 5.116 As recommended above, the DPP should be empowered to take over a contempt proceeding commenced by a private party.
- 5.117 The DPP has a published policy providing the criteria for when a prosecution may proceed. It requires consideration of the prospects of conviction and whether the prosecution is in the public interest.⁹¹ Although this policy does not refer directly to contempt proceedings, it guides the DPP’s prosecutorial discretion in relation to contempt proceedings. To aid consistency and transparency, all state agencies should have similar policies to guide the exercise of their prosecutorial discretion in relation to contempt proceedings.

89 *Public Prosecutions Act 1994* (Vic) s 22(1)(ba)(iii), (c).

90 Submission 28 (Director of Public Prosecutions).

91 Office of Public Prosecutions Victoria, *Policy of the Director of Public Prosecutions for Victoria* (December 2019).

Recommendation

- 23 The proposed Act should provide that the Director of Public Prosecutions may apply to the Supreme Court to deal with a contempt of court where the contempt arises in relation to:
- a criminal proceeding (whether pending or otherwise)
 - any matter being conducted by the DPP in accordance with the functions conferred by the Public Prosecutions Act.

Role of the Prothonotary

- 5.118 As discussed in Chapter 3, the power of the courts to deal with contempt is at its heart a power of the courts to protect their authority and the administration of justice. It is therefore important that the court has the power to commence contempt proceedings. Under Order 75, the court can order an officer of the court (in the case of the Supreme Court, the Prothonotary) to apply to deal with the contempt.⁹²
- 5.119 An issue with this procedure is that the Prothonotary has no discretion not to proceed with such an order by the court.
- 5.120 In practice, after receiving such an order, the Prothonotary seeks legal advice from the VGSO on whether the conduct amounts to a contempt and, sometimes, whether it is in the interest of justice to commence a proceeding. Where the advice is not to proceed, contempt proceedings are not always commenced.⁹³ However, Order 75 does not give the Prothonotary any choice to decide whether to proceed.
- 5.121 Legal practitioners with experience in contempt proceedings told the Commission that this aspect of the procedure should be clarified. The Prothonotary should be given the authority to determine whether contempt proceedings are pursued after the court makes a referral.⁹⁴
- 5.122 However, the Commission also heard reservations about allowing the Prothonotary to consider whether to commence a contempt proceeding. The Commission was told that the Prothonotary's Office would usually rely on external legal advice. Therefore, the process would be the same as if the court referred the matter directly to the DPP or Attorney-General to consider whether they should commence contempt proceedings.

Commission's conclusions: the Supreme Court should direct the Prothonotary to commence or continue a proceeding

- 5.123 The proposed Act should provide for the Supreme Court to order the Prothonotary to commence contempt proceedings. This is the established way for the Court to commence contempt proceedings, no issues were raised with this procedure and it should be restated in the proposed Act.
- 5.124 However, it is necessary to make clear when the Prothonotary may not commence contempt proceedings despite receiving such an order.

92 *Supreme Court (General Civil Procedure) Rules 2015* (Vic) r 75.07.

93 Consultation 13 (Fiona K Forsyth QC, John Langmead QC).

94 *Ibid.* Professor David Rolph told the Commission that if there is a court referral mechanism, the second decision maker should have the discretion to assess the allegation and evidence and determine whether it is appropriate to proceed: Consultation 12 (Professor David Rolph).

- 5.125 In cases where the Prothonotary considers it not in the interests of justice to commence proceedings, the Prothonotary should seek further directions from the Court before proceeding with the application. For example, this may be the case when the Prothonotary receives legal advice that there is not enough evidence to prove the charge.

Recommendation

- 24 The proposed Act should provide that the Supreme Court can order the Prothonotary to make an application to deal with a contempt of court. The Prothonotary may seek further directions from the Court before proceeding with the application. The Prothonotary must proceed as directed.

Warnings

- 5.126 A feature of the law of contempt is the courts' discretion to determine whether and how a person is dealt with for contempt. This discretion is reflected in the use of judicial warnings to address possible cases of contempt.
- 5.127 As discussed in the consultation paper, judicial officers issue contempt warnings in two contexts:
- Warnings are used to put a person on notice of the risk of being in contempt if they persist in their conduct.
 - Warnings are used in a 'show cause' context: that is, to alert a person that the court has formed a preliminary view that the person has committed a contempt and, depending on any submissions that may be made, a contempt proceeding may be initiated.⁹⁵
- 5.128 As discussed in the consultation paper, warnings allow the courts to address potentially contemptuous behaviour in a flexible and proportionate way. Such warnings give people an opportunity to cease, explain or atone for their behaviour. This avoids the need to resort to contempt proceedings.
- 5.129 However, the informal status of warning means that people may feel pressured into making an admission, offering an apology, or abandoning a submission or course of conduct without a clear charge ever being articulated against them.⁹⁶

Responses

- 5.130 The consultation paper asked when contempt warnings should be given. It also asked if there should be guidance, including in legislation, on the status of a contempt warning and its use by courts.⁹⁷
- 5.131 Stakeholders indicated general support for the way courts used warnings to deal with contempt, and they focused on the benefits rather than the risks of the courts' use of warnings.⁹⁸
- 5.132 The County Court observed that, although warnings may be capable of misuse, this is subject to scrutiny on appeal, as demonstrated by previous decisions.⁹⁹

⁹⁵ Victorian Law Reform Commission, *Contempt of Court* (Consultation Paper, May 2019) 33–6 [3.56]–[3.80].

⁹⁶ *Ibid* 35–8 [3.70]–[3.80].

⁹⁷ *Ibid* Questions 8–11.

⁹⁸ Submissions 14 (Children's Court of Victoria), 26 (Chief Examiner, Victoria), 27 (Australia's Right to Know coalition), 28 (Director of Public Prosecutions), 29 (Supreme Court of Victoria), 31 (County Court of Victoria); Consultation 9 (Victorian Government Solicitor's Office). However, in the context of discussing scandalising contempt, the Law Institute of Victoria identified a number of problems with the show cause process adopted by the Court of Appeal in *DPP (Cth) v Besim*; *DPP (Cth) v MHK (No 2)* [2017] VSCA 165: Submission 22 (Law Institute of Victoria).

⁹⁹ Submission 31 (County Court of Victoria).

- 5.133 Stakeholders noted that warnings are important because they:
- can stop a person from continuing to misbehave¹⁰⁰
 - provide an opportunity for a person to apologise¹⁰¹
 - allow for procedural fairness¹⁰²
 - ensure that expensive and time-consuming contempt proceedings are not unnecessarily commenced.¹⁰³
- 5.134 Stakeholders were divided on whether a court must give a person a warning before dealing with the person for contempt, and on the need for a more detailed procedure for the use of warnings.
- 5.135 Some submitted that it was unnecessary to prescribe when and how a judicial officer could give warnings.¹⁰⁴ What mattered was that the procedure was fair.¹⁰⁵ Factors that were relevant to whether a warning should be given included:
- whether the conduct was continuing¹⁰⁶
 - the type of contempt¹⁰⁷
 - whether legislation prescribed conduct to be a contempt¹⁰⁸
 - whether a warning may be counter-productive and in fact may escalate a situation, giving rise to safety and security concerns.¹⁰⁹
- 5.136 The County Court told the Commission that a contempt warning should be issued only when there is no other appropriate way of regaining authority and control. However, prescribing when and how to use warnings might reduce the use of warnings, and make them less effective. While warnings were important to ensure procedural fairness, the court needed to have flexibility so they could consider ‘the unique circumstances that may prevail’.¹¹⁰
- 5.137 The DPP submitted that, although it was appropriate to warn a person, it should not be necessary to issue a warning before commencing a contempt proceeding.¹¹¹
- 5.138 Professor David Rolph and the Criminal Bar Association commented that a judicial bench book would be an appropriate way to provide guidance on when and how to use warnings.¹¹²
- 5.139 Other stakeholders argued for greater procedural certainty. Professor Mark Pearson et al submitted that
- Warnings should include specified content to ensure procedural fairness. Warnings should be accompanied by adjournments to enable legal representation and the opportunity to take further advice and to increase the possibility that even a late apology will issue. Specific court procedural forms could be developed by rules committees for use by the registrars to formally warn litigants and set out next procedural steps.¹¹³

100 Submission 29 (Supreme Court of Victoria); Consultations 9 (Victorian Government Solicitor’s Office), 15 (Children’s Court of Victoria) .
101 Submissions 6 (Professors Mark Pearson, Patrick Keyzer, Anne Wallace and Associate Professor Jane Johnston), 31 (County Court of Victoria).

102 Submissions 26 (Chief Examiner, Victoria), 29 (Supreme Court of Victoria), 31 (County Court of Victoria).

103 Submission 31 (County Court of Victoria); Consultation 9 (Victorian Government Solicitor’s Office).

104 Submissions 14 (Children’s Court of Victoria), 31 (County Court of Victoria); Consultations 12 (Professor David Rolph), 13 (Fiona K Forsyth QC, John Langmead QC).

105 Consultation 13 (Fiona K Forsyth QC, John Langmead QC).

106 Submission 20 (Criminal Bar Association).

107 Consultation 9 (Victorian Government Solicitor’s Office).

108 Submission 20 (Criminal Bar Association).

109 Submission 7 (The Victorian Civil and Administrative Tribunal).

110 Submission 31 (County Court of Victoria).

111 Submission 28 (Director of Public Prosecutions).

112 Submission 20 (Criminal Bar Association); Consultation 12 (Professor David Rolph).

113 Submission 6 (Professors Mark Pearson, Patrick Keyzer, Anne Wallace and Associate Professor Jane Johnston).

Commission’s conclusions: use of warnings should not be regulated

- 5.140 Warnings, used judiciously, are a valuable tool to address misconduct and to provide a person with an opportunity to respond before contempt proceedings are commenced. Warnings can provide an opportunity to protect the administration of justice without the need for contempt proceedings.
- 5.141 The consultation paper raised concerns that informal contempt warnings may mask the use of the threat of contempt proceedings to pressure parties and extract apologies without a clear legal foundation. These concerns were not reflected in the submissions of stakeholders. Even those who considered that any proposed legislation should address the use of warnings did so with the view that specifying the content and timing of warnings would make procedures fairer.
- 5.142 The Commission agrees with stakeholders that ordinarily a person should be warned before steps are taken to commence contempt proceedings. However, there are many ways in which a contempt may arise.
- 5.143 It may be counterproductive to prescribe that a person must be warned. For example, a warning may make a person more likely to be disruptive. Prescribing the use of warnings could also discourage a judicial officer from giving an effective warning if this was seen as a formal step in commencing proceedings.
- 5.144 A warning provides a valuable opportunity for a person to apologise. This can mean it is no longer necessary to deal with the contempt. However, as discussed below, a person can still apologise even if a contempt proceeding has commenced.
- 5.145 Rather than regulating the use of warnings in the proposed Act, it would be more appropriate to provide guidance on the use of warnings in a judicial bench book.

Recommendation

- 25 **The proposed Act should not regulate the use of contempt warnings. This should remain a matter for judicial discretion. Guidance should be given to judicial officers through the Judicial College on the appropriate use of warnings.**

Apologies

- 5.146 Apologies are important in contempt law. As in ordinary criminal law, courts can consider apologies when deciding on the appropriate penalty. In contempt cases, an apology can also have greater significance. If a person apologises for an alleged contempt, the court may regard this as ‘purging’ the contempt, so it is no longer necessary to impose any penalty, or find the contempt proved, or even direct that a contempt proceeding be commenced.¹¹⁴
- 5.147 Both the *Magistrates’ Court Act 1989* (Vic) and the *Coroners Act 2008* (Vic) provide that the court may accept an apology and decide not to impose or to reduce any punishment for contempt accordingly.¹¹⁵

Responses

- 5.148 The consultation paper asked what weight, if any, should be given to apologies in determining whether and what penalty is imposed for contempt of court.¹¹⁶
- 5.149 Australia's Right to Know coalition (ARTK) submitted that apologies should be given significant weight in determining penalties. They should signal 'that a repeat contempt is unlikely and therefore no specific deterrence is necessary'. ARTK also observed that in some instances an apology should be capable of entirely purging an alleged contempt.¹¹⁷
- 5.150 The Supreme Court stated that:
- Apologies serve an important role in contempt and should remain capable of being assessed by the court as purging contempt. The vice of certain contempts can often be more effectively remedied by a public apology than prosecution of the prior actions. ... Whether an apology purges a contempt can only be determined in the circumstances as they arise. In other instances an apology may be evidence of remorse and can be taken into account in determining the appropriate penalty.¹¹⁸
- 5.151 The County Court expressed a similar view on the significance of apologies. It told the Commission that the legislation should not prescribe when an apology 'purged' a contempt but should leave the decision to the discretion of the judicial officer.¹¹⁹
- 5.152 Other stakeholders, including the DPP, considered that apologies should be relevant to penalty.¹²⁰ Legal practitioners experienced in contempt said that an apology should not be treated as purging a contempt if a proceeding to deal with the contempt had already been commenced.¹²¹

Commission's conclusions: give courts discretion to act on an apology

- 5.153 The Commission considers that the proposed Act should make clear the distinctive role played by apologies in contempt law.
- 5.154 As discussed in Chapter 3, contempt is in essence a judicial power to uphold the administration of justice. The contempt power should only be used when a court decides this is needed to protect the administration of justice. The courts should therefore continue to have broad discretion to decide that an apology makes it unnecessary to commence or continue a contempt proceeding, or record a conviction, or impose a penalty.
- 5.155 For that reason, the Commission considers that the proposed Act should make clear that the court may accept an apology and, if it does, the court may decide that a contempt proceeding should not commence or continue, or that the apology means no penalty should be imposed or any penalty should be reduced.

116 Victorian Law Reform Commission, *Contempt of Court* (Consultation Paper, May 2019) 33, Question 6.

117 Submission 27 (Australia's Right to Know coalition).

118 Submission 29 (Supreme Court of Victoria).

119 Consultation 24 (County Court of Victoria).

120 Submission 28 (Director of Public Prosecutions); Consultation 13 (Fiona K Forsyth QC, John Langmead QC).

121 Consultation 13 (Fiona K Forsyth QC, John Langmead QC).

Recommendation

- 26 The proposed Act should set out the role of apologies in contempt proceedings, and should provide that the court may, at its discretion, accept an apology and:
- determine that no proceeding should be commenced to deal with the alleged contempt
 - determine that a proceeding already commenced should be discontinued
 - determine that, although the contempt has been proved, no conviction should be recorded and/or penalty imposed, or
 - take the apology into account in determining what penalty should be imposed.

When can the power be exercised?

A power of last resort

- 5.156 As discussed in the consultation paper, the cases establish that the power of the courts to deal with a contempt is:
- important to protect the administration of justice¹²²
 - to be used sparingly and only when necessary.¹²³
- 5.157 In relation to this second principle, as the consultation paper noted, there are usually other ways for dealing with conduct which might amount to contempt. For example, the consultation paper listed other options available to a court so that it can address disruptions in the courtroom¹²⁴ and can enforce compliance with court orders.¹²⁵
- 5.158 The Commission has considered whether the proposed Act should provide that the contempt power should only be used if there are no other reasonably available mechanisms to deal with the conduct. However, making this a condition could cause difficulties because a court would need to identify all other mechanisms and determine whether they would be effective before a proceeding could be commenced.
- 5.159 A better, more flexible, way of reflecting this principle in the proposed Act would be to require the court to consider whether there are more appropriate procedures either before commencing a contempt proceeding on its own motion or before continuing to try a contempt proceeding commenced by another party. If other appropriate procedures are available to deal with the conduct, it will be harder to establish the need for the court to act to protect the administration of justice.

122 See, eg, *Morris v Crown Office* [1970] 2 QB 114, 122.

123 See, eg, *Keeley v Brooking* (1979) 143 CLR 162, 174.

124 Victorian Law Reform Commission, *Contempt of Court* (Consultation Paper, May 2019) 55–6 [4.77].

125 *Ibid* 75–6 [6.34]–[6.35].

Recommendation

- 27 The proposed Act should provide that in determining whether to commence a contempt proceeding or to continue a contempt proceeding commenced by another party, the Supreme Court should consider the extent to which other procedures to deal with the conduct are available.

Interaction with criminal law

- 5.160 A related question is whether the proposed Act should regulate the relationship between the court's power to deal with a contempt and the ordinary criminal law.
- 5.161 In Victoria, there are many ordinary criminal offences, both in legislation and in common law, which prohibit conduct that interferes with the proper administration of justice.¹²⁶ The courts' contempt powers therefore often overlap with the criminal law, and the same misconduct may be dealt with either as contempt of court or by way of prosecution under the Criminal Procedure Act.
- 5.162 Existing legislation does not specify when the power to deal with a contempt can be used even though the same conduct could be punished as an ordinary criminal offence.
- 5.163 As the Children's Court noted, it is common for offences to overlap, even under legislation.¹²⁷ However, as discussed in the consultation paper, if conduct is punished as contempt rather than as an ordinary criminal offence, a person can lose the right to be tried by a jury and a higher penalty could be imposed.¹²⁸

Responses

- 5.164 The consultation paper asked whether there was a need for legislative guidance on when conduct should be punished as a contempt rather than as an ordinary criminal offence.¹²⁹
- 5.165 The VLA, the Criminal Bar Association and ARTK all told the Commission that if there was an ordinary criminal offence that covered the same conduct the better approach would be to prosecute the conduct as an offence rather than as contempt.¹³⁰ The Criminal Bar Association submitted that, to make this easier, the courts should be able to refer conduct to the DPP for prosecution.¹³¹
- 5.166 The DPP expressed the view that judicial officers should continue to have discretion to determine whether to deal with conduct as a contempt.¹³² The Chief Examiner stated that this discretion was needed because:

in some cases 'swifter or more condign action is required to uphold the due administration of justice'. Though it is a discretionary exercise, the court or officer with the conduct of the relevant proceedings is well-placed to determine whether the particular circumstances warrant resorting to the laying of a charge for contempt.¹³³

126 Ibid 29–30 [3.33]–[3.40], 49–50 [4.44]–[4.47].

127 Submission 14 (Children's Court of Victoria).

128 Victorian Law Reform Commission, *Contempt of Court* (Consultation Paper, May 2019) 50 [4.45].

129 Ibid 31, Question 4.

130 Submissions 11 (Victoria Legal Aid), 20 (Criminal Bar Association), 27 (Australia's Right to Know coalition).

131 Submission 20 (Criminal Bar Association).

132 Submission 28 (Director of Public Prosecutions).

133 Submission 26 (Chief Examiner, Victoria), citing *Solicitor-General v Cox* [2016] EWHC 1241 (QB) [31].

Commission’s conclusions: contempt power not excluded where criminal offence available

- 5.167 The power of the courts to deal with a contempt exists alongside the ordinary criminal law, rather than only filling gaps in criminal law. It should be able to be used if required to protect the administration of justice, even if another criminal charge is available. For example, it may be necessary to deal with conduct as a contempt to identify and address the real harm caused to the administration of justice, such as where there is a threat of assault by one party on another in the course of a hearing in a civil proceeding.
- 5.168 Therefore, the proposed Act should still allow a court to exercise its contempt powers even if the conduct could be dealt with as a criminal offence. As discussed earlier, the court must consider whether other mechanisms may be more appropriate, but this should operate as a discretionary factor rather than a limit on its power to commence proceedings.
- 5.169 In some cases, there will be practical reasons to prosecute an offence rather than deal with a matter as contempt. For example, the DPP, the Attorney-General and the Prothonotary do not have the same capacity to investigate a matter as the police or to gather evidence if the facts are contested.
- 5.170 Finally, it should be made clear that the same conduct cannot be punished both as a contempt and an ordinary criminal offence. This may already be dealt with by the general provision in the *Interpretation of Legislation Act 1984* (Vic) that protects a person from being punished twice under different laws (including under the common law) for the same conduct, even if that person is charged with both offences.¹³⁴
- 5.171 However, there may be some doubt as to whether contempt amounts to an ‘offence’ for the purposes of this provision, and the approach in most legislation has been to make the position clear by protecting a person from being punished under both that Act and as a contempt.¹³⁵ The Commission recommends that a similar provision should be included in the proposed Act.

Recommendation

- 28 The proposed Act should provide that if an act or omission constitutes both a contempt of court under the proposed Act and a criminal offence under another Act or the general common law, the person may be either charged with the offence or dealt with for contempt, or both, but may not be punished more than once for the same act or omission.

Costs

- 5.172 The court has discretion to award an applicant costs for any contempt proceedings, even if no penalty is imposed.¹³⁶ In Victoria it is usual for a court to order a person found to be in contempt to pay the applicant’s costs on an indemnity basis.¹³⁷ This recognises that the party bringing the proceeding has defended the public interest in upholding the rule of

¹³⁴ *Interpretation of Legislation Act 1984* (Vic) s 51.

¹³⁵ See, eg, *Independent Broad-based Anti-corruption Commission Act 2011* (Vic) s 158; *Major Crime (Investigative Powers) Act 2004* (Vic) s 50; *Juries Act 2000* (Vic) s 86; *Victorian Civil and Administrative Tribunal Act 1998* (Cth) s 139; *Taxation Administration Act 1997* (Vic) s 73A(5). Other legislation conversely makes it clear that the contempt powers are not affected by any parallel offence: see, eg, *Heritage Act 2017* (Vic) s 230(5); *Fisheries Act 1995* (Vic) ss 129A(8), 130C; *Environment Protection Act 1970* (Vic) ss 67AC(8), 67E(5); *Evidence (Miscellaneous Provisions) Act 1958* (Vic) ss 42BN(3), 42BQ(5).

¹³⁶ *Supreme Court (General Civil Procedure) Rules 2015* (Vic) r 75.14.

¹³⁷ *VICT v CFMMEU* [2018] VSC 794 [44]; *Deputy Commissioner of Taxation v Gashi (No 3)* [2011] VSC 448 [20]; *National Australia Bank Ltd v Juric (No 2)* [2001] VSC 398 [67]–[70].

law, and that the 'litigant who must come to court in order to enforce an order which has been breached by contempt, or to have a person dealt with [for] contempt, should not be out of pocket'.¹³⁸

- 5.173 An order for costs may be significant. This can be considered in determining what other penalties are imposed,¹³⁹ and even whether there is a need for any other penalty.¹⁴⁰
- 5.174 If an applicant fails to prove the contempt, they may have to pay the respondent's costs.¹⁴¹ This can make it risky for a party to decide to commence proceedings, especially when the person must pay the costs order 'without having achieved the purpose of enforcing the original order'.¹⁴²

Responses

- 5.175 Other than the DPP, few stakeholders addressed the issue of costs. The DPP raised concerns that the current approach to costs, especially the risk of an order for indemnity costs, made it a 'difficult task' to determine whether there were sufficient prospects of conviction and it was in the public interest to commence a contempt prosecution. The DPP submitted that the 'approach to costs in contempt proceedings should reflect the current approach to costs in criminal matters (for example, where there has been a failure to disclose) and liability for indemnity costs should be removed'.¹⁴³

Commission's conclusions: costs should be at the court's discretion

- 5.176 The DPP plays an important public role in bringing contempt proceedings to protect the fairness of criminal trials in Victoria. In determining whether commencing a proceeding is in the public interest, the DPP is guided by prosecutorial guidelines.¹⁴⁴
- 5.177 The DPP's discretion to apply to the court to deal with a contempt (and similarly that of the Attorney-General or Prothonotary) should not be unduly constrained by the risks of an order for indemnity costs. However, these concerns do not justify limiting the court's discretion to order the costs appropriate in the circumstances.
- 5.178 While it is the practice to award indemnity costs in contempt cases, this is not a rule. The cases make clear that the courts consider the circumstances of the proceeding before awarding costs. For example, indemnity costs were awarded against an unsuccessful applicant in *Advan Investments Pty Ltd v Dean Gleeson Motor Sales Pty Ltd* only after the court concluded that:
- the defendants did not have an opportunity to explain their conduct before the proceeding was commenced
 - the evidence for the contempt was tenuous at best
 - the applicant commenced the proceedings on a suspicion, and the proceedings should not have been commenced.¹⁴⁵
- 5.179 The cases also suggest that, although a successful defendant will generally be entitled to costs, the court can choose not to order costs if the proceeding was properly brought.¹⁴⁶

138 *National Australia Bank Ltd v Juric (No 2)* [2001] VSC 398 [70].

139 *VICT v CFMMEU* [2018] VSC 794 [44]; *Zhang v Fortune Holding Group Pty Ltd (No 2)* [2018] VSCA 70 [33].

140 *Pelechowski v Registrar, Court of Appeal* [1999] HCA 19 [148] (Kirby J), (1999) 198 CLR 435.

141 *Registrar of the Court of Appeal v Willesee* (1985) 3 NSWLR 650, 661; *Advan Investments Pty Ltd v Dean Gleeson Motor Sales Pty Ltd* [2003] VSC 201.

142 Law Council of Australia, Submission No 6 to the Senate and Legal Constitutional Affairs References Committee, *Law of Contempt* (13 November 2017) [32].

143 Submission 28 (Director of Public Prosecutions).

144 Office of Public Prosecutions Victoria, *Policy of the Director of Public Prosecutions for Victoria* (17 December 2019) Ch 1.

145 *Advan Investments Pty Ltd v Dean Gleeson Motor Sales Pty Ltd* [2003] VSC 201 [118]–[119].

146 *Registrar of the Court of Appeal v Willesee* (1985) 3 NSWLR 650, 661. Cf *DPP (Cth) v Sexton* [2008] NSWSC 352, although in this case, the DPP did not make submissions on how the court should exercise its costs discretion even though the judge was critical of the defendant's conduct.

- 5.180 The proposed Act should not interfere with the court’s discretion to award costs. There are too many factors that need to be considered. An exemption for the DPP would need to address cases where the proceedings should not have been brought or were not efficiently prosecuted. Further, such an exemption might need to be extended to the Attorney-General and the Prothonotary. This would introduce more complexity than is justified.

Recommendation

- 29 The proposed Act should specify that a court may award costs at its discretion.

Penalties

- 5.181 The Supreme Court has a broad discretion to determine whether to impose a penalty for contempt of court, and if so, what that penalty should be.¹⁴⁷
- 5.182 Under rule 75.11 of the Civil Procedure Rules, the court may punish a contempt by committing a person to prison, fining the person, or doing both.¹⁴⁸ If a body corporate is found guilty of contempt, the court may sequester (take possession of) the body corporate’s property, fine the body corporate, or do both.
- 5.183 The penalty regime is flexible in that:
- there is no maximum penalty¹⁴⁹
 - if the court imposes a fine, it may commit, or further commit, the person to prison until the fine is paid¹⁵⁰
 - the court may make an order that a penalty may end if a condition is met (for example, a court can order that a person must pay a fine that accrues until the person complies with the court order)¹⁵¹
 - the court may release a person from imprisonment earlier than originally ordered.¹⁵²

Maximum penalty or penalties

- 5.184 The consultation paper asked whether there should be a statutory maximum penalty for contempt of court. If so, it asked what penalties should apply and whether different penalties should apply for distinct categories of contempt.
- 5.185 The Commission received legal advice that the Parliament could set a maximum penalty for contempt without breaching the Constitution. However, particular care should be taken because:

if the maximum penalty were set too low, it may preclude the Supreme Court from selecting a punishment that it thought adequate in the particular circumstances, thereby inhibiting its ability to protect itself or the due administration of justice. That might lead to the conclusion that the Supreme Court has been deprived of its ‘defining characteristic’ to deal with a contempt.¹⁵³

147 The County Court has the same sentencing discretion as the Supreme Court, but statutory limits are placed on the penalties that the Magistrates’ Court, Children’s Court and Coroners Court may impose for contempt of court, as discussed in Chapter 6.

148 *Supreme Court (General Civil Procedure) Rules 2015* (Vic) r 75.11(1)–(2).

149 *Contempt of court* is not alone in Victoria in having a penalty that is at large. Section 320 of the *Crimes Act 1958* (Vic) provides a statutory penalty for some (but not all) common law offences.

150 *Supreme Court (General Civil Procedure) Rules 2015* (Vic) r 75.11(3).

151 *Ibid* r 75.11(4).

152 *Ibid* r 75.12.

153 See Appendix D 13 [36].

- 5.186 The Sentencing Act includes general rules for penalties. The Act includes a default penalty scale that identifies levels of maximum penalties in terms of imprisonment and penalty units for fines.¹⁵⁴ It also provides that for offences under the *Crimes Act 1958* (Vic) the maximum fine for a body corporate is five times the fine that can be imposed on a natural person.¹⁵⁵

Responses

- 5.187 Stakeholders noted that the absence of a statutory maximum penalty does not mean that in practice or in principle there are no parameters on sentencing for contempt.¹⁵⁶ However, the LIV also noted that the absence of a maximum was 'one of the most striking features of the unfettered powers of the court relating to contempt'.¹⁵⁷ With few exceptions,¹⁵⁸ stakeholders supported fixing a maximum penalty for contempt.¹⁵⁹
- 5.188 Stakeholders expressed different views on what the maximum penalty should be. Both the County Court and Children's Court submitted that the penalty should be the same for all types of contempt.¹⁶⁰
- 5.189 Stakeholders noted that:
- contempt covers a wide range of behaviours varying greatly in seriousness¹⁶¹
 - the capacity of individuals and bodies corporate to pay fines also varies greatly and penalties need to reflect this.¹⁶²
- 5.190 The Supreme Court submitted that the maximum penalty should reflect the most serious case. The Court noted that the maximum penalty for the common law offence of attempting to pervert the course of justice is 25 years imprisonment and for perjury 15 years imprisonment.¹⁶³

Commission's conclusions: there should be a maximum penalty

- 5.191 A maximum penalty should be set for contempt of court. This is consistent with the approach for statutory offences and for most common law offences in Victoria.¹⁶⁴
- 5.192 Setting a maximum penalty provides an indication of how seriously the community views contempt, including in relation to other types of misconduct. It makes clear to the public the consequences of not obeying a law. It promotes the rule of law by limiting judicial discretion.¹⁶⁵
- 5.193 The Commission considers that there should not be an unlimited and indefinite penalty for contempt. Even if a penalty for contempt is imposed for a coercive purpose, it is still a punishment. Therefore, the sentence should be finite and based on consideration of the contempt that has been proved.

154 *Sentencing Act 1991* (Vic) s 109. This section creates 12 levels of penalty for fines, and nine levels of penalty in terms of imprisonment. The value of each penalty unit is fixed under section 5 of the *Monetary Units Act 2004* (Vic). For the 2019–20 financial year, the value of a penalty unit in Victoria is \$165.22: Treasurer (Vic), '*Monetary Units Act 2004* (Vic)—Notice under Section 6, Fixing the Value of a Fee Unit and a Penalty Unit' in Victoria, *Victoria Government Gazette*, No G 14, 4 April 2019, 544.

155 *Sentencing Act 1991* (Vic) s 113D.

156 Submission 26 (Chief Examiner, Victoria); Consultation 13 (Fiona K Forsyth QC, John Langmead QC).

157 Submission 22 (Law Institute of Victoria).

158 Submission 26 (Chief Examiner, Victoria); Consultation 13 (Fiona K Forsyth QC, John Langmead QC).

159 Submissions 6 (Professors Mark Pearson, Patrick Keyzer, Anne Wallace and Associate Professor Jane Johnston), 11 (Victoria Legal Aid), 20 (Criminal Bar Association), 22 (Law Institute of Victoria), 27 (Australia's Right to Know coalition); Consultation 12 (Professor David Rolph).

160 Submission 14 (Children's Court of Victoria); Consultation 24 (County Court of Victoria).

161 Submission 31 (County Court of Victoria); Consultation 13 (Fiona K Forsyth QC, John Langmead QC).

162 Consultations 9 (Victorian Government Solicitor's Office), 12 (Professor David Rolph).

163 Submission 29 (Supreme Court of Victoria). See *Crimes Act 1958* (Vic) ss 314 (perjury), 320 (perverting the course of justice and attempt to pervert the course of justice).

164 *Crimes Act 1958* (Vic) s 320.

165 Sentencing Advisory Council, *Maximum Penalties: Principles and Purposes* (Preliminary Issues Paper, October 2010) <<https://www.sentencingcouncil.vic.gov.au/publications/maximum-penalties-principles-and-purposes-preliminary-issues-paper>>.

- 5.194 This coercive aspect can be recognised by giving the court power to release a person from a sentence of imprisonment early or to impose a fine that accrues until a maximum is reached. The court should also continue to be able to order sequestration; that is, taking possession of someone’s property until they comply with the court order.¹⁶⁶
- 5.195 The Commission has made recommendations in Chapters 7 to 11 about the maximum penalty for the types of contempt discussed in those chapters.¹⁶⁷ In view of the legal advice received by the Commission and the maximum penalty available for comparative offences,¹⁶⁸ the Commission recommends that the maximum penalty for the general category of contempt should be 10 years imprisonment.
- 5.196 To ensure consistency, these maximum penalties for imprisonment should correspond with the maximum monetary penalties set out in the default penalty scale in the Sentencing Act.
- 5.197 Similarly, consistent with the Sentencing Act, the proposed Act should provide for maximum penalties for bodies corporate five times greater than the maximum imposed on a natural person.

Application of the Sentencing Act

- 5.198 As discussed in the consultation paper, it is unclear which provisions of the Sentencing Act, if any, are relevant to sentencing for contempt of court.¹⁶⁹ This uncertainty can limit the sentencing options available to the court.
- 5.199 The Sentencing Act sets out principles for sentencing decisions, the factors that must be considered when sentencing, and the purposes of sentencing. Many principles in this Act are already applied in sentencing a person for contempt.
- 5.200 The options in the Sentencing Act give the court the flexibility to determine an appropriate penalty in all circumstances. These options include:
- imprisonment
 - community correction order with or without conviction
 - fine with or without conviction
 - adjourned undertaking with or without conviction (which allows the court to adjourn the hearing for up to five years and release the defendant if they undertake to be of good behaviour and to comply with any other conditions ordered by the court)
 - dismissal (which allows the court, where a charge is proved, to make an order dismissing the charge without recording a conviction or imposing a penalty)
 - discharge (which allows the court, where a charge is proved, to record that the person has been convicted without imposing a penalty).
- 5.201 Many of these sentencing options are already reflected in the sentencing outcomes of contempt cases. However, the Sentencing Act provides a clearer legislative framework for formulating sentencing orders and for attaching consequences to any failure to comply.
- 5.202 The consultation paper asked whether the Sentencing Act should apply to contempt proceedings.¹⁷⁰

166 A sequestration order directs named sequestrators to take possession of the defendant’s property and to retain it until the contempt has been purged and the court has made appropriate orders.

167 See Appendix E for recommended penalties for all categories of contempt included in the proposed Act. See also Appendix G for an illustrative list of sentences imposed for different categories of contempt.

168 See Appendix F for an illustrative list of comparative offences and penalties from Australian jurisdictions.

169 Victorian Law Reform Commission, *Contempt of Court* (Consultation Paper, May 2019) 32–3 [3.52]–[3.55].

170 Ibid 33, Question 7.

Responses

- 5.203 Stakeholders supported the application of the Sentencing Act to contempt. The Supreme Court stated that:
- a number of cases have had regard to the *Sentencing Act 1991* to a greater or lesser extent. A provision which formally applied the *Sentencing Act 1991* to contempt offences would provide greater certainty in practice, ensuring the availability of a full range of sentencing orders and the framework within which orders are made.¹⁷¹
- 5.204 The Criminal Bar Association cautioned that there was also a need to recognise the coercive aspect of punishment for contempt ‘which is directed towards bringing the contemptuous conduct to an immediate end in addition to punishment and denunciation’.¹⁷²
- 5.205 The VLA submitted that the Children, Youth and Families Act should be applied to the sentencing of young offenders for contempt.¹⁷³ The Children, Youth and Families Act includes sentencing principles and options that differ from those applying to adults.¹⁷⁴ The main consideration for sentencing young offenders is the prospect of rehabilitation.¹⁷⁵

Commission’s conclusions: Sentencing Act should apply to contempt

- 5.206 The Commission agrees with stakeholders that the Sentencing Act should apply to contempt proceedings. This will give courts a broader range of sentencing options and therefore more flexibility.
- 5.207 Further, there is no reason punishment for contempt should sit outside the uniform approach to sentencing provided for in the Act. While courts apply the Sentencing Act in contempt cases by analogy, the application of the Sentencing Act to contempt should be made clear in legislation. Some modification may need to be made to reflect the coercive purpose of some penalties.¹⁷⁶
- 5.208 The sentencing principles in the Children, Youth and Families Act should apply when a child is sentenced for contempt. Again, there is no reason to apply a distinctive approach to sentencing young offenders for contempt.

171 Submission 29 (Supreme Court of Victoria).

172 Submission 20 (Criminal Bar Association).

173 Submission 11 (Victoria Legal Aid).

174 *Children, Youth and Families Act 2005* (Vic) pt 5.3.

175 This principle is reflected in *Children, Youth and Families Act 2005* (Vic) s 361(1)(a)–(d). See generally Judicial College of Victoria, ‘29.1.1 Focus on Rehabilitation’, *Children’s Court Bench Book* (Online Manual, 5 April 2018) <<http://www.judicialcollege.vic.edu.au/eManuals/CHCBB/index.htm#60154.htm>>.

176 The Commission notes that in addition to the proposed Act providing that the Sentencing Act and the Children, Youth and Families Act apply to sentencing for contempt, these Acts may require consequential amendments declaring their application to contempt proceedings.

Recommendations

- 30 The proposed Act should fix a maximum penalty for contempt of court. Different maximum penalties should apply for different categories of contempt as set out in subsequent recommendations. The maximum penalty for the general category of contempt should be for an individual 10 years imprisonment or 1200 penalty units.
- 31 The proposed Act should provide for maximum penalties for bodies corporate that are five times those that can be imposed on a natural person.
- 32 To ensure the availability of the full range of sentencing orders and to provide a consistent framework for the making of sentencing orders, the proposed Act should provide that:
 - the Sentencing Act applies to the sentencing of an adult for contempt of court
 - the Children, Youth and Families Act applies to the sentencing of a child for contempt of court.
- 33 To retain flexibility, the proposed Act should provide that the Supreme Court retains the discretion to order early discharge from a sentence of imprisonment or other sentencing order, an accruing fine up to a set maximum, and/or sequestration.

Contempt powers of lower courts

- 75** How should the proposed Act deal with lower courts?
- 75** County Court
- 76** Magistrates' Court
- 78** Children's Court
- 80** Coroners Court
- 82** Procedure in lower courts
- 83** Referral to the Supreme Court

6. Contempt powers of lower courts

Overview

- The proposed Act should set out the powers of all Victorian courts to deal with contempt.
 - The County Court of Victoria should have the same powers as the Supreme Court to deal with contempt. The procedure and penalties in the proposed Act that apply to the Supreme Court should also apply to the County Court.
 - There should be two exceptions. The County Court should not have the power to punish contempts committed in other courts. It should not have the power to punish contempt by publication of material undermining public confidence in the judiciary or courts.
 - The Magistrates' Court and the Coroners Court should have the power to punish as contempt witness misconduct and conduct that occurs in or near the courtroom and that interferes with a proceeding of that court. These types of contempt are defined in Chapter 7. There should be a lower maximum penalty in these courts.
 - The Children's Court should have the power to punish as contempt witness misconduct and conduct that occurs in or near the courtroom and that interferes with a proceeding of the court. The Children's Court should have the power to deal, on referral, with contempts committed by children in other courts. Children accused of contempt should be dealt with under the *Children, Youth and Families Act (2005)* (Vic).
 - The procedure for dealing with a contempt in the lower courts (other than the County Court) should be the modified procedure, discussed in Chapter 5, for dealing with a contempt in or near the courtroom that interferes with a proceeding. This procedure requires the presiding judicial officer to formulate a charge of contempt, supported by particulars, and order that the person be tried before a different judicial officer. The new procedure should be developed in consultation with the courts.
 - Lower courts should have the power to refer a matter for the Supreme Court to consider whether it should commence contempt proceedings.
-

How should the proposed Act deal with lower courts?

- 6.1 Chapters 4 and 5 define and regulate the contempt powers of the Supreme Court of Victoria. This chapter deals with the contempt powers of other Victorian courts referred to here as 'lower courts':
- the County Court of Victoria
 - the Magistrates' Court of Victoria
 - the Children's Court of Victoria
 - the Coroners Court of Victoria.
- 6.2 The legislation that establishes each of these courts also confers on those courts powers to punish for contempt. This chapter discusses the scope of these powers and what contempt power should be conferred on those courts by the proposed Act.
- 6.3 The proposed Act could confer on each lower court the power to deal directly with a person for any contempt arising in proceedings before that court. Another option would be for each lower court to refer possible contempts to be dealt with by the Supreme Court, which already has the inherent power to deal with contempts of lower courts.¹
- 6.4 The contempt jurisdiction of lower courts in other Australian jurisdictions varies greatly.²

Responses

- 6.5 The consultation paper did not ask any questions about the contempt powers of lower courts in Victoria. Most stakeholders therefore did not address this issue. Further, this was largely unnecessary for those who supported recasting the law of contempt into ordinary criminal offences.

County Court

- 6.6 The County Court has the same power to deal with a contempt of the County Court as the Supreme Court has to deal with a contempt of the Supreme Court.³ This power was conferred on the County Court on the basis that:
- the increasingly important role which the [County] court is expected to carry out in the administration of justice requires it to have a more extensive power to punish for contempt. It should be the same as that of the Supreme Court.⁴
- 6.7 Order 75 of the *County Court Civil Procedure Rules 2018* sets out the procedures for dealing with contempt. These procedures mirror those of the Supreme Court. There is no limit on the penalty that the County Court may impose on a person found guilty of contempt.
- 6.8 In its submission, the County Court stated that 'As the major trial court in Victoria, the Court considers that contempt law plays a critical role in its ability to manage its proceedings and enforce its orders'.⁵
- 6.9 Although the County Court has the same contempt powers as the Supreme Court, in practice contempts of the County Court are often dealt with directly by the Supreme Court. For example, the Supreme Court dealt with the contempt proceeding arising from the media reporting on the case of George Pell,⁶ and has also dealt with other high-profile contempt cases concerning the County Court.⁷

¹ *John Fairfax & Sons Pty Ltd v McRae* (1955) 93 CLR 351; *Supreme Court (General Civil Procedure) Rules 2015* (Vic) r 75.05(1)(c).

² See Appendix H for a comparison of the contempt powers of courts in other Australian jurisdictions.

³ *County Court Act 1958* (Vic) s 54.

⁴ Victoria, *Parliamentary Debates*, Legislative Assembly, 28 November 1985, 2607 (Mr Mathews, Minister for the Arts).

⁵ Submission 31 (County Court of Victoria).

⁶ Michael Pelly, 'Thirty-six Media Outlets Cited for Pell Contempt', *The Australian Financial Review* (online, 26 March 2019) <<https://www.afr.com/companies/professional-services/thirtysix-media-outlets-cited-for-pell-contempt-20190326-h1ctf2>>.

⁷ See, eg, *R v Sherwani* [2017] VSC 147; *R v Bonacci* [2015] VSC 121; *DPP (Vic) v Johnson* [2002] VSC 583; *R v Hoser & Kotabi Pty Ltd* [2001] VSC 443.

Commission's conclusions: retain the scope of the County Court's powers

- 6.10 In the absence of submissions to the contrary, the County Court should have the same contempt powers as the Supreme Court under the proposed Act. The County Court is the forum for most jury trials in Victoria. Although it does not have the same overarching responsibilities as the Supreme Court to protect the proper administration of justice in Victoria, it should be empowered to deal with threats and disruptions to its own proceedings whether they occur inside or outside the courtroom.
- 6.11 There should be two exceptions. The County Court should not have power to punish a contempt of any other court. This is the responsibility of the Supreme Court. Further, as discussed in Chapter 11, the County Court should not have the power to deal with contempt by publication of material undermining public confidence in the judiciary or courts (scandalising contempt).
- 6.12 These powers should be set out in the proposed Act to ensure clarity and accessibility and should replace the contempt powers in the *County Court Act 1958* (Vic). The proposed Act should provide that the County Court can only deal with a person for contempt under the proposed Act.

Recommendation

- 34 The contempt provisions in the County Court Act should be repealed and the proposed Act should confer on the County Court the same power to deal with a person for contempt as the Supreme Court except that the County Court should not have the power to punish:
- contempt of any other court
 - contempt by publication of material undermining public confidence in the judiciary or courts (scandalising contempt).

Magistrates' Court

- 6.13 Under its Act, the Magistrates' Court has power only to deal with:
- contempts committed in the face of the court
 - contempts by witnesses, such as not answering a summons, refusing to be sworn or affirmed, refusing to answer a lawful question and wilful prevarication.⁸
- 6.14 For a contempt in the face of the court, the Magistrates' Court can impose penalties of up to six months imprisonment or a fine of up to 25 penalty units.⁹ For contempts by witnesses, the maximum penalty is imprisonment of up to one month or a fine of up to five penalty units.¹⁰
- 6.15 The Magistrates' Court also has power under section 135 of its Act to enforce an order other than for the payment of money, by fining or imprisoning a person in default of a court order. This is not, however, referred to as a contempt power¹¹ and is rarely used.¹²

8 *Magistrates' Court Act 1989* (Vic) ss 133–4.

9 *Ibid* s 133(4).

10 *Ibid* s 134(3). The court may also order that, if the fine is not paid within a specified time, the person be imprisoned for up to one month.

11 *Magistrates' Court Act 1989* (Vic) ss 135(3)–(4). A person who defaults on an order is liable to pay one penalty unit per day for every day during which the default continues (up to a maximum of 40 penalty units) or to be imprisoned for as long as the default continues (up to a maximum of two months imprisonment).

12 Consultation 25 (Magistrates' Court of Victoria).

- 6.16 A member of the Magistrates' Court told the Commission it would be better to have consistency across jurisdictions if a new Contempt of Court Act was introduced. The member acknowledged this would depend on the approach to reform and the extent to which it relied on the Supreme Court's inherent contempt powers.¹³
- 6.17 The Director of Public Prosecutions (DPP) submitted that, although the Supreme Court can deal with contempts of the Magistrates' Court, often the matters are not suitable for Supreme Court litigation.¹⁴
- 6.18 The DPP and Magistrates' Court supported clarifying the procedure for dealing with contempts in the face of the court, so that the Magistrates' Court can use its contempt powers more effectively.¹⁵

Commission's conclusions: retain the scope of the Magistrates' Court's powers

- 6.19 The Magistrates' Court should have the power to deal itself with disruptions to its proceedings and recalcitrant witnesses. The Commission agrees with the DPP that some matters are better dealt with in the Magistrates' Court.
- 6.20 Therefore, the Magistrates' Court should have power to deal with contempts that occur in or near to the courtroom and interfere with a court proceeding and with witness misconduct.¹⁶ In Chapter 7, the Commission recommends making clear the conduct that constitutes these types of contempt. This will ensure greater consistency between jurisdictions.
- 6.21 As the Magistrates' Court has more limited jurisdiction generally, it is appropriate to limit its jurisdiction to these types of contempt.
- 6.22 The penalty that the Magistrates' Court may impose for contempt should continue to be more limited than the penalty available in the Supreme Court. This recognises that more serious contempts should be dealt with by the Supreme Court. The penalty that may be imposed by the Magistrates' Court for contempt is discussed in Chapter 7. The Magistrates' Court should retain the discretion to order early discharge from any term of imprisonment ordered.
- 6.23 The Magistrate Court's contempt powers should be set out exhaustively in the proposed Act dealing with contempt. This should replace the current powers in sections 133 and 134 of the *Magistrates' Court Act 1989* (Vic).
- 6.24 The Commission makes no recommendations about the enforcement power under section 135 of the Magistrates' Court Act. This is not currently expressed as a power to punish for contempt. No issues were raised in relation to that power in this inquiry. Chapter 8 discusses the need for a clearer, more consistent statutory regime for the enforcement of orders across Victorian courts and tribunals. In that chapter, the Commission recommends a broader review of enforcement mechanisms as this extends beyond the scope of this inquiry.

13 Ibid.

14 Submission 28 (Director of Public Prosecutions).

15 Ibid; Consultation 25 (Magistrates' Court of Victoria).

16 There are currently provisions peculiar to the Magistrates' Court which provide that it is a *contempt of court* not to answer certain summonses issued under the Magistrates' Court Rules or other various Acts: *Magistrates' Court Act 1989* (Vic) ss 134(5)–(6). Additional provisions may be required to accommodate these within the proposed Act.

Recommendation

- 35 The contempt provisions in the Magistrates' Court Act should be repealed and the proposed Act should confer on the Magistrates' Court power to punish as a contempt witness misconduct and conduct that occurs in or near the courtroom and that interferes with a court proceeding. (This type of contempt is defined in Chapter 7.)

Children's Court

- 6.25 The Children's Court has the same powers to deal with contempt as the Magistrates' Court.¹⁷ It is unclear whether it also has an enforcement power equivalent to section 135 of the Magistrates' Court Act.¹⁸
- 6.26 The Children's Court does not have the power to commit a minor to prison for contempt. Instead, they can commit them to a youth justice or a youth residential centre.¹⁹ The Children's Court can also deal with a person for contempt if the person is the author of a report to the Court and fails, without sufficient excuse, to attend and give evidence as required.²⁰
- 6.27 The Children's Court submitted that it should have 'the full suite of clear powers to deal with all forms of contempt' but such powers should be used reluctantly and as a last resort. However, the Children's Court also submitted that 'where the contempt is egregious, or undermines the proper administration of justice, the full armoury of contempt powers should be available to the [Children's Court] in legislation'.²¹
- 6.28 In particular, the Children's Court noted that, unlike other courts in Victoria, it does not have any clear statutory powers to enforce its own orders or issue remedies for non-compliance with its orders. The Children's Court stated that it 'requires a workable remedy for disobedience contempt by persons committing serious breaches of Court orders'.²² (See Chapter 8.)

Jurisdiction to deal with children accused of contempt before other courts

- 6.29 Although it rarely occurs, a child may be charged with committing a contempt of a court other than the Children's Court.²³ In this case, there is no legislation that provides for the matter to be transferred and dealt with by the Children's Court.
- 6.30 This makes contempt different from other crimes committed by children, which are dealt with by the Children's Court. The Criminal Division of the Children's Court can hear and determine all charges against children for summary offences and for most indictable offences.²⁴ The Supreme Court and County Court may order a proceeding for an

17 *Children, Youth and Families Act 2005* (Vic) s 528(2).

18 Submission 14 (Children's Court of Victoria).

19 *Children, Youth and Families Act 2005* (Vic) s 528(3).

20 *Ibid* s 550(4).

21 Submission 14 (Children's Court of Victoria).

22 *Ibid*.

23 In a recent case, a child was charged with contempt of the Chief Examiner and, as provided for by section 49 of the *Major Crime (Investigative Powers) Act 2004*, was dealt with (and punished) by the Supreme Court as though he had committed a contempt of an inferior court: *R v Hopkins (a Pseudonym)* [2018] VSC 756. The Court stated that the defendant was the first child contemnor to be sentenced by the Court: [21].

24 *Children, Youth and Families Act 2005* (Vic) s 516. Six offences, involving death, are currently excluded under section 416(1)(b). Section 356(6) also creates a presumption that certain other offences should be heard in a higher court, such as aggravated home invasion, carjacking or related terrorism offences. Section 356(8) also provides that, for some other offences, such as rape or home invasion, a court must consider whether there are exceptional circumstances which mean the charges should not be dealt with summarily and should be dealt with by a higher court. See generally Judicial College of Victoria, '23.2.3 Serious Youth Offences', *Children's Court Bench Book* (Online Manual, 5 April 2018) [23.2.3] <<http://www.judicialcollege.vic.edu.au/eManuals/CHCBB/index.htm#66507.htm>> .

indictable offence to be transferred to the Children’s Court, if the accused consents and the court considers that the charge is appropriate to be determined summarily.²⁵

- 6.31 The Children’s Court has specialist staff, separate courtrooms, and a range of specialist services for children. Its governing legislation provides a complete framework for dealing with children accused of crime. This sets out the overriding consideration of the best interests of the child.²⁶ It also includes special procedures with greater protections for children.²⁷ This gives effect to the human right of a child ‘to a procedure that takes account of his or her age and the desirability of promoting the child’s rehabilitation’.²⁸ Importantly, the Act also includes sentencing principles and options which are different from those that apply to adults.²⁹

Commission’s conclusions: give the Children’s Court the power to deal with contempt by children in other courts

- 6.32 The Children’s Court should continue to have the same contempt powers as the Magistrates’ Court. This means that it should only have power to deal with contempts that occur in or near to the courtroom and interfere with a court proceeding, and witness misconduct, as defined in Chapter 7.
- 6.33 As with the other courts, these powers should be exhaustively set out in the proposed Act, replacing the existing provisions. A further provision may be needed to replace the current power to deal with a report author who fails to attend the Children’s Court.
- 6.34 The Children’s Court should also have powers to deal with contempts committed by a child in other courts, or conduct which legislation allows the Supreme Court to deal with as a contempt of court. As discussed in Chapters 2 and 3, contempt is different from other offences and the jurisdiction that is exercised is not the ordinary criminal jurisdiction. However, the reasons children should be treated differently from adults in criminal proceedings also apply to contempt proceedings. The proposed Act should recognise this in two ways.
- 6.35 Any court should consider whether to transfer an application to punish a child for contempt to the Children’s Court for determination, provided that the child consents to the transfer.
- 6.36 This is consistent with existing powers of courts to transfer criminal matters to the Children’s Court. The proposed Act should confer jurisdiction on the Children’s Court to deal with any matter transferred in this way.
- 6.37 Further, in a contempt proceeding against a child, regardless of which court it is heard in, the procedural requirements of the *Children, Youth and Families Act 2005* (Vic) should apply with any changes as needed.³⁰
- 6.38 As discussed in Chapter 5, the sentencing principles in the *Children, Youth and Families Act* should apply when a child is found guilty of contempt. Contempt is not such a unique crime that it needs different sentencing principles.
- 6.39 The concerns raised by the Children’s Court about its ability to enforce orders are discussed in Chapter 8. As noted in relation to the Magistrates’ Court, the Commission recommends in that chapter that there should be a further inquiry into the broader issue of enforcement of court orders.

25 *Criminal Procedure Act 2009* (Vic) s 168. For certain offences, there are other conditions that apply before the matter can be transferred to the Children’s Court: s 168A.

26 *Children, Youth and Families Act 2005* (Vic) s 10.

27 For example, a duty to ensure legal representation and a prohibition on identifying children involved in proceedings: *Children, Youth and Families Act 2005* (Vic) ss 524, 534.

28 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 25(3).

29 *Children, Youth and Families Act 2005* (Vic) pt 5.3.

30 For a discussion of how the Supreme Court should meet its responsibility to adopt procedures that take account of a child’s age and the desirability of promoting the child’s rehabilitation, see *DPP v SL* [2016] VSC 714, (2016) 263 A Crim R 193.

Recommendations

- 36 The contempt provisions in the Children, Youth and Families Act should be repealed and the proposed Act should confer on the Children's Court the power to punish as a contempt witness misconduct and conduct that occurs in or near the courtroom and that interferes with a court proceeding. (This type of contempt is defined in Chapter 7.)
- 37 The proposed Act should provide that any court should consider transferring an application to punish a child for contempt to the Children's Court provided that:
- the child consents
 - the court considers that it is appropriate for the charge to be determined by the Children's Court.
- 38 The proposed Act should confer jurisdiction on the Children's Court to deal with a matter transferred in this way.
- 39 The proposed Act should provide that in any contempt proceeding against a child the procedural requirements and sentencing principles of the Children, Youth and Families Act should apply.

Coroners Court

- 6.40 The Coroners Court has powers to deal with a person for contempt if the person does any of the following:
- wilfully fails to comply with a summons or order of a coroner or a judicial registrar
 - insults an officer of the Coroners Court while that officer is performing functions as an officer of the Coroners Court
 - insults, obstructs or hinders a person attending an inquest
 - misbehaves at or interrupts an inquest
 - obstructs or hinders a person from complying with an order of a coroner or a judicial registrar or a summons to attend the Coroners Court
 - any other act that would, if the Coroners Court were the Supreme Court, constitute contempt of that court.³¹
- 6.41 The maximum penalty is 12 months imprisonment or a fine of 120 penalty units, or in the case of a body corporate, a fine of 600 penalty units.³²
- 6.42 The Coroners Court has the same contempt powers as the County Court and the Supreme Court, including powers to deal with interferences with witnesses outside the courtroom and publications involving coronial proceedings. In other Australian jurisdictions, contempts in coronial proceedings have been dealt with by the Supreme Court.³³

31 *Coroners Act 2008* (Vic) s 103(1).

32 *Ibid* s 103(7).

33 See, eg, *A-G (NSW) v Mirror Newspapers Ltd* [1980] NSWLR 374; *Civil Aviation Authority v Australian Broadcasting Corporation* (1995) 39 NSWLR 540.

- 6.43 The Coroners Court stated that the broad contempt powers of the Court were important for coroners in investigations and at inquests. The coronial jurisdiction is inquisitorial, and the coroner has responsibility for ‘investigating and advancing the case’. In that context, it submitted that a coroner’s contempt powers encourage people and organisations to comply with orders to provide documents for an investigation. The Coroners Court submitted that if non-compliance with an order could only be dealt with as a contempt by the Supreme Court or as a criminal charge this ‘would cause delay to the coronial investigation, increase costs and possibly impede the investigation itself’.³⁴
- 6.44 The Coroners Court also submitted that more guidance was needed on the procedure for dealing with a contempt.³⁵

Commission’s conclusions: give the Coroners Court the same powers as the Magistrates’ Court

- 6.45 The Commission considers that the Coroners Court, like the Magistrates’ Court, should have contempt powers to:
- allow the Court to control the orderly and safe conduct of proceedings before the Court
 - enforce its powers to compel witnesses to attend and give evidence.
- 6.46 The Commission acknowledges the unique inquisitorial nature of the coronial jurisdiction. In support of this, the *Coroners Act 2008* (Vic) includes provisions which:
- require certain people to give the coroner any information or other assistance that the coroner requests for the purposes of the coroner’s investigation³⁶
 - confer coercive powers to gather evidence and compel the production of documents.³⁷
- 6.47 These provisions of the Coroners Act are supported by statutory penalties for non-compliance.³⁸ The Commission considers that these provisions adequately support the inquisitorial function of the coroner, and it is therefore not necessary for the Coroners Court to have a broader contempt jurisdiction than the Magistrates’ Court.
- 6.48 The Commission also notes that the contempt powers of the Magistrates’ Court include powers to deal with witnesses who, when summoned, fail to attend or produce documents as lawfully required.
- 6.49 The Commission considers that, if conduct beyond that defined in Chapter 7 interferes with the proper administration of justice in the Coroners Court, then it is better dealt with in the Supreme Court or, in appropriate cases, as an ordinary criminal offence. Case law from other jurisdictions indicates that contempts of the Coroners Court can be dealt with in the Supreme Court.³⁹
- 6.50 Therefore, the Commission recommends that the contempt powers of the Coroners Court should be the same as those of the Magistrates’ Court.
- 6.51 The Commission recommends that, as with other courts, the powers of the Coroner to punish for contempt should be exhaustively set out in the proposed Act and replace the existing powers under section 103 of the Coroners Act.

34 Submission 34 (Coroners Court of Victoria—supplementary submission).

35 Submission 21 (Coroners Court of Victoria).

36 *Coroners Act 2008* (Vic) pt 4 div 3.

37 *Ibid* pt 4 div 4.

38 *Ibid* ss 32–4, 37–8, 40, 42.

39 *A-G (NSW) v Mirror Newspapers Ltd* [1980] NSWLR 374; *Civil Aviation Authority v Australian Broadcasting Corporation* (1995) 39 NSWLR 540.

- 6.52 The maximum penalty that the Coroners Court may impose for contempt is discussed in Chapter 7. In that chapter, the Commission recommends that the maximum penalty should be reduced to correspond with the penalty in the Magistrates' Court. The Coroners' Court should retain the discretion to order early discharge from any term of imprisonment ordered.

Recommendation

- 40 The contempt provisions in the Coroners Act should be repealed and the proposed Act should confer on the Coroners Court the power to punish as a contempt witness misconduct and conduct that occurs in or near the courtroom and that interferes with a court proceeding. (This type of contempt is defined in Chapter 7.)

Procedure in lower courts

- 6.53 One purpose of the proposed Act is to clarify the procedure for dealing with a contempt. This purpose is best served by procedures that are uniform across jurisdictions to the extent possible.

County Court

- 6.54 The proposed Act should provide that the County Court should use the same procedure for dealing with contempt as the Supreme Court. This procedure is discussed in Chapter 5. The same penalties should apply.

Other courts

- 6.55 The Magistrates' Court, the Children's Court and the Coroners Court all use the special summary procedure to deal with contempt in their jurisdictions. There is no other procedure, unlike in the County Court and Supreme Court. In Chapter 5, the Commission recommends abolishing the special summary procedure. This will mean a change of procedure in these courts.
- 6.56 In Chapter 5, the Commission has recommended a new procedure that may be used to deal with contempts that occur in or near the courtroom and interfere with a court proceeding and with witness misconduct. Under this procedure, the presiding judicial officer must issue and must particularise a charge of contempt, and direct that the charge be heard before a different judicial officer under the ordinary summary procedure, also discussed in Chapter 5.
- 6.57 This change may mean that the respective registrars of the Magistrates', Children's and Coroners Courts will need to assume responsibility for coordinating the prosecution of the contempt charge. Processes should be considered to support this change, especially in regional areas where it may be more difficult to arrange for another judicial officer to hear the matter or to brief external counsel. The process should be developed in close consultation with the courts to ensure that it is efficient and effective.
- 6.58 The Commission recommends that, as is now the case, parties other than the courts should not be able to commence a contempt proceeding in these courts. This does not prevent a party from bringing conduct that may be a contempt to a court's attention or asking a court to exercise its powers to deal with the conduct.

- 6.59 In its submission, the Coroners Court stated that ‘it may be appropriate for either Victoria Police or the Court’s principal Registrar to be able to institute contempt proceedings in this jurisdiction’.⁴⁰ The Commission considers this unnecessary in view of the recommendation to confine that Court’s contempt powers to witness misconduct and contempts occurring in or near the courtroom.
- 6.60 The proposed Act should provide for appeals from the lower courts if a conviction has been recorded or a penalty imposed. It should also clarify how the *Criminal Procedure Act 2009* (Vic) applies for this purpose.

Referral to the Supreme Court

- 6.61 There is no legislation in Victoria that provides for a lower court to refer an alleged contempt to the Supreme Court. Lower courts generally depend on the DPP or Attorney-General to commence a contempt proceeding in the Supreme Court to punish a contempt of a lower court. This practice should be reflected in the proposed Act.
- 6.62 In New South Wales, lower courts can refer an alleged contempt to the Supreme Court to be determined.⁴¹ Where this occurs, the registrar of the Supreme Court ‘must commence proceedings for punishment of the contempt, and no direction from the Court is necessary to enable the registrar to do so’.⁴²
- 6.63 A court or other body may also refer a matter for the Supreme Court to consider whether a contempt proceeding should be commenced. In those cases, the Supreme Court Rules provide that the registrar must:
- take advice from the Crown Solicitor as to whether to commence proceedings
 - unless the Court otherwise orders, act in accordance with the advice
 - inform the Attorney-General of the matter.⁴³
- 6.64 This procedure helps the Supreme Court to fulfil its function of supervising the administration of justice in other courts. It means that the Supreme Court can deal with a contempt in a lower court, even if that court does not have power to punish a contempt (for example, if the contempt is by publication). It recognises that the contempt power is a judicial power and that lower courts should not have to depend on the executive to invoke the jurisdiction of the Supreme Court. It may also help lower courts if they are reluctant to deal with the matter because of uncertainty about the extent or exercise of their powers.
- 6.65 For these reasons, the proposed Act should enable the County Court, Magistrates’ Court, Coroners Court and Children’s Court to refer a matter for the Supreme Court to consider whether to commence a contempt proceeding. On receiving a referral, the Prothonotary should obtain and act on legal advice about whether to commence a contempt proceeding, subject to the direction of the Court.

40 Submission 21 (Coroners Court of Victoria).

41 *District Court Act 1973* (NSW) s 203; *Local Court Act 2007* (NSW) s 24(4).

42 Supreme Court Rules 1970 (NSW) r 55.11(3).

43 *Ibid* r 55.11(6). See *Prothonotary of Supreme Court of NSW v Chan (No 23)* [2017] NSWSC 535 for discussion of how the Local and District Courts are currently not empowered to make a referral to the Supreme Court of this type, although other tribunals can do so.

Recommendations

- 41 The proposed Act should provide that the Supreme Court has jurisdiction to punish a contempt of a lower court.
- 42 The proposed Act should provide for the County Court to use the same procedure for dealing with contempt as the Supreme Court. The same penalties should apply.
- 43 The proposed Act should specify the procedure for contempt proceedings in the Magistrates' Court, Children's Court and Coroners Court. It should provide that the judicial officer before whom the alleged contempt occurred cannot adjudicate the alleged contempt and must:
 - formulate the charge and particularise the conduct giving rise to the alleged contempt
 - refer the alleged contempt to another judicial officer for hearing according to the ordinary summary procedure set out in Chapter 5.
- 44 The processes necessary to support this procedure, including in regional areas, should be developed in close consultation with the Magistrates' Court, Children's Court and Coroners Court.
- 45 The proposed Act should provide that where it is alleged, or appears to the County Court, Magistrates' Court, Children's Court or Coroners Court on its own view, that a person has committed contempt of court, the Court may refer the matter to the Supreme Court for consideration. On receiving a referral, the Prothonotary should obtain and act on legal advice about whether to commence a contempt proceeding, subject to the direction of the Court. The County Court, Magistrates' Court, Children's Court and Coroners Court may make such a referral regardless of whether the court has jurisdiction to deal with the contempt itself.

Dealing with disruptive behaviour: contempt 'in the face of the court'

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7. Dealing with disruptive behaviour: contempt ‘in the face of the court’

Overview

- All courts have the power to punish disruptions occurring in or close to the courtroom that interfere with the conduct of a proceeding. This is now known as ‘contempt in the face of the court’.
 - Contempt in the face of the court should be redefined in the proposed Act as ‘contempt by conduct that interferes with a court proceeding’.
 - This form of contempt is usually witnessed by a presiding judicial officer with the power to charge, try and punish the contempt using the ‘special summary procedure’. In Chapter 5, the Commission recommends abolishing this procedure.
 - To provide certainty and ensure the appropriate use of this power, the proposed Act should comprehensively describe the conduct that constitutes this form of contempt.
 - The proposed Act should also require proof that the conduct undermines or interferes with the conduct of the proceeding.
 - The proposed Act should also require the court, in determining whether to deal with a person for contempt, and/or the penalty to be imposed, to consider the personal circumstances of the person, including (but not limited to) age, and/ or any mental or cognitive impairment or other condition or disability, and whether the conduct was repeated, calculated or planned to interfere with the proceeding, or was threatening.
 - The proposed Act should specify that any person attending court can be punished for conduct that interferes with a proceeding.
-

What is contempt in the face of the court?

- 7.1 The term ‘contempt in the face of the court’ originates in common law and is not defined in statute. It does not refer to particular types of conduct. Rather, it is any conduct that occurs in or near the court, which interferes with, or tends to interfere with, the proper administration of justice.
- 7.2 All Victorian courts have the power to punish for contempt in the face of the court. As discussed in Chapter 3, the Supreme Court of Victoria has inherent powers to punish for contempt, including contempt committed in the courtroom, which arise out of its powers to protect the administration of justice.¹ All other courts have this power conferred by legislation.²
- 7.3 Contempt in the face of the court can be committed by:
- disrupting or interrupting proceedings³
 - assaulting or threatening those in court⁴
 - behaving in an insulting or disrespectful way⁵
 - refusing as a witness to be sworn or to answer a question, or prevaricating (that is, evading answering a question, for example, by pretending not to remember)⁶
 - making an unauthorised recording of proceedings.⁷
- 7.4 Typically, this conduct is witnessed by the presiding judicial officer, who can then charge, try and punish the contempt based on their own observations. This is known as the ‘special summary procedure’.⁸ As discussed in Chapter 5, the Commission recommends that this procedure should be abolished.⁹

Should contempt in the face of the court be retained?

- 7.5 In Chapter 4, the Commission recommends that legislation should define the law of contempt, including specific categories of contempt. This would make the law clearer, certain and more accessible, and therefore make it more likely people will comply with the law. That chapter also discusses the general views of stakeholders on whether legislation is needed.
- 7.6 The consultation paper asked whether contempt in the face of the court should be retained and, if so, whether it should be restated in statute.¹⁰ This section briefly discusses stakeholder views on this question, focusing on concerns specific to contempt in the face of the court.

1 *R v Metal Trades Employers’ Association; Ex parte Amalgamated Engineering Union (Australian Section)* (1951) 82 CLR 208, 241–3, 254; *Broken Hill Pty Co Ltd v Dagi* [1996] 2 VR 117, 125, 137. See also *Supreme Court (General Civil Procedure) Rules 2015* (Vic) ord 75 pt 2, which sets out the procedure for the application of this power.

2 *County Court Act 1958* (Vic) s 54; *Magistrates’ Court Act 1989* (Vic) s 133; *Children, Youth and Families Act 2005* (Vic) s 528; *Coroners Act 2008* (Vic) s 103. Similar powers are also conferred on tribunals and other bodies: see, eg, *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 137; *Major Crime (Investigative Powers) Act 2004* (Vic) s 49.

3 See, eg, *R v Slaveski* [2011] VSC 643; *R v Ogawa* [2009] QCA 307; *Re Perkins; Mesto v Galpin* [1998] 4 VR 505.

4 See, eg, *R v Slaveski* [2015] VSC 400; *DPP (Vic) v Johnson* [2002] VSC 583; *A-G (Vic) v Rich* [1998] VSC 41.

5 See, eg, *R v Slaveski* [2011] VSC 643; *DPP (Vic) v Johnson* [2002] VSC 583.

6 See, eg, *Allen v The Queen* [2013] VSCA 44, (2013) 36 VR 565; *R v Garde-Wilson* [2005] VSC 441; *Keeley v Brooking* (1979) 143 CLR 162.

7 See, eg, *Prothonotary of the Supreme Court of New South Wales v Rakete* [2010] NSWSC 665.

8 See Chapter 5 for more discussion on the special summary procedure. See also Victorian Law Reform Commission, *Contempt of Court* (Consultation Paper, May 2019) 50–5 [4.48]–[4.75].

9 In Chapter 5 the Commission recommends a modified procedure where the presiding judicial officer who witnessed the conduct may formulate a charge of contempt but must refer it to another judicial officer for hearing and determination.

10 Victorian Law Reform Commission, *Contempt of Court* (Consultation Paper, May 2019) 46, Questions 12–13.

Responses

- 7.7 Most stakeholders who addressed this question supported the retention of this form of contempt and its restatement in legislation.¹¹ Other stakeholders said this form of contempt was needed but did not address whether it should be restated in legislation,¹² or else queried the need for legislation.¹³
- 7.8 As the Supreme Court submitted, ‘the ability to control the conduct of proceedings before the Court is fundamental to ensuring the proper administration of justice’.¹⁴ A fair hearing requires ‘an environment where all parties are heard, witnesses give evidence and juries can deliberate free from intimidation or disruption or threats to the proper process of the Court’.¹⁵
- 7.9 Some courts told the Commission that the power to charge a person immediately for contempt in the face of the court has an important deterrent effect on disruptive behaviour and provides a mechanism to deal with such behaviour where other strategies have failed.¹⁶
- 7.10 However, courts and tribunals also told the Commission that most disruptive behaviour in court is dealt with by ‘court-craft’, rather than through contempt proceedings.¹⁷ For example, courts can adjourn a proceeding or require a person to leave the courtroom for a period of time.¹⁸
- 7.11 Victoria Legal Aid (VLA) expressed concern that restating this form of contempt as an offence could lead to overuse.¹⁹ VLA told the Commission in consultations that including an element of intention could address this concern.²⁰
- 7.12 Stakeholders observed that the power to punish for contempt in the face of the court was the source of the presiding judicial officer’s power to deal with disruptive conduct by, for example, ejecting a person from the court or detaining a person in the dock or cells. If the court’s power to deal with someone for contempt in the face of the court was removed, there may not be a clear foundation for these other powers.²¹

Commission’s conclusions: retain and restate as ‘contempt by conduct that interferes with a court proceeding’

- 7.13 Contempt in the face of the court should be retained and restated in the proposed Act as a distinct category of contempt. As discussed in Chapter 4, restatement in statute makes the law clearer, more certain and more accessible.
- 7.14 Statutory restatement enables contempt in the face of the court to be redefined using accessible and accurate language specific to the type of contempt, namely conduct interfering with a court proceeding. A more appropriate description of contempt in the face of the court is ‘contempt by conduct that interferes with a court proceeding’.

11 Submissions 4 (Dr Suzie O’Toole), 7 (The Victorian Civil and Administrative Tribunal), 14 (Children’s Court of Victoria), 20 (Criminal Bar Association), 29 (Supreme Court of Victoria), 31 (County Court of Victoria); Consultation 20 (Victorian Equal Opportunity and Human Rights Commission). One person submitted that the law of contempt generally, including those covered by contempt in the face of the court, should not be retained: Submission 2 (David S Brooks).

12 Consultations 1 (Representatives of victims of crime support organisations), 13 (Fiona K Forsyth QC, John Langmead QC).

13 Submissions 11 (Victoria Legal Aid), 28 (Director of Public Prosecutions);

14 Submission 29 (Supreme Court of Victoria)

15 Ibid.

16 Submissions 14 (Children’s Court of Victoria), 29 (Supreme Court of Victoria), 31 (County Court of Victoria); Consultation 15 (Children’s Court of Victoria). The Chief Examiner also noted that having the power to charge for contempt ‘appears to have been effective in deterring disruptive or other types of contemptuous behaviour’: Submission 26 (Chief Examiner, Victoria).

17 Consultations 15 (Children’s Court of Victoria), 22 (The Victorian Civil and Administrative Tribunal), 25 (Magistrates’ Court of Victoria). The Supreme Court submitted that the law of contempt generally is invoked infrequently: Submission 29 (Supreme Court of Victoria).

18 Consultations 15 (Children’s Court of Victoria), 22 (The Victorian Civil and Administrative Tribunal), 25 (Magistrates’ Court of Victoria).

19 Submission 11 (Victoria Legal Aid).

20 Consultation 6 (Victoria Legal Aid).

21 Consultations 26 (Supreme Court of Victoria), 12 (Professor David Rolph), 13 (Fiona K Forsyth QC, John Langmead QC).

- 7.15 Restating this contempt in legislation is also necessary to make clear:
- whether the judicial officer must have directly observed the conduct
 - whether this form of contempt should be defined as specific conduct or as conduct which interferes with a proceeding or the administration of justice
 - whether insulting or disrespectful conduct should constitute contempt
 - what fault element applies.

Recommendation

- 46 The proposed Act should recognise ‘contempt in the face of the court’ as a distinct category of contempt and redefine it as ‘contempt by conduct that interferes with a court proceeding’.

Definition of ‘contempt by conduct that interferes with a court proceeding’

Conduct not observed by the judicial officer

- 7.16 As discussed in the consultation paper, the meaning of ‘in the face of the court’ is not settled at common law. It is unclear whether the power to use the special summary procedure to deal with a person for contempt ‘in the face of the court’ can only be exercised in respect of conduct seen or heard by the judicial officer.²²
- 7.17 In Chapter 5 the Commission recommended abolishing the special summary procedure. This removes the ability of a judicial officer to immediately try and punish disruptive conduct as a contempt based on their observations. This procedural change raises the question of whether, for this form of contempt, direct observation of the conduct by the presiding judicial officer is still a relevant requirement.

Responses

- 7.18 Most stakeholders addressing this issue considered that this type of contempt should extend beyond conduct directly observed by the judicial officer.²³ The County Court of Victoria stated:
- Defining ‘in the face of the court’ to include only matters directly seen or heard by the judge is too narrow. The Court supports a broader view of the meaning, which covers inside a courtroom, within the court building, or other areas that are physically proximate to the County Court, provided they are connected with the administration of justice.²⁴
- 7.19 The Supreme Court supported defining what is required for a contempt to be in ‘the face of a court’. It suggested requiring actions to be ‘sufficiently proximate to affect a pending case’.²⁵

²² Victorian Law Reform Commission, *Contempt of Court* (Consultation Paper, May 2019) 47–8 [4.34]–[4.43]. As discussed there, judges in New South Wales have disagreed on this issue, although the New South Wales cases were affected by legislation which referred to contempt in the face or hearing of a court: see *European Asian Bank AG v Wentworth* (1986) 5 NSWLR 445; *Fraser v The Queen* (1984) 3 NSWLR 212; *Registrar, Court of Appeal v Collins* [1982] 1 NSWLR 682.

²³ Submissions 7 (The Victorian Civil and Administrative Tribunal), 11 (Victoria Legal Aid), 14 (Children’s Court of Victoria), 31 (County Court of Victoria). The special summary procedure may only be available in cases where the conduct has been directly seen or heard by the presiding judge in any event, and if all other forms of contempt were replaced by statutory provisions, these might include conduct not directly seen or heard by the presiding judge: Submission 20 (Criminal Bar Association).

²⁴ Submission 31 (County Court of Victoria).

²⁵ Submission 29 (Supreme Court of Victoria).

- 7.20 In contrast, the Law Institute of Victoria (LIV) considered this form of contempt should be limited to conduct directly seen or heard by the presiding judicial officer. In its view, the ability to quickly and efficiently determine the matter using these perceptions is a key justification for the existing procedure.²⁶

Commission’s conclusions: conduct must occur in or near the courtroom

- 7.21 Since the Commission recommends abolishing the special summary procedure, it is unnecessary to confine this category of contempt to conduct directly observed by a judicial officer. However, the conduct must still occur in or near the courtroom. This is consistent with current law. It is also consistent with the current scope of the powers of the Magistrates’ Court of Victoria and the Children’s Court of Victoria.
- 7.22 Underlying the Commission’s recommendations is a concern that it is important for those attending courts to know the limits of permissible behaviour in and near the courtroom.
- 7.23 Further, as a practical matter, it is often only evidence of conduct in or near the courtroom that is readily available through audio and CCTV recordings or witnessed by court staff. Without the support of an investigative agency, it may be difficult for a court to gather evidence of conduct that does not occur in or near a courtroom.
- 7.24 Where conduct does not occur in or near the courtroom but falls within another category of contempt, including the general category, an application can still be made to deal with the contempt under the proposed Act. However, the Magistrates’ Court, Children’s Court and Coroners Court will not have jurisdiction to deal with the contempt.

Recommendation

- 47 The proposed Act should provide that ‘contempt by conduct that interferes with a court proceeding’ is limited to conduct that occurs in or near the courtroom.

Defining the conduct—a specified list or a broad definition?

Other jurisdictions

- 7.25 At common law, contempt in the face of the court is not specifically defined. Rather, it is defined broadly as any conduct that interferes with, or has a tendency to interfere with, the administration of justice.²⁷
- 7.26 Many jurisdictions continue to rely on a common law definition of contempt in the face of the court.²⁸ This gives a court flexibility to deal with a wide range of behaviour. It also ensures the conduct is only punished where the presiding judicial officer considers it amounts to an interference with the administration of justice.
- 7.27 This is important since conduct may often interrupt or disrupt a court proceeding but will not amount to a contempt, because it does not interfere with the administration of justice. However, this common law approach creates uncertainty about what type of conduct may be punished as a contempt in the face of the court, because different judicial officers may apply different thresholds.

26 Submission 22 (Law Institute of Victoria).

27 *Re Dunn* [1906] VLR 493, 497.

28 See, eg, *Federal Circuit Court of Australia Act 1999* (Cth) s 17; *District Court Act 1973* (NSW) s 199; *Local Court Act 2007* (NSW) s 24; *Magistrates Court Act 1930* (ACT) s 307.

- 7.28 Legislation in other jurisdictions which gives contempt powers to lower courts often lists exhaustively the conduct that constitutes this form of contempt.²⁹ This provides certainty and accessibility for those attending courts, but limits flexibility, and may leave courts without power to punish conduct that falls outside those categories. It also exposes people to punishment where they carry out the specified conduct, even though the conduct may not amount to an interference with the administration of justice.
- 7.29 Finally, some jurisdictions adopt a hybrid approach. They prohibit specific types of conduct but also give the court power to punish for any other conduct that amounts to a contempt in the face of the court.³⁰
- 7.30 Jurisdictions that have listed specific conduct have included the following actions:
- interrupting³¹ or wilfully interrupting a court proceeding³²
 - wilfully disrupting a court proceeding³³
 - wilfully obstructing a proceeding³⁴
 - misbehaving³⁵ or wilfully misbehaving before the court³⁶
 - insulting a person constituting the court,³⁷ including when they are on their way to or from the court³⁸
 - insulting any person attending court³⁹ or wilfully insulting a judge, juror, registrar, sheriff, clerk or officer of the court⁴⁰
 - wilfully obstructing a person constituting the court, including when they are on their way to or from the court⁴¹
 - obstructing,⁴² hindering,⁴³ or unlawfully obstructing a person attending court⁴⁴
 - assaulting a person attending court⁴⁵
 - failing to take an oath or affirmation⁴⁶
 - failing to give evidence⁴⁷ or wilfully prevaricating⁴⁸
 - disobeying the court's orders or directions at a hearing.⁴⁹

Approach of other law reform agencies

- 7.31 The Australian Law Reform Commission (ALRC) and the Law Reform Commission of Western Australia (WA Commission) both recommended replacing contempt in the face of the court with offences defining the conduct comprehensively in legislation.

29 See eg, *Magistrates Court Act 1991* (SA) s 45; *Magistrates Court Act 2004* (WA) s 15; *Magistrates Court Act 1987* (Tas) s 17A; *District Court Act 2016* (NZ) s 212. The District Court of WA has both an exhaustive list of conduct constituting contempt and a provision conferring the same powers as the Supreme Court for matters that are within its jurisdiction: *District Court of Western Australia Act 1969* (WA) ss 55 (general powers), 63 (contempt in the face of the court).

30 See, eg, *Coroners Act 2008* (Vic) s 103; *Magistrates Courts Act 1921* (Qld) s 50(1).

31 *Coroners Act 2008* (Vic) s 103(d); *Magistrates Court Act 1991* (SA) s 45(a); *Magistrates Court Act 1930* (ACT) s 307(1), example 2.

32 *Magistrates Courts Act 1921* (Qld) s 50(1)(c); *District Court of Western Australia Act 1969* (WA) s 63(1)(b); *Magistrates Court Act 2004* (WA) s 15(1)(a)(i); *Magistrates Court Act 1987* (Tas) s 17A(1)(b).

33 *Contempt of Court Act 2019* (NZ) s 10(a). This section replaces *contempt of court* with similar legislative powers empowering a judicial officer to cite a person for disruptive behaviour.

34 *Magistrates Court Act 1987* (Tas) s 17A(1)(b).

35 *Coroners Act 2008* (Vic) s 103(1)(d); *Magistrates Courts Act 1921* (Qld) s 50(1)(c); *Magistrates Court Act 1991* (SA) s 45(a); *District Court of Western Australia Act 1969* (WA) s 63(1)(f); *Magistrates Court Act 1930* (ACT) s 307(1), example 2.

36 *Magistrates Court Act 2004* (WA) s 16(1)(a)(ii); *Magistrates Court Act 1987* (Tas) s 17A(1)(a).

37 *Coroners Act 2008* (Vic) s 103(b); *Magistrates Court Act 1991* (SA) s 45(b); *Magistrates Court Act 2004* (WA) ss 15(1)(a)(iii), (b); *Magistrates Court Act 1930* (ACT) s 307(1), example 1.

38 *District Court of Western Australia Act 1969* (WA) s 63(1)(a); *Magistrates Court Act 2004* (WA) s 15(1)(b).

39 *Coroners Act 2008* (Vic) s 103(1)(c).

40 *District Court of Western Australia Act 1969* (WA) s 63(1)(a).

41 *Magistrates Court Act 2004* (WA) s 15(b).

42 *Coroners Act 2008* (Vic) s 103(c); *Magistrates Court Act 1930* (ACT) s 307(1), example 3.

43 *Coroners Act 2008* (Vic) s 103(c).

44 *Magistrates Courts Act 1921* (Qld) s 50(1)(d).

45 Ibid; *Magistrates Court Act 1930* (ACT) s 307(1), example 3.

46 *Magistrates' Court Act 1989* (Vic) s 134(1)(b), (c); *Magistrates Court Act 2004* (WA) s 15(c);

47 *District Court of Western Australia Act 1969* (WA) s 63(1)(d); *Magistrates Court Act 2004* (WA) s 15(1)(d).

48 *District Court of Western Australia Act 1969* (WA) s 63(1)(e); *Magistrates Court Act 1987* (Tas) s 17A(1)(c).

49 *Magistrates Courts Act 1921* (Qld) s 50(1)(e); *Magistrates Court Act 1991* (SA) s 45(c); *Magistrates Court Act 2004* (WA) s 15(1)(e); *Magistrates Court Act 1930* (ACT) s 307(1), example 4; *Contempt of Court Act 2019* (NZ) s 10(1)(b).

- 7.32 The ALRC recommended replacing contempt of court with offences of:
- causing a substantial disruption to a hearing
 - failing to appear as a witness or be sworn or make an affirmation, or give evidence ('witness misconduct')
 - recording proceedings by taking or publishing photographs, video or film in court without leave of the court, or publishing sound recordings of court proceedings without leave of the court.⁵⁰
- 7.33 The WA Commission recommended replacing contempt in the face of the court with similar offences, but also recommended an offence of insulting the presiding judicial officer or officer of a court.⁵¹

Responses

- 7.34 The Commission was told that a non-exhaustive definition of contempt in the face of the court was required to ensure flexibility.⁵² The County Court stated:
- some behaviour will vary in seriousness depending on the context in which it is exhibited. Flexibility is preferred over consistency to ensure that the process fairly takes into account the unique features of each case.⁵³
- 7.35 Members of the Magistrates' Court told the Commission that contempt in the face of the court needs a broad definition to allow for flexibility.⁵⁴ The Supreme Court submitted that this category of contempt should be defined according to recognised principles and should include a non-exhaustive list about contempt generally, because it is 'not possible in advance to identify every form of behaviour which may have a tendency to interfere with the proper administration of justice'.⁵⁵
- 7.36 Similarly, the Chief Examiner commented that the scope of contempt is 'necessarily nebulous' and that if legislation specified the conduct that could be sanctioned 'novel or uncommon types of conduct' might be overlooked.⁵⁶
- 7.37 In addition, the Chief Examiner noted that conduct could take on:
- a contemptuous character because of the circumstances in which, or the frequency with which, it is carried out. For example, a witness who without proper basis, objects to the nature of the questioning during an examination may be engaging in behaviour that has a tendency to disrupt proceedings, depending on the extent to which that behaviour is sustained.⁵⁷
- 7.38 However, the LIV supported the ALRC's recommendation that contempt in the face of the court be replaced with two offences:
- acting so as to cause a substantial disruption to a hearing
 - witness misconduct, such as refusing to appear, to be sworn or to make an affirmation or to answer a lawful question.⁵⁸

50 The Law Reform Commission, *Contempt* (Report No 35, December 1987) 71–7, [114]–[126].

51 Law Reform Commission of Western Australia, *Report on Review of the Law of Contempt* (Project No 93, June 2003) Recommendations 27, 29–31.

52 Submissions 14 (Children's Court of Victoria), 29 (Supreme Court of Victoria), 31 (County Court of Victoria). VCAT stated additional types of behaviour should be defined in its Act and a general residual offence of contempt is also needed to provide sufficient flexibility: Consultation 22 (The Victorian Civil and Administrative Tribunal).

53 Submission 31 (County Court of Victoria).

54 Consultation 25 (Magistrates' Court of Victoria).

55 Submission 29 (Supreme Court of Victoria)

56 Submission 26 (Chief Examiner, Victoria).

57 Ibid.

58 Submission 22 (Law Institute of Victoria).

- 7.39 The LIV stated this approach provided greater certainty, recognised the difficulties faced by those appearing before the courts, and protected against arbitrary or vindictive use of the power.⁵⁹
- 7.40 The Victorian Equal Opportunity and Human Rights Commission prioritised certainty over flexibility. They noted that self-represented litigants and vulnerable people are more likely to be dealt with for contempt in the face of the court. Legislation that clearly sets out the conduct that constitutes contempt would assist these individuals.⁶⁰

Commission’s conclusions: conduct should be exhaustively defined

- 7.41 Flexibility to respond to unanticipated conduct, as emphasised by the courts, must be balanced with certainty. People attending courts should know and understand what behaviour constitutes contempt by conduct that interferes with a court proceeding. This also protects against the inappropriate use of the contempt power.
- 7.42 Accordingly, the proposed Act should exhaustively list the conduct that can constitute contempt by interfering with a court proceeding. Drawing on the approach of other jurisdictions the following conduct should be included:
- disruptions or interruptions to a court proceeding
 - obstructions, threats, abuse, or the assault of any person in or near a court—including a judicial officer, court officer, witness, party to a proceeding, legal practitioner, court staff or member of the public
 - any other conduct that improperly influences any person in or near a court
 - failure to comply with an order or direction made by a judicial officer at the hearing
 - making any unauthorised recording of a proceeding, including photography, filming or audio recording
 - any other insulting behaviour.
- 7.43 The Commission acknowledges that this approach fetters the court’s powers and reduces flexibility. However, the need for certainty for court users outweighs the need for flexibility.
- 7.44 To ensure that this contempt power is used appropriately, the Commission considers that the proposed Act should provide that the listed conduct does not constitute a contempt unless it also interferes with or undermines the conduct of the proceeding. This protects people from being charged for minor interferences. Conduct that falls outside the listed categories cannot be punished as this type of contempt.
- 7.45 The Commission considers that using the expression ‘interference with the conduct of a proceeding’ is more readily understood than ‘interference with the administration of justice’.

Recommendation

- 48 The proposed Act should provide that a person may be dealt with by a court for 'contempt by conduct that interferes with a court proceeding' where a person:
- disrupts or interrupts a proceeding
 - obstructs, threatens, abuses or assaults any person in or near a court
 - seeks to improperly influence any person in or near a court
 - disobeys an order or direction made by a judicial officer at and in relation to the hearing of a proceeding
 - makes an unauthorised recording of a proceeding, including by taking photographs, filming or other recording
 - engages in any other insulting behaviour, and
 - the conduct undermines or interferes with the conduct of the proceeding.

Insulting or disrespectful behaviour

- 7.46 The consultation paper asked whether insulting or disrespectful behaviour should be included within the scope of contempt in the face of the court.⁶¹
- 7.47 It is uncertain whether insulting or disrespectful behaviour can amount to contempt under common law.
- 7.48 Courts have often emphasised that the contempt power should not be used to 'vindicate the personal dignity'⁶² or 'assuage the injured feelings'⁶³ of judicial officers. However, disrespectful or insulting conduct directed towards a judicial officer may still be dealt with as contempt because of its potential to diminish the authority of the court⁶⁴ or interrupt a proceeding.⁶⁵
- 7.49 On one view, the law should not punish behaviour that is insulting or disrespectful but does not disrupt court proceedings. Another view is that the court should have power to punish this behaviour since it undermines the court's authority, thereby interfering with the court's ability to conduct a proceeding.
- 7.50 The Coroners Court of Victoria is the only Victorian court that is given the power under legislation to punish for contempt for insulting an officer of the court or a person attending an inquest.

Approach by other jurisdictions and law reform bodies

- 7.51 Legislation in several jurisdictions specifies that contempt includes 'insults' or 'wilful insults' towards a judicial officer.⁶⁶ The courts interpret 'wilfully' as requiring an intention to deliberately interfere with or obstruct a proceeding.⁶⁷

61 Victorian Law Reform Commission, *Contempt of Court* (Consultation Paper, May 2019) 47, Question 14.

62 *Lewis v Ogden* (1984) 153 CLR 682, 693.

63 *Magistrates' Court of Prahran v Murphy* [1997] 2 VR 186, 216 (Callaway JA).

64 See, eg, *Zukanovic v Magistrates' Court of Victoria at Moorabbin* [2011] VSC 141 [4]–[5], (2011) 32 VR 216.

65 *Lewis v Ogden* (1984) 153 CLR 682, 688.

66 See, eg, *Coroners Act 2008* (Vic) s 103(1)(b); *Magistrates Courts Act 1921* (Qld) s 50(1)(b); *Magistrates Court Act 1991* (SA) s 45(b); *Magistrates Court Act 2004* (WA) s 15(1)(b); *Magistrates Court Act 1930* (ACT) s 307(1)(b), example 1. In the District Court of Western Australia, this is extended to insults towards a juror, registrar, sheriff, clerk or officer of the Court: *District Court of Western Australia Act 1969* (WA) s 63(1)(a).

67 *Lewis v Ogden* (1984) 153 CLR 682, 688.

- 7.52 The ALRC recommended that insulting or disrespectful conduct should only be prohibited if it amounted to a substantial disruption, because the criminal law is not an appropriate way to maintain the dignity of a public institution where nothing else is at stake. It noted that this reflects the approach adopted by many judges of ignoring conduct which does not disrupt proceedings. It considered that where insulting or offensive acts were persistent, these would most likely result in a substantial disruption.⁶⁸
- 7.53 In contrast, the WA Commission recommended that insulting a judicial officer could attract liability, but only where this was done ‘wilfully’.⁶⁹
- 7.54 South Australia and New South Wales have enacted summary offences of disrespectful conduct, which is distinct from the contempt power. New South Wales prohibits disrespectful behaviour, defined ‘according to established court practice and convention’.⁷⁰ South Australia defines disrespectful conduct as including:
- refusing to stand up after being requested to do so
 - using offensive or threatening language
 - interfering with or undermining the authority, dignity or performance of the court.⁷¹

Responses

- 7.55 The Children’s Court supported including insulting conduct as part of a statutory contempt offence, but did not express a view regarding disrespectful behaviour.⁷²
- 7.56 The Criminal Bar Association and the Victorian Civil and Administrative Tribunal (VCAT) stated that insulting and disrespectful behaviour should constitute contempt.⁷³ VCAT also stated that there must be ‘a degree of latitude which takes [into] account the repetition and gravity of the behaviour in the particular circumstances’.⁷⁴
- 7.57 The Commission was told by the Magistrates’ Court that people appearing before the Court regularly engage in disrespectful behaviour. While the approach of magistrates varies, many magistrates prefer to continue to hear the matter, as contempt proceedings take extra time and resources.⁷⁵
- 7.58 Victorian Legal Aid (VLA) expressed concern that contempt may be overused if it encompassed minor disrespectful behaviour.⁷⁶
- 7.59 The LIV stated that insulting or disrespectful behaviour should not be included within the scope of the offence, unless it reached the threshold of ‘persistently insulting or disrespectful behaviour resulting in a substantial disruption’.⁷⁷ The LIV noted that:

conduct which appears to offend judicial dignity may often arise because of misunderstandings or heightened emotion due to the critical importance of the proceedings for those appearing before the court. The LIV does not consider criminal penalties are an appropriate mechanism for attempting to maintain the dignity of the court or the judicial officer, where nothing but dignity is at stake, and notes that it may in fact diminish the dignity of the court if the court is seen as retaliating against, or acting vindictively towards, an alleged contemnor.⁷⁸

68 The Law Reform Commission, *Contempt* (Report No 35, December 1987) 72–3 [115].

69 Law Reform Commission of Western Australia, *Report on Review of the Law of Contempt* (Project No 93, June 2003) 63, Recommendation 63. It noted that this requirement was not included in its other recommended offences.

70 *Local Court Act 2007* (NSW) s 24A(1)(c).

71 *Summary Offences Act 1953* (SA) s 60(9).

72 Submission 14 (Children’s Court of Victoria).

73 Submissions 7 (The Victorian Civil and Administrative Tribunal), 20 (Criminal Bar Association), although the Criminal Bar Association stated that it should not be able to be dealt with under the special summary procedure.

74 Submission 7 (The Victorian Civil and Administrative Tribunal).

75 Consultation 25 (Magistrates’ Court of Victoria). David S Brooks also submitted that this should not be an offence, as it is a ‘victimless crime’: Submission 2 (David S Brooks).

76 Submission 11 (Victoria Legal Aid).

77 Submission 22 (Law Institute of Victoria).

78 Ibid.

Commission's conclusions: insulting conduct may sometimes constitute contempt

- 7.60 Conduct that is only disrespectful should not be dealt with as contempt, unless it also falls into another proposed category such as an interruption or disruption to a proceeding.
- 7.61 Disrespectful behaviour can result from a person being unfamiliar with the court system, or because of a misunderstanding, and may be trivial. What amounts to disrespectful behaviour can be subjective. In the Commission's view, such conduct should not be punished. Where a person exhibits disrespectful behaviour, a judicial officer can direct the behaviour to cease. If the person fails to comply with this request, the failure can then be dealt with as contempt under the proposed Act.
- 7.62 Insulting behaviour is less likely to be inadvertent than disrespectful behaviour and has a more significant impact on the standing of the court. Accordingly, conduct which is insulting should be recognised as contempt if it interferes with or undermines the conduct of a proceeding.
- 7.63 This approach ensures that the insulting conduct must go beyond merely offending the feelings of the judicial officer to impacting on the court's performance and authority. This aligns with the general purpose of the law of contempt, which is to protect and promote the proper administration of justice.
- 7.64 In addition, and as discussed below, the proposed Act should provide that, in determining whether a contempt has occurred, the court must also consider whether the conduct is repeated, sustained, calculated, or planned to interfere with the proceeding, or is threatening.

Unauthorised recording of proceedings

- 7.65 An unauthorised recording of proceedings by taking photographs, filming or otherwise recording in the courtroom, can constitute a contempt in the face of the court at common law.⁷⁹ It is also an offence in Victoria to make a recording of a proceeding under the *Court Security Act 1980* (Vic).⁸⁰
- 7.66 The Commission recommends that the proposed Act retain the making of an unauthorised recording of a proceeding as a contempt. This allows the court to retain an independent power to control the courtroom without relying on the executive arm of government to commence a prosecution under the Court Security Act. In a digital age, where recordings can easily be made and disseminated, this remains an important power.

Fault element

- 7.67 To establish contempt in the face of the court at common law, it must be proved that the conduct constituting the contempt was intentional. It is not necessary to prove that the person intended to interfere with the administration of justice.⁸¹
- 7.68 The consultation paper asked what fault elements should be required if contempt in the face of the court is restated in statute.⁸² It questioned whether this type of contempt should be limited to conduct that is 'wilful'.⁸³ 'Wilful' has been interpreted as an intention to deliberately interfere with or obstruct a judicial proceeding.⁸⁴

Approach by other jurisdictions and law reform bodies

- 7.69 Jurisdictions have adopted different approaches to the fault element when enacting statutory provisions for contempt by interference with a court proceeding.

79 Victorian Law Reform Commission, *Contempt of Court* (Consultation Paper, May 2019) 43-4 [4.9].

80 *Court Security Act 1980* (Vic) s 4A(1).

81 See, eg, *Ex parte Tucker*; *Re Nash* [1970] 3 NSW 23, 28, where the Court took the view that what was relevant was the objective effect of the conduct, not the underlying intent of the person carrying out the conduct.

82 Victorian Law Reform Commission, *Contempt of Court* (Consultation Paper, May 2019) 46, Question 13.

83 *Ibid* 45 [4.22].

84 *Lewis v Ogden* (1984) 153 CLR 682, 688.

- 7.70 Some jurisdictions require that conduct, such as insults,⁸⁵ interruptions,⁸⁶ disruptions⁸⁷ or disobeying or a court order or direction,⁸⁸ be ‘wilful’. Other jurisdictions do not expressly require that the conduct must be wilful.⁸⁹
- 7.71 In considering reform of contempt in the face of the court, the WA Commission recommended against including a fault element for offences of contempt in the face of the court, consistent with the general approach of the Western Australia criminal code.⁹⁰ Nevertheless, the WA Commission included a fault element in the proposed offence of ‘wilfully’ insulting a judicial officer or officer of the court.⁹¹
- 7.72 In contrast, the ALRC considered that the usual requirement of a ‘guilty intent’ in criminal law should apply to its proposed offence of substantial disruption. An accused should only be liable for this offence if he or she intended to disrupt the proceedings or was recklessly indifferent as to whether the conduct would have this effect.⁹²

Responses

- 7.73 The LIV supported including a fault element because it is an ‘essential component’ of criminal liability. The LIV proposed that it should be necessary to prove a person intended to cause a disruption or was recklessly indifferent as to whether the conduct would have that effect.⁹³
- 7.74 In consultations, the VLA told the Commission that requiring proof of intention would protect against the overuse of this contempt power. An intention element could be framed to capture calculated behaviour, not emotional outbursts. Participants were concerned that requiring an ‘intention to interfere with a proceeding’ may be too narrowly interpreted, and that an ‘intention to interfere with the administration of justice’ might be a better test.⁹⁴
- 7.75 In relation to contempt generally, the Director of Public Prosecutions (DPP) and the Chief Examiner told the Commission that it would be difficult to prove that a person intended to interfere with the administration of justice, and that this should not be required.⁹⁵ Victoria Police told the Commission that it can be very difficult to prove intent in offences relating to the administration of justice. The DPP added that fault and intent should only be relevant in determining penalty.⁹⁶ Legal practitioners also told the Commission that including a fault element in contempt generally would significantly confine the law of contempt, and would allow people to be careless about their conduct.⁹⁷

Commission’s conclusions: conduct must be intentional, but no intention to interfere with the proceeding required

- 7.76 To establish contempt in the face of the court at common law it must be proved that the conduct constituting the contempt was intentional.
- 7.77 This common law standard should remain. That is, the conduct must be intentional, but it is not necessary to prove an intention to interfere with a proceeding or the administration of justice. This reflects the importance of the court being able to control the courtroom, and the significant challenge in proving an intent to interfere with the administration of justice or with a court proceeding.

85 *Magistrates Courts Act 1921* (Qld) s 50(1)(b); *Magistrates Court Act 2004* (WA) s 15(1)(a)(iii).

86 *Magistrates Courts Act 1921* (Qld) s 50(1)(c); *Magistrates Court Act 2004* (WA) s 15(1)(a)(i).

87 *Contempt of Court Act 2019* (NZ) s 10(1)(a).

88 *Ibid* s 10(1)(b) (and without lawful excuse).

89 *Magistrates Court Act 1991* (SA) s 45; *Magistrates Court Act 1930* (ACT) s 307(1)(b).

90 Law Reform Commission of Western Australia, *Report on Review of the Law of Contempt* (Project No 93, June 2003) 62.

91 *Ibid* 63 (while they are acting in the course of their official duties).

92 The Law Reform Commission, *Contempt* (Report No 35, December 1987) 73 [116].

93 Submission 22 (Law Institute of Victoria). The Children’s Court of Victoria also suggested consideration be given to including a fault element of either actual intention or recklessness, although it noted that this would depend on how the contempt in the face of the court was restated in legislation: Submission 14 (Children’s Court of Victoria).

94 Consultation 6 (Victoria Legal Aid.).

95 Submissions 26 (Chief Examiner, Victoria), 28 (Director of Public Prosecutions).

96 Submission 28 (Director of Public Prosecutions).

97 Consultation 13 (Fiona K Forsyth QC, John Langmead QC).

Recommendation

- 49 The proposed Act should provide that for a person to be liable for 'contempt by conduct that interferes with a court proceeding' the court must be satisfied that the person's conduct was intentional.

Defence of 'reasonable excuse'

- 7.78 As discussed in the consultation paper, case law suggests that certain groups of people may be more at risk of being found in contempt, including self-represented litigants⁹⁸ and people with mental health issues.⁹⁹ This raises the questions of whether there are circumstances where people may be less culpable for their behaviour, and whether a defence should be available.

Approach by other jurisdictions and law reform bodies

- 7.79 The WA Commission proposed the introduction of an offence of interrupting or disrupting a court proceeding 'without reasonable excuse'.¹⁰⁰
- 7.80 South Australia has a summary offence criminalising disrespectful behaviour, distinct from the court's contempt power. It is a defence if the conduct was due to a physical disability or cognitive impairment, which includes:
- a developmental disability
 - an acquired disability as a result of illness or injury
 - a mental illness.¹⁰¹

Responses

- 7.81 Stakeholders observed that litigation can be very stressful.¹⁰² As the VLA points out, this may lead to 'poor choices of language and behaviour'.¹⁰³
- 7.82 Stakeholders noted that some people may be more prone to the stress of litigation.¹⁰⁴ These may include:
- people experiencing mental health issues¹⁰⁵
 - children and young people¹⁰⁶
 - people with disabilities such as a cognitive impairment¹⁰⁷ or acquired brain injury¹⁰⁸
 - people who suffer from drug or alcohol dependence¹⁰⁹
 - domestic violence victims¹¹⁰

98 See, eg, *Doughty-Cowell (Victoria Police) v Kyriazis* [2018] VSCA 216; *R v Slaveski* [2015] VSC 400; *R v Vasiliou* [2012] VSC 216; *R v Slaveski* [2011] VSC 643; *R v Ogawa* [2009] QCA 307; *Clampett v A-G (Cth)* [2009] FCAFC 151, (2009) 181 FCR 473.

99 See, eg, *Registrar of the Supreme Court of South Australia v Moore-McQuillan* [2007] SASC 447.

100 Law Reform Commission of Western Australia, *Report on Review of the Law of Contempt* (Project No 93, June 2003) Recommendation 27. Summary Offences Act 1953 (SA) s 60(3). Section 60(9)(a) provides that a developmental disability includes for example, an intellectual disability, Down syndrome, cerebral palsy or an autistic spectrum disorder. Section 60(9)(b) provides that an acquired disability as a result of illness or injury includes, for example, dementia, a traumatic brain injury or a neurological disorder.

102 Submissions 4 (Dr Suzie O'Toole), 11 (Victoria Legal Aid), 22 (Law Institute of Victoria).

103 Submission 11 (Victoria Legal Aid).

104 Submissions 4 (Dr Suzie O'Toole), 11 (Victoria Legal Aid), 22 (Law Institute of Victoria); Consultations 9 (Victorian Government Solicitor's Office), 20 (Victorian Equal Opportunity and Human Rights Commission).

105 Submissions 4 (Dr Suzie O'Toole), 7 (The Victorian Civil and Administrative Tribunal), 11 (Victoria Legal Aid), 22 (Law Institute of Victoria); Consultation 9 (Victorian Government Solicitor's Office).

106 Submissions 11 (Victoria Legal Aid), 22 (Law Institute of Victoria).

107 Submissions 11 (Victoria Legal Aid), 22 (Law Institute of Victoria).

108 Consultation 6 (Victoria Legal Aid).

109 Submission 22 (Law Institute of Victoria).

110 Ibid.

- victims of and witnesses to crime¹¹¹
 - self-represented litigants.¹¹²
- 7.83 The disadvantage faced by certain groups of people may lead to some members of those groups being unfairly¹¹³ or disproportionately¹¹⁴ exposed to an exercise of the contempt power.
- 7.84 Challenges with cross-cultural communication can also heighten these risks, including for Indigenous people.¹¹⁵
- 7.85 In consultations, members of the Magistrates' Court told the Commission that charging a person with contempt is not appropriate when their conduct relates to a mental illness, but that this can be difficult to identify.¹¹⁶
- 7.86 VLA suggested that the law should be framed to protect against the overuse of contempt powers by only capturing deliberate behaviour, not emotional outbursts. This would help to address the vulnerability of certain groups who are more at risk, such as young people who are more prone to outbursts.¹¹⁷
- 7.87 Noting the stress of litigation, Dr O'Toole stated:
- for some people in some circumstances, their mental health challenges may be so significant that they are unaware of their behaviour or oblivious to the effect of their behaviour on others. Others may be aware of their behaviour but find it difficult to control, which has a bearing on culpability, and questions relating to appropriate penalties ... there are some litigants whose mental ill-health draws them to querulous behaviour.
- 7.88 Dr O'Toole also drew attention to the need to support judicial officers and court staff who experience the impacts of abusive behaviour.¹¹⁸
- 7.89 Contempt in the face of the court is common at VCAT, where there are many litigants without representation, a certain proportion of whom may also have mental health issues.¹¹⁹ Disruptive behaviour can have a significant detrimental impact on other parties to the proceeding, and is often intended to intimidate and bully them.¹²⁰ VCAT stated that the courts and the Tribunal should apply contempt powers with a 'degree of latitude which takes account of the repetition and gravity of the behaviour in particular circumstances'.¹²¹

Commission's conclusions: factors to be considered in determining whether to deal with a person for contempt and penalty

- 7.90 The Commission acknowledges that court proceedings can be stressful, especially for certain groups of people who may be disadvantaged when engaging with the court system. For a small number of these people, this may lead to a greater risk of improper behaviour in the courtroom. This raises the question of whether culpability should be reduced to take disadvantage into account.
- 7.91 Such considerations must be balanced against the need to control court proceedings and to deter disruptions that undermine the functioning of the court and impact on court staff and other court users.

111 Ibid.
 112 Submissions 7 (The Victorian Civil and Administrative Tribunal), 22 (Law Institute of Victoria); Consultation 9 (Victorian Government Solicitor's Office).
 113 Submission 22 (Law Institute of Victoria).
 114 Submission 11 (Victoria Legal Aid)
 115 Consultation 20 (Victorian Equal Opportunity and Human Rights Commission).
 116 Consultation 25 (Magistrates' Court of Victoria).
 117 Consultation 6 (Victoria Legal Aid).
 118 Submission 4 (Dr Suzie O'Toole).
 119 Submission 22 (The Victorian Civil and Administrative Tribunal).
 120 Submission 22 (The Victorian Civil and Administrative Tribunal); Consultation 7 (The Victorian Civil and Administrative Tribunal).
 121

- 7.92 Consistent with the existing common law, the proposed Act should not include a defence of 'reasonable excuse' to contempt by conduct that interferes with the conduct of a court proceeding.
- 7.93 However, the court should be required to take certain factors into account in determining whether to exercise its discretion to deal with a person for contempt, and what penalty to impose if a contempt is proved. While the court should retain a broad discretion, properly exercised, this requirement will minimise the risk that people will be punished for contempt where they are less culpable due to their particular circumstances.
- 7.94 Accordingly, the Commission recommends that in determining whether to deal with a person for contempt, and in determining penalty, the proposed Act should provide that the court must consider whether the conduct was:
- calculated or planned to interfere with the proceeding
 - repeated or sustained
 - threatening.
- 7.95 Including these factors will reduce the likelihood that inadvertent or unintentional disruptive behaviour will be dealt with as contempt.
- 7.96 The court should also be required to consider the personal circumstances of the person that may impact on their culpability and degree of responsibility, including age and any mental or cognitive impairment or other condition or disability.
- 7.97 The Commission notes the comment made in consultation with the Magistrates' Court that people should not be dealt with for contempt when their conduct relates to a mental illness. However, it can be difficult to identify when this is the case. The Commission considers that further training should be provided to judicial officers about how to identify and help people who may need assistance when navigating court proceedings.

Recommendations

- 50 The proposed Act should not include a defence of reasonable excuse for contempt by conduct that interferes with a court proceeding.
- 51 The proposed Act should provide that in determining whether to exercise its discretion to deal with a person for contempt by conduct that interferes with a court proceeding, or in determining what penalty should be imposed, the court must consider:
- the personal circumstances of the person that may affect their culpability and degree of responsibility for the conduct, including (but not limited to) age and/or any mental or cognitive impairment or other condition or disability
 - whether the conduct is calculated or planned to interfere with the proceeding, is repeated or sustained, or is threatening.
- 52 Further education should be made available to judicial officers on how to identify and assist particular groups of people who may need assistance during court proceedings.

Is a risk of interference sufficient?

- 7.98 In Chapter 4 the Commission proposed a general power to punish for contempt, when there is a substantial risk of interference with the administration of justice, rather than a 'tendency'.
- 7.99 Accordingly, the Commission has considered whether conduct that has a substantial risk of interfering with the conduct of a proceeding should constitute contempt under the proposed Act.
- 7.100 To prove contempt in the face of the court at common law, it is not necessary to prove actual interference with the administration of justice, only that the conduct 'tended' to interfere.¹²² This makes it easier to prove the contempt.
- 7.101 No stakeholders addressed this issue.

Commission's conclusions: proof of interference should be required

- 7.102 The Commission considers that there is a qualitative difference between the common law test of 'interference with the administration of justice', and the proposed test of interference 'with the conduct of a proceeding'.
- 7.103 The administration of justice is an amorphous concept. Proving that a person has interfered with the administration of justice can be difficult. For this reason, it is enough to prove that the person has created a substantial risk of interference. In contrast, it is easier to prove that a person has interfered with the conduct of a proceeding.
- 7.104 The Commission recommends that to prove a contempt of this kind, the conduct must undermine or interfere with the conduct of the proceeding. In this context, it would set the threshold too low if it were enough to prove only a risk of interference. As VLA observes, court is a stressful environment which can lead people to make poor choices of language and behaviour.¹²³ Where conduct does not reach the level of an actual interference or undermining with the conduct of a proceeding, it should not be punished.

Recommendation

- 53 The proposed Act should provide that actual interference with, or undermining of, the conduct of a proceeding is required to constitute contempt by conduct that interferes with a court proceeding. A risk of interference is not sufficient.

Who may be charged with contempt by conduct that interferes with a proceeding?

- 7.105 Persons found guilty of contempt in the face of the court at common law include a party to the proceeding, a legal practitioner, a witness, a juror and a member of the public.
- 7.106 The Commission considers the common law standard is appropriate and that the proposed Act should make clear that the court should continue to have power to sanction any person's interference with a proceeding.

Recommendation

- 54 The proposed Act should provide that any person can commit a contempt that interferes with a court proceeding including, but not limited to, a party to the proceeding, an accused, a legal practitioner, a witness, a juror or a member of the public.

Misconduct by witnesses

- 7.107 Witness misconduct is an established category of contempt in the face of the court.
- 7.108 As the Supreme Court submitted, the law of contempt protects the Court's power to compel witnesses to attend and give evidence so that judicial decisions can be made on the best evidence.¹²⁴
- 7.109 The Children's Court and the Magistrates' Court told the Commission that they use their contempt powers most often in relation to misconduct by witnesses, particularly when witnesses refused to give evidence. The existence of these powers is important in encouraging testimony from reluctant witnesses, although the courts have other ways to encourage witnesses to testify.¹²⁵
- 7.110 As already noted, both the ALRC and the WA Commission recommended replacing the law of contempt with offences of witness misconduct.¹²⁶

Commission's conclusions: witness misconduct

- 7.111 The *Magistrates' Court Act 1989* (Vic) provides a comprehensive regime specifying when witness misconduct can constitute contempt. The *Supreme Court (General Civil Procedure) Rules 2015* (Vic) and the *County Court Civil Procedure Rules 2018* provide that a failure to comply, without lawful excuse, with a subpoena to produce or to attend to give evidence is a contempt of court.¹²⁷ To achieve clarity and consistency, and noting the important role contempt plays in dealing with witness misconduct, uniform provisions should apply across all jurisdictions in the proposed Act.
- 7.112 These provisions should be set out separately from the court's power to deal with contempt by interference with a proceeding. It should not be necessary to prove the misconduct interferes with or undermines the conduct of a proceeding, because that would introduce an unnecessary threshold.
- 7.113 This list of specified conduct should be exhaustive to provide certainty. Witnesses may also be dealt with for contempt by conduct that interferes with a proceeding, if applicable.

124 Submission 29 (Supreme Court of Victoria).

125 Consultations 15 (Children's Court of Victoria), 25 (Magistrates' Court of Victoria).

126 The Law Reform Commission, *Contempt* (Report No 35, December 1987) 73–5, [117]–[121]; Law Reform Commission of Western Australia, *Report on Review of the Law of Contempt* (Project No 93, June 2003) Recommendation 30.

127 *Supreme Court (General Civil Procedure) Rules 2015* (Vic) r 42.12; *County Court Civil Procedure Rules 2018* (Vic) r 42.12.

Recommendation

- 55 The proposed Act should provide that witness misconduct constituting a contempt is limited to a person:
- failing to comply, without lawful excuse, with a summons or subpoena to produce documents or things, or to attend to give evidence or to attend to give evidence and produce documents or things
 - when summoned or subpoenaed, refusing to be sworn or affirmed, or refusing to answer any lawful question
 - when being examined as a witness or being present in court and required to give evidence, refusing to be sworn or affirmed, or refusing to answer any lawful question, or, without sufficient excuse, refusing to produce any documents or things that the person is required to produce
 - when attending court to give evidence, refusing to leave the court and remain outside and beyond the hearing of the court until required to give evidence contrary to an order to that effect
 - who, in the opinion of the judicial officer, is guilty of wilful prevarication, that is, evading answering questions.

Penalties

- 7.114 Currently, the Supreme Court or County Court may punish a person for contempt, including contempt in the face of the court by imprisonment or fine or both.¹²⁸ No maximum penalty is specified.
- 7.115 The Magistrates' Court, Children's Court and Coroners Court may also order a term of imprisonment, or a fine, up to a statutory maximum, as set out in the following table.

| | |
|--|---|
| Magistrates' Court and Children's Court: contempt in the face of the court | six months imprisonment or 25 penalty units ¹²⁹ |
| Magistrates' Court and Children's Court: witness misconduct | one month imprisonment or 5 penalty units ¹³⁰ |
| Coroners Court: all contempt (including contempt in the face of the court) | 12 months imprisonment or 120 penalty units (or 600 penalty units for a body corporate). ¹³¹ |

Responses

- 7.116 As discussed in Chapter 5, with few exceptions,¹³² most stakeholders told the Commission that a maximum penalty should be set for contempt.¹³³ Stakeholders commented that the maximum penalty should reflect comparable offences which address interfering with the administration of justice.¹³⁴

128 *Supreme Court (General Civil Procedure) Rules 2015* (Vic) r 75.11(1); *County Court Civil Procedure Rules 2018* (Vic) r 75.11(1). The rules also set out that a body corporate may be punished for contempt by sequestration or fine or both. See Chapter 5 for further discussion of the current rules regarding penalty.

129 *Magistrates' Court Act 1989* (Vic) s 133(4). This section applies to the Children's Court: *Children, Youth and Families Act 2005* (Vic) s 528.

130 *Magistrates' Court Act 1989* (Vic) s 134(3). This section applies to the Children's Court: *Children, Youth and Families Act 2005* (Vic) s 528.

131 *Coroners Act 2008* (Vic) s 103(7). For a body corporate, the maximum penalty is 600 penalty units.

132 Submission 26 (Chief Examiner, Victoria); Consultation 13 (Fiona K Forsyth QC, John Langmead QC).

133 Submissions 6 (Professors Mark Pearson, Patrick Keyzer, Anne Wallace and Associate Professor Jane Johnston), 11 (Victoria Legal Aid), 22 (Law Institute of Victoria), 27 (Australia's Right to Know coalition); Consultation 12 (Professor David Rolph).

134 Submissions 11 (Victoria Legal Aid), 29 (Supreme Court of Victoria).

- 7.117 Only one stakeholder suggested a preferred maximum penalty of imprisonment of 12 months for contempt in the face of court.¹³⁵ In other Australian jurisdictions, the penalty for contempt in the face of the court ranges between 28 days and two years.¹³⁶

Commission's conclusions: penalties

- 7.118 The general recommendations made in Chapter 5 should apply to contempt by conduct that interferes with a court proceeding.¹³⁷

Magistrates', Children's, and Coroners Courts

- 7.119 To achieve consistency among the lower courts, the maximum penalty for contempt by conduct that interferes with a proceeding and witness misconduct in the Magistrates', Children's and Coroners Courts should be six months, or a fine of 25 penalty units.
- 7.120 This would result in an increase in the penalty for witness misconduct from one month to six months, and from five penalty units to 25 penalty units in the Magistrates' and Children's Court.
- 7.121 Neither the Magistrates' Court nor the Children's Court expressly stated a need to increase the penalty levels. However, the Commission considers an increase is warranted in view of the Courts' comments that witness misconduct is a key area where contempt powers are needed and most often used (although this remains infrequent).¹³⁸
- 7.122 This proposal reduces the maximum penalty in the Coroners Court for contempt by conduct that interferes with a proceeding and witness misconduct from 12 months to six months.

Supreme and County Courts

- 7.123 For the Supreme and County Courts, the maximum penalty for each type of misconduct should reflect its gravity. In setting these proposed maximums, the Commission has considered comparable statutory schemes and/or penalties imposed by the court in contempt cases (see Appendices I and G).
- 7.124 The Commission therefore recommends a maximum penalty of imprisonment for 12 months and/or a fine of 120 penalty units for:
- making an unauthorised recording of a proceeding including by taking photographs, filming or other recording
 - insulting behaviour
 - disrupting or interrupting a proceeding
 - disobeying an order or direction made by a judicial officer at the hearing of the proceeding.
- 7.125 The Commission recommends a higher maximum penalty of imprisonment for five years and/or a fine of 600 penalty units for:
- obstructing, threatening, abusing, assaulting or seeking to improperly influence any person in or near a court
 - witness misconduct.

135 Submission 6 (Professors Mark Pearson, Patrick Keyzer, Anne Wallace and Associate Professor Jane Johnston).

136 See Appendix I. See also Appendix G for an illustrative list of penalties imposed for contempt in the face of the court.

137 This includes setting maximum penalties, providing for the application of the *Sentencing Act 1991* (Vic) and the *Children, Youth and Families Act 2005* (Vic) for sentencing of children, and providing the court with discretion to order early discharge from a term of imprisonment.

138 Consultations 15 (Children's Court of Victoria), 25 (Magistrates' Court of Victoria).

Recommendation

- 56 The proposed Act should include maximum penalties for contempt by conduct that interferes with a court proceeding and witness misconduct, as follows:
- for the Magistrates' Court, Children's Court and Coroners Court: six months imprisonment and/or a fine of 25 penalty units
 - for the Supreme and County Courts for the making of an unauthorised recording of a proceeding, including by taking photographs, filming or other recording; insulting behaviour; disrupting or interrupting a proceeding; or for defying an order or direction made by a judicial officer at and in relation to the hearing of the proceeding: 12 months imprisonment and/or a fine of 120 penalty units
 - for the Supreme and County Courts for obstructing, threatening, abusing, assaulting or seeking to improperly influence any person in or near the court, or for witness misconduct: five years imprisonment and/or a fine of 600 penalty units.

A consistent approach across all Victorian courts

- 7.126 As noted earlier, all Victorian courts have power to punish for contempt in the face of the court.
- 7.127 To ensure consistency across Victoria's court system, the recommendations in this chapter for the restatement of contempt in the face of the court should apply to all Victorian courts empowered to deal with contempt in the face of the court.¹³⁹

Recommendation

- 57 The Commission's recommendations for contempt by conduct that interferes with a court proceeding should apply to all Victorian courts.

Consistency of use of contempt powers

- 7.128 The consultation paper noted there are many ways to deal with disruptive behaviour in the courtroom.¹⁴⁰ It asked whether, to achieve consistency and certainty, there should be guidance regarding when contempt powers or other options should be applied.¹⁴¹

Responses

- 7.129 Stakeholders told the Commission that as disruptive behaviour is largely managed using court-craft, recourse to contempt powers is rare.¹⁴²

139 This was supported as the preferable position by a participant from the Magistrates' Court: Consultation 25 (Magistrates' Court of Victoria).
 140 Victorian Law Reform Commission, *Contempt of Court* (Consultation Paper, May 2019) 55–6 [4.76]–[4.77].
 141 Ibid 56, Question 18.
 142 Consultations 15 (Children's Court of Victoria), 22 (The Victorian Civil and Administrative Tribunal), 25 (Magistrates' Court of Victoria). The Supreme Court submitted that the law of contempt generally is invoked infrequently: Submission 29 (Supreme Court of Victoria).

- 7.130 However, some stakeholders observed that the use of such powers varies between individual judicial officers.¹⁴³
- 7.131 Representatives of victims of crime support organisations told the Commission that contempt powers should be used more by judicial officers. They stated that offenders were sometimes hostile, insulting and threatening, which is frightening for victims.¹⁴⁴
- 7.132 Members of the Magistrates' Court stated that magistrates will often disregard contemptuous conduct because contempt proceedings take extra time and resources.¹⁴⁵
- 7.133 Participants from the Judicial College of Victoria stated that there are often other pressures within the courts, such as financial pressures, which influence whether they exercise their contempt powers.¹⁴⁶
- 7.134 Some stakeholders stated that consistency would be improved by setting thresholds for the behaviour that can be dealt with as contempt,¹⁴⁷ and minimising the use of the special summary procedure.¹⁴⁸
- 7.135 The Children's Court submitted that the decision to exercise contempt powers should be left to the discretion of each judicial officer, although it was an appropriate matter for judicial education.¹⁴⁹

Commission's conclusions: no further measures required

- 7.136 The Commission has recommended that the proposed Act contain an exhaustive list of conduct that can constitute contempt by conduct that interferes with a proceeding. As set out in Chapter 5, the Commission has also recommended abolishing the special summary procedure.
- 7.137 These measures will enhance consistency and certainty in the way people are dealt with for conduct that interferes with a proceeding. Whether or not the court decides to deal with someone for contempt must remain in the discretion of the court, and is highly dependent on the particular circumstances of each case. The Commission does not consider any other measures are required to address consistency in managing disruptive courtroom behaviour.

143 Consultations 1 (Representatives of victims of crime support organisations); 6 (Victoria Legal Aid), 25 (Magistrates' Court of Victoria. Victoria Police noted that in recent years behaviour in courtrooms has deteriorated but that courts are generally very tolerant: Consultation 19 (Victoria Police).

144 Consultation 1 (Representatives of victims of crime support organisations).

145 Consultation 25 (Magistrates' Court of Victoria).

146 Consultation 10 (Judicial College of Victoria).

147 Submissions 20 (Criminal Bar Association), 22 (Law Institute of Victoria).

148 Submission 22 (Law Institute of Victoria).

149 Submission 14 (Children's Court of Victoria).

Disobedience contempt: non- compliance with court orders and undertakings

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8. Disobedience contempt: non-compliance with court orders and undertakings

Overview

- A person may be dealt with for contempt when they do not comply with an order made by, or an undertaking given to, the court.
 - Non-compliance with court orders threatens the rule of law and undermines public confidence in our legal system, which requires respect for the authority of the court.
 - Non-compliance with orders can be classified as a civil contempt, when the purpose is to compel compliance with an order, or as a criminal contempt, when the purpose is to punish disobedience. As the courts have recognised, this distinction is uncertain and creates complexity. In the Commission's view this distinction should not be maintained.
 - Non-compliance with court orders and undertakings should be included in the proposed Act as a distinct category of conduct that can be dealt with as a contempt of court. This category should encompass both civil and criminal contempt.
 - The proposed Act should require the court to consider the extent to which other mechanisms to ensure compliance are available; the impact of the non-compliance; and the attitude of the person when determining whether to deal with a person for contempt, and in fixing penalty. This requirement will protect against the overuse or misuse of contempt proceedings for non-compliance.
 - The full range of penalties discussed in Chapter 5 should be available to the court for dealing with contempt by non-compliance with a court order or undertaking.
 - The general contempt procedure discussed in Chapter 5 should also apply.
-

What is disobedience contempt and what is its purpose?

- 8.1 Disobedience contempt is the failure or refusal of a person to comply with a court order or an undertaking given to the court.¹ For example, a person may be in contempt if they fail to pay money required by a court order or dispose of their assets in breach of a court order.²
- 8.2 Non-compliance with orders is a common form of contempt and typically arises in civil proceedings.³ Disobedience contempt can also arise when a person fails to comply with an order made by the court in a criminal proceeding, such as a failure to comply with a suppression order.
- 8.3 As noted in the consultation paper, the law of disobedience contempt serves two interrelated purposes:
- coercing compliance with court orders and undertakings for the benefit of the party in whose favour the order or undertaking was made
 - punishing non-compliance with court orders and undertakings to safeguard the authority of the court and ensure public confidence that court orders cannot be disobeyed without consequence.⁴
- 8.4 It is essential to ensure that people comply with orders and undertakings made to the court. This maintains the public's confidence in the courts' ability to resolve disputes and thereby upholds the rule of law.⁵
- 8.5 As the Supreme Court of Victoria has stated:
- It is vital to the administration of justice in this State that a person bound by an order obeys it. Disobedience of an order poses a threat to the administration of justice and attacks its very foundation.⁶

Should the court be able to deal with non-compliance as a contempt?

- 8.6 There are many ways for a party to enforce a court order or undertaking in a civil proceeding. For example, the Sheriff may be directed to seize property or land, or a court can strike out a defence in a civil proceeding where a defendant fails to comply with a procedural order. In addition, some legislation provides specific enforcement mechanisms or makes it an offence to breach an order.⁷
- 8.7 Proceedings for disobedience contempt are usually commenced to enforce an order where there are no other effective means to do so.⁸
- 8.8 The consultation paper asked whether courts need to retain a power to deal with a person for contempt where they have failed to comply with an order or undertaking.⁹

1 An undertaking is a promise given to the court. Where a person has given an undertaking, they are required to comply with it as if it is an order of the court.

2 Victorian Law Reform Commission, *Contempt of Court* (Consultation Paper, May 2019) 71 [6.8]–[6.12].

3 As discussed in Chapter 2, the Supreme Court has inherent jurisdiction to punish contempt of court, which includes contempt by non-compliance with its orders. The County Court and Coroners Court have no inherent jurisdiction to deal with non-compliance with court orders or undertaking by punishing for contempt, but this power is conferred on them by statute: *County Court Act 1958* (Vic) ss 53–4; *Coroners Act 2008* (Vic) s 103. The Magistrates' Court and Children's Court have limited statutory enforcement powers, which are discussed in Chapter 6.

4 Victorian Law Reform Commission, *Contempt of Court* (Consultation Paper, May 2019) 77 [6.40].

5 *Pelechowski v Registrar, Court of Appeal* [1999] HCA 19 [149] (Kirby J) (in dissent on the substantive issue), (1999) 198 CLR 435.

6 *Law Institute of Victoria v Nagle* [2005] VSC 47 [5] (Gillard J).

7 Victorian Law Reform Commission, *Contempt of Court* (Consultation Paper, May 2019) 75–7 [6.34]–[6.36].

8 *Advan Investments Pty Ltd v Dean Gleeson Motor Sales Pty Ltd* [2003] VSC 201 [93], citing in support *Danchevsky v Danchevsky* [1975] Fam 17, 22–3; *Ansah v Ansah* (1977) Fam LR 138, 144, [1977] 2 All ER 638.

9 Victorian Law Reform Commission, *Contempt of Court* (Consultation Paper, May 2019) 80, Question 25.

Responses

- 8.9 Most stakeholders addressing this issue agreed that the courts should retain their contempt powers to deal with non-compliance with court orders.¹⁰
- 8.10 The County Court of Victoria stated that the law of disobedience contempt 'is critical to the court's ability to ensure that orders are complied with and to give parties confidence in the legal system'.¹¹
- 8.11 The Supreme Court similarly submitted that disobedience contempt 'remains an important option, and in some instances, the only option' to enforce orders, which are the 'means by which rights and laws are given ultimate effect'.¹²
- 8.12 The Criminal Bar Association favoured retaining the concept of an offence for failure to comply to protect against disregard of the processes of the courts. It submitted that, while there were other ways to enforce compliance, these do not deal with the impact on the legal system of the failure to comply.¹³
- 8.13 The Law Institute of Victoria (LIV) submitted that disobedience contempt should be replaced by a statutory regime of non-compliance proceedings. Only the person entitled to the benefit of the order should be able to commence civil compliance proceedings. The court should retain a power to commence proceedings, or after an aggrieved party has discontinued proceedings, continue proceedings where the disobedience constitutes a challenge to the court's authority.¹⁴

Commission's conclusions: the court should be able to deal with non-compliance as a contempt

- 8.14 Non-compliance with court orders challenges the foundations of our legal system and undermines the proper administration of justice. However, this does not mean that non-compliance should routinely be dealt with as a contempt. In many cases, there may be other enforcement mechanisms which should be used before contempt. Contempt remains an exceptional power (see Chapter 3).
- 8.15 However, as the Supreme Court notes, there are not always effective alternatives for enforcement. Sometimes compliance may no longer be possible, such as where a person has already disposed of assets contrary to a court order.
- 8.16 Sometimes the circumstances of the breach may defy the authority of the court in a way which needs to be dealt with separately to the issue of compliance. For example, if a person publicly and defiantly disobeys a court order not to approach a person or place, the court needs the power to punish this defiance of its authority.
- 8.17 The courts must be able to sanction such non-compliance. The proposed Act should recognise 'disobedience contempt' as a distinct category of contempt, which should be redefined for clarity as 'contempt by non-compliance with a court order or undertaking'. The proposed Act should provide that the court may deal with a person for contempt where they have not complied with a court order or undertaking given to the court.

10 Submissions 7 (The Victorian Civil and Administrative Tribunal), 14 (Children's Court of Victoria), 17 (Dr Denis Muller), 29 (Supreme Court of Victoria), 31 (County Court of Victoria). As discussed below, the Law Institute of Victoria proposed a statutory form of non-compliance proceedings: Submission 22 (Law Institute of Victoria). Professor David Rolph told the Commission that disobedience contempt requires reform and restatement in statute to provide a 'clear and rational framework for non-compliance': Consultation 12 (Professor David Rolph).

11 Submission 31 (County Court of Victoria).

12 Submission 29 (Supreme Court of Victoria).

13 Submission 20 (Criminal Bar Association).

14 Submission 22 (Law Institute of Victoria).

Recommendation

- 58 The proposed Act should recognise ‘disobedience contempt’ as a distinct category of contempt and redefine it as ‘contempt by non-compliance with a court order or undertaking’.

The distinction between civil and criminal contempt

- 8.18 Under the common law disobedience contempt is classified as either civil or criminal contempt. The basis of the distinction is complex and uncertain.¹⁵ Nonetheless, the courts continue to make this distinction.¹⁶
- 8.19 Often the distinction is explained by reference to the purpose of the proceeding. If the purpose is to coerce compliance with a court order or undertaking the contempt is classified as civil. If the purpose is to punish non-compliance the contempt is classified as criminal.¹⁷
- 8.20 Historically this distinction had practical consequences, including the application of different procedures, burdens of proof and penalties. Over time, these differences have eroded.¹⁸ Today, the procedure, penalties and burden of proof are the same. The sole remaining difference is that a conviction can only be recorded for a criminal contempt.¹⁹
- 8.21 Further, in determining whether non-compliance is dealt with as a criminal contempt, courts generally consider whether the defendant was deliberately defiant (‘contumacious’) in breaching the order.²⁰
- 8.22 The High Court has stated that the distinction between civil and criminal contempt is ‘illusory’.²¹ The distinction is often criticised because:
- It is not possible to separate the purpose of punishment from the purpose of compelling compliance.²²
 - To the person affected, the result is punishment, whether it is imposed to punish or to compel compliance.²³
 - There is always public interest in ensuring that people comply with court orders and undertakings, regardless of whether it serves private interests.²⁴
 - A civil contempt proceeding can become a criminal contempt proceeding part-way through, which is procedurally unfair.²⁵
- 8.23 These difficulties with classifying disobedience contempt have led other law reform commissions to recommend that the distinction between civil and criminal contempt should not be maintained.²⁶

15 Victorian Law Reform Commission, *Contempt of Court* (Consultation Paper, May 2019) 74–5 [6.26]–[6.32]. See generally *Construction, Forestry, Mining and Energy Union v Grocon Constructors (Victoria) Pty Ltd* [2014] VSCA 261 [144]–[190], (2014) 47 VR 527.

16 *Construction, Forestry, Mining and Energy Union v Grocon Constructors (Victoria) Pty Ltd* [2014] VSCA 261 [179].

17 See for further discussion Victorian Law Reform Commission, *Contempt of Court* (Consultation Paper, May 2019) 74 [6.26]–[6.32].

18 *Witham v Holloway* (1995) 183 CLR 525, 539–41; *Australasian Meat Industry Employees’ Union v Mudginberri Station Pty Ltd* (1986) 161 CLR 98, 106.

19 *Construction, Forestry, Mining and Energy Union v Grocon Constructors (Victoria) Pty Ltd* [2014] VSCA 261 [173]–[177].

20 *Ibid* [144]–[156].

21 *Witham v Holloway* (1995) 183 CLR 525, 534.

22 *Ibid* 533–4.

23 *Ibid* 534.

24 *Ibid* 532–3.

25 *Seymour v Migration Agents Registration Authority* [2006] FCA 965 [102]. See also *Construction, Forestry, Mining and Energy Union v Grocon Constructors (Victoria) Pty Ltd* [2014] VSCA 261 [279]–[298].

26 Law Commission (New Zealand), *Reforming the Law of Contempt of Court: A Modern Statute* (Report No 140, May 2017) 100–1 [5.60]–[5.69] (which recommended replacing the common law of contempt with a new statutory enforcement procedure); Law Reform Commission of Western Australia, *Report on Review of the Law of Contempt* (Project No 93, June 2003) 94–5 (which recommended abolishing civil contempt and treating all disobedience contempt as a criminal offence); The Law Reform Commission, *Contempt* (Report No 35, December 1987) lxxxiv [64], 329–30 [568] (which recommended retaining contempt only in cases of a flagrant challenge to the court’s authority).

- 8.24 The consultation paper asked whether the distinction between civil and criminal contempt should be maintained.

Responses

- 8.25 With the exception of the Children’s Court,²⁷ most stakeholders who addressed the issue supported abolishing the distinction between civil and criminal contempt.²⁸ The Supreme Court stated:

The Court’s experience accords with the body of judicial commentary about the illusory and unhelpful nature of attempts to distinguish civil and criminal contempt. Formal abolition of the distinction would seem desirable.²⁹

- 8.26 Legal practitioners told the Commission that the distinction between civil and criminal contempt produces needless confusion.³⁰
- 8.27 However, stakeholders differed on the model for reforming the law if the distinction is removed.

Commission’s conclusions: remove the distinction between civil and criminal contempt

- 8.28 Whether contempt is defined as civil or criminal depends on whether the purpose of the sanction or remedy is to compel compliance or to punish non-compliance. This often depends on a determination being made about the circumstances of the breach and the intent and attitude of the defendant. A person may be dealt with for civil contempt because the level of defiance and overall seriousness do not warrant a finding of criminal contempt, even though compliance with the order is no longer possible and the proceeding can only have a punitive purpose.³¹
- 8.29 The distinction has no clear conceptual foundation and leads to confusion about the purpose of the contempt power. The procedures and penalties for both types of contempt are the same. The distinction creates an illusion of a tiered system of contempt, which masks the fact that, as the High Court has said, ‘Punishment is punishment’.³²
- 8.30 Accordingly, the proposed Act should not distinguish between civil and criminal contempt.

Recommendation

- 59 The distinction between civil and criminal contempt should not be retained.

Consequences of removing the distinction

- 8.31 There are several possible approaches to reform consistent with the view that the distinction between civil and criminal contempt should not be retained. These include:
- abolishing civil contempt and replacing it with a statutory enforcement scheme
 - replacing civil and criminal contempt by non-compliance with an ordinary criminal offence or offences

27 Submission 14 (Children’s Court of Victoria).

28 Submissions 29 (Supreme Court of Victoria), 31 (County Court of Victoria); Consultation 13 (Fiona K Forsyth QC, John Langmead QC).

29 Submission 29 (Supreme Court of Victoria).

30 Consultation 13 (Fiona K Forsyth QC, John Langmead QC).

31 See, eg, *Victoria International Container Terminal Ltd v Construction, Forestry, Maritime, Mining and Energy Union* [2018] VSC 794 [10].

32 *Witham v Holloway* (1995) 183 CLR 525, 534.

- retaining the courts' power to deal with non-compliance with court orders and undertakings as a contempt, but treating all such contempts as criminal in nature, with appropriate procedural protections.
- 8.32 The Australian Law Reform Commission (ALRC) and the New Zealand Law Commission both recommended replacing civil contempt with a statutory civil enforcement scheme.³³ The ALRC also recommended making it an ordinary criminal offence to wilfully fail or refuse to comply with an order of the court in such a way that 'constitute(s) a flagrant challenge to the authority of the court'.³⁴ The Law Reform Commission of Western Australia (WA Commission) also recommended a similar offence, and further recommended replacing the civil form of contempt with a less serious criminal offence.³⁵

Responses

- 8.33 Stakeholders differed on the model of reform. The LIV supported the ALRC's proposed statutory non-compliance regime to replace civil contempt.³⁶ The Criminal Bar Association preferred to retain an offence for failing to comply.³⁷
- 8.34 The County Court proposed that, although the distinction should be abolished, any proposed Act should make it possible to avoid a criminal finding of contempt or the consequences of a conviction. It suggested this could be done by applying the *Sentencing Act 1991* (Vic) to contempt proceedings. This would mean that for less serious contempts courts could order diversion or find a charge proved but dismiss the case.³⁸
- 8.35 The Supreme Court supported abolishing the distinction but did not propose a specific model of reform.³⁹ In consultations, some members of the Court identified two options:
- Only deliberately defiant non-compliance with court orders should be dealt with as contempt, with ordinary non-compliance dealt with under a statutory civil enforcement procedure, or through amendments to the *Civil Procedure Act 2010* (Vic)⁴⁰
 - All disobedience to court orders should be dealt with as criminal contempt, with wilfulness bearing on sentence only.⁴¹
- 8.36 Professor David Rolph told the Commission that 'a clear and rational framework for non-compliance' is needed. Such statutory regimes provide effective mechanisms to ensure compliance without having to meet the thresholds for proving contempt.⁴²
- 8.37 Two experienced practitioners considered that contempt proceedings should be reserved for the worst cases of interference with the administration of justice and should reflect the criminal nature of the contempt.⁴³

33 The Law Reform Commission, *Contempt* (Report No 35, December 1987) lxxxiv [64]–[66], 329–30 [568]; Law Commission (New Zealand), *Reforming the Law of Contempt of Court: A Modern Statute* (Report No 140, May 2017) 100–1 [5.60]–[5.69]. This is reflected in *Contempt of Court Act 2019* (NZ) ss 16–20.

34 The Law Reform Commission, *Contempt* (Report No 35, December 1987) 326 [561].

35 Law Reform Commission of Western Australia, *Report on Review of the Law of Contempt* (Project No 93, June 2003) Recommendation 48. Western Australia also provides a statutory framework for enforcement of court orders in civil proceedings: *Civil Judgments Enforcement Act 2004* (WA).

36 Submission 22 (Law Institute of Victoria).

37 Submission 20 (Criminal Bar Association).

38 Submission 31 (County Court of Victoria).

39 Submission 29 (Supreme Court of Victoria).

40 See, eg, *Civil Procedure Act 2010* (Vic) pt 2.4, ss 46, 51, 56, 65C.

41 Consultation 26 (Supreme Court of Victoria).

42 Consultation 12 (Professor David Rolph).

43 Consultation 13 (Fiona K Forsyth QC, John Langmead QC).

Commission's conclusions: retain the full scope of disobedience contempt

- 8.38 The purpose of abolishing the distinction between civil and criminal contempt is to remove confusion and complexity in the law.
- 8.39 As the Supreme Court has stated, non-compliance with orders directly threatens the very foundation of the administration of justice and threatens the rule of law.⁴⁴ All non-compliance with court orders therefore interferes with the administration of justice.
- 8.40 The distinction between civil and criminal contempt reflects a different issue, which is the gravity of the risk that the non-compliance poses to the administration of justice. For example, some non-compliance will be too trivial for a court to deal with as a contempt. In other cases, it will be enough to find the charge proved, but not record a conviction. Occasionally, when there is deliberate or prolonged defiance of a court, the strongest sanctions may be warranted.
- 8.41 The assessment of the gravity of the risk to the administration of justice is qualitative and requires consideration of the relevant circumstances. The court should make this assessment when exercising its discretion to determine whether to deal with the conduct as a contempt and when determining penalty.
- 8.42 The clearest and most conceptually sound approach is to retain the full scope of disobedience contempt, recognise its criminal nature, and apply appropriate protections to every proceeding for non-compliance contempt.
- 8.43 This approach better reflects the nature of contempt. As discussed in Chapter 3, contempt is better characterised as a power of the courts to safeguard the administration of justice than as an ordinary criminal offence. It is consistent with this approach that the courts must retain the power to protect their authority and ensure compliance with their orders in any circumstances.
- 8.44 This power is moderated by the court's discretion about when and how to punish for contempt. Although all non-compliance is an interference with the administration of justice, not all non-compliance should be dealt with as a contempt or punished. Courts may choose not to exercise their powers for trivial non-compliance, as already occurs in practice. Courts also have powers to dismiss proceedings brought by private parties if they are vexatious or an abuse of process.
- 8.45 Courts have broad discretion in determining penalty. They can decide not to impose a penalty or record a conviction. The Commission recommends further flexibility by applying relevant provisions of the *Sentencing Act*.
- 8.46 As discussed in the following paragraphs, there are other aspects of the existing law that also limit liability for non-compliance, which the Commission considers should be retained.

Dealing with a person for contempt by non-compliance

The test for liability

- 8.47 To establish disobedience contempt at common law, the following five elements must be proved beyond reasonable doubt:
- an order was made by the court or an undertaking given to the court
 - the terms of the order or undertaking were clear, unambiguous, and capable of compliance
 - in the case of an order of the court, it was served on the person or, if not, service was excused in the circumstances or dispensed with

- the person had knowledge of the terms of the order or undertaking, and
 - the person breached the terms of the order or undertaking.⁴⁵
- 8.48 In addition, the Supreme Court (General Civil Procedure) Rules 2015 (Vic) (Civil Procedure Rules) provide that an order cannot be enforced by imprisonment or sequestration unless the order was served on the person together with a notice stating that the person is liable to imprisonment or to sequestration of property if they do not comply.⁴⁶ This ensures that a person is aware of the consequences of non-compliance. The Civil Procedure Rules provide that the courts may waive this notice requirement.⁴⁷ The courts have held this should only be done where it is clear the person was aware of the order and the consequences of breaching it.⁴⁸ In practice, the courts have been reluctant to waive this safeguard.⁴⁹
- 8.49 Stakeholders addressing this issue did not identify any concerns with the elements of the common law test or the requirement that it be proved beyond reasonable doubt.
- 8.50 This test should be retained in the proposed Act to define when non-compliance with a court order can be dealt with as a contempt of court. The test includes essential safeguards, ensuring a person cannot be dealt with for contempt if the order or undertaking cannot be complied with, the terms of the order are unclear, or the person did not know about the order or undertaking.

Recommendation

- 60 The proposed Act should provide that a person may be dealt with by a court for contempt by non-compliance with a court order or undertaking where:
- an order was made by a court, or an undertaking was given to a court
 - the terms of the order or undertaking were clear, unambiguous and capable of being complied with
 - in the case of an order made by the court, the order was properly served on the person in accordance with the rules and/or that service was excused in the circumstances, or dispensed with pursuant to the rules of the court
 - the person had knowledge of the terms of the order or undertaking, and
 - the person breached the order or undertaking.

Other considerations

- 8.51 The common law contains other factors which the courts may consider when determining whether to exercise their contempt power in relation to non-compliance with an order or undertaking, and the penalty to impose. These factors are not part of the test of liability. They include:
- the availability of other enforcement mechanisms
 - whether the behaviour is deliberately defiant or contumacious
 - the level of risk posed to the administration of justice.

45 *Grocon Constructors (Victoria) Pty Ltd v Construction, Forestry, Mining and Energy Union* [2013] VSC 275 [8]; *Advan Investments Pty Ltd v Dean Gleeson Motor Sales Pty Ltd* [2003] VSC 201 [31].

46 *Supreme Court (General Civil Procedure) Rules 2015* (Vic) r 66.10(3).

47 *Ibid* r 66.10(6).

48 *Morgan v State of Victoria* [2008] VSCA 267 [132], (2008) VR 237.

49 See, eg, *Morgan v State of Victoria* [2008] VSCA 267 [132]; *Alpass v Hession* [2017] VSC 748 [47]–[55].

- 8.52 This section considers whether these factors should be included in the proposed Act and, if so, on what basis.

An option of last resort

- 8.53 At common law, the courts have held that contempt proceedings should only be commenced to enforce an order or undertaking where there are no other effective means to do so.⁵⁰ New Zealand incorporated this limitation in the *Contempt of Court Act 2019* (NZ).⁵¹
- 8.54 Stakeholders who addressed this issue considered that disobedience contempt should only be available as a last resort or for the most serious cases.⁵² The LIV stated that the court should only institute or continue proceedings if the non-compliance constitutes a challenge to the court's authority.⁵³ The Supreme Court submitted that, for parties, 'other means of enforcement are clearly to be preferred because they offer a tangible remedy' but that contempt remains 'an important remedy in the context of injunctive or mandatory orders'.⁵⁴

Commission's conclusions: availability of other mechanisms

- 8.55 The Commission agrees that, in general, other enforcement mechanisms should be tried before commencing contempt proceedings. Contempt is an exceptional power used where other mechanisms are ineffective or have failed. Where other mechanisms remain available to enforce the order, there is less need to use the contempt power to vindicate the court's authority.
- 8.56 However, although this is a sound principle, it is too restrictive to require other enforcement mechanisms be exhausted before contempt proceedings can be commenced. Such a requirement would restrict the powers of the court and would be futile where a person has displayed a clear intention not to comply with the order.
- 8.57 The proposed Act should require a court to consider the availability of other enforcement mechanisms when determining whether to deal with someone for non-compliance contempt. Where other enforcement mechanisms are available, the court should not be prevented from dealing with a person for contempt, but rather the availability of other mechanisms should be a factor the court considers in determining whether to exercise its discretion to deal with the contempt and in considering the penalty to impose.

Deliberate defiance

- 8.58 As with other forms of contempt, it is not necessary at common law to prove that a person intended to interfere with the administration of justice or breach the order. Instead, the law requires only that the person voluntarily committed the act that constituted the breach. The court may decide however, not to exercise its contempt powers if the conduct is casual, accidental or unintentional.⁵⁵
- 8.59 However, intention has traditionally been relevant in determining whether a contempt should be dealt with as a civil or criminal contempt, and the extent of the penalty to be imposed. Where a person acts contumaciously—that is, in deliberate defiance of the order—a contempt would be classified as criminal, and a conviction could be recorded.⁵⁶

50 *Advan Investments Pty Ltd v Dean Gleeson Motor Sales Pty Ltd* [2003] VSC 201 [93], citing in support *Danchevsky v Danchevsky* [1975] Fam 17, 22–3; *Ansah v Ansah* (1977) Fam LR 138, 144. See also *Bellerive Homes Pty Ltd v FW Projects Pty Ltd* [2019] NSWSC 193 [140]–[145]; *Morgan v State of Victoria* [2008] VSCA 267 [145].

51 *Contempt of Court Act 2019* (NZ) s 16(3)(a).

52 Consultations 9 (Victorian Government Solicitor's Office), 13 (Fiona K Forsyth QC, John Langmead QC), 17 (Victorian Bar).

53 Submission 22 (Law Institute of Victoria).

54 Submission 29 (Supreme Court of Victoria).

55 *Advan Investments Pty Ltd v Dean Gleeson Motor Sales Pty Ltd* [2003] VSC 201 [34], [51]; *Construction, Forestry, Mining and Energy Union v Grocon Constructors (Victoria) Pty Ltd* [2014] VSCA 261 [138]–[142].

56 *Construction, Forestry, Mining and Energy Union v Grocon Constructors (Victoria) Pty Ltd* [2014] VSCA 261 [173], [275]–[276].

- 8.60 As discussed in Chapter 4, the law of contempt does not generally require proof of a person's intent to defy the order or interfere with the administration of justice. However, this departs from the standard framing of criminal offences. The Commission concluded in that chapter that the appropriate fault element should vary depending on the type of contempt.

Responses

- 8.61 Few stakeholders addressed the question of whether a person must intend to disobey an order. The LIV supported requiring that a party intended to disobey, or made no reasonable attempt to comply with, the order.⁵⁷
- 8.62 Professor Rolph told the Commission that there should be more guidance about the definition of 'wilful and contumacious' behaviour, which distinguishes criminal disobedience contempt from civil disobedience contempt. In his view, 'contumacious' was something more than intention and extended to considering the consequences of the interference. Professor Rolph suggested as one possibility distinguishing in statute between a person's intent and the impact of their conduct on the administration of justice.⁵⁸

Commission's conclusions: 'deliberate defiance' should remain a discretionary consideration

- 8.63 Before a person can be dealt with for contempt, the person must have knowledge of the terms of the order or undertaking, the terms must be clear, and the person must have voluntarily committed the act that breaches the order or undertaking. Knowledge of the order or undertaking and its terms places a positive obligation on the person to ensure that they comply. In these circumstances, and because of the importance in ensuring court orders are obeyed, the court should be able to deal with a person for contempt even though the person may not have intended to breach the order.
- 8.64 However, consistent with current law, the proposed Act should require a court to consider a person's intention, and whether they were deliberately defiant, when deciding whether a failure to comply should be dealt with as contempt, and also when determining penalty.
- 8.65 The level of defiance and the seriousness of the conduct should also be relevant to this assessment. This includes the impact of the conduct on specific persons, or the community more generally. Conduct may be considered more serious if it affects or inconveniences members of the public, or wastes government resources.⁵⁹
- 8.66 The impact of the non-compliance on the persons affected, or on the community more broadly, should be considered by the court in deciding whether to deal with a breach as contempt and in determining a penalty.

⁵⁷ Submission 22 (Law Institute of Victoria). This reflects the recommendation made by the ALRC: The Law Reform Commission, *Contempt* (Report No 35, December 1987) 308–9 [523].

⁵⁸ Consultation 12 (Professor David Rolph).

⁵⁹ See, eg, *Victoria International Container Terminal Ltd v Construction, Forestry, Maritime, Mining and Energy Union* [2018] VSC 794 [10].

Recommendation

- 61 The proposed Act should provide that in determining whether to exercise its discretion to deal with a person for contempt by non-compliance with a court order or undertaking, and in fixing the appropriate penalty, the court must consider:
- the extent to which other mechanisms to enforce the law are available
 - the impact of the failure to comply with the order or undertaking on specific persons or the community more generally
 - the attitude of the person, and whether they were deliberately defiant.

Risk of interference with the administration of justice

8.67 Proving contempt generally requires proof that the conduct had a tendency to interfere with the administration of justice. However, under common law, there is no express requirement to prove that a person's non-compliance with an order or undertaking has a tendency to interfere with the administration of justice.⁶⁰ A question arises as to whether the proposed Act should expressly require proof of this.

Commission's conclusion: no need to expressly require a risk to the administration of justice

8.68 All failures to comply with court orders or undertakings, where a person knows of the order and voluntarily fails or refuses to comply, pose a risk to the administration of justice. As the Supreme Court stated, such non-compliance undermines the essence of a court's authority, and threatens the rule of law.⁶¹ Accordingly, there is no need to expressly refer to this outcome in the test for liability.

The procedure for contempt by non-compliance

8.69 The consultation paper asked who should be able to commence proceedings for disobedience contempt.⁶² Private parties typically bring disobedience contempt applications for failures to comply with orders made in civil proceedings.⁶³

The role of private parties

8.70 Chapter 5 recommends a general procedure for bringing contempt proceedings, which should apply to this form of contempt.

8.71 Chapter 5 also discusses the role of private parties in bringing proceedings, which is especially relevant in non-compliance contempt. For the reasons outlined there, the Commission recommends that private parties continue to have the power to bring proceedings, as well as the courts on their own motion, the Attorney-General, and the Director of Public Prosecutions (in criminal proceedings).

8.72 There are sufficient protections to deal with any abuse of this power by private parties. These include the court's role in ultimately deciding to exercise such jurisdiction, and its power to dismiss proceedings that are vexatious, an abuse of process, or brought for an extraneous purpose.

60 The common law test has been variously described as a 'real' risk or a 'tendency'. As discussed in Chapter 4, the Commission has recommended that this test is more clearly expressed in terms of a 'substantial risk'.

61 *Law Institute of Victoria v Nagle* [2005] VSC 47 [5].

62 Victorian Law Reform Commission, *Contempt of Court* (Consultation Paper, May 2019) 80, Question 26(b)(i).

63 *Ibid* 73 [6.22]–[6.24].

Who should hear the proceeding?

- 8.73 In Chapter 5, the Commission recommended that an application for contempt for conduct that interferes with a proceeding be heard by a different judicial officer to the officer who witnessed the conduct to avoid any risk of perceptions of partiality.
- 8.74 Applications for punishment for disobedience contempt are typically heard within the same proceeding by the judicial officer who made the order.
- 8.75 Where a person charged with contempt argues that, for example, the order was not made in clear terms, the same concern regarding partiality of the judicial officer who made the order could arise.
- 8.76 The WA Commission raised concerns regarding ‘the actuality and appearance of judicial neutrality’ in this context, proposing that an indictable offence for failure to comply with an order must be heard by a different judicial officer.⁶⁴
- 8.77 In consultations, members of the Supreme Court stated that, ideally, any enforcement proceedings should be heard by the judicial officer who made the original order because that officer would be familiar with the history of the proceeding. If there is a dispute about the meaning of the original order, then it may be preferable for a different judicial officer to decide the matter.⁶⁵
- 8.78 Accordingly, the Commission considers that a person charged with contempt for non-compliance with a court order or undertaking should have the right to have the matter heard by a different judicial officer.

Recommendation

- 62 **The proposed Act should provide that a person who is to be dealt with for contempt by non-compliance with a court order or undertaking has the right to have the matter heard by a judicial officer who did not make the original order.**

Penalties

- 8.79 The consultation paper asked what penalties should be available for disobedience contempt.⁶⁶
- 8.80 In Chapter 5, the Commission recommends that a range of penalties should be available for all forms of contempt, including fines, imprisonment and sequestration of property. The Commission also recommends that fines could accrue up to a set maximum and that a person could be discharged early from prison.
- 8.81 Varied sentencing options provide the court with flexibility. This is particularly important in the context of non-compliance contempt. If compliance with the order or undertaking remains possible, the court may choose a sanction directed towards compelling compliance, such as sequestration, or a fine that accrues pending compliance. The power of the court to order early discharge from a term of imprisonment and impose penalties directly on the officers of corporate bodies in certain circumstances⁶⁷ can also compel compliance.

64 Law Reform Commission of Western Australia, *Report on Review of the Law of Contempt* (Project No 93, June 2003) 100–1. Consultation 26 (Supreme Court of Victoria).

66 Victorian Law Reform Commission, *Contempt of Court* (Consultation Paper, May 2019) 80, Question 26(b)(iii).

67 Order 66 of the Civil Procedure Rules provides that a judgment may be enforced by imposing penalties on an officer of the body corporate. A director who has had notice of a court order will be under a duty to take reasonable steps to ensure it is obeyed, and if they wilfully fail to do so, may be directly liable for contempt. See, eg, *Moira Shire Council v Sidebottom Group Pty Ltd* (No 3) [2018] VSC 556 [33].

- 8.82 If the order or undertaking can no longer be complied with, the court may impose a penalty that reflects a punitive purpose, such as a fixed fine or term of imprisonment.
- 8.83 In Chapter 5, the Commission recommends that the proposed Act set penalties for contempt specifying both the maximum fines and terms of imprisonment to be imposed.
- 8.84 In relation to disobedience contempt, only one stakeholder specified a preferred maximum penalty, of two years imprisonment.⁶⁸ During consultations, members of the Supreme Court told the Commission that the penalties for enforcement proceedings should be sufficient to deter parties from applying a cost–benefit analysis when determining whether to comply with an order.⁶⁹
- 8.85 The maximum penalty for breaching a court order or undertaking must be significant, particularly for bodies corporate. There are examples in other legislation for setting penalty levels to discourage bodies corporate from deciding that there would be more financial benefit in not complying with the law.⁷⁰
- 8.86 The Commission considers that this can be achieved in relation to bodies corporate by setting a maximum penalty that is the greater of:
- 3000 penalty units
 - if the court can determine the value of the benefit obtained as a consequence of the non-compliance by the body corporate (and any related bodies corporate), three times the value of the benefit
 - if the court cannot determine the value of the benefit as a consequence of the non-compliance by the body corporate (and any related bodies corporate), 10 per cent of the annual turnover of the body corporate in the year the offending occurred.⁷¹
- 8.87 The Commission considers that an appropriate maximum term of imprisonment for non-compliance with an order or undertaking should be five years for an individual, with an equivalent fine.⁷²

Recommendations

- 63 The proposed Act should provide that the maximum penalty for contempt by non-compliance with a court order or undertaking for an individual is five years imprisonment and/or a fine of 600 penalty units.
- 64 The proposed Act should provide that the maximum penalty for contempt by non-compliance with a court order or undertaking for a body corporate is:
- 3000 penalty units, or
 - if the court can determine the value of the benefit obtained because of the non-compliance by the body corporate (and any related bodies corporate), three times the value of the benefit, or
 - if the court cannot determine the value of the benefit because of the non-compliance by the body corporate (and any related bodies corporate), 10 per cent of the annual turnover of the body corporate in the year the offending occurred.

68 Submission 6 (Professors Mark Pearson, Patrick Keyzer, Anne Wallace and Associate Professor Jane Johnston).

69 Consultation 26 (Supreme Court of Victoria).

70 See, eg, *Competition and Consumer Act 2010* (Cth) sch 2 ('Australian Consumer Law')

71 This replicates the scheme for calculating maximum penalties under the *Competition and Consumer Act 2010* (Cth) sch 2 ('Australian Consumer Law') s 224(3A).

72 See Appendix J for an illustrative list of comparative offences and penalties and Appendix G for an illustrative list of sentences imposed in disobedience contempt cases. See also Annexure A in *Moira Shire Council v Sidebottom Group Pty Ltd (No 3)* [2018] VSC 556, for a summary of penalties imposed by the court for contempt for breach of court orders, which range from three months to two years imprisonment.

Enforcing court orders—a broader issue

- 8.88 As discussed in the consultation paper, there are other ways a party may enforce a court order or an undertaking. For example, the Sheriff may be directed to seize and sell property to satisfy a judgment debt,⁷³ or a court can dismiss a claim or strike out a defence during a civil proceeding.⁷⁴ Some Acts create their own mechanisms or offences.⁷⁵
- 8.89 However, as Professor Rolph told the Commission, there is no uniform or principled approach to other enforcement mechanisms and their relationship with disobedience contempt. This causes unnecessary complexity and underlies the need for reform.⁷⁶
- 8.90 One area of complexity is the relationship between Order 75 of the Civil Procedure Rules, which regulates contempt, and Order 66, which provides for the enforcement of orders. Order 66 does not refer to contempt but sets out when an order may be enforced by committal. Case law indicates that an application for committal for failure to comply with an order is a contempt application, which must meet the requirements of both Order 66 and Order 75.⁷⁷ Further statutory guidance would be beneficial on how Order 66 and Order 75 are intended to interact.⁷⁸
- 8.91 The Commission also heard that there are gaps in enforcement. In particular, as discussed below, the Victorian Civil and Administrative Tribunal (VCAT) and the Children’s Court told the Commission they face significant challenges with enforcing their orders.

Deficiencies with existing enforcement mechanisms

Children’s Court’s orders

- 8.92 The Children’s Court of Victoria, which hears applications for the protection of children and young persons at risk, told the Commission it does not have clear statutory powers to enforce its own orders or remedy non-compliance.⁷⁹
- 8.93 This can have significant consequences. When the state fails to comply with contact and access conditions, the consequences for children are profound.⁸⁰ The Children’s Court observed that, while parents have a powerful incentive to comply with orders, these incentives do not apply to the state. Nor are measures used in other civil contexts, such as dismissing a case, appropriate when the case concerns child protection.
- 8.94 The Children’s Court stated that it should be given clear and broader enforcement powers. It prefers a statutory procedure for civil enforcement of court orders and undertakings, in which proceedings could be commenced by a magistrate or the President of the Children’s Court. Failure to comply with an order should be proved on the balance of probabilities, and could be dealt with by undertakings, imposing monetary penalties, declaratory or injunctive relief, or similar remedies. While these powers would be used rarely, they would have an effect in compelling compliance.⁸¹

73 *Supreme Court (General Civil Procedure) Rules 2015* (Vic) r 66.02(1)(a), ord 69.

74 See, eg, *Supreme Court (General Civil Procedure) Rules 2015* (Vic) r 24.02(1).

75 See Victorian Law Reform Commission, *Contempt of Court* (Consultation Paper, May 2019) 76–7 [6.34]–[6.36].

76 Consultation 12 (Professor David Rolph).

77 See, eg, *Morgan v State of Victoria* [2008] VSCA 267 [107]; cf in New South Wales, *Bellerive Homes Pty Ltd v FW Projects Pty Ltd* [2019] NSWSC 193 [124]–[125].

78 Order 66 also sets out that a remedy to enforce an order is sequestration. Order 76 sets out the process by which sequestration can be effected. Sequestration to enforce an order appears to be distinct from contempt. The interrelationship between orders 66, 75 and 76 would also benefit from clarification.

79 Submission 14 (Children’s Court of Victoria). While in general the powers of the Magistrates’ Court are conferred on the Children’s Court, the Children’s Court told the Commission that it is not apparent that the enforcement power available under section 135 of the Magistrates’ Court Act applies in the Children’s Court: Submission 14 (Children’s Court of Victoria).

80 Submission 14 (Children’s Court of Victoria); Consultation 15 (Children’s Court of Victoria).

81 Submission 14 (Children’s Court of Victoria); Consultation 15 (Children’s Court of Victoria).

Enforcement of VCAT orders

- 8.95 VCAT submitted that an ‘issue for the Tribunal is the inability to enforce its own orders.’⁸² Orders must be enforced through the courts, a process that is difficult to navigate, expensive, and may not secure the desired outcome. Parties find it difficult to understand why VCAT cannot enforce its own orders.⁸³
- 8.96 VCAT has a broad contempt power which replicates the contempt jurisdiction of the Supreme Court,⁸⁴ and can impose significant penalties for contempt.⁸⁵ However, making a contempt application is slow, complex, costly, and the process is unclear.⁸⁶ If the Tribunal fines a person for contempt, the order must be enforced through the Supreme Court.⁸⁷ While a finding of contempt may lead to fine or imprisonment, this may not result in compliance with the original order, and enforcement action will still need to be taken in the relevant court.⁸⁸
- 8.97 The *Victorian Civil and Administrative Tribunal Act 1998* (Vic) makes it an offence not to comply with a non-monetary order of the Tribunal.⁸⁹ The Commission was told that it is unclear how this provision interacts with the Tribunal’s general contempt power.⁹⁰
- 8.98 VCAT submitted to the Commission that there should be clearer, simpler and cost-effective processes for enforcing Tribunal orders which would reduce the need for parties to resort to contempt applications.⁹¹ Consideration should be given to introducing a new statutory framework for the exercise of VCAT’s disobedience contempt powers.⁹²

Commission’s conclusions: a review of civil enforcement mechanisms

- 8.99 It is beyond the scope of the Commission’s review to consider civil enforcement mechanisms for Victoria’s civil law jurisdictions.
- 8.100 However, this is an issue requiring further consideration. The Commission recommends the Victorian Government conduct a review of the adequacy and effectiveness of the mechanisms for enforcing orders in civil proceedings more generally.
- 8.101 The Commission also notes that, if the Commission’s recommendations are adopted, order 66 of the Civil Procedure Rules may need to be amended.

Recommendation

- 65 The Victorian Government should conduct a review of the adequacy and effectiveness of the enforcement of orders in civil proceedings, including proceedings in the Children’s Court and the Victorian Civil and Administrative Tribunal.**

82 Submission 7 (The Victorian Civil and Administrative Tribunal).

83 Ibid.

84 *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 137. A new provision to be inserted in the Act will confirm that VCAT’s contempt powers apply in relation to a failure to comply with an order: *Justice Legislation Amendment (Access to Justice) Act 2018* (Vic) s 70(1) (which has not yet commenced).

85 *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 137(5). VCAT can punish a contempt by imprisoning a person for up to five years and/or imposing a fine of up to 1000 penalty units for a natural person or 5000 penalty units for a body corporate.

86 Submission 7 (The Victorian Civil and Administrative Tribunal); Consultation 22 (The Victorian Civil and Administrative Tribunal).

87 *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 137(9).

88 Submission 7 (The Victorian Civil and Administrative Tribunal).

89 *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 133.

90 Consultation 22 (The Victorian Civil and Administrative Tribunal).

91 Submission 7 (The Victorian Civil and Administrative Tribunal).

92 Ibid. As VCAT’s contempt powers reflect the powers of the Supreme Court, the Commission’s recommendations regarding reform of the Supreme Court’s powers will affect VCAT unless otherwise stipulated: see *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 137(1)(f).

Juror contempt

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9. Juror contempt

Overview

- Jurors may commit contempt in various ways, such as refusing to answer questions, disclosing the deliberations of a jury, or conducting their own research on matters before a trial.
 - Most of these kinds of contempt are also offences under the *Juries Act 2000 (Vic)*. There is still a need to retain the law of contempt to deal with juror misconduct not covered by those offences or where it is more appropriate for it to be punished as a contempt.
 - The *Juries Act* should be changed to make it more effective by adjusting penalties (including how penalties are imposed) and making it clear who is responsible for investigating and prosecuting offences under the Act.
 - The *Juries Act* should be changed to ban jurors from publishing information that reveals that they are jurors.
 - Jurors should be required to swear or affirm that they will not conduct any research independently and will not disclose the deliberations of the jury.
 - Jurors should be encouraged to ask more questions of the judge through changes in the law and guidance.
 - Judges and jurors should receive more education and guidance on the uses and impacts of social media.
-

What is juror contempt and what is its purpose?

- 9.1 Juries play a key role in the justice system in Victoria, especially in criminal trials. Jury trials safeguard the rights of the accused, ensure justice is administered according to community standards, and enable the community to participate directly in the administration of justice.¹ The Supreme Court of Victoria and the County Court of Victoria hold trials by jury.
- 9.2 The law of contempt regulates the conduct of jurors through ‘juror contempt’, discussed in this chapter, and sub judice contempt, which is discussed in Chapter 10. Juror conduct is also regulated by other common law offences,² the *Jury Directions Act 2015* (Vic) and the *Juries Act 2000* (Vic). Together, these laws protect the fairness of a trial by ensuring that juries reach verdicts on the facts and evidence before them.
- 9.3 Although juror contempt is often referred to as a specific form of contempt, it is not a distinct category of the law of contempt of court. Jurors can commit contempt in many different ways. For example, a juror may be dealt with for contempt for refusing to answer a question, or for refusing to be sworn or to make an affirmation. This falls within the category of contempt by conduct interfering with a court proceeding discussed in Chapter 7. This conduct is also an offence under the *Juries Act*.³
- 9.4 As discussed in the consultation paper, there have been few cases in Victoria involving contempt by jurors.⁴

Dealing with juror contempt

- 9.5 The *Juries Act* makes it an offence to:
- fail to answer a question or produce a document without a reasonable excuse when asked by the Juries Commissioner or court
 - supply false or misleading information to the Juries Commissioner to evade jury service
 - fail to appear for jury service
 - refuse to be sworn or to make an affirmation
 - impersonate a juror
 - identify a person attending for jury service
 - disclose or publish the deliberations of a jury
 - make enquiries about trial matters, if the person is a juror or on the panel for a trial.⁵
- 9.6 The *Juries Act* also provides that the Act does not affect the power of a court to deal with a contempt of court.⁶ This is different from the position in other states or territories, where legislation either does not expressly address the overlap with contempt,⁷ or specifies the circumstances when a juror can be dealt with for contempt.⁸
- 9.7 The consultation paper asked whether the courts still needed a general power to deal with jurors for contempt, given the offences in the *Juries Act* and, if so, how the law should be restated.⁹

1 See Victorian Law Reform Commission, *Contempt of Court* (Consultation Paper, May 2019) 60 [5.5]–[5.7]; see also *Juries Commissioner v Slattery* [2017] VSC 3, [23]–[28]. See generally Victorian Law Reform Commission, *Jury Empanelment* (Report No 27, May 2014) Ch 2.

2 For example, there is a common law offence of ‘embracery’ (attempting to corrupt, influence, instruct or induce a jury or jurors to favour one side) and of ‘perverting the course of justice’ (conduct which may lead and is intended to lead to a miscarriage of justice). Penalties for these common law offences are set out in *Crimes Act 1958* (Vic) s 320.

3 See *Juries Act 2000* (Vic) ss 68, 73.

4 Victorian Law Reform Commission, *Contempt of Court* (Consultation Paper, May 2019) 63 [5.22].

5 *Juries Act 2000* (Vic) ss 68–78A. See also Appendix K for a more complete list of offences in the *Juries Act* and a list of comparable offences in other Australian jurisdictions.

6 *Juries Act 2000* (Vic) s 84.

7 See, eg, *Jury Act 1977* (NSW).

8 See, eg, *Jury Act 1995* (Qld) ss 28(2) (obligation to comply with summons), 38(5) (supplementary jurors), 53(9) (separation of jury); *Juries Act 2003* (Tas) ss 51(1) (misconduct of jurors).

9 Victorian Law Reform Commission, *Contempt of Court* (Consultation Paper, May 2019) 67, Questions 21–2.

Responses

- 9.8 Stakeholders addressing these questions all supported the courts' continuing power to deal with jurors for contempt.¹⁰ The Commission was told that the offences in the Juries Act did not cover all possible types of juror misconduct.¹¹
- 9.9 Stakeholders submitted that the law of contempt provided a 'catch all',¹² and enabled courts to deal with types of 'unforeseen types of conduct' not covered by the Juries Act.¹³ The Director of Public Prosecutions (DPP) submitted that the courts should still be able to deal with juror conduct as a contempt, even if the same conduct could be prosecuted under the Juries Act.¹⁴
- 9.10 These views were supported by academics with expertise in juror decision making and juror behaviour. They told the Commission that a general power to punish contempt by jurors allows for flexibility in dealing with misconduct that has not been conceived of yet—and in the age of the internet, new and novel types of misconduct can always emerge.¹⁵

Commission's conclusions: courts should be able to deal with jurors for contempt

- 9.11 The Commission agrees that the courts that hold jury trials must be able to deal with jurors for contempt. This power is needed to address new circumstances or conduct not covered by the Juries Act or other legislation. There are no statutory criminal offences applicable to jurors who disobey their oath or do not comply with directions given by the judge during a trial.
- 9.12 The court should retain its power to deal with contempt by jurors under the category of contempt relevant to the misconduct. For example, a juror who refuses to be sworn or comply with a judicial direction may commit a contempt by conduct that interferes with a court proceeding (see Chapter 7).
- 9.13 Other juror misconduct, such as a juror making enquiries about trial matters or disclosing jury deliberations, could be dealt with under the proposed Act's general category of contempt, discussed in Chapter 4.
- 9.14 The courts should continue to be able to deal with a juror for contempt where appropriate, even if the same conduct is covered by the Juries Act or other legislation. This is consistent with the approach taken by the Commission in Chapter 5.

Recommendation

- 66** The Supreme Court of Victoria and the County Court of Victoria should continue to be able to deal with jurors for contempt where a juror's conduct satisfies any category of contempt specified in the proposed Act.

10 Submissions 11 (Victoria Legal Aid), 28 (Director of Public Prosecutions), 29 (Supreme Court of Victoria), 31 (County Court of Victoria).
11 Submissions 11 (Victoria Legal Aid), 28 (Director of Public Prosecutions), 29 (Supreme Court of Victoria), 31 (County Court of Victoria).
12 Submission 31 (County Court of Victoria).
13 Submission 11 (Victoria Legal Aid).
14 Submission 28 (Director of Public Prosecutions).
15 Consultation 2 (Academics on juror decision making and juror contempt).

Reforms to the Juries Act

- 9.15 The consultation paper asked whether there was any need to change the Juries Act to deal with juror misconduct and if so how.¹⁶
- 9.16 Stakeholders expressed support for the Juries Act. The Commission was told the Act made it clear to jurors what their obligations were and what conduct was permitted.¹⁷ The Act enabled jurors to regulate their own conduct and address misconduct by another juror.¹⁸
- 9.17 However, stakeholders identified four issues with the Juries Act:
- Some of the offences may be more effectively penalised using an infringement notice with a fixed penalty rather than a prosecution.
 - The penalty for a juror making enquiries about trial matters is too low and is inconsistent with other juror offences under the Act.
 - There is a need to clarify who is responsible for investigating and prosecuting juror offences under the Act.
 - There is a need to modernise the restrictions on identifying a juror.
- 9.18 Some of these issues extend beyond the Commission's terms of reference. It is beyond the scope of this inquiry to consider the penalties for offences by persons other than jurors,¹⁹ and procedures for investigating and prosecuting other offences under the Juries Act. However, there would be benefit in the government reviewing these broader issues.

Infringement notices

- 9.19 Juries Victoria submitted that some of the offences in the Juries Act would be more effective if restated as offences punishable by a fine imposed by an infringement notice,²⁰ rather than a fine imposed by the court.²¹ These offences were:
- failure to complete a juror questionnaire²²
 - failure to attend for jury service as summoned²³
 - failure to attend for jury service when empanelled as a juror.²⁴
- 9.20 Juries Victoria identified these offences as suitable for restatement because a juror either did or did not comply with the obligation (for example, a person either attended for jury service or did not).²⁵ In New South Wales, the failure of a potential juror to attend for jury service is dealt with by 'penalty notice'.²⁶
- 9.21 The Commission was told that prosecuting such offences can be time-consuming and expensive. To prosecute a failure to attend jury service, the Juries Commissioner must apply to the Supreme Court with affidavit evidence for the court to exercise its powers under its civil jurisdiction.²⁷ The Juries Commissioner must also prove the failure of the juror to attend beyond reasonable doubt.²⁸

16 Victorian Law Reform Commission, *Contempt of Court* (Consultation Paper, May 2019) 67, Question 20.
 17 Submission 28 (Director of Public Prosecutions); Consultation 2 (Academics on juror decision making and juror contempt).
 18 Consultation 2 (Academics on juror decision-making and juror contempt).
 19 *Juries Act 2000* (Vic) ss 74, 76.
 20 Courts have a discretion to impose a fine up to the maximum penalty for an offence. However, an infringement penalty is a fixed amount specified in an infringement notice, and is typically used for minor offences: see *Infringements Act 2006* (Vic).
 21 Submission 25 (Juries Victoria).
 22 *Juries Act 2000* (Vic) s 67.
 23 *Ibid* s 71(1).
 24 *Ibid* s 71(3).
 25 Submission 25 (Juries Victoria).
 26 *Jury Act 1977* (NSW) s 66.
 27 *Juries Commissioner v Slattery* [2017] VSC 3 [2], [9]. As this case showed, the procedure was conducted under the *Supreme Court (Miscellaneous Civil Proceedings) Rules 2008* (Vic) rr 12.09, 12.10.
 28 *Juries Commissioner v Slattery* [2017] VSC 3 [10].

Commission's conclusions: restate some offences as infringement offences

- 9.22 The Commission agrees with Juries Victoria that there are practical and procedural advantages in restating these juror offences as offences punishable by fine imposed by infringement notice (infringement offences).
- 9.23 To ensure these juror offences are suitable for an infringement notice, sections 67 (the failure to complete a juror questionnaire), 71(1) (the failure to attend for jury service as summoned) and 71(3) (the failure to attend for jury service when empanelled as a juror) would need to be recast as strict liability offences, with the effect that the references to 'without reasonable excuse' would need to be removed. Section 67 would need to be recast as a positive obligation to comply. Similar amendments would need to be made to sections 71(1) and (3) and section 71(2) would need to be removed.
- 9.24 Such amendments would remove the court's discretion, for example, to sentence a person to imprisonment under the Juries Act if that person fails to attend jury service.²⁹ However, as Justice Forrest has noted, 'it is the penalty itself that delivers the real message to members of the community about this vital civic function'.³⁰

Recommendation

- 67 Sections 67, 71(1) and 71(3) of the Juries Act should be restated as offences punishable by fine imposed by infringement notice.

Penalty for making enquiries about trial matters

- 9.25 The maximum penalty for the offence under section 78A of the Juries Act of a juror or panel member making enquiries about trial matters is low compared with other juror offences under the Act. The maximum penalty for a juror or panel member committing this offence is 120 penalty units,³¹ compared to a maximum penalty under the Act of 600 penalty units or five years imprisonment for identifying a juror or disclosing juror deliberations.³²
- 9.26 The Judicial College of Victoria stated that this discrepancy made it difficult to frame guidance to jurors.³³
- 9.27 The absence of reported cases indicates that offences under the Juries Act are rarely prosecuted. The Juries Commissioner has referred suspected offences under section 78A for investigation six times since March 2012.³⁴ The Juries Commissioner also advised that, given what we know about how people rely on their devices and the internet, it was reasonable to suspect that jurors conduct their own research more than we are aware of.³⁵

29 *Juries Act 2000* (Vic) ss 71(1), (3).

30 *Juries Commissioner v Slattery* [2017] VSC 3 [31].

31 *Juries Act 2000* (Vic) s 78A(1). The value of a penalty unit is fixed by the *Monetary Units Act 2004* (Vic). A penalty unit for the 2019–20 financial year is \$165.22, so 120 penalty units are equivalent to \$19,826: Treasurer (Vic), 'Monetary Units Act 2004 (Vic)—Notice under Section 6, Fixing the Value of a Fee Unit and a Penalty Unit' in Victoria, *Victoria Government Gazette*, No G 14, 4 April 2019, 544.

32 See Appendix K for a list of comparative offences and penalties in other Australian jurisdictions.

33 Consultation 10 (Judicial College of Victoria).

34 Consultation 4 (Juries Commissioner, Victoria).

35 *Ibid.*

Commission’s conclusions: increase the penalty for making enquiries about trial matters

- 9.28 Given changing juror behaviour and the potential consequences, the penalty for the breach of section 78A is too low. The current penalty level does not reflect the seriousness of the potential consequences, which include discharging the jury or retrial.³⁶
- 9.29 The penalty should be increased to align with the maximum penalties for breach of other juror offences under the Act. That is, a maximum of 600 penalty units or five years imprisonment.
- 9.30 Offences are only one part of managing juror behaviour. There must also be juror education and other measures to manage juror behaviour.

Recommendation

- 68 The penalty for breach of section 78A of the Juries Act should be amended to align with the penalties for breach of sections 77 and 78 of the Act, with the effect that the maximum penalty for breach of section 78A should be increased to 600 penalty units or five years imprisonment.

Investigating and prosecuting offences under the Juries Act

- 9.31 The Juries Act provides several ways to deal with juror offences under the Act. For example, the Act provides for:
- *prosecution as an indictable offence*—if information or images are published that identify or can identify a person attending for jury service³⁷
 - *prosecution as an indictable offence, but only with the consent of the DPP*—if a person publishes, or a juror discloses, the deliberations of a jury³⁸
 - *examination on oath by a judge*—if a juror or panel member makes enquiries about trial matters³⁹
 - *imposition of a fine by a court ‘in a summary way’*—if a person fails to attend for jury service, answer a question or produce a document, or if a person gives false or misleading answers, or refuses to be sworn or make an affirmation.⁴⁰
- 9.32 In practice, the DPP has no investigative powers, so any referral to the DPP usually requires a request to Victoria Police to investigate.
- 9.33 The Juries Act provides that the DPP or the Juries Commissioner may request the Chief Commissioner of Police to investigate a complaint about a disclosure of or publication about a jury deliberation. However, if a complaint is made to the Juries Commissioner during a trial, it must be referred to the trial judge.⁴¹
- 9.34 The Juries Commissioner advised that, in relation to jurors making enquiries about trial matters, the procedure for investigating and prosecuting is ad hoc. Usually the Juries Commissioner, at the request of a judge, asks the police to investigate the matter. The Juries Commissioner also told the Commission that, in a recent case, a judge had referred the matter directly to the DPP.⁴²

36 *Benbrika v The Queen* [2010] VSCA 281 [214], (2010) 29 VR 593.
 37 *Juries Act 2000* (Vic) s 77(4).
 38 *Ibid* ss 78(10), (11).
 39 *Ibid* ss 78A, 78B.
 40 *Ibid* s 81.
 41 *Ibid* s 78.
 42 Submission 25 (Juries Victoria).

Commission's conclusions: clarify the Juries Act

- 9.35 To ensure greater clarity and certainty, the Act should be amended to simplify the processes for investigating and prosecuting juror offences under the Juries Act. It should specify more clearly who is empowered to undertake such investigations and prosecutions.
- 9.36 As Appendix K illustrates, the Juries Act creates offences for persons other than jurors and specifies a range of procedures for these different offences. Simplifying the procedures for investigation and prosecution and making them more consistent requires consideration of the Juries Act as a whole. This has implications for the resourcing of the agencies involved.
- 9.37 The Commission does not make any recommendations beyond requiring that the Act specify who can investigate and prosecute juror offences and, where an investigation by Victoria Police is requested, Victoria Police must report the outcome of their investigation to the requesting agency. Other stakeholders did not address this issue, which requires more consultation and consideration.

Recommendation

- 69 The Juries Act should be amended to expressly state who can investigate and bring a prosecution for juror offences under the Act, and to require that, where an investigation by Victoria Police is requested, Victoria Police must report to the requesting agency the outcome of their investigation.

Modernising restrictions on identifying jurors

- 9.38 Stakeholders identified a need to modernise the restriction in section 77 of the Juries Act that prohibits a person from identifying a person as a juror. These restrictions needed to reflect the reality of modern life, in which most people are active on social media.⁴³
- 9.39 As the Tasmania Law Reform Institute has noted, jurors are 'the person on the street. It follows that they tweet, blog, post, share, message, chat, like, follow and comment like everyone else'.⁴⁴
- 9.40 Stakeholders identified several risks that arose from this changed reality:
- Jurors may self-identify themselves by, for example, posting selfies of themselves attending jury service.⁴⁵
 - Jurors may be easier to locate online, creating a greater risk that jurors will be identified and cyberstalked or otherwise interfered with.⁴⁶

43 See generally Tasmania Law Reform Institute, *Jurors, Social Media and the Right of an Accused to a Fair Trial* (Issues Paper No 30, August 2019) 14–16 [1.3.1]–[1.3.9].

44 Ibid 18 [1.4.4].

45 Submission 25 (Juries Victoria).

46 Consultation 2 (Academics on juror decision making and juror contempt).

Commission's conclusions: prohibit jurors from self-identifying

- 9.41 To ensure the identity of jurors is protected, the Juries Act should be amended to prohibit jurors (including persons called for jury service but not empanelled and released and persons who have previously attended for jury service or served as a juror) from self-publishing information or images of themselves which identify them as attending jury service; for example, by posting images of themselves in a jury room or the jury pool room. Jurors should be given early and clear advice about the prohibition and the reasons for it.
- 9.42 As to the risk of cyberstalking, the Commission considers this a question of interference. Such conduct can be dealt with through the laws of contempt (for example, as conduct that interferes with those involved in court proceedings discussed in Chapter 4). In serious cases and consistent with the Commission's recommendations in Chapter 5, it may be more appropriate for such conduct to be dealt with as a criminal offence under the relevant provisions of the *Crimes Act 1958* (Vic).

Recommendation

- 70 Section 77 of the Juries Act should be amended to expressly prohibit jurors (including persons called for jury service but not empanelled and released, and persons who have previously attended for jury service or served as a juror) from self-publishing information about or images of themselves that can identify them as a person attending for jury service.

Managing the impact of the internet on jurors

- 9.43 The internet has significantly changed how news is produced, circulated and accessed. Traditional media no longer dominates. Content is published and shared across different media and platforms by many more people both within and outside Victoria.⁴⁷
- 9.44 These changes affect how jurors understand evidence and directions in the courtroom.⁴⁸
- 9.45 These changes make it more difficult to protect jurors from prejudicial publicity. As discussed in Chapter 10, these changes make restrictions such as sub judice contempt less effective.
- 9.46 Courts and researchers are increasingly challenging the assumption that jurors need to be protected from prejudicial publicity.⁴⁹ The courts are increasingly assuming that juries follow judicial directions and make decisions based on the evidence before them, even if they have been exposed to irrelevant or prejudicial material.⁵⁰
- 9.47 This part of the chapter considers ways to help jurors manage the risks of being exposed to prejudicial material.⁵¹ Chapter 10 discusses other ways for courts and the law to manage jurors who have been exposed to such material.

47 Victorian Law Reform Commission, *Contempt of Court* (Consultation Paper, May 2019) 101–2 [7.130]–[7.133].

48 The effect of these changes is discussed further in Victorian Law Reform Commission, *Contempt of Court* (Consultation Paper, May 2019) 103–4 [7.139]–[7.143].

49 For further discussion, see *ibid* 97–9 [7.106]–[7.115].

50 *Ibid* 97 [7.104]. As discussed in Chapter 1, the Commission has assumed that the laws of evidence, which determine when prejudicial evidence is inadmissible, will continue to apply.

51 See *ibid* 107–11 [7.166]–[7.169].

The juror oath

- 9.48 Jurors take an oath or affirmation to ‘faithfully and impartially’ try the issues before them and to ‘give a true verdict according to the evidence’.⁵² However, there is still a risk that jurors may independently access information about trials, and may make decisions based on information not presented and tested in court.⁵³
- 9.49 While this risk is not new, the risk has become greater in the age of the internet. It is now much easier for jurors to search for information about cases. Material is easily accessed and shared on social media,⁵⁴ so jurors may be exposed to prejudicial material even without searching for it.
- 9.50 The Juries Act prohibits jurors from making enquiries about trial matters and from disclosing information about deliberations to people outside the jury.⁵⁵
- 9.51 The consultation paper identified that one way to reinforce these prohibitions would be to require jurors to swear or affirm that they would not make enquiries about trial matters or disclose information about jury deliberations.⁵⁶ This was recommended by the Law Commission of England and Wales (Law Commission E&W) and the New Zealand Law Commission (NZ Commission).⁵⁷

Responses

- 9.52 Stakeholders divided on this proposal. The Commission was told by the Supreme Court that amending the oath and affirmation was ‘not considered likely to be an effective means of reinforcing obligations on the jury’. Rather, engagement with the jury is ‘a better means of reinforcing the obligation than a recitation of additional words’.⁵⁸
- 9.53 In contrast, Victoria Legal Aid submitted that this proposal was ‘a practical approach’ that was ‘unlikely to have negative consequences’.⁵⁹ Academics with expertise in juror decision making suggested that different methods may influence different jurors’ behaviour in different ways and swearing a direct oath not to conduct research may, for some jurors, create a more binding obligation.⁶⁰

Commission’s conclusions: extend the juror oath and affirmation

- 9.54 There is merit in extending the jurors’ oath and affirmation to a promise not to make independent enquiries about trial matters and not to disclose information about deliberations.
- 9.55 As the Law Commission E&W and the NZ Commission have concluded, this could reinforce the prohibitions and create a greater sense of obligation for at least some jurors.

Recommendation

- 71 The wording of the juror oath and affirmation in the Juries Act should be amended to specify that jurors should not independently conduct trial-related research or disclose information about deliberations.**

52 *Juries Act 2000* (Vic) s 42, sch 3.

53 Victorian Law Reform Commission, *Contempt of Court* (Consultation Paper, May 2019) 63 [5.24].

54 *Ibid* [5.25]–[5.26].

55 *Juries Act 2000* (Vic) s 78.

56 Victorian Law Reform Commission, *Contempt of Court* (Consultation Paper, May 2019) 66 [5.44].

57 Law Commission (England and Wales), *Contempt of Court (1): Juror Misconduct and Internet Publications* (Report No 340, December 2013) 116 [5.35]; Law Commission (New Zealand), *Reforming the Law of Contempt of Court: A Modern Statute* (Report No 140, May 2017) 78 [4.41]–[4.45].

58 Submission 29 (Supreme Court of Victoria).

59 Submission 11 (Victoria Legal Aid).

60 Consultation 2 (Academics on juror decision making and juror contempt).

Jury directions and questions from the jury

- 9.56 Trial judges give juries directions to help jurors understand their role, including the need to make decisions based only on the evidence before them. Jury directions are also often used to manage the impact of prejudicial publicity in criminal trials.⁶¹
- 9.57 As discussed in the consultation paper, there are concerns that:
- jurors do not always understand jury directions⁶²
 - jurors sometimes ignore judicial directions and carry out their own research⁶³
 - jurors may come across information unintentionally⁶⁴
 - jury directions may be counter-productive, by alerting jurors to media which they seek out.⁶⁵
- 9.58 The Law Commission E&W and the NZ Commission recommended a range of measures to manage these risks. These included:
- updating jury warnings and directions to take account of technological developments and providing specific examples⁶⁶
 - consistently and frequently explaining to jurors why they should make their decisions based only on the evidence before them and not conduct their own research⁶⁷
 - making it clearer to juries in directions and in legislation that jurors can ask questions and how they should do so.⁶⁸
- 9.59 The Judicial College of Victoria publishes bench books and model jury directions, including information on how to direct juries to ask questions of the judge.⁶⁹ The *Criminal Charge Book* specifies that information about matters such as note taking and asking questions should be provided to a jury,⁷⁰ and that the role of the foreperson includes asking questions of the judge.⁷¹
- 9.60 Court Services Victoria has recently piloted a *Jury Guide for Criminal Trials*, which helps jury members fulfil their role. The Guide notes in relation to the judge's role:
- If you have a question you may discuss it with the other members of your jury (as they may know the answer) or, you may ask me [the presiding judge]. To ask me [the presiding judge] a question, please provide the question in writing (if possible) to my staff to give to me. If the question is urgent, bring it to the attention of my staff as soon as possible.⁷²
- 9.61 However, there is limited information in both the *Criminal Charge Book* and the Jury Guide about the kinds of question that can be asked or when the judge should give juries the opportunity to ask such questions. As the Juries Commissioner told the Commission, while members of a jury pool are told they can ask questions, they are not given specific

61 The role of jury directions is discussed further in Victorian Law Reform Commission, *Contempt of Court* (Consultation Paper, May 2019) 109 [7.180]–[7.183].

62 Law Commission (New Zealand), *Juries in Criminal Trials Part Two—A Summary of the Research Findings* (Preliminary Paper No 37, November 1999) [7.45]; New South Wales Law Reform Commission, *Contempt by Publication* (Report No 100, June 2003) 29 [2.50]; Jacqueline Horan, *Juries in the 21st Century* (The Federation Press, 2012) 73, 186.

63 See, eg, *Benbrika v The Queen* [2010] VSCA 281 [214]; *Martin v The Queen* [2010] VSCA 153 [57]–[58], (2010) 29 VR 579.

64 Elizabeth Greene and Jodie O'Leary, 'Ensuring a Fair Trial for an Accused in a Digital Era: Lessons for Australia' in Patrick Keyzer, Jane Johnson and Mark Pearson (eds), *The Courts and the Media: Challenges in the Era of Digital and Social Media* (Halstead Press, 2012) 116. Ibid citing V Gordon Rose and James R P Ogloff, 'Challenge for Cause in Canadian Criminal Jury Trials: Legal and Psychological Perspectives' (2002) 46 *Criminal Law Quarterly* 210, 236.

66 Law Commission (England and Wales), *Contempt of Court (1): Juror Misconduct and Internet Publications* (Report No 340, December 2013) 113 [5.24].

67 Law Commission (New Zealand), *Reforming the Law of Contempt of Court: A Modern Statute* (Report No 140, May 2017) 79 [4.52].

68 Victorian Law Reform Commission, *Contempt of Court* (Consultation Paper, May 2019) 67 [5.49]–[5.50]; see also Law Commission (England and Wales), *Contempt of Court (1): Juror Misconduct and Internet Publications* (Report No 340, December 2013) 117 [5.39]; Law Commission (New Zealand), *Reforming the Law of Contempt of Court: A Modern Statute* (Report No 140, May 2017) 80 [4.57].

69 Victorian Law Reform Commission, *Contempt of Court* (Consultation Paper, May 2019) 67 [5.51].

70 Judicial College of Victoria, '1.1 Introductory Remarks', *Criminal Charge Book* (Online Manual, 15 June 2007) <<https://www.judicialcollege.vic.edu.au/eManuals/CCB/index.htm#1262.htm>>.

71 Judicial College of Victoria, '1.3.1 Charge: Selecting a Foreperson', *Criminal Charge Book* (Online Manual, 14 November 2006) <<https://www.judicialcollege.vic.edu.au/eManuals/CCB/index.htm#1275.htm>>.

72 Court Services Victoria, *Jury Guide for Criminal Trials* (2019) 5.

guidance on the timing or process for doing so during the trial.⁷³

- 9.62 A report prepared for the Victorian Department of Justice recommended that juries be directed not to research trial matters. The directions should include references to social media, be written in plain language, and should clearly explain the consequences of not following the directions.⁷⁴
- 9.63 Accordingly, the consultation paper asked whether current jury directions adequately instructed juries on their obligations and what reforms were required.⁷⁵

Responses

- 9.64 Juries Victoria submitted that most jurors found it hard to understand why they should not research trial matters, and that the instruction was 'inconsistent with contemporary human behaviour, where almost every piece of information is questioned'.⁷⁶ This view was supported by academics with expertise in juror decision making and juror behaviour, who pointed out that such directions are 'contrary to how [jurors] have been taught to learn, evaluate information and problem-solve'.⁷⁷
- 9.65 The Commission was told that 'greater attention should be paid to improving the content, delivery and reinforcement of "do not research" instructions to jurors'.⁷⁸ Jury directions should reflect how people engage with information and the internet, and be realistic about the risks of exposure to prejudicial material.⁷⁹
- 9.66 Stakeholders generally supported encouraging jurors to ask questions.⁸⁰ The Supreme Court said that this approach acknowledged 'the natural urge of jurors committed to the fact-finding task to seek out answers, but directs it in an appropriate way'.⁸¹
- 9.67 Academics with expertise on juror decision making stated it was better to bring misunderstandings and misconceptions to light in the courtroom. Even if a judge could not answer the question, this could help the jury to understand their task.⁸² Jury questions can reveal fundamental misunderstandings or errors that can be addressed by the judge.⁸³

Commission's conclusions: more guidance for jurors and judges

- 9.68 There is a need for more specific and detailed guidance for jurors, and judges on the kinds of question that jurors can ask during the trial and the timing of them. The guidance should include examples of questions. Jurors should be given regular opportunities to ask questions during a trial.
- 9.69 If the law made clear that jurors could ask the judge questions, it would help dissuade jurors from looking outside the courtroom for answers to their questions. Changes to the Juries Act should enable the jury foreperson, on behalf of jurors, to ask questions of the judge.

73 Consultation 4 (Juries Commissioner, Victoria).

74 Jane Johnston et al, *Juries and Social Media: A Report Prepared for the Victorian Department of Justice* (Report, January 2013) Recommendation 1.

75 Victorian Law Reform Commission, *Contempt of Court* (Consultation Paper, May 2019) 68, Question 23.

76 Submission 25 (Juries Victoria).

77 Consultation 2 (Academics on juror decision making and juror contempt).

78 Submission 6 (Professors Mark Pearson, Patrick Keyzer, Anne Wallace and Associate Professor Jane Johnston).

79 Consultation 11 (Professor James Ogloff).

80 As well as those cited below, see Submission 11 (Victoria Legal Aid).

81 Submission 29 (Supreme Court of Victoria).

82 Consultation 2 (Academics on juror decision making and juror contempt).

83 Consultation 11 (Professor James Ogloff).

Recommendations

- 72 The Juries Act should be amended to expressly enable the jury foreperson to ask questions in writing of the presiding judge on behalf of a juror or jurors.
- 73 The Judicial College of Victoria should develop further guidance materials and, in consultation with the courts, provide specific training for judicial officers on:
- how and when to prompt a jury to ask questions of the presiding judge during a trial
 - how to encourage jurors to ask questions more often, including examples of the types of question on which juries may seek answers.

Educating jurors and judges about social media

- 9.70 Potential jurors are given training and information about their role by Juries Victoria before they are empanelled on a jury.
- 9.71 The Juries Commissioner advised that, when potential jurors are summoned to a juror pool room, they are provided with an orientation that combines short videos, a verbal presentation, and questions and answers. At this time, they are formally advised of the prohibition on making enquiries about trial matters.⁸⁴
- 9.72 Once jurors are empanelled, they are also given directions by judges. The Judicial College of Victoria has published relevant guidance materials, including model jury directions.⁸⁵ Such materials are used by the judge at his or her discretion, because 'they are best placed to determine what is appropriate and necessary in each case'.⁸⁶
- 9.73 The Judicial College of Victoria does not provide judicial officers with training on online news and information, including social media, other than as part of the program for newly appointed officers.⁸⁷
- 9.74 The Victorian Government has recently piloted a Jury Guide for jurors to refer to during a trial. This explains why a jury must decide the case on the evidence in the court, noting that a juror must not 'research the case or the law on the internet'⁸⁸ or 'make your own inquiries about the case or accused, or conduct your own legal research (do not use Google, the internet, Facebook, Twitter, social media of any sort, or look anywhere else)'.⁸⁹
- 9.75 The consultation paper asked whether there was any need to improve the training and guidance given jurors and potential jurors about their functions and duties.⁹⁰ It also asked whether there was a need to provide particular groups, such as judicial officers and jurors, with education about the potentially negative impacts of social media on the administration of justice.⁹¹

84 The documents received before a person attends a jury pool room also advise potential jurors to visit the Juries Victoria website for further information: Submission 25 (Juries Victoria).

85 Judicial College of Victoria, *Criminal Charge Book* (Online Manual, 2019) <<https://www.judicialcollege.vic.edu.au/eManuals/CCB/index.htm#19193.htm>>.

86 Judicial College of Victoria, 'How to Use This Publication', *Criminal Charge Book* (Online Manual, 15 June 2007) <<https://www.judicialcollege.vic.edu.au/eManuals/CCB/index.htm#1262.htm>>.

87 Consultation 10 (Judicial College of Victoria).

88 Court Services Victoria, *Jury Guide for Criminal Trials* (2019) 8.

89 Ibid 11.

90 Victorian Law Reform Commission, *Contempt of Court* (Consultation Paper, May 2019) 68, Question 24.

91 Ibid 111, Question 30.

Responses

- 9.76 Stakeholders told the Commission that jurors ‘commonly’ do not understand that they need to evaluate the evidence before them,⁹² and that jury education had a ‘very important role’.⁹³ Jurors needed to be ‘informed not only about what they must do and what they cannot do’, but also about why those rules exist.⁹⁴
- 9.77 The County Court supported more training of jurors and judicial officers, including encouraging juries to ask questions.⁹⁵
- 9.78 Juries Victoria emphasised that the messaging must be ‘seamless and consistent’.⁹⁶
- 9.79 Other stakeholders emphasised the need for more training on the potentially negative impacts of social media. Media academics emphasised that social media posed ‘intense challenges’,⁹⁷ and Australia’s Right to Know coalition submitted that jurors should be advised of the need to manage their access and use of social media.⁹⁸ As noted in Chapter 10, research has demonstrated that social media may also have a cumulative effect of prejudicing a trial.⁹⁹
- 9.80 Victoria Legal Aid suggested there may be benefit in training judicial officers about the ‘speed and reach of social media’.¹⁰⁰ These views were echoed by the Commercial Bar Association Media Law Section Working Group, which considered that such training should extend to the broader community, including potential jurors and judicial officers.¹⁰¹

Commission’s conclusions: more training needed

- 9.81 There are already significant efforts to better inform jurors. However, there is a gap in training jurors about the potential impact of online news and information, including social media.
- 9.82 There is a need for further training and guidance for both judges and jurors on the use and potentially negative impacts of online news and information, including social media, on the administration of justice. This should include information about the cumulative impacts of such media.

Recommendation

- 74 The Judicial College of Victoria and the Juries Commissioner should develop further training and guidance for judges and jurors on the use and potentially negative impacts of social media on the administration of justice.**

92 Consultation 11 (Professor James Ogloff).
93 Submission 29 (Supreme Court of Victoria).
94 Ibid.
95 Submission 31 (County Court of Victoria).
96 Submission 25 (Juries Victoria).
97 Submission 6 (Professors Mark Pearson, Patrick Keyzer, Anne Wallace and Associate Professor Jane Johnston).
98 Submission 27 (Australia’s Right to Know coalition).
99 Submission 8 (Rachel Jane Hews).
100 Submission 11 (Victoria Legal Aid).
101 Submission 18 (Commercial Bar Association Media Law Section Working Group).

Sub judice contempt: restricting the publication of prejudicial information

- 139** What is sub judice contempt and what is its purpose?
- 140** Is sub judice still relevant?
- 141** Other approaches
- 144** Should sub judice be defined in the proposed Act?
- 145** Defining sub judice contempt—the test for liability
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- 158** What should be the procedure and penalties for sub judice contempt?
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10. Sub judice contempt: restricting the publication of prejudicial information

Overview

- The law protects a person's right to a fair hearing by preventing people from publishing information that may improperly influence a jury or witness. This is known as sub judice contempt.
 - It is increasingly difficult to protect jurors from information in an online age. There should be more emphasis on other ways of managing the risk of jurors being exposed to prejudicial material.
 - Sub judice contempt is still relevant. In an age where everyone can be a publisher, it is important to define sub judice contempt in legislation, so the law is clear, certain and accessible.
 - Sub-judice contempt should be renamed as contempt by publishing material prejudicial to legal proceedings.
 - The proposed Act should give greater weight to freedom of expression. There should be a defence of reasonable care and clearer guidance about how to balance the risk to a fair trial against other matters in the public interest.
 - The proposed Act should prevent a person from publishing evidence not heard by a jury or ruled inadmissible while the matter is before the court.
 - The general procedure set out in Chapter 5 should apply to sub judice contempt.
 - The maximum penalty for sub judice contempt for an individual should be two years imprisonment.
-

What is sub judice contempt and what is its purpose?

- 10.1 A person may commit contempt by publishing material which, when it is published, has a 'real and definite tendency' to prejudice legal proceedings.¹ This is known as sub judice contempt.
- 10.2 Sub judice contempt is most common in criminal proceedings, which are the focus of this chapter. However, it may also occur in civil and other types of legal proceedings, which are discussed later in the chapter.²
- 10.3 Sub judice contempt is an exception to the principles of freedom of expression and open justice. These principles normally require that the public knows and can discuss information before and about the courts. Public scrutiny keeps judges accountable and helps the law reflect the values of a community.
- 10.4 Freedom of expression is a fundamental human right. It includes the right to receive information and ideas of all kinds. A free press is one of the cornerstones of a democratic society.³
- 10.5 The right to a fair hearing includes the right to a public hearing,⁴ so people can see that the hearing has been run fairly and understand why and how a decision has been reached, even if they do not agree with the decision.⁵
- 10.6 Such purposes, however, cannot be served if the hearing itself is not fair. A fair hearing means a jury must make its decision based on the evidence before it and by applying legal rules, including the presumption of innocence.
- 10.7 Sub judice contempt protects against these risks. However, it is only one of the ways in which the law restricts the publication of information. A court also has the power to order that particular kinds of information should not be published about or during court proceedings (suppression orders). Former Court of Appeal Justice Frank Vincent has recently reviewed the main legislation governing suppression orders, the *Open Courts Act 2013* (Vic).⁶
- 10.8 A court can order published material to be taken down (take-down orders). (See Chapter 14.)
- 10.9 Legislation also makes it a crime to publish certain kinds of information about and during court proceedings. An example is the *Judicial Proceedings Reports Act 1958* (Vic) (see Chapter 12).⁷ That Act limits the information that can be published about pre-trial proceedings.⁸ It also protects interests beyond that of a fair hearing, such as the privacy of victims.
- 10.10 This chapter discusses five questions:
- Is sub judice still relevant?
 - Should sub judice be defined as a category of conduct that can be dealt with as a contempt in the proposed Act?
 - How should sub judice contempt be defined?
 - What should be the procedure and penalties for sub judice contempt?
 - Should sub judice contempt apply to civil proceedings?

1 *John Fairfax & Sons Pty Ltd v McRae* (1995) 93 CLR 351, 372.

2 For example, sub judice contempt can arise where publications may create risks that witnesses in a coronial inquest may change their testimony: see, eg, *A-G (NSW) v Mirror Newspapers Ltd* [1980] NSWLR 374.

3 United Nations Human Rights Committee, *General Comment No. 34 (Article 19: Freedoms of Opinion and Expression)*, UN Doc CCPR/C/GC/34 (12 September 2011) [11], [13].

4 In Victoria, these rights are set out in *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 24 (right to a fair hearing).

5 For a full discussion, see Frank Vincent, *Open Courts Act Review* (Report, September 2017) Chs 6, 7 <<https://engage.vic.gov.au/open-courts-act-review>>.

6 *Ibid.* The Victorian Government has supported most of those recommendations, including that this inquiry be conducted.

7 See also *Serious Sex Offenders (Detention and Supervision) Act 2009* (Vic) s 182 (although publication of the prohibited information can be authorised by a court); *Children, Youth and Families Act 2005* (Vic) s 534 (although publication of the prohibited information can be authorised by a court).

8 *Judicial Proceedings Reports Act 1958* (Vic) s 3(1)(c).

Is sub judice still relevant?

- 10.11 The law of sub judice contempt assumes that:
- Media can divert a jury from making their decision on the evidence before them.
 - Jurors will continue to be influenced by prejudicial material, even if the judge directs them to ignore it.
 - Jurors find this material through traditional media such as newspapers, which can be controlled through preventing publication or take-down orders.
- 10.12 These assumptions should be questioned. As discussed in Chapter 9, there is conflicting judicial opinion and research about whether jurors can and should be trusted to follow directions and apply the law, regardless of prejudicial material.⁹
- 10.13 More importantly, people publish, share and consume information online. Anyone can now publish and share information, and jurors can find and read it readily, including old material.¹⁰
- 10.14 It has become difficult to prevent people overseas from publishing prejudicial information accessible in Victoria. (See Chapter 13.)
- 10.15 The pressure of online publishing has changed traditional media. The Australian Competition and Consumer Commission (ACCC) stated in a recent report that media organisations have fewer and less experienced reporters. Fewer reporters and decreasing profits have led to fewer stories being published in the public interest. Publishers and journalists are also under greater pressure to publish quickly and continuously.¹¹
- 10.16 Meanwhile, online intermediaries or digital platforms, such as Google and Facebook, are becoming the main ways in which people consume news.¹² (See Chapter 13.)
- 10.17 These changes affect the way jurors understand and receive information. If sub judice contempt can no longer control the flow of information, it may no longer be useful.

Responses

- 10.18 The consultation paper asked whether sub judice contempt should be retained.¹³ Stakeholders broadly agreed that the law was still important and should be retained.¹⁴ As Dr Denis Muller argued:
- The care taken by Australian courts to ensure that the presumption of innocence is protected and that juries arrive at their verdicts based on admissible evidence heard in court represents a protection for individual liberties that is of the first importance.¹⁵
- 10.19 The courts emphasised that even though jurors are true to their oath and follow the directions they are given, the 'law recognises that some information has a tendency to create a cognitive bias that is difficult to overcome on a subconscious level'.¹⁶
- 10.20 Researchers on jury decision making stated it was important to help jurors by shielding them, where possible, from information that prejudices a fair hearing.¹⁷

9 Victorian Law Reform Commission, *Contempt of Court* (Consultation Paper, May 2019) 97–9 [7.103]–[7.115].

10 Ibid 101–2 [7.130]–[7.133].

11 For a detailed discussion, see Australian Competition & Consumer Commission, *Digital Platforms Inquiry* (Final Report, June 2019) Ch 6; see also Submission 17 (Dr Denis Muller).

12 Australian Competition & Consumer Commission, *Digital Platforms Inquiry* (Final Report, June 2019) 51–4.

13 Victorian Law Reform Commission, *Contempt of Court* (Consultation Paper, May 2019) 111, Question 27.

14 Submissions 11 (Victoria Legal Aid), 17 (Dr Denis Muller), 18 (Commercial Bar Association Media Law Section Working Group), 20 (Criminal Bar Association), 22 (Law Institute of Victoria), 23 (MinterEllison Media Group), 27 (Australia's Right to Know coalition), 28 (Director of Public Prosecutions), 29 (Supreme Court of Victoria), 31 (County Court of Victoria); Consultation 5 (Media lawyers and academics on contempt by publication). However, there was some dissent: see Submission 2 (David S Brooks).

15 Submission 17 (Dr Denis Muller).

16 Submissions 29 (Supreme Court of Victoria), 31 (County Court of Victoria).

17 Consultation 2 (Academics on juror decision making and juror contempt),

- 10.21 Most stakeholders still saw value in sub judge contempt, despite information ‘now spread[ing] across the internet like wildfire’.¹⁸ However, they disagreed about how great that value was.¹⁹
- 10.22 The Director of Public Prosecutions (DPP) and Dr Denis Muller both observed a greater trust in traditional media, which still had a greater reach, and so the law still served a purpose.²⁰
- 10.23 Stakeholders also said that although few cases attract international coverage, it was challenging to enforce the law against overseas publications.²¹ The issue of enforcing sub judge contempt outside Victoria is discussed in Chapter 13.

Commission’s conclusions: retain sub judge contempt

- 10.24 There is still value in retaining sub judge contempt. While jurors are and should be trusted to perform their role, they inevitably have their own biases. In this context, the law of sub judge contempt still aids jurors to perform their vital task.
- 10.25 While controlling information is increasingly difficult, sub judge contempt focuses on the publications posing the greatest risk to a trial. Even though publishing can be global, the greatest media interest will still be local. The greatest risks will come from widespread distribution by credible media organisations rather than social media.
- 10.26 However, there is a need to respond to changing media by adding tools that manage the risks to a fair hearing. In the age of social media, it is no longer realistic to expect sub judge contempt to control the risks of prejudice.

Other approaches

- 10.27 Chapter 9 deals with measures to limit the risk of jurors researching or disclosing information that could undermine a fair hearing. In that chapter, the Commission recommends improving the information and guidance given to juries. It also recommends that jurors and judges should be educated on the use and risks of social media. Finally, it recommends making it clear in legislation that jurors can ask questions of the judge during the trial, so they do not feel they need to do their own research.
- 10.28 Even if jurors do not research or disclose prejudicial information, such information can come to them without their doing anything. The consultation paper asked whether there was a need for more use of other approaches to reduce and deal with this risk. These approaches include questioning jurors about their exposure to information, using jury directions, and legal education about social media and sub judge contempt.²²
- 10.29 The consultation paper referred to other ways of managing the risk, including postponing a trial, changing its venue, sequestering a jury, or having the trial heard by a judge rather than a jury. These options are used in the United States.²³
- 10.30 This inquiry has not considered the option of judge-alone trials, as the Victorian Government is currently reviewing their feasibility.²⁴

18 Submission 23 (MinterEllison Media Group).

19 Some considered there was an argument it was redundant: Submission 23 (MinterEllison Media Group).

20 Submissions 17 (Dr Denis Muller), 28 (Director of Public Prosecutions).

21 Submissions 6 (Professors Mark Pearson, Patrick Keyzer, Anne Wallace and Associate Professor Jane Johnston), 17 (Dr Denis Muller), 20 (Criminal Bar Association); Consultations 2 (Academics on juror decision making and juror contempt), 17 (Victorian Bar).

22 Victorian Law Reform Commission, *Contempt of Court* (Consultation Paper, May 2019) 107–11 [7.166]–[7.196].

23 Ibid 107 [7.169]–[7.170].

24 Farrah Tomazin and Sumeyya Ilanbey, ‘Andrews Government Considers “Judge-Only” Trials for Criminal Cases’, *The Age* (online, 13 December 2018) <www.theage.com.au/national/victoria/andrews-government-considers-judge-only-trials-for-criminal-cases-20181213--p50m5u.html>.

Responses

- 10.31 Although most stakeholders agreed that sub judice contempt should remain, some supported emphasising other options.²⁵ Some said it might be safer to assume that jurors had been exposed to some prejudicial information.²⁶
- 10.32 Victoria Legal Aid supported courts being given a suite of powers, including take-down powers and the power to postpone or stay trials.²⁷ In some very high-profile cases and in certain categories of crime and offender it may not be possible to guarantee a fair trial and there needed to be a way to protect the integrity of the criminal trial process.²⁸
- 10.33 The DPP said preventative measures were an important way of protecting a fair trial and it was easier to prevent a juror being exposed than to ‘cure’ the prejudice later.²⁹
- 10.34 Most stakeholders agreed that the intensive style of pre-trial questioning used in the United States would not suit Australia.³⁰ MinterEllison submitted that it was worth considering as an alternative.³¹
- 10.35 The Commercial Bar Association Media Law Section Working Group (CommBar—Media Law Section) considered it better for judges to put questions to potential jurors after hearing submissions from counsel on the form of the question.³² Australia’s Right to Know coalition (ARTK) supported jurors completing pre-trial questionnaires about their media consumption and exposure to prejudicial material.³³
- 10.36 In consultations, members of the Bar said there was a role for specific questions about exposure to particularly prejudicial material, and this type of questioning already occurred on an ad hoc basis. They considered that there would be some value in regularising this procedure.³⁴ The Juries Commissioner said that judges had used juror questionnaires as part of the empanelment process in high-profile trials.³⁵
- 10.37 Jurors are already able to say they know of the case or parties through the current process of excusing jurors, although this relies on jurors knowing of and choosing to disclose the risk of prejudice.³⁶
- 10.38 The Supreme Court noted that having to exclude people from the jury because of their exposure to prejudicial material can distort jury composition. One of the aims of sub judice contempt is to ensure the jury pool reflects a broad cross-section of the community and is not narrowed by exclusions caused by pre-trial publicity.³⁷
- 10.39 Stakeholders also supported greater use of jury directions³⁸ and more education of jurors and judges in the use and risks of social media.³⁹
- 10.40 Some stakeholders emphasised that jurors should be trusted more to act in accordance with jury directions and referred to the existing prohibitions on jury research.⁴⁰ The CommBar—Media Law Section supported further research on the effect of publicity on potential jurors.⁴¹ Others, including the Supreme Court, stated their strong faith and respect in jurors, but observed:

25 Submissions 18 (Commercial Bar Association Media Law Section Working Group), 23 (MinterEllison Media Group).
26 Consultation 17 (Victorian Bar).
27 Submission 11 (Victoria Legal Aid).
28 Consultation 6 (Victoria Legal Aid).
29 Submission 28 (Director of Public Prosecutions).
30 Submissions 11 (Victoria Legal Aid), 31 (County Court of Victoria); Consultations 4 (Juries Commissioner, Victoria), 17 (Victorian Bar).
31 Submission 23 (MinterEllison Media Group).
32 Submissions 18 (Commercial Bar Association Media Law Section Working Group), 23 (MinterEllison Media Group), 27 (Australia’s Right to Know coalition).
33 Submission 27 (Australia’s Right to Know coalition).
34 Consultation 17 (Victorian Bar).
35 Consultation 4 (Juries Commissioner, Victoria).
36 Consultation 17 (Victorian Bar).
37 Submission 29 (Supreme Court of Victoria).
38 Submissions 20 (Criminal Bar Association), 23 (MinterEllison Media Group), 27 (Australia’s Right to Know coalition).
39 Submissions 18 (Commercial Bar Association Media Law Section Working Group), 20 (Criminal Bar Association), 23 (MinterEllison Media Group).
40 Submission 23 (MinterEllison Media Group).
41 Submission 18 (Commercial Bar Association Media Law Section Working Group).

The essence of matters which are prejudicial is that they have the tendency to assume undue significance in the human reasoning process, be that of a juror or a judge. The cognitive process of excluding prejudicial information from a reasoning process is a difficult one, even for the judiciary.⁴²

- 10.41 The Criminal Bar Association said judges should have the power to postpone a trial, despite this being a costly and significant measure.⁴³
- 10.42 Some also indicated support for judge-alone trials, especially in high-profile cases,⁴⁴ although the DPP observed that in practice the accused person will almost always seek a jury trial.⁴⁵
- 10.43 Finally, several stakeholders pointed to the need to improve the relationship between the media and the courts.⁴⁶

Commission's conclusions: new procedures needed

- 10.44 Although sub judge contempt remains relevant, the challenges posed by online publishing will require greater reliance on other measures. This is a key reason for the recommendations in Chapter 9 for improving jury and judicial education and guidance.
- 10.45 Judges should have a broad range of choices to deal with risks to a fair hearing. As discussed in Chapter 9, this should begin with making sure that jurors understand why they should limit what they read about a trial, and how to deal with any exposure to prejudicial information, including information that is prejudicial but was lawfully published at the time.
- 10.46 It appears that some judges are already asking jurors about their media consumption and exposure to information about the trial. Courts should develop procedures to make this more routine. Courts could, with the help of the Juries Commissioner, develop general questionnaires on media consumption for jurors to complete.
- 10.47 Courts should also develop standard questions for jurors to answer during the excuse process about their exposure to prejudicial material. Judges can then determine if there are ways to manage this risk other than by removing the person from the jury or jury pool (for example, by giving appropriate jury directions).
- 10.48 Courts should develop a procedure for a judge to put more specific written questions to jurors. Courts should use this procedure where, for example, the parties want to find out if the jury has become aware of specific material during the trial that would prejudice the trial. The procedure should require the court to hear the parties on the form of the questions.
- 10.49 Judges should use such procedures before they exercise stronger powers such as issuing a take-down order (see Chapter 14) or moving, postponing or staying a trial.⁴⁷

42 Submission 29 (Supreme Court of Victoria).

43 Submission 20 (Criminal Bar Association).

44 Submissions 11 (Victoria Legal Aid), 27 (Australia's Right to Know coalition).

45 Submission 28 (Director of Public Prosecutions).

46 Submission 17 (Dr Denis Muller); Consultation 5 (Media lawyers and academics on contempt by publication).

47 For example, this may be necessary if the judge considers it necessary to disqualify all or most of the potential jurors.

Recommendation

- 75 The courts should develop procedures to identify and manage the risks of jurors being exposed to prejudicial material before or during a trial, including through:
- the use of juror questionnaires
 - questions to be put in the excuse process
 - jurors answering written questions about their potential exposure.

Should sub judice be defined in the proposed Act?

- 10.50 In Chapter 4, the Commission recommends that legislation should define the law of contempt, including specific categories of contempt. This would make the law clearer, more certain and more accessible, and therefore make it more likely people will comply with the law. That chapter also discusses the general views of stakeholders on whether legislation is needed.
- 10.51 The consultation paper asked whether legislation should replace the common law of sub judice contempt.⁴⁸ This section briefly discusses stakeholder views on this question, focusing on concerns specific to sub judice contempt.

Responses

- 10.52 Stakeholders divided on the value of defining sub judice contempt in statute. Most, including the Supreme Court and the County Court, supported defining sub judice contempt in statute. As discussed in that chapter, legislation would make the law clearer and more accessible, especially for publishers outside the mainstream media.⁴⁹
- 10.53 Media lawyers and academics, and the DPP, preferred the flexibility and responsiveness of the common law. They also considered the common law was clear enough.⁵⁰ However, some supported clarifying the procedure in legislation, or a partial restatement of the common law.⁵¹
- 10.54 Some believed the main problem was not the law, but an increasingly distrustful relationship between the courts and the media. Stakeholders differed as to whether legislation would make the media too cautious or too careless.⁵²

Commission's conclusions: define sub judice contempt in legislation

- 10.55 The Commission recommends defining sub judice contempt in legislation. It is important that this restriction is clearly stated and made accessible to the blogger, tweeter or citizen journalist. Legislation would be especially useful for sub judice contempt, as other types of restriction on publication are set out in legislation or in court orders. The need for flexibility can be managed by careful restatement of the principles.

48 Victorian Law Reform Commission, *Contempt of Court* (Consultation Paper, May 2019) 111, Question 28.
49 Submissions 11 (Victoria Legal Aid), 20 (Criminal Bar Association), 22 (Law Institute of Victoria), 27 (Australia's Right to Know coalition), 29 (Supreme Court of Victoria), 31 (County Court of Victoria).
50 Submissions 18 (Commercial Bar Association Media Law Section Working Group), 23 (MinterEllison Media Group), 28 (Director of Public Prosecutions); Consultation 5 (Media lawyers and academics on contempt by publication). These stakeholders did, however, support some form of change to the existing law, as discussed later in this chapter.
51 Consultation 5 (Media lawyers and academics on contempt by publication).
52 Ibid.

- 10.56 Further, for the reasons discussed below, there should be changes to the law of sub judge contempt to better balance the competing rights and interests. Legislation is needed to limit the scope of liability, and this would be clearer if expressed in terms of a comprehensive statement of the law.

Recommendation

- 76 The proposed Act should recognise ‘sub judge contempt’ as a distinct category of contempt and redefine it as ‘contempt by publishing material prejudicial to legal proceedings’.

Defining sub judge contempt—the test for liability

- 10.57 The High Court has stated the test for sub judge contempt as whether:
- the matter published has, as a matter of practical reality, a tendency to interfere with the due course of justice. The impugned material must exhibit a real and definite tendency to prejudice or embarrass pending proceedings.⁵³
- 10.58 As discussed in the consultation paper, there are four ways in which this test could be made clearer and more accessible in any proposed Act:
- The ‘tendency’ test could be more clearly expressed as a ‘substantial risk’.
 - The legislation could more clearly focus on the potential influence on jurors and witnesses.
 - The legislation could include a list of relevant factors for assessing ‘tendency’.⁵⁴
 - The legislation could include a list of types of information that may be prohibited by sub judge contempt.⁵⁵
- 10.59 Another potential reform, the definition of ‘publication’, is addressed in Chapter 13.
- 10.60 As discussed in the consultation paper, other law reform commissions have proposed similar reforms. The New South Wales Law Reform Commission (NSW Commission) recommended that publication should amount to contempt if it:
- creates a ‘substantial risk’ that jurors or witnesses would become aware of the publication and recall the content of the publication at the relevant time
 - by virtue of those facts, the fairness of the proceedings would be prejudiced.⁵⁶
- 10.61 Similarly, in New Zealand, sub judge contempt legislation requires the court to consider the availability of the publication to jurors. The offence includes a list of factors the court must consider in assessing whether a publication creates a real risk of prejudice to a person’s fair trial. These factors are:
- the likely effect of the publication as a whole
 - whether the publication is likely to be available to jurors or potential jurors
 - the medium in which the publication is presented and its potential accessibility and durability
 - the content of the publication

53 *Hinch v A-G (Vic)* (1987) 164 CLR 15, 34 (Wilson J).

54 These factors include: the content of the publication; the nature of the proceedings that may be affected; the profile of the person making the statement or publishing the material; the size of the publication and the audience; the stage of the legal proceedings; the time between publication and the legal proceedings; and whether prejudicial material has already been published.

55 Victorian Law Reform Commission, *Contempt of Court* (Consultation Paper, May 2019) 85–7 [7.20]–[7.33].

56 New South Wales Law Reform Commission, *Contempt by Publication* (Report No 100, June 2003) Recommendation 2, 71–4 [4.18]–[4.30].

- the character of the publication, including the language and tone
- any other relevant circumstances relating to the likely effect of the publication.⁵⁷

10.62 The legislation provides that, in assessing the content of the publication, the court may, without limitation, consider whether the publication includes certain kinds of prejudicial information, such as information imputing the bad character of the accused.⁵⁸ The legislation prohibits publication of previous convictions once proceedings have commenced for certain offences, and gives a court the power to temporarily suppress other trial-related information.⁵⁹

Responses

- 10.63 Most stakeholders supported clarifying the common law test in legislation.⁶⁰ Several also supported raising the threshold of harm to ‘serious injustice’ or ‘serious interference’.⁶¹ ARTK and others also favoured a new requirement that the injustice could ‘not be overcome by other reasonably available means’.⁶² ARTK favoured a defence that there was no actual interference with the administration of justice.⁶³
- 10.64 Several stakeholders supported defining the test for liability as requiring a ‘substantial risk’ rather than a ‘tendency’.⁶⁴ Some expressly endorsed the statutory test proposed by the NSW Commission.⁶⁵ ARTK favoured the ‘real and definite tendency as a matter of practical reality’.⁶⁶
- 10.65 Some stakeholders supported an inclusive list of factors to be considered in determining the risk posed by a publication, as adopted in New Zealand.⁶⁷
- 10.66 Stakeholders divided on whether to list kinds of information that may be restricted. The Supreme Court said it could be helpful to have a clear rule against disclosure of prior convictions.⁶⁸ The Criminal Bar Association favoured such a list, provided these were only presumed to fall within sub judice contempt.⁶⁹
- 10.67 Other stakeholders did not favour such a list, because everything depended on the context.⁷⁰ The DPP expressed concern that even an inclusive list could lead people to avoid publishing that information where there was no prejudice.⁷¹ MinterEllison opposed any automatic suppression on criminal history as an undue restriction on freedom of expression.⁷²

57 *Contempt of Court Act 2019* (NZ) s 8(1). The Bill was amended to include express reference to jurors on the recommendation of the Ministry of Justice: Ministry of Justice (NZ), *Departmental Report: Administration (Reform of Contempt of Court) Bill* (2019) 55.

58 *Contempt of Court Act 2019* (NZ) s 8(2). This list also includes: information indicating that the accused has confessed to the charge, parts of the charge or conduct which might result in charge or conviction; information commenting on the credibility of the accused or a witness; information given at trial in the jury’s absence or information that has been ruled inadmissible at trial; and photographs, pictorial information, or other information that reveals the appearance of the accused if the identity of the accused is likely to be in issue at trial.

59 *Contempt of Court Act 2019* (NZ) sch 2 introducing ss 199A–D to the *Criminal Procedure Act 2011* (NZ). At the time of writing, these provisions were not yet in force.

60 Submissions 11 (Victoria Legal Aid), 17 (Dr Denis Muller), 20 (Criminal Bar Association), 22 (Law Institute of Victoria), 27 (Australia’s Right to Know coalition), 29 (Supreme Court of Victoria), 30 (Liberty Victoria), 31 (County Court of Victoria). However, as discussed earlier and in Chapter 2, others did not favour any legislation: Submissions 18 (Commercial Bar Association Media Law Section Working Group), 23 (Minter Ellison), 28 (Director of Public Prosecutions); Consultation 5 (Media lawyers and academics on contempt by publication).

61 Submissions 17 (Dr Denis Muller), 27 (Australia’s Right to Know coalition); Consultation 5 (Media lawyers and academics on contempt by publication).

62 Submission 27 (Australia’s Right to Know coalition); Consultation 5 (Media lawyers and academics on contempt by publication). This requirement must be met for a suppression order on the grounds of a real and substantial risk of prejudice to the proper administration of justice under the *Open Courts Act 2013* (Vic) ss 18(1)(a), 26(1)(a).

63 Submission 27 (Australia’s Right to Know coalition).

64 Submissions 11 (Victoria Legal Aid), 17 (Dr Denis Muller), 22 (Law Institute of Victoria), 23 (MinterEllison Media Group); Consultation 5 (Media lawyers and academics on contempt by publication).

65 Submission 22 (Law Institute of Victoria); Consultation 6 (Victoria Legal Aid).

66 Submission 27 (Australia’s Right to Know coalition).

67 Consultations 6 (Victoria Legal Aid), 26 (Supreme Court of Victoria).

68 Submission 29 (Supreme Court of Victoria).

69 Submission 20 (Criminal Bar Association).

70 Consultations 2 (Academics on juror decision making and juror contempt), 5 (Media lawyers and academics on contempt by publication), 8 (Law Institute of Victoria).

71 Submission 28 (Director of Public Prosecutions).

72 Submission 23 (MinterEllison Media Group).

10.68 However, most supported prohibiting the publication of evidence given at trial in the jury's absence or that had been ruled inadmissible. Some emphasised that this was not a form of sub judice contempt. Rather, it was a contempt because the court had already determined the jury should not hear such information.⁷³ The legislation could simply prohibit publication of this kind of material without requiring a further test of a risk to the administration of justice.⁷⁴

Commission's conclusions: clarify the test for liability

- 10.69 The Commission recommends adopting the statutory test proposed by the NSW Commission. This sets out clearly the proper threshold and the potential risk of interference with the administration of justice.
- 10.70 The test should include a list of factors relevant to whether there is a substantial risk. This gives clarity and guidance to those looking to publish information. The list in the New Zealand legislation provides the basis for the Commission's recommendation.
- 10.71 There are two minor changes to the proposed list. First, the test for liability should require consideration of the accessibility of the information to jurors. This factor therefore does not need to be repeated. Secondly, there is some repetition in including 'the likely effect of the publication as a whole' twice in the list of factors.
- 10.72 The legislation should not list kinds of information that may fall within sub judice contempt. The Commission considers such a list may discourage people from publishing material that falls within the list even if there is no substantial risk, and may also encourage publication of material outside the list that may create a substantial risk. Instead, a legislative note could provide examples that, while still forming part of the legislation, more clearly indicate their nature as examples.⁷⁵
- 10.73 Finally, once a trial has commenced,⁷⁶ there should be a clear prohibition on publishing information that has been heard in the jury's absence or ruled inadmissible. This rule does not depend on an assessment of risk. Instead, it is the result of the decision or legal rule that the evidence should not be heard by a jury.

Recommendation

- 77 The proposed Act should provide that a person may be dealt with by a court for contempt by publishing material prejudicial to legal proceedings when a person publishes material, while proceedings are pending, that creates a substantial risk that jurors or witnesses (or potential jurors or witnesses) will:
- become aware of the material, and
 - recall the material at the time of the proceeding.

73 Consultation 5 (Media lawyers and academics on contempt by publication).

74 Consultation 8 (Law Institute of Victoria).

75 *Interpretation of Legislation Act 1984* (Vic) ss 36, 36A.

76 The time a trial commences is defined by the *Criminal Procedure Act 2009* (Vic) s 210. Before a trial has commenced, other publication restrictions apply under section 3 of the *Judicial Proceedings Report Act*: see Chapter 12. This proposed prohibition would therefore only begin after a trial has commenced and those protections lapse.

Recommendations

- 78 The proposed Act should include the factors a court must consider in determining whether the published material creates a substantial risk of prejudicing a person's right to a fair hearing. This list should include:
- the medium in which the publication is presented and its potential accessibility and durability
 - the content of the publication
 - the character of the publication, including the language and tone used in it
 - any other relevant circumstances relating to the likely effect of the publication.
- 79 The proposed Act should provide that it is a contempt of court to publish material, once a trial has commenced and remains pending, that was heard in the absence of the jury or was held to be inadmissible by the court.

Defining sub judice contempt—limits of the offence

The fault element

- 10.74 A person can be responsible for a publication if the person was involved in producing or distributing the material, even if the person did not make the offending statements.⁷⁷ This issue is also relevant to the liability of online intermediaries (see Chapter 13).
- 10.75 A person can be responsible even if they did not know of the material or did not intend to interfere with the administration of justice. These matters are considered when a court decides whether to exercise its powers and decides on the appropriate penalty.⁷⁸
- 10.76 The justification is that the purpose of this contempt is to protect a fair hearing and there needs to be a higher standard to ensure media organisations take reasonable care. However, this position has been criticised for not reflecting general principles of criminal responsibility, and for unduly restricting freedom of expression.
- 10.77 These concerns could be addressed in one of the following ways:
- introducing an actual intention or recklessness element to the test for liability
 - introducing a requirement of negligence by the accused
 - creating a defence when a person is not at fault and reasonable care has been taken.⁷⁹
- 10.78 Most law reform commissions have recommended a defence of reasonable care,⁸⁰ though they vary in how widely they are framed.

77 A-G (NSW) v Willesee [1980] 2 NSWLR 143, 155–7. The selective prosecution of persons at the exclusion of others who also have responsibility for publication has been criticised. See *Gallagher v Durack* (1983) 152 CLR 238, 252–3 (Murphy J). See also Chapter 11.

78 *R v David Syme & Co Ltd* [1982] VR 173, 178.

79 Victorian Law Reform Commission, *Contempt of Court* (Consultation Paper, May 2019) 91–2 [7.67]–[7.77].

80 The Law Reform Commission, *Contempt* (Report No 35, December 1987) 145–6 [262]; Law Commission (New Zealand), *Reforming the Law of Contempt of Court: A Modern Statute* (Report No 140, May 2017) 54 [2.93] Recommendation 9; Law Reform Commission of Western Australia, *Report on Review of the Law of Contempt* (Project No 93, June 2003) 41–2 Recommendation 14; New South Wales Law Reform Commission, *Contempt by Publication* (Report No 100, June 2003) 104–9 [5.20]–[5.37] Recommendation 5.

- 10.79 For example, the *Contempt of Court Act 2019* (NZ) includes a defence if a person can prove that, at the time of publication and ‘after taking all reasonable care’, the person ‘did not know or could not reasonably have known of [the accused’s] arrest or charge or the possibility or existence of a jury trial’.⁸¹
- 10.80 The NSW Commission framed its recommended defence more broadly, by providing for a defence if a person proves, on the balance of probabilities:
- a) that the person did not know a fact that would cause the publication of the matter to be criminal contempt
 - b) that before the matter was published, the person took reasonable steps to ascertain any fact that would cause the publication to be a criminal contempt and to prevent its publication if any such fact was ascertained.⁸²
- 10.81 The consultation paper asked whether fault should be an element of sub judice contempt or whether there should be a defence to cover the absence of fault.⁸³

Responses

- 10.82 Most stakeholders who addressed this issue favoured introducing some form of fault element. Many favoured a requirement that a person must have intended interference, or have been reckless as to the potential of interference, with the administration of justice.⁸⁴ Some favoured limiting this to an intention to cause prejudice to the administration of justice or an intention to prejudice proceedings.⁸⁵ MinterEllison also favoured a defence of reasonable care.⁸⁶
- 10.83 The Supreme Court opposed requiring an element of intent, since this would undermine the positive obligation of publishers to avoid contempt.⁸⁷ The DPP opposed any fault element, because it would be impossible to prove and greatly weaken the law.⁸⁸
- 10.84 ARTK argued that a defence would require publishers to ‘go to considerable expense in pleading such matters in defence’.⁸⁹
- 10.85 The Law Institute of Victoria argued that a defence was unnecessary and would undermine fundamental rights, including the right to be presumed innocent until guilty. However, if a defence was adopted, it preferred the model proposed by the NSW Commission.⁹⁰

Commission’s conclusions: include a defence of reasonable care

- 10.86 The power to punish a person for a contempt should not be used where they did not know and could not have known that the material would interfere with the administration of justice. That is neither consistent with the general principles of criminal responsibility nor a proportionate restriction of freedom of expression. The Commission therefore agrees with most stakeholders that there should be some requirement of fault.
- 10.87 However, it would be too difficult to prosecute sub judice contempt if intention or recklessness had to be proved. This would significantly undermine the purpose and value of the restriction.

81 *Contempt of Court Act 2019* (NZ) s 7(4)(a). Section 7(4)(b) also provides that an online content host or distributor has a defence if, after taking all reasonable care, the person did not know or could not reasonably have known that the publication contained information that created a real risk of prejudicing the person’s right to a fair trial.

82 New South Wales Law Reform Commission, *Contempt by Publication* (Report No 100, June 2003) Recommendation 5. The recommendation also includes a ‘reasonable reliance’ clause for those who relied on others to take such reasonable care. The recommendation is modelled on the ALRC’s recommendation: The Law Reform Commission, *Contempt* (Report No 35, December 1987) 145–6 [262].

83 Victorian Law Reform Commission, *Contempt of Court* (Consultation Paper, May 2019) 111, Question 28(b).

84 Submissions 20 (Criminal Bar Association), 22 (Law Institute of Victoria), 27 (Australia’s Right to Know coalition), 30 (Liberty Victoria). The Criminal Bar Association also stated that consideration could be given to negligence as a fault element.

85 Submissions 18 (Commercial Bar Association Media Law Section Working Group), 23 (MinterEllison Media Group).

86 Submission 23 (MinterEllison Media Group).

87 Submission 29 (Supreme Court of Victoria).

88 Submission 28 (Director of Public Prosecutions).

89 Submission 27 (Australia’s Right to Know coalition).

90 Submission 22 (Law Institute of Victoria).

- 10.88 The problem arises because the intention or recklessness must be in relation to creating a substantial risk to a fair hearing. That is much harder to prove than, for example, that a person intended or was reckless about breaching the terms of a suppression order. In that case, the connection between the act and the result is much closer, and the intent or recklessness can be more readily inferred.
- 10.89 The circumstances are also different. In the case of a suppression order, a judge has already determined that the material, if published, would pose a risk to a fair hearing. In sub judge contempt, the publisher must assess whether the material creates a risk. There is a greater possibility of the publisher creating such a risk even without intending to do so or being reckless as to the risk.
- 10.90 The circumstances warrant imposing a positive obligation on publishers to take reasonable care. At stake is the fundamental right to a fair hearing. If a person is aware of a legal proceeding, the person should have to take care about what he or she publishes about it. This is a well-known norm that is key to the fairness of our justice system.
- 10.91 A better approach would be to include a defence of reasonable care. Although framing it as a defence imposes a burden on the accused, a publisher who has taken reasonable care will be better placed than the prosecution to present evidence of the steps they have taken.⁹¹
- 10.92 The defence should be framed in the broader way proposed by the NSW Commission. This provides a better balance between the competing rights at stake.
- 10.93 This defence involves a degree of uncertainty as to the requirements of ‘reasonable care’. This is a common problem with any such standard but is a trade-off for the flexibility to adapt to a wide variety of conditions and circumstances.
- 10.94 It could be useful for the courts and media to discuss the practical content of this standard. A relevant forum may be the mechanism recommended by the Vincent Review for improving the relationship between the courts and media. Courts could consider this as part of their regular media liaison practices.

Recommendations

- 80 The proposed Act should provide that for a person to be liable for contempt by publishing material prejudicial to legal proceedings, the court must be satisfied that the person intended to publish the material.
- 81 The proposed Act should provide that it is a defence to this form of contempt if at the time of publication, and after taking all reasonable care, the person:
- did not know, or could not reasonably have known, of a fact that caused the publication to be in contempt, or
 - reasonably relied on another person to take such reasonable care before publishing the material.

Pending proceedings

- 10.95 Sub judge contempt only restricts publication while legal proceedings are ‘pending’. The consultation paper asked stakeholders whether the pending period should be defined and, if so, when the period should begin and end.⁹²

91 Attorney-General’s Department (Cth), *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (Report, September 2011) 50 [4.3.1] <<https://www.ag.gov.au/Publications/Documents/GuidetoFramingCommonwealthOffencesInfringementNoticesandEnforcementPowers/A%20Guide%20to%20Framing%20Cth%20Offences.pdf>>.

92 Victorian Law Reform Commission, *Contempt of Court* (Consultation Paper, May 2019) 111, Question 28(iii).

- 10.96 As discussed in the consultation paper, there is some uncertainty about when the pending period begins. There are three possible starting points: when a warrant for an arrest is issued, when a person has been arrested, or when a person is charged.⁹³
- 10.97 The pending period ends once all avenues of appeal have been exhausted or an appeal judgment has been handed down,⁹⁴ although there is less risk to a trial once a verdict has been reached.⁹⁵ One reform would be to end this period earlier, at the time of verdict or acquittal. This would be consistent with the view that the purpose of the law was to prevent influencing the decision of a jury.⁹⁶

Responses

- 10.98 Several stakeholders supported clarifying the pending period in statute. They supported ending the pending period at the point of verdict,⁹⁷ and most supported beginning the period again if a re-trial was ordered.⁹⁸ As the County Court stated, this approach recognised that it would be too onerous to continue the pending period beyond verdict, because ‘appellate time frames are uncertain and subject to change’.⁹⁹
- 10.99 The Criminal Bar Association and the CommBar—Media Law Section preferred to leave the pending period to the common law.¹⁰⁰ The Criminal Bar Association said it would be difficult to define this period and ‘may result in conduct aimed at delaying or bringing forward the commencement to suit a particular purpose’.¹⁰¹ The CommBar—Media Law Section considered that any specific pending period would necessarily be arbitrary.¹⁰²
- 10.100 MinterEllison supported defining the period in which proceedings are pending. For criminal proceedings, it preferred starting the period when a person is charged and ending at the time of verdict,¹⁰³ and beginning again if a re-trial is ordered after an appeal. For civil proceedings, it stated that this period should begin when a form of initial process is filed and end when judgment is handed down or preferably when the decision is reserved.¹⁰⁴
- 10.101 The Children’s Court of Victoria noted that the prohibition on publication in its legislation does not clearly apply until a charge sheet is filed. This caused problems when footage of children engaging in offending behaviour had been widely distributed before a charge was filed.¹⁰⁵
- 10.102 Dr Denis Muller’s research on juror recall of media coverage indicated that the focus should be on publicity that occurs during the trial or very shortly beforehand. He found that extensive media coverage was unlikely to leave indelible impressions on potential jurors, unless other factors were present.¹⁰⁶

Commission’s conclusions: define the ‘pending’ period

- 10.103 The Commission recommends defining a clear beginning and end of the pending period to provide certainty and clarity for those who are exercising what is otherwise a fundamental freedom. This is especially important as more people are now likely to be publishers.

93 Ibid 90 [7.55]–[7.59].

94 *James v Robinson* (1963) 109 CLR 593, 615, citing *R v Duffy; Ex parte Nash* [1960] 2 QB 188.

95 See *A-G v Nationwide News Pty Ltd* (1986) 43 SASR 374, 405-8 (Olsson J).

96 Victorian Law Reform Commission, *Contempt of Court* (Consultation Paper, May 2019) 90–1 [7.60]–[7.66].

97 Submissions 17 (Dr Denis Muller), 22 (Law Institute of Victoria), 31 (County Court of Victoria).

98 Submissions 22 (Law Institute of Victoria), 31 (County Court of Victoria).

99 Submission 31 (County Court of Victoria).

100 Submissions 18 (Commercial Bar Association Media Law Section Working Group), 20 (Criminal Bar Association).

101 Submission 20 (Criminal Bar Association).

102 Submission 18 (Commercial Bar Association Media Law Section Working Group).

103 This was also supported by one member of the Law Institute of Victoria who considered it problematic to rely on the time of arrest as a starting point for when sub judice prohibitions commence because it is not always publicly known when an arrest took place: Submission 8 (Law Institute of Victoria).

104 Submission 23 (MinterEllison Media Group).

105 Submission 14 (Children’s Court of Victoria).

106 Submission 17 (Dr Denis Muller). The other relevant factors mentioned included features of the crime, such as its randomness and brutality, and the ability to identify with the victim and the circumstances of the crime.

- 10.104 Criminal proceedings should be defined as ‘pending’ once a person is arrested or otherwise when criminal proceedings are commenced. The pending period should end when there is a verdict or when criminal proceedings end otherwise (for example, because the person is released without charge, the proceeding is discontinued, or a person pleads guilty).¹⁰⁷ It should restart if a re-trial is ordered after an appeal against conviction.
- 10.105 Publications before an arrest would not pose a great enough risk, but beginning the pending period later, at the time of being charged, could undermine the purpose of the restriction. This concern is reinforced by the experience of the Children’s Court.
- 10.106 The pending period, however, only defines one element of sub judice contempt, and there must still be a substantial risk even if the publication occurs within this period. The timing of publication, therefore, will still be relevant to evaluating risk.
- 10.107 A publisher may not have any way of knowing of an arrest. In that case the publisher can rely on the recommended defence of reasonable care.
- 10.108 As discussed below, the Commission also recommends extending sub judice contempt to civil proceedings, where the harm is the risk of prejudicing a jury. For the same reasons, the period should similarly be defined for civil proceedings.¹⁰⁸
- 10.109 This period should apply from the time an initiating process is filed and should end at the time of verdict or when the proceeding has otherwise concluded.
- 10.110 A different period may need to apply in the context of other forms of contempt, such as interferences with witnesses, in both civil and criminal proceedings.¹⁰⁹

Recommendations

- 82** The proposed Act should provide that liability for contempt by publishing material prejudicial to legal proceedings only arises where the legal proceeding is ‘pending’ at the time of publication.
- 83** For criminal proceedings, the proposed Act should provide that a proceeding is ‘pending’:
- from the date on which an arrest or charge is made until the date on which either the verdict is delivered or the criminal proceeding ends otherwise, and
 - recommences from the date on which a retrial is ordered until the date on which the retrial concludes.
- 84** For other legal proceedings, the proposed Act should provide that a proceeding is ‘pending’ from the date on which the initiating process is filed until the date on which a final decision is delivered, or when the proceeding ends otherwise.

107 The equivalent UK provision provides for a definition of when criminal proceedings are concluded. This includes ‘any other verdict, finding, order or decision which puts an end to the proceedings’, ‘by discontinuance or by operation of law’, and in specific circumstances related to double jeopardy: *Contempt of Court Act 1981* (UK) Sch 1 para 5.

108 The NSW Commission provided that, where the risk was as to an influence on jurors, the pending period should begin at the time it is known a jury will be used in civil or coronial proceedings, and in relation to a risk of influence on witnesses or parties, from the issue of a writ or summons, and should end when proceedings are disposed of by judgment at first instance, settled or discontinued, and recommence when a re-trial is ordered: New South Wales Law Reform Commission, *Contempt by Publication* (Report No 100, June 2003) Recommendations 15, 18.

109 The NSW Commission recommended in the context of influencing witnesses or parties for civil or criminal proceedings, that the restrictions should apply until the appeal proceedings have ended or the expiry of any period of appeal or further appeal: New South Wales Law Reform Commission, *Contempt by Publication* (Report No 100, June 2003) Recommendation 17.

The 'public interest' principle

- 10.111 The common law has recognised that, even where a publication creates a substantial risk to a fair hearing, it may not be a contempt because, on balance, its publication is still in the public interest. For example, publishing the identity of a criminal at large in the community may be necessary to protect the right to life and public safety.
- 10.112 This principle is often referred to as the 'public interest' defence. However, once the defendant has raised the issue, the prosecution bears the burden of proof.¹¹⁰
- 10.113 In practice, whether a publication is in the public interest is generally considered before a person is prosecuted. As discussed in Chapter 5, the DPP applies prosecutorial guidelines to determine whether a prosecution is in the public interest.¹¹¹
- 10.114 The scope of the public interest principle is unclear in Australia, although it is more developed here than elsewhere. The High Court has made clear that a court must balance the interests of the administration of justice against the freedom of discussion of public affairs, and that the principle can apply to publications dealing specifically with legal proceedings, although the circumstances in which it would apply in such cases is unclear.¹¹²
- 10.115 Cases in Australia and overseas have considered as relevant:
- the extent to which the publication focuses on specific legal proceedings
 - the character of the offending material, such as whether it focuses on the guilt or innocence of the accused
 - the prominence of the offending material within the context of the investigation
 - the subject matter of the publication and its relevance to areas of significant public concern
 - the timing of the publication, including the value of publishing it at that time and whether it continued an existing discussion
 - the contribution the publication made to the public debate by the extent of research or investigation and the tone of the publication.¹¹³
- 10.116 For example, in New South Wales, a court held that it was open to a judge to find that it was not a contempt to publish material that clearly implied an accused was guilty of being a drug dealer, even though the person was facing similar charges. The court held that the information was published as part of a 'wide ranging, serious in-depth journalistic investigation of a major social problem with significant public policy implications', which was in the public interest.¹¹⁴
- 10.117 Many other aspects of the law remain unclear. For example, there is little guidance on how the balancing exercise is to be undertaken, including how much weight should be given to the principle of freedom of expression and what types of public interest might outweigh the risk to the administration of justice.¹¹⁵
- 10.118 Law reform commissions have taken different approaches to clarifying the public interest principle.¹¹⁶ The Australian Law Reform Commission (ALRC) recommended narrowing the scope of the principle, which the NSW Commission originally proposed as well.¹¹⁷

110 New South Wales Law Reform Commission, *Contempt by Publication* (Report No 100, June 2003) 200 [8.52].

111 Office of Public Prosecutions Victoria, *Policy of the Director of Public Prosecutions for Victoria* (17 December 2019) Ch 1.

112 *Hinch v A-G (Vic)* (1987) 164 CLR 15; *Victoria v Australian Building Construction Employees' and Builders' Labourers' Federation* (1982) 152 CLR 25.

113 New South Wales Law Reform Commission, *Contempt by Publication* (Report No 100, June 2003) Ch 8.

114 *A-G (NSW) v X* [2000] NSWCA 199; *A-G (NSW) v X* (2000) 49 NSWLR 653, [149] (Spigelman CJ).

115 See *ibid* for a full discussion.

116 Victorian Law Reform Commission, *Contempt of Court* (Consultation Paper, May 2019) 93–4 [7.84].

117 New South Wales Law Reform Commission, *Contempt by Publication* (Discussion Paper No 43, 2000) Proposal 19.

- 10.119 However, after hearing from stakeholders, the NSW Commission chose instead to restate the common law more precisely in its proposed legislation.¹¹⁸ It recommended that a person charged with sub judice contempt on account of responsibility for the publication of material should not be found guilty if:
- a) the material relates to a matter of public interest
 - b) the public benefit from the publication of the material, in the circumstances in which it was published, and from the maintenance of freedom to publish such material, outweighs the harm caused to the administration of justice by virtue of the risk of influence on one or more jurors, potential jurors, witnesses, potential witnesses and/ or litigants created by the publication.¹¹⁹
- 10.120 As part of its review of Australia’s uniform defamation law, the Council of Attorneys-General has recently proposed including a public interest defence for defamation (see Chapter 13). The draft legislation specifies factors in determining whether the publication is ‘responsible communication’ for the purposes of that defence but does not address what is in the public interest.¹²⁰

Responses

- 10.121 Stakeholders who addressed this issue supported restating the public interest principle, with the Law Institute of Victoria endorsing the approach of the NSW Commission.¹²¹
- 10.122 Dr Denis Muller said it would ‘help the media immensely’ to provide more guidance on the scope of the public interest.¹²² He observed it would be desirable to consolidate some of the types of interest already identified by the media and in case law and rules of practice into an agreed statutory definition.¹²³
- 10.123 The Criminal Bar Association supported instead including a defence of ‘necessity’.¹²⁴ Consistently with its general approach, the CommBar—Media Law Section considered there was no need to restate the public interest principle in legislation.¹²⁵

Commission’s conclusions: clarify ‘public interest’

- 10.124 Although it has rarely been used successfully, the public interest principle is an important way for the common law of contempt to balance competing public interests including, most importantly, the principle of freedom of expression.
- 10.125 The public interest principle also enables the balancing of rights and interests beyond that of freedom of expression or political communication. For example, public order and public safety could also be considered under the public interest principle, as in the case of publishing the identity of a criminal at large to protect the community.¹²⁶
- 10.126 Even where other rights and interests are not involved, the application of the balancing test may nevertheless favour publication. A key element of the balancing tests is a consideration of the individual circumstances. It would be rare but not impossible for a publication to contribute to a discussion whose importance and urgency outweighed its small risk to the trial.

118 New South Wales Law Reform Commission, *Contempt by Publication* (Report No 100, June 2003) 194–200 [8.31]–[8.52].

119 Ibid Recommendation 20.

120 Council of Attorneys-General, Department of Communities and Justice (NSW), *Model Defamation Amendment Provisions 2020 (Consultation Draft)* (Background Paper, December 2019) sch 1 para 22, Introduction s 29A <<https://www.justice.nsw.gov.au/justicepolicy/Documents/review-model-defamation-provisions/defamation-final-background-paper.pdf>>; *ibid* 20–2, Recommendation 11.

121 Submissions 17 (Dr Denis Muller), 22 (Law Institute of Victoria), 23 (MinterEllison Media Group), 27 (Australia’s Right to Know coalition).

122 Submission 17 (Dr Denis Muller).

123 For example, public health and safety; the performance of public duties by public officials; the performance of public institutions and public companies; the expenditure of public money; the performance of markets; and the performance of any enterprise in which the public has been invited to invest money or trust. Dr Muller notes that this is not very far from the public interest test in the defence of comment in defamation law: Submission 17 (Dr Denis Muller).

124 Submission 20 (Criminal Bar Association).

125 Submission 18 (Commercial Bar Association Media Law Section Working Group).

126 The examples given in the case law of a constitutional crisis or a nuclear disaster would be justified by these interests: *Hinch v A-G (Vic)* (1987) 164 CLR 15, 26 (Mason CJ).

- 10.127 The Commission therefore concludes it is important to restate the public interest principle in the proposed legislation. However, it agrees with the NSW Commission that the principle should be clarified.
- 10.128 The Commission supports the NSW Commission's recommendations, including its more precise definition of 'risk to a fair hearing' and its framing of the principle as an exclusion rather than as a defence. However, the Commission would extend that recommendation in two ways.
- 10.129 First, the balancing test in this area of contempt was developed before the constitutional protection for political communication was developed, and before the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (the Charter) was adopted. Both the constitutional doctrine and the Charter already include balancing tests.
- 10.130 All these tests balance competing interests. The tests under both the constitutional doctrine and the Charter are more useful and analytically stronger than under the common law of contempt. It therefore makes sense for the legislation to refer, as part of the balancing test, to the freedom of expression under the Charter as well as the freedom of political communication.
- 10.131 The legislation should also make clear that the balancing test may also protect other rights and interests, such as the right to life and physical integrity, and to reasonable limitations on the grounds of public order and public safety. This would make unnecessary a separate exclusion in the cases of public safety, as recommended by the NSW Commission.
- 10.132 The Commission also recommends listing relevant factors to guide the balancing test, and to include examples of matters in the 'public interest' in a legislative note. This would make the law clearer, more certain and more useful.
- 10.133 The factors listed in the recommendation draw from the existing case law in sub judice contempt. However, the case law provides only limited guidance, and other relevant factors might be drawn from the constitutional and Charter contexts.
- 10.134 More clarity could be provided through practical guidance for the use of the media. Examples of responsible reporting could be included in the education and training recommended for members of the media (see Chapter 16).

Recommendations

- 85 The proposed Act should provide that a person is not liable to contempt for publishing material prejudicial to legal proceedings if the extent of prejudice is outweighed by the competing public interest in publication, including the effect of restricting publication on freedom of expression and on the principle of open justice.
- 86 The proposed Act should include the relevant factors a court must consider in determining the balance between the competing interests. These should include the extent to which the publication:
- refers to specific court proceedings
 - refers to the guilt or innocence of the accused
 - refers to the offending material, in the context of the publication as a whole
 - raises an issue of significant public concern
 - is relevant to public discussion at the time it is published
 - contributes to public debate including through the extent of any research or investigation and the tone of the publication
 - contributes to the effective and fair working of the criminal justice process.

Fair and accurate reports

- 10.135 A fair and accurate report of court proceedings published in good faith is not a contempt of court, even if prejudicial.¹²⁷ Like the public interest principle, this is often referred to as a defence but is better described as a ground of exoneration.¹²⁸
- 10.136 A fair and accurate report must be one 'which a person of ordinary intelligence using reasonable care might reasonably regard as giving a fair summary of the proceedings'.¹²⁹ It can be unfair or inaccurate if, for example, it is partial or lacking in balance, or is selective in its choice of evidence or misrepresents the importance of information that is unfavourable to the accused.¹³⁰
- 10.137 The report must be made in good faith. The timing of publication is relevant in showing the presence or absence of good faith.¹³¹
- 10.138 Law reform commissions have agreed that the common law principle should be retained in any legislation.¹³² Both the United Kingdom and New Zealand included it as an exclusion from liability in their respective legislation.¹³³

127 *Ex parte Terrill; Re Consolidated Press Ltd* (1937) 37 SR (NSW) 255, 257. A common example is the reporting of bail and committal proceedings, which often includes prejudicial material: *Hinch v A-G (Vic)* (1987) 164 CLR 15, 25–6, 43, 83.

128 New South Wales Law Reform Commission, *Contempt by Publication* (Report No 100, June 2003) 184 [8.1]–[8.3].

129 *Ex parte Terrill; Re Consolidated Press Ltd* (1937) 37 SR (NSW) 255, 259.

130 See New South Wales Law Reform Commission, *Contempt by Publication* (Report No 100, June 2003) 212–4 [9.3].

131 *Ibid* 214–5 [9.5].

132 Committee on *Contempt of Court* (UK), *Report of the Committee on Contempt of Court* (Cmnd 5794, December 1974) [141]; The Law Reform Commission, *Contempt* (Report No 35, December 1987) 185–6 [321]; New South Wales Law Reform Commission, *Contempt by Publication* (Report No 100, June 2003) 219 [9.22].

133 *Contempt of Court Act 1981* (UK) s 4; *Contempt of Court Act 2019* (NZ) s 7(5).

- 10.139 Both countries also require that the report be published contemporaneously and in good faith. The ALRC had recommended that the ‘good faith’ requirement should be removed, because it was unnecessary if the publication must be contemporaneous and would mean the prosecution must inquire into the motives for publication.¹³⁴ However, the NSW Commission considered that the contemporaneous requirement was only one of the factors that was considered in the common law test of good faith, and recommended no reform of the principle.¹³⁵
- 10.140 While the consultation paper did not identify any issues with the role of this principle, the DPP considered that this defence was uncertain and might make it necessary to rely on suppression orders instead.¹³⁶ One stakeholder raised the concern of how the law would deal with a series of tweets which, while factually accurate, might present a distorted view through its selection of the evidence.¹³⁷

Commission’s conclusions: restate the exception for fair and accurate reports

- 10.141 This common law principle should be restated as an exception to liability for sub judice contempt under the proposed Act. In general, the common law principles do not appear in need of significant reform.
- 10.142 However, the position should be clarified for social media posts that report on a proceeding sequentially. A series of publications by a single author or publisher, such as tweets or a series of blog posts, should be treated together for the purposes of determining whether the report is fair and accurate. This would enable the common law requirements of balance and representation to apply across the series of posts.
- 10.143 Sub judice contempt cannot properly address the risks of prejudice created by multiple tweets covering a trial from different publishers. Although together such tweets could cause a risk of prejudice, it is not appropriate to punish a person for the risks created by other people, especially where the fundamental right of freedom of expression is engaged.¹³⁸ Such risks may be better managed through clear jury directions on the use of social media (see Chapter 9).
- 10.144 The exception for fair and accurate court proceedings does not apply to evidence that has been ruled inadmissible or is not heard by a jury. The Commission recommends prohibiting this as a separate provision to make it clear.
- 10.145 The Commission agrees with the NSW Commission that the publication must be in good faith, and that the timing of publication is relevant to that requirement. There is no reason why a fair and accurate report should not be protected even if published after the court proceedings, if the report is not being used for another purpose.

Recommendation

- 87** Subject to Recommendation 79, the proposed Act should provide that it is not a contempt of court to publish in good faith a fair and accurate report of a court proceeding, including where a report is published in sections or as a series.

134 The Law Reform Commission, *Contempt* (Report No 35, December 1987) 186–7 [322].
 135 New South Wales Law Reform Commission, *Contempt by Publication* (Report No 100, June 2003) 217–18 [9.15]–[9.18].
 136 Submission 28 (Director of Public Prosecutions).
 137 Submission 8 (Rachel Jane Hews).
 138 Law Commission (England and Wales), *Contempt by Publication* (Consultation Paper No 209, 2012) [2.33].

What should be the procedure and penalties for sub judice contempt?

The proposed procedure for sub judice contempt

- 10.146 Chapter 5 of this report discusses the arguments for and against the use of the summary procedure in contempt law. That chapter outlines the Commission's proposals for a procedure that includes protections reflecting the criminal nature of contempt.
- 10.147 The Supreme Court, the DPP in criminal proceedings, and the Attorney-General can all start proceedings under this proposal. It can also be commenced by a party to a proceeding in relation to which the contempt occurs.
- 10.148 The question is whether there is any need to change this procedure in the case of sub judice contempt. It can be argued that sub judice contempt is distinctive because:
- Hearing the contempt proceeding is not urgent and is already dealt with usually after the main criminal proceedings.¹³⁹
 - The main evidence is the publication itself, so it does not raise the same evidentiary issues as in contempt in the face of the court.
 - There are issues of fact that could be determined best by a jury, such as the 'substantial risk' test proposed and the defence of reasonable care.¹⁴⁰

Responses

- 10.149 Very few submissions addressed this issue specifically although, as discussed in Chapter 3, some stakeholders submitted that contempt should be redefined in terms of ordinary criminal offences, subject to the usual criminal procedures.
- 10.150 The DPP argued it was important for the DPP to retain the power to commence proceedings to deal with matters speedily. The DPP considered the current procedure was workable and fair. The DPP also argued for a reform to the costs procedure, discussed in Chapter 5.¹⁴¹
- 10.151 The DPP was open to a requirement to send a letter prior to starting a proceeding with an opportunity to provide material before a decision is made to begin proceedings, which had been the practice in recent cases.¹⁴²
- 10.152 The County Court of Victoria indicated that it should also retain the power to commence proceedings, although in practice judges often raised the matter informally with the DPP. This was important to ensure it was not dependent on the executive to protect its proceedings, and in exceptional cases such a right may be needed if a member of the executive branch may have committed contempt.¹⁴³

Commission's conclusions: the same procedure for sub judice as for other forms of contempt

- 10.153 The strongest reasons for reforming the summary procedure have been considered in the procedure proposed in Chapter 5. There is no compelling reason to adapt the procedure and such reforms may introduce unjustified complexity and costs. The procedure outlined in Chapter 5 should also apply to sub judice contempt.

139 New South Wales Law Reform Commission, *Contempt by Publication* (Report No 100, June 2003) 297–8 [12.62]–[12.65]; The Law Reform Commission, *Contempt* (Report No 35, December 1987) 276 [473].

140 New South Wales Law Reform Commission, *Contempt by Publication* (Report No 100, June 2003) 299–300 [12.66]–[12.69]; The Law Reform Commission, *Contempt* (Report No 35, December 1987) 277 [473].

141 Submission 28 (Director of Public Prosecutions).

142 Ibid.

143 Consultation 24 (County Court of Victoria).

- 10.154 In the ordinary case, the DPP should commence proceedings where needed. This reduces the apparent conflict of the court's role in the proceedings and better enables the arguments to be presented. While the Commission has considered whether the legislation should indicate this preference, it cannot see any practical need for reform and concludes it could introduce complexity.
- 10.155 The DPP's practice of providing an opportunity for comment before deciding to commence proceedings can be useful and could benefit from being expressed in a public policy document, such as in the Director's Prosecution Guidelines or in a practice note. This would clarify the status of such an invitation and the kinds of information relevant to the Director's exercise of its powers. The Commission does not consider that this needs to be set out in legislation.

The maximum penalty for sub judice contempt

- 10.156 The question of maximum penalties for restrictions on publications is dealt with in Chapter 15. The Commission recommends that sub judice contempt should attract a maximum penalty of two years imprisonment for an individual or 240 penalty units or both, with a maximum fine for bodies corporate of 1200 penalty units.
- 10.157 Other law reform commissions have considered the appropriateness of recovering costs for aborted trials from publishers.¹⁴⁴ This was not an option raised by the Commission or discussed by stakeholders in submissions or consultations, so it is not appropriate to make any recommendation in this respect.

Should sub judice contempt apply to civil proceedings?

- 10.158 Sub judice contempt applies to civil proceedings. However, as there are very few juries in civil proceedings and usually less media coverage, in practice it is rare for this form of contempt to arise in civil proceedings.
- 10.159 For these reasons, the consultation paper did not discuss the application of sub judice contempt to civil proceedings. Stakeholders did not address the issue in submissions or consultations.
- 10.160 However, as the Commission is proposing a comprehensive Act, it is necessary to make clear how the proposed Act should deal with sub judice contempt in civil proceedings.

Sub judice contempt in civil proceedings

- 10.161 There are three main ways in which sub judice contempt can apply to civil proceedings. Publications can:
- improperly influence jurors or witnesses, in a comparable way to criminal proceedings
 - place improper pressure on litigants to change the way they approach litigation (for example, by shaming them into settling or dropping a case)
 - 'prejudge' the issue being determined by civil proceedings by, for example, publishing an article alleging that a drug company has been negligent when that company is being sued for negligence (the 'prejudgment principle').
- 10.162 The last two forms can also apply to criminal proceedings, although they rarely appear in that context.
- 10.163 There are many uncertainties in the law in relation to civil proceedings. For example, it is unclear whether in practice jurors or witnesses in civil proceedings can be influenced in the same way as in criminal proceedings.

- 10.164 Similarly, it is unclear whether there is any need to protect litigants from improper pressure. It is also difficult to define when pressure becomes improper.¹⁴⁵
- 10.165 The NSW Commission noted divergent views on whether this part of the law was still needed. The New South Wales Solicitor General preferred to abolish this law because it served no purpose. The Victorian Bar Council supported a narrower form of contempt in terms of vilifying a litigant with the intention of exerting pressure on them.¹⁴⁶
- 10.166 The balance between the right to freedom of expression and the right to a fair hearing also shifts when proceedings are not criminal in nature. There is a greater need to protect the right to a fair hearing in criminal proceedings, as these involve the punishment of the individual by the state and can affect the liberty of a person.¹⁴⁷
- 10.167 The prejudgment principle is especially controversial. No case in Australia has applied the principle.¹⁴⁸ Kirby P (as he then was) concluded that there should not be a general rule preventing a person from suggesting the proper outcome of a case, as this was too great a restriction on freedom of expression.¹⁴⁹ The principle has been held by the European Court of Human Rights to breach freedom of expression.¹⁵⁰ The scope of the principle is unclear and broad.¹⁵¹ Its abolition or exclusion has been universally recommended by law reform commissions.¹⁵²

Reform options

- 10.168 The New Zealand Law Commission chose to leave the issue of contempt in civil proceedings to be developed by the common law under its general contempt powers.¹⁵³ This preserves the flexibility of the common law and avoids the need to restate an unsettled and complex area of the law.
- 10.169 The NSW Commission recommended:
- extending to civil proceedings the statutory sub judice contempt as it applies to jurors or witnesses
 - creating a narrower statutory offence of vilifying the character of litigants so that a party to civil (or criminal proceedings) will make a different decision in relation those proceedings
 - excluding the prejudgment principle.¹⁵⁴
- 10.170 The ALRC recommended that:
- there should be a more limited sub judice offence about influencing jurors in the context of civil trials
 - the risks of ‘improper pressure’ should be dealt with through an offence of reprisals against parties.
 - the prejudgment principle should be excluded.¹⁵⁵

145 These include whether in practice there were any circumstances in which there was a substantial risk of influence on witnesses or jurors in civil proceedings; the test for determining when comment becomes ‘improper pressure’; the factors and scope of ‘improper pressure’; whether there must be an intention to deter the litigant; whether the test of improper pressure should be measured against the standard of a litigant of reasonable fortitude; and whether the prejudgment principle has been adopted in Australia: New South Wales Law Reform Commission, *Contempt by Publication* (Report No 100, June 2003) 140–1 [6.34]–[6.37].

146 Ibid 143 [6.44].

147 The right to a fair hearing applies to both criminal and civil proceedings, but there are specific procedural guarantees for criminal proceedings for this reason: *Charter of Human Rights and Responsibilities Act 2006* (Vic).

148 For a discussion of the operation of the principle in other jurisdictions, see New South Wales Law Reform Commission, *Contempt by Publication* (Discussion Paper No 43, 2000) 215 [6.47].

149 *Civil Aviation Authority v Australian Broadcasting Corporation* (1995) 39 NSWLR 540, 560.

150 *Sunday Times v UK* (1979) 2 EHRR 245.

151 The Law Reform Commission, *Contempt* (Report No 35, December 1987) 236 [407].

152 Ibid Ch 9; New South Wales Law Reform Commission, *Contempt by Publication* (Report No 100, June 2003) Recommendation 11; Law Reform Commission of Western Australia, *Contempt by Publication* (Discussion Paper No 93(II), March 2002) Recommendation 15.

153 Law Commission (New Zealand), *Reforming the Law of Contempt of Court: A Modern Statute* (Report No 140, May 2017) 44–6, 55 [2.39]–[2.48], [2.97].

154 New South Wales Law Reform Commission, *Contempt by Publication* (Report No 100, June 2003) Chapter 6.

155 The Law Reform Commission, *Contempt* (Report No 35, December 1987) 198 [338]–[339].

Commission's conclusions: civil proceedings

- 10.171 The issue of civil proceedings was not canvassed by this inquiry. However, it is desirable to address the application of sub judice contempt to civil proceedings in the proposed legislation for reasons of clarity and accessibility. The Commission has taken as a starting point the recommendations of earlier law reform commissions which considered the issue, including the views of stakeholders.
- 10.172 The Commission recommends extending the proposed sub judice contempt to civil jury trials. The reasons for protecting juries apply also to civil trials, although with lesser force because of the different context.
- 10.173 The weight of competing principles and rights is different in the civil context. This can be dealt with by listing the civil or criminal nature of proceedings as one of the factors that a judge should weigh in determining any risk.
- 10.174 The Commission recommends stating that the prejudgment principle does not apply in Victoria. The principle is too great a restriction on freedom of expression and, since it has never been used in Australia, it cannot serve any compelling need.
- 10.175 The Commission's preliminary view is that there is no compelling need to protect against improper pressure in civil proceedings. However, further consultation is needed.
- 10.176 Improper pressure on litigants can also be considered as interference with those involved in proceedings. This issue therefore overlaps with the category of contempt of interference with witnesses or parties.
- 10.177 In Chapter 4, the Commission recommends that interference with witnesses or parties should be recognised as a distinct category of contempt, but does not further define the scope of that category. These two issues should be considered together if a new Contempt of Court Act is introduced.

Recommendation

- 88 The proposed Act should provide that contempt by publishing material prejudicial to legal proceedings applies in civil proceedings where there is a jury and that:
- the nature of the proceeding is a relevant factor in determining the risk to a fair hearing
 - the prejudgment principle does not apply.

Scandalising the court

164 What is scandalising the court?

165 Should scandalising the court be abolished?

169 How should scandalising contempt be limited?

174 The procedure and penalties for scandalising contempt

11. Scandalising the court

Overview

- The breadth of the common law contempt of scandalising the court can no longer be justified.
- There is still a limited need to protect against statements that impair public confidence in the courts.
- This protection should exist only where the statement is false and where a person intends or is reckless as to its effect on the courts. It should not extend to opinions.
- This protection should only exist where there is a serious risk to the integrity and authority of the courts.
- Proceedings for this form of contempt may be commenced by the Attorney-General, the Director of Public Prosecutions and the Supreme Court.
- The maximum penalty for this contempt should be two years imprisonment for an individual or an equivalent fine.

What is scandalising the court?

- 11.1 If a person publishes statements that impair public confidence in the courts, this can be contempt.¹ This is referred to as ‘scandalising the court’. This kind of contempt is not limited to comment on specific trials.² For example, it can be a contempt to say that a union influenced a judge’s decision³ or to allege that judges are biased and corrupt.⁴
- 11.2 This is the most controversial form of contempt. This chapter considers whether this form of contempt can still be justified. It concludes that, while it is becoming less relevant, there is still a limited need to protect the judiciary.
- 11.3 The chapter then discusses how to narrow the scope of this form of contempt. It concludes by considering the appropriate procedure and penalty.

1 *R v Dunbabin; Ex parte Williams* [1935] 53 CLR 434; *R v Kopyto* (1987) 62 OR (2d) 449.

2 *R v Fletcher* (1935) 52 CLR 248, 257 (Evatt J); *R v Dunbabin; Ex parte Williams* [1935] 53 CLR 434, 442 (Rich J).

3 *Gallagher v Durack* (1983) 152 CLR 238; *McNair Anderson Associates Pty Ltd v Hinch* [1985] VR 309.

4 *R v Hoser & Kotabi Pty Ltd* [2001] VSC 443; *Hoser & Kotabi Pty Ltd v The Queen* [2003] VSCA 194.

Should scandalising the court be abolished?

11.4 Scandalising the court exists because:

The authority of the law rests on public confidence, and it is important to the stability of society that the confidence of the public should not be shaken by baseless attacks on the integrity or impartiality of courts or judges.⁵

11.5 The consultation paper asked whether scandalising contempt was still needed.⁶ It noted that attitudes have changed, and the public expects courts will be open to robust scrutiny. There is greater recognition of freedom of expression and the principle of open justice.⁷

11.6 Having ruled that scandalising the court was incompatible with free speech, Courts in Canada and the United States narrowed its scope to the extent that it is never used.⁸ In other countries with similar protections, such as New Zealand and South Africa, courts have held that scandalising the court is compatible with their respective charters of human rights.⁹

11.7 The consultation paper discussed other criticisms of this form of contempt, including:

- It gives protection to the judiciary not available to others.¹⁰
- It reflects an outmoded view of how to promote public trust and confidence in the courts, which is best earned rather than commanded.¹¹
- There is an inherent conflict of interest in the judicial officer being victim, prosecutor and judge.¹²
- Exercising the power to punish for this contempt undermines rather than bolsters respect for the courts.¹³
- It is not well known to the public and has a limited symbolic value.¹⁴
- There is no evidence that such protection is needed to maintain public confidence¹⁵ and the risks to the administration of justice are remote and speculative.¹⁶
- Its scope is uncertain.¹⁷
- It is selectively prosecuted, which further ‘chills’ public discussion and undermines public confidence in the courts.¹⁸

11.8 Another argument is that courts have found other ways to deal with criticism. For example, courts now publish summaries of judgments and sentencing remarks, employ media liaison officers, publish podcasts,¹⁹ and sometimes respond publicly to criticism.²⁰ Professional associations such as the Victorian Bar Association, the Judicial Conference of Australia and the Law Institute of Victoria (LIV) regularly defend judges publicly.²¹

5 *Gallagher v Durack* (1983) 152 CLR 238, 243 (Gibbs CJ, Mason, Wilson and Brennan JJ).

6 Victorian Law Reform Commission, *Contempt of Court* (Consultation Paper, May 2019) 129, Question 32.

7 *Ibid* 121–4 [8.52]–[8.77].

8 *R v Kopyto* (1987) 62 OR (2d) 449; *Bridges v California* 314 US 252 (1941).

9 *Solicitor-General v Smith* [2004] 2 NZLR 540; *S v Mamabolo* [2001] ZACC 17.

10 The Law Reform Commission, *Contempt* (Report No 35, December 1987) 264 [457].

11 *S v Mamabolo* [2001] ZACC 17, [78] (Sachs J, dissenting).

12 Victorian Law Reform Commission, *Contempt of Court* (Consultation Paper, May 2019) 119–20 [8.42]–[8.46].

13 Oyiela Litaba, ‘Does the “Offence” of Contempt by Scandalising the Court Have a Valid Place in the Law of Modern Day Australia?’ (2003) 8(1) *Deakin Law Review* 113.

14 Law Commission (England and Wales), *Contempt of Court: Scandalising the Court* (Consultation Paper No 207, December 2012) 5 [8].

15 Sir Anthony Mason, ‘The Courts and Public Opinion’ (Speech, National Institute of Government, 20 March 2002) 30–31. See also Justice Ronald Sackville, ‘How Fragile are the Courts? Freedom of Speech and Criticism of the Judiciary’ (2005) 31(2) *Monash University Law Review* 191.

16 Submission 10 (Bill Swannie).

17 Victorian Law Reform Commission, *Contempt of Court* (Consultation Paper, May 2019) 116 [8.15]–[8.18]; *Gallagher v Durack* (1983) 152 CLR 238, 248 (Murphy J).

18 Submission 10 (Bill Swannie).

19 See, eg, *Gertie’s Law* (Supreme Court of Victoria, March 2019) <<https://www.supremecourt.vic.gov.au/podcast>>.

20 Submissions 10 (Bill Swannie), 22 (Law Institute of Victoria).

21 See, eg, Judicial Conference of Australia, ‘Response to Serious Allegations Against a Judge’ (Media Release, 27 February 2019) <https://www.jca.asn.au/wp-content/uploads/2013/10/P18_01_73-Media-release-re-Ergas-article-on-Preston-J-Feb-2019.pdf>; Law Institute of Victoria, ‘LIV Concern over Reaction to Recent Sentencing Decision’ (Media Release, 30 Aug 2019) <<https://www.liv.asn.au/Staying-Informed/Media-Releases/Media-Releases/August-2019/LIV-concern-over-reaction-to-recent-sentencing-decs>>; Victorian Bar, ‘Leaders of the Legal Profession Unite to Condemn Baseless Attack on Chief Justice Ferguson and the Judiciary’ (Media Release, 27 October 2019) <<https://www.vicbar.com.au/news-events/media-release-leaders-legal-profession-unite-condemn-baseless-attack-chief-justice>>.

Abolishing or reforming scandalising the court

- 11.9 As discussed in the consultation paper, there are two main approaches to scandalising the court:
- abolishing it, as was done by England and Wales in 2013²²
 - narrowing it in legislation, as recommended by several law reform commissions.²³
- 11.10 The New Zealand Law Commission (NZ Commission) adopted the second approach.²⁴ A more limited offence was introduced into Parliament.²⁵ During the passage of the Bill, the Justice Committee unanimously recommended that the offence should be removed.²⁶
- 11.11 It was re-inserted by the New Zealand Government, which relied in part on concerns expressed by the UK Government about its experience since scandalising the court was abolished.²⁷ The offence was narrowed further before the Bill was passed.²⁸

Responses

- 11.12 Stakeholders strongly supported courts being open to criticism and held accountable. Thus, the scope of current law could not be justified. However, they disagreed about whether scandalising the court should be abolished or narrowed in legislation.
- 11.13 Most stakeholders recommended abolishing scandalising the court,²⁹ because it was ‘unnecessary, dangerous and oppressive in a modern democratic society’.³⁰ Several considered this contempt an unjustified restriction on freedom of speech.³¹ Further, laws should foster discussion of court decisions and the reporting of judicial misconduct.³²
- 11.14 Many stakeholders agreed with other criticisms of scandalising the court. These included that judges should not be singled out for special treatment³³ and the judiciary could withstand criticisms.³⁴
- 11.15 They also agreed this contempt was counterproductive³⁵ and there was insufficient evidence for its underlying assumptions.³⁶ They pointed to its absence or repeal in other jurisdictions.³⁷ They emphasised its extremely vague nature³⁸ and the counterproductive effect of selective prosecutions.³⁹
- 11.16 Most also considered there were better ways to address the underlying concern, such as better engagement with the media and the public.⁴⁰

22 *Crime and Courts Act 2013* (UK) s 33; Law Commission (England and Wales), *Scandalising the Court: Summary of Conclusions* (Final Report No 335, December 2012).

23 The Law Reform Commission, *Contempt* (Final Report No 35, December 1987) 266 [460]; Law Reform Commission of Western Australia, *Report on Review of the Law of Contempt* (Project No 93, June 2003) 116; Law Commission (New Zealand), *Reforming the Law of Contempt of Court: A Modern Statute* (Report No 140, May 2017) 118–21.

24 Law Commission (New Zealand), *Reforming the Law of Contempt of Court: A Modern Statute* (Report No 140, May 2017) Recommendations 42–3.

25 New Zealand, *Parliamentary Debates*, House of Representatives, 2 May 2018, 3389 (Christopher Finlayson).

26 Justice Committee, *Administration of Justice (Reform of Contempt of Court) Bill* (Final Report, 5 April 2019) 9.

27 New Zealand, *Parliamentary Debates*, House of Representatives, 6 August 2019, vol 740 (Andrew Little, Attorney-General).

28 These largely adopted the recommendations of the Ministry of Justice (NZ), *Departmental Report: Administration (Reform of Contempt of Court) Bill* (2019).

29 Submissions 2 (David S Brooks), 10 (Bill Swannie), 12 (Timothy Smartt), 17 (Dr Denis Muller), 18 (Commercial Bar Association Media Law Section Working Group), 22 (Law Institute of Victoria), 23 (MinterEllison Media Group), 27 (Australia’s Right to Know coalition); Consultation 12 (Professor David Rolph).

30 Submission 10 (Bill Swannie).

31 Submissions 10 (Bill Swannie); 12 (Timothy Smartt); 22 (Law Institute of Victoria); 23 (MinterEllison Media Group).

32 Submissions 10 (Bill Swannie), 17 (Dr Denis Muller), 22 (Law Institute of Victoria); 23 (MinterEllison Media Group); 27 (Australia’s Right to Know coalition).

33 Submissions 12 (Timothy Smartt), 18 (Commercial Bar Association Media Law Section Working Group), 22 (Law Institute of Victoria), 23 (MinterEllison Media Group).

34 Submissions 17 (Dr Denis Muller), 22 (Law Institute of Victoria); Consultation 12 (Professor David Rolph).

35 Submissions 17 (Dr Denis Muller), 22 (Law Institute of Victoria).

36 Submissions 12 (Timothy Smartt), 17 (Dr Denis Muller), 18 (Commercial Bar Association Media Law Section Working Group), 22 (Law Institute of Victoria), 23 (MinterEllison Media Group).

37 Submissions 18 (Commercial Bar Association Media Law Section Working Group), 22 (Law Institute of Victoria), 23 (MinterEllison Media Group).

38 Submissions 10 (Bill Swannie), 12 (Timothy Smartt), 18 (Commercial Bar Association Media Law Section Working Group), 22 (Law Institute of Victoria), 23 (MinterEllison Media Group).

39 Submissions 22 (Law Institute of Victoria), 23 (MinterEllison Media Group).

40 Submissions 10 (Bill Swannie), 12 (Timothy Smartt), 17 (Dr Denis Muller), 18 (Commercial Bar Association Media Law Section Working Group), 22 (Law Institute of Victoria), 23 (MinterEllison Media Group).

- 11.17 The LIV observed that the case for abolition was stronger in Victoria because of Victoria's Charter of Human Rights. In its view, the 'broad, uncertain and unfettered' scope of this contempt breached the Charter, including the right to a fair trial.⁴¹ Some noted that its scope may be limited by the implied right to political communication in the Constitution.⁴²
- 11.18 The Commercial Bar Association Media Law Working Group (CommBar—Media Law Section) argued that the 'central problem is that the determination of what is true, fair or robust is not always clear and the final determination is made by the very instrument that is being criticised'.⁴³
- 11.19 The courts and tribunals and the International Commission of Jurists recommended reforming scandalising contempt through a statutory provision.⁴⁴
- 11.20 The Supreme Court endorsed the formulation proposed in the New Zealand Bill (before the amendments made in committee).⁴⁵ The Court emphasised that mere criticism and insult should not be criminalised. The law should penalise conduct seemingly directed at influencing decisions or seeking to de-legitimise the courts and undermine their authority.
- 11.21 The Court pointed to examples in other countries and through history where campaigns had been mounted to undermine the courts' ability to check power. The Court noted that courts and judicial officers are ethically constrained in responding to public accusations. In its view, contempt remained the appropriate means of enforcement.⁴⁶
- 11.22 The County Court said this form of contempt was more important today because of increased media scrutiny and consequent increased risks of unfounded or malicious criticism. It indicated that certain actions could cause significant damage to the court.
- 11.23 The Court gave as examples attempts to incite others to defy lawful authority or to influence the way judges made their decisions. It supported modernising scandalising the court in legislation. It agreed with the Supreme Court that other remedies did not replace the need for this form of contempt.⁴⁷
- 11.24 The International Commission of Jurists reported that, in a recent judicial roundtable, many had expressed concerns about the increasingly 'vitriolic' nature of commentary. It argued 'that this is not the time to diminish the capacity of the contempt power'. In its view, there was no need to restrict fair and objective criticism, even exceptionally harsh criticism, of court decisions on the ground of error of reasoning, facts or exercise of discretion. However, this form of contempt was needed as a last resort and should be sparingly used to protect against 'unbalanced, ill-informed, inaccurate, biased, superficial or sensational criticism'.⁴⁸

Commission's conclusions: define a more limited contempt

- 11.25 The common law of scandalising the court cannot be justified today. There needs to be greater room for freedom of expression and robust scrutiny of the courts. Respect for the courts is best earned rather than commanded.
- 11.26 Mere criticism and insult should not be a crime. Nor should this form of contempt protect the reputations and feelings of individual judges.

41 Submission 22 (Law Institute of Victoria). The LIV also noted that the reasons relied on by other law reform commissions to justify retaining the offence were no longer relevant.

42 Submission 10 (Bill Swannie); Consultation 12 (Professor David Rolph).

43 Submission 18 (Commercial Bar Association Media Law Section Working Group).

44 Submissions 7 (The Victorian Civil and Administrative Tribunal), 20 (Criminal Bar Association), 29 (Supreme Court of Victoria), 31 (County Court of Victoria), 32 (International Commission of Jurists, Victoria); Consultation 25 (Magistrates' Court of Victoria).

45 Submission 29 (Supreme Court of Victoria).

46 Ibid.

47 Submission 31 (County Court of Victoria). The Criminal Bar Association agreed that public engagement was 'not a complete answer to the problem': Submission 20 (Criminal Bar Association).

48 Submission 32 (International Commission of Jurists, Victoria).

- 11.27 The courts can and should use other ways to address much of what is now within this form of contempt. However, the Commission acknowledges that in practice judges are unlikely to sue for defamation, and that defamation proceedings protect the individual reputation rather than systemic harm to the courts.
- 11.28 Some kinds of conduct falling within scandalising are better characterised as harassment of judicial officers. Such conduct may be better dealt with through specific statutory offences. For example, the existing offence of harassing witnesses could be expressly extended to judges.⁴⁹ However, such a recommendation goes beyond the terms of reference of this inquiry.
- 11.29 Much of the conduct that falls within scandalising now could be removed safely. The key question is whether a person can, through public statements, risk undermining the public confidence needed to sustain our courts.
- 11.30 The Commission considers there are few occasions where this could occur. In almost all cases, there will be no substantial risk in criticisms of courts and judges by disappointed litigants, frustrated citizens, or even high-profile media commentators or publications. Such criticism can ordinarily be treated as part of robust public discourse.
- 11.31 However, there are extreme cases where such statements could create such a risk. In recent years, judges of the United Kingdom Supreme Court have been labelled ‘enemies of the people’,⁵⁰ and, in other countries, presidents and other high-ranking members of the executive or legislature have made increasingly strident attacks on the competency and impartiality of the courts.⁵¹
- 11.32 Such cases expose the limits to which the courts can respond compared to other arms of government. Parliaments and the executive can respond publicly and engage to the full extent with media. Those arms of government are also elected, so must be subject to greater scrutiny.
- 11.33 The courts perform a distinctive function. They regulate disputes between individuals, as well as between the individual and the state. The judiciary is also the arm of government deliberately designed not to reflect the will of the majority or political power. However, the courts are dependent on the executive to enforce their decisions.
- 11.34 Therefore, courts are more vulnerable constitutionally because their decisions can be unpopular and can check the power of others. This is especially important today, when there are risks to the rule of law.
- 11.35 Ultimately, the purpose of this contempt is to protect the rule of law, including the confidence of those appearing before the courts in the fairness of the system. In this way, this contempt protects the right to a competent, independent and impartial court or tribunal.⁵²
- 11.36 Contempt law can play only a limited role in protecting against the erosion of the respect of the courts. In a healthy constitutional democracy, contempt powers need to be exercised rarely and with great discretion to preserve their effectiveness.

49 *Summary Offences Act 1966* (Vic) s 52A. The offence covers persons taking part in a criminal proceeding as a witness or in any other capacity, so it may already include judges. Provisions in other states protect judicial officers against threats or intimidation: see, eg, *Crimes Act 1900* (NSW) ss 322, 326; *Criminal Code 1899* (Qld) s 119B.

50 Claire Phipps, ‘British Newspapers React to Judges’ Brexit Ruling: “Enemies of the People”’, *The Guardian* (online, 4 November 2016) <<https://www.theguardian.com/politics/2016/nov/04/enemies-of-the-people-british-newspapers-react-judges-brexit-ruling>>.

51 Ariane de Vogue and Veronica Stracqualursi, ‘Federal Judge Rebukes Trump Attacks on Courts, Compares to Segregationist Era’, *CNN* (online, 12 April 2019) <<https://edition.cnn.com/2019/04/12/politics/federal-judge-compares-trump-segregationist-era/index.html>>; Hugh Corder, ‘Critics of South Africa’s Judges are Raising the Temperature: Legitimate, or Dangerous?’, *The Conversation* (Web Page, 22 August 2019) <<https://theconversation.com/critics-of-south-africas-judges-are-raising-the-temperature-legitimate-or-dangerous-122209>>.

52 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 24.

- 11.37 Nevertheless, such examples show it is possible for statements to create a substantial risk of undermining public confidence in the judiciary. In extreme cases, the risk to the administration of justice may be greater than in more ordinary forms of contempt. It would be inconsistent to protect the administration of justice against these lesser risks but not the greater risks created by public statements.
- 11.38 The Commission therefore recommends a more limited protection of the judiciary and the courts in the legislation. Consistently with the approach of the Commission elsewhere in this report, this category of contempt should be redefined in simpler and more accessible language that more accurately reflects the scope and purpose of this type of contempt.

Recommendation

- 89 The proposed Act should recognise ‘scandalising contempt’ as a distinct category of contempt and redefine it as ‘contempt by publishing material undermining public confidence in the judiciary or courts’.

How should scandalising contempt be limited?

- 11.39 The consultation paper identified two models of statutory offences which had been proposed by the Australian Law Reform Commission (ALRC) and the NZ Commission.
- 11.40 Some stakeholders endorsed a particular model in their submissions. The Supreme Court and the Criminal Bar Association supported the New Zealand model as introduced into their Parliament.⁵³ The LIV, while strongly recommending abolition, supported the ALRC model in the alternative.⁵⁴
- 11.41 This section discusses how to identify the permissible limits of the protection. It examines the following areas of the common law that need to be rebalanced or made clear:
- truth
 - opinion
 - the mental element (intention)
 - the appropriate threshold of risk required
 - the harm that is the focus of the contempt.

Truth

- 11.42 It is not clear whether truth is a complete defence to contempt by scandalising the court.⁵⁵ As the NZ Commission stated:
- a defendant cannot be said to be responsible for undermining public confidence in the judiciary where the allegations made are in fact true.⁵⁶
- 11.43 This uncertainty could discourage people from making well-founded allegations and reduce the proper scrutiny of the judiciary.⁵⁷ Law reform commissions therefore have consistently proposed that truth should be a defence.⁵⁸

53 Submissions 20 (Criminal Bar Association), 29 (Supreme Court of Victoria).

54 Submission 22 (Law Institute of Victoria).

55 It has been suggested in obiter that it is a defence: *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 39. Whether it is a complete defence remains unsettled: Law Commission (New Zealand), *Reforming the Law of Contempt of Court: A Modern Statute* (Report No 140, May 2017) 9 [6.76]; LexisNexis, *Halsbury's Laws of Australia* (online, 25 September 2018) 105 Contempt, '2 Criminal Contempt' [05–230].

56 Law Commission (New Zealand), *Reforming the Law of Contempt of Court: A Modern Statute* (Report No 140, May 2017) 120 [6.78].

57 The Law Reform Commission, *Contempt* (Report No 35, December 1987) 255 [439].

58 *Ibid*; Law Reform Commission of Western Australia, *Report on Review of the Law of Contempt* (Project No 93, June 2003) 116; Law Commission (New Zealand), *Reforming the Law of Contempt of Court: A Modern Statute* (Report No 140, May 2017) 120 [6.78].

- 11.44 However, concerns have also been raised about a defence of truth. In New Zealand, such a defence was originally included in the proposed offence but it was opposed by legal academics. They considered that this infringed the presumption of innocence, and the defence of truth ‘may be illusory or, at best, put the courts asked to adjudicate on it in a difficult position’.⁵⁹
- 11.45 During the debate on the New Zealand contempt legislation, the New Zealand Ministry of Justice proposed significant changes to the statutory offence.⁶⁰ This included making the prosecution prove the falsity of the statement rather than making the defendant prove truth. This change was made to align with general criminal law principles.⁶¹ This change is reflected in the Act.⁶²

Opinion and fair comment

- 11.46 The common law is unclear as to the extent to which it can punish mere opinion. Cases indicated that it is not scandalising the courts if the publication is ‘fair comment’.⁶³ ‘Fair comment’ has been said to mean:
- it must be honest criticism based on rational grounds, and be a discussion which is fairly conducted. It must not be motivated by malice or by an intention to undermine the standing of the courts within the community.⁶⁴
- 11.47 The Law Reform Commission of Western Australian (WA Commission) recommended protecting fair comment.⁶⁵ The NZ Commission, however, considered there should be no defence of honest opinion, because it had never been part of the law of contempt and was not consistent with its overall purpose. In its view, such a defence would ‘confine the proposed offence to a very small choice of exceptional cases’.⁶⁶
- 11.48 The freedom to hold an opinion, unlike freedom of expression, is considered an absolute freedom under human rights law.⁶⁷ In the European context, it has been therefore held that it is an infringement of that freedom to hold a person liable for the expression of an opinion based on facts.⁶⁸
- 11.49 One of the changes made to the New Zealand Contempt of Court Bill was to limit liability to false factual statements rather than ‘accusations or allegations’. This would exclude expressions of opinion.⁶⁹
- 11.50 The New Zealand Ministry of Justice noted that ‘including opinion involves too great a trade-off against free speech for too little benefit’. In its view, if a person’s opinions were extreme and potentially damaging, the Solicitor-General or Attorney-General could still defend the judiciary.⁷⁰

59 Ministry of Justice (NZ), *Departmental Report: Administration (Reform of Contempt of Court) Bill* (2019) 14 [35].

60 This recommendation was made by the NZ Legislation Design and Advisory Committee, if its first submission to abolish the offence was not adopted: Ministry of Justice (NZ), *Departmental Report: Administration (Reform of Contempt of Court) Bill* (2019) 14 [34].

61 Ministry of Justice (NZ), *Departmental Report: Administration (Reform of Contempt of Court) Bill* (2019) 14 [44].

62 *Contempt of Court Act 2019* (NZ) s 22.

63 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 31–2 (Mason CJ), 38–9 (Brennan J), 90–1 (Dawson J), 98 (McHugh J); *R v Hoser & Kotabi Pty Ltd* [2001] VSC 443 [66]–[91].

64 *R v Hoser & Kotabi Pty Ltd* [2001] VSC 443 [66].

65 Law Reform Commission of Western Australia, *Report on Review of the Law of Contempt* (Project No 93, June 2003) 116.

66 Law Commission (New Zealand), *Reforming the Law of Contempt of Court: A Modern Statute* (Report No 140, May 2017) 121 [6.82]. The Australian Law Reform Commission did not include fair comment as a defence: The Law Reform Commission, *Contempt* (Report No 35, December 1987) 257 [443], 266 [460].

67 United Nations Human Rights Committee, *General Comment No. 34 (Article 19: Freedoms of Opinion and Expression)*, UN Doc CCPR/C/GC/34 (12 September 2011) 2 [9].

68 *Lingens v Austria* (1986) 8 EHR 496.

69 Ministry of Justice (NZ), *Departmental Report: Administration (Reform of Contempt of Court) Bill* (2019) 16 [43].

70 *Ibid* 17 [47].

The mental element (intention)

- 11.51 As discussed in the consultation paper, it appears that an intention to interfere with the administration of justice is not a necessary element of this form of contempt.⁷¹
- 11.52 The New Zealand Ministry of Justice also changed this part of the offence during the passage of the Bill. It recommended including a mental element of intention or recklessness. This means the prosecution would have to prove that the defendant knew or ought reasonably to have known that their statement could undermine public confidence in the judiciary or a court.⁷²

Threshold of risk

- 11.53 The courts have emphasised the need for the conduct to pose a ‘real’ or ‘serious’ risk of undermining public confidence in the administration of justice.⁷³
- 11.54 In this report, the Commission has recommended that a ‘substantial risk’ should be the threshold for the general law of contempt. However, there may be a justification for a higher threshold for scandalising contempt.
- 11.55 In Canada, courts adopted a higher threshold to better reflect the guarantee of free speech in the Canadian Charter of Human Rights. The Ontario Court of Appeal ruled that the act or publication must be of a ‘clear and present danger to the administration of justice’.⁷⁴

The harm required

- 11.56 Judges have described the harm of scandalising contempt in different ways. The most influential statement describes scandalising contempt as:
- publications calculated to impair the confidence of the people in the Court’s judgments because the matter published 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.⁷⁵
- 11.57 In its proposed statutory offence, the ALRC recommended that the publication must be ‘likely to cause serious harm to the reputation of the judge or magistrate in his or her official capacity’.⁷⁶ The New Zealand offence refers to risks that the publication ‘could undermine public confidence in the independence, integrity, impartiality or authority of the judiciary or a court’.⁷⁷

Responses

- 11.58 Several stakeholders supported a defence of truth, including those who would have preferred the offence to be abolished.⁷⁸ The CommBar—Media Law Section also supported a defence of the absence of malice.⁷⁹ The LIV proposed that there should be the defence of truth or honest and reasonable belief in the truth, if the Commission decided that the offence should not be abolished.⁸⁰

71 Victorian Law Reform Commission, *Contempt of Court* (Consultation Paper, May 2019) [8.14]. See also *A-G (NSW) v Munday* [1972] 2 NSWLR 887, 911 (Hope J); *A-G (Qld) v Lovitt* [2003] QSC 279 [58] (Chesterman J).

72 Ministry of Justice (NZ), *Departmental Report: Administration (Reform of Contempt of Court) Bill* (2019) 16 [44], Recommendation 1.

73 *R v Hoser & Kotabi Pty Ltd* [2001] VSC 443 [205]–[207]; *The Herald & Weekly Times v A-G (Vic)* [2001] VSCA 152 [7].

74 *R v Kopyto* (1987) 62 OR (2d) 449. This adopted language similar to that used in the United States.

75 *R v Dunbabin; Ex Parte Williams* [1935] 53 CLR 434, 442 (Rich J).

76 The Law Reform Commission, *Contempt* (Report No 35, December 1987) 266 [460].

77 *Contempt of Court Act 2019* (NZ) s 22.

78 Submissions 18 (Commercial Bar Association Media Law Section Working Group), 20 (Criminal Bar Association), 22 (Law Institute of Victoria).

79 Submission 18 (Commercial Bar Association Media Law Section Working Group).

80 Submission 22 (Law Institute of Victoria).

- 11.59 Australia’s Right to Know coalition (ARTK) suggested that a defence of honest opinion should apply where the comment was based on proper material and related to a matter of public interest.⁸¹ It noted that the conduct of courts is inherently a matter of public interest. It also supported introducing a public interest defence.⁸²
- 11.60 Several stakeholders who had supported abolishing scandalising the court objected to the state punishing ‘those who criticise or disagree with the decisions or processes of a court or a judge’. They said people should be able to ‘comment rightly or wrongly on the decisions of the courts’.⁸³
- 11.61 The CommBar—Media Law Section emphasised that it would not be enough to permit only fair or accurate, or even robust, criticism of the courts. It was not easy to identify the boundary of such criticism. Further, the boundary would be determined by the ‘very instrument that is being criticised’.⁸⁴
- 11.62 ARTK argued that public scrutiny could amount to ‘strident criticism’. In its view, discussion of the exercise of a court’s functions should be immune from prosecution.⁸⁵
- 11.63 Several stakeholders, including those who argued for the offence to be abolished, addressed the issue of intention.
- 11.64 ARTK supported requiring that a person must have intended to bring the court into disrepute or reduce the public’s confidence in the integrity of the judicial system.⁸⁶
- 11.65 The LIV said there must be an intention to publish the material and the person must have known or ought reasonably to have known the material would interfere with the administration of justice.⁸⁷
- 11.66 The Criminal Bar Association supported requiring that a person must have been reckless as to the effect of his or her conduct.⁸⁸ The CommBar—Media Law Section submitted that the defendants must be shown to have been aware of the facts that gave rise to the restriction.⁸⁹
- 11.67 The CommBar—Media Law Section also argued that, if scandalising the court was retained, the ‘tendency’ test should be replaced by a test that ‘publications are calculated to, and are likely to, result in a reduction of public confidence in the court system’.⁹⁰
- 11.68 The Supreme Court and the Criminal Bar Association favoured identifying the harm in terms similar to those used in the New Zealand legislation.⁹¹ The LIV proposed that, if scandalising the court was retained, it should be modelled on the offence recommended by the ALRC.⁹²
- 11.69 The LIV also recommended other defences of a fair, accurate and reasonably contemporaneous reporting of legal or Parliamentary proceedings.⁹³

81 This was based on the defence of honest opinion in defamation law. The Council of Attorneys-General has proposed some amendments to clarify this defence in draft legislation as part of the review of Australia’s defamation law, which is discussed in Chapter 13: Australasian Parliamentary Counsel’s Committee, Council of Attorneys-General (NSW), *Model Defamation Amendment Provisions (Draft for public consultation)* (Report Draft d15, 2019) sch 1 para 26 <<https://www.justice.nsw.gov.au/Justicepolicy/Documents/review-model-defamation-provisions/consultation-draft-of-mdaps.pdf>>; Council of Attorneys-General, Department of Communities and Justice (NSW), *Model Defamation Amendment Provisions 2020 (Consultation Draft)* (Background Paper, December 2019) paras [23]–[25], Recommendation 12 <<https://www.justice.nsw.gov.au/Justicepolicy/Documents/review-model-defamation-provisions/defamation-final-background-paper.pdf>>.

82 Submission 27 (Australia’s Right to Know coalition).

83 Submissions 10 (Bill Swannie), 22 (Law Institute of Victoria). The second quote cites *Gallagher v Durack* (1983) 152 CLR 238, 248 (Murphy J). The original statement continues: ‘in a way that does not constitute a clear and present danger to the administration of justice’.

84 Submission 18 (Commercial Bar Association Media Law Section Working Group). See also the analysis of the fair comment defence in Submission 12 (Timothy Smartt).

85 Submission 27 (Australia’s Right to Know coalition).

86 Ibid.

87 Submission 22 (Law Institute of Victoria).

88 Submission 20 (Criminal Bar Association).

89 Submission 18 (Commercial Bar Association Media Law Section Working Group).

90 Ibid.

91 Submissions 29 (Supreme Court of Victoria), 20 (Criminal Bar Association).

92 Submission 22 (Law Institute of Victoria).

93 Ibid.

Commission's conclusions: limit the scope of the contempt

- 11.70 True statements should not be punished. This would not serve the purpose of the contempt. It would therefore be disproportionate in its burden on freedom of expression.
- 11.71 The Commission recommends the New Zealand model in which the prosecution must prove the falsity of the statement. This is more consistent with criminal law principles and the presumption of innocence. It also avoids some of the disadvantages of proving truth.
- 11.72 Opinion should not be included within the scope of the contempt. Freedom to hold an opinion is a distinctive human right and it is incompatible with that freedom to criminalise the holding of an opinion.⁹⁴
- 11.73 Excluding opinion narrows significantly the scope of the contempt. This would remove, for example, the ability to punish mere insults or views on whether a judgment was correct, provided the underlying facts were accurately represented.
- 11.74 It is also consistent with the requirement that the statement must be false. By definition, it would be impossible to prove an opinion false.
- 11.75 Further, it must be proved that the person intended to undermine public confidence in the courts or was reckless about whether the publication would undermine public confidence in the courts. This is consistent with the Commission's view that the scope of this contempt should be narrowed, and the competing rights rebalanced.
- 11.76 This position differs from sub judice contempt, where intention or recklessness is less relevant to the need to protect a fair trial. It would often be difficult to prove intention or recklessness for sub judice contempt, because the primary purpose may be to publish information that is newsworthy.
- 11.77 In contrast, the main purpose of the law of scandalising is to punish statements tending to impair public confidence in the courts and judiciary. In many cases, the intention or recklessness will be self-evident or readily inferred from the statement itself.
- 11.78 However, it would be too restrictive to require only intention and exclude recklessness. As a default, recklessness should be the mental element where it involves a circumstance or result.⁹⁵
- 11.79 The contempt should be further narrowed in another way. For other contempts, the Commission has recommended that the threshold should be a 'substantial risk'.⁹⁶ In this form of contempt, the risk to the administration of justice is more remote and there is no competing right to a fair trial. There is a greater need therefore to justify and limit this restriction.
- 11.80 A higher threshold of risk should therefore apply to this form of contempt. This is consistent with modern practice in which scandalising is rarely prosecuted. Prosecuting high-profile individuals may, at least in part, reflect an assessment of the level of risk in those cases.
- 11.81 The Commission recommends elevating the threshold to narrow the scope of this contempt. However, it does not favour a 'clear and present danger' test, but rather a 'serious risk' test. This is more consistent with the common law in Australia and with the adoption of the 'substantial risk' test.

94 UN Human Rights Committee, *General Comment No. 34 (Article 19: Freedoms of Opinion and Expression)*, UN Doc CCPR/C/GC/34 (12 September 2011).

95 Attorney-General's Department (Cth), *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (Report, September 2011) 20 [2.2.4] <<https://www.ag.gov.au/Publications/Documents/GuidetoFramingCommonwealthOffencesInfringementNoticesandEnforcementPowers/A%20Guide%20to%20Framing%20Cth%20Offences.pdf>>.

96 Recommendations 9, 77 and 78.

- 11.82 Finally, the proposed Act should use language that directs attention to the institutional harm at risk in this kind of contempt. This is better reflected in the terms used in the New Zealand legislation, which focus on public confidence and more clearly specify the relevant attributes of the institution that are at risk.
- 11.83 Together, these changes would deal with most of the criticisms of the contempt. Defining the contempt would remove much of the vagueness and uncertainty of the offence. It would be clear that criticism of court decisions and processes is not punishable, unless such criticism was based on false statements of fact. Falsity would be a necessary element of the offence rather than a presumption to be rebutted by a defence of truth.
- 11.84 Narrowing the scope of the offence also addresses the concern that this offence is selectively prosecuted. This would also deal with the concern that the law could deter good faith disclosures of judicial misconduct.

Recommendation

- 90 The proposed Act should provide that a person may be dealt with by a court for contempt by publishing material undermining public confidence in the judiciary or courts where a person publishes a false statement about a judge or court and intended or was reckless as to whether the publication created a serious risk of undermining public confidence in the independence, integrity, impartiality or authority of the judiciary.

The procedure and penalties for scandalising contempt

The proposed procedure

- 11.85 In Chapter 5 the Commission recommends a procedure for contempt of court that includes greater procedural protections for the accused. However, the procedure does not include the right to a jury. The Supreme Court can still commence proceedings, as well as the Attorney-General and Director of Public Prosecutions. A party with a sufficient interest may also commence proceedings.
- 11.86 Is there a reason to change this procedure for the new contempt of publishing false statements about the courts? There are three possible reasons:
- the greater risk of an appearance of bias or a conflict of interest
 - the concern that it would undermine the aim of protecting public confidence, because courts would appear to be protecting their own interests
 - the greater value of a jury in determining whether there is a risk to public confidence in these cases.⁹⁷
- 11.87 Arguments to the contrary include:
- It is necessary for the courts to vindicate their own authority swiftly.
 - Courts are best placed to understand the need for the integrity and impartiality of courts and judges.
 - There is generally no evidentiary dispute about the scandalising conduct.
 - A summary trial would involve magistrates ruling on judgments that may involve higher courts.

- The current process is more flexible in allowing for mitigation.⁹⁸
- 11.88 These issues are resolved in the New Zealand legislation by replacing the common law with ordinary criminal offences.⁹⁹ The New Zealand legislation also requires the consent of the Solicitor-General and limits the maximum penalty to six months imprisonment or an equivalent fine.¹⁰⁰
- 11.89 Similarly, the New South Wales Law Reform Commission and the WA Commission would have converted these offences to ordinary criminal offences.¹⁰¹ The ALRC proposed that trial by jury should be the normal procedure for scandalising contempt.¹⁰²

Responses

- 11.90 Most stakeholders addressed this issue in the context of the general features of the contempt procedure (see Chapter 5). Several stakeholders said that the lack of procedural safeguards was another reason to abolish this category of contempt.¹⁰³
- 11.91 The CommBar—Media Law Section supported abolishing the summary procedure because it was unacceptable for a judge to act as victim, prosecutor, witness and adjudicator. If there was no practical way of dealing with this contempt other than by summary prosecution, the category of contempt should be abolished.¹⁰⁴
- 11.92 Bill Swannie noted that codifying the contempt had its own risks, including making ‘prosecution less flexible and most likely considerably slower’.¹⁰⁵
- 11.93 The LIV said that, if scandalising the court was retained, it should be an indictable offence that can be tried summarily.¹⁰⁶ It expressed concern about the ‘global discretionary exercise’ used to determine this contempt, as demonstrated in *DPP (Cth) v Besim*.¹⁰⁷

Commission’s conclusions: procedure

- 11.94 There is a stronger argument for removing the court’s powers to deal with a person for scandalising contempt. Such powers can undermine the purpose of the contempt by leading people to believe that judges are protecting themselves and involving the court in an apparent conflict of interest.
- 11.95 The narrowing of the scope of the contempt and the greater procedural protections go some way to addressing these concerns. As discussed in Chapter 15, the Commission is also recommending reducing the maximum penalty.
- 11.96 These changes do not entirely overcome these concerns. Nevertheless, the Commission concludes on balance that there are insufficient reasons to justify changing the general procedure in this case.
- 11.97 A summary or indictable procedure has important disadvantages. It leaves the courts dependent on the executive to vindicate their authority. It provides another platform for the accused to republish statements to others. It makes the procedure more complex and costly. This may undermine the effectiveness of the protection, especially as the contempt itself has been narrowed considerably.
- 11.98 Further, some of the most serious cases have involved senior members of the executive. If the executive alone had the power to commence proceedings, this could leave courts without protection in those cases.

98 The Law Reform Commission, *Contempt* (Report No 35, December 1987) 280–1 [478].

99 *Ibid* 278 [476].

100 *Contempt of Court Act 2019* (NZ) ss 22(2), 23(1).

101 *DPP (Cth) v Besim* [2017] VSCA 165.

102 The Law Reform Commission, *Contempt* (Report No 35, December 1987) 281–2 [479].

103 Submissions 10 (Bill Swannie), 18 (Commercial Bar Association Media Law Section Working Group), 22 (Law Institute of Victoria); Consultation 12 (Professor David Rolph).

104 Submission 18 (Commercial Bar Association Media Law Section Working Group).

105 Submission 10 (Bill Swannie).

106 Submission 22 (Law Institute of Victoria).

107 *DPP (Cth) v Besim* [2017] VSCA 165.

- 11.99 However, there are greater risks in courts choosing to commence proceedings and such cases should be rare. The Commission recommends, therefore, that only the Supreme Court should have the power to bring proceedings, including in relation to publications made about other courts. As the harm is to the courts and the judiciary, private parties should not be able to commence proceedings for this form of contempt.
- 11.100 The Commission has considered whether other procedural steps should be required before the Supreme Court exercises this power. The Commission has concluded that these would not add value and could introduce complexity.

Recommendations

- 91 The proposed Act should provide that only the Attorney-General, Director of Public Prosecutions and the Supreme Court can bring proceedings to deal with contempt by publishing material undermining public confidence in the judiciary or courts.
- 92 The proposed Act should provide that the Supreme Court should continue to have power to deal with contempt in respect of publications made about other courts or judges in those courts.

The maximum penalty

- 11.101 Penalties for restrictions on publications are discussed in Chapter 15. For reasons discussed there, the Commission has concluded that a maximum penalty of two years imprisonment or 240 penalty units or both should apply for an individual, and a maximum penalty of 1200 penalty units for bodies corporate.

PART THREE: THE JUDICIAL PROCEEDINGS REPORTS ACT

The Judicial Proceedings Reports Act

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12. The Judicial Proceedings Reports Act

Overview

- The Judicial Proceedings Reports Act restricts what people can publish about court proceedings in four ways.
 - Two of these restrictions no longer serve a purpose and should be abolished. These prohibit the publication of indecent matters and the details of divorce and related proceedings.
 - There is still value in the restriction on directions hearings and sentence indications. This should be moved to the Open Courts Act with minor changes, but its scope should not be extended.
 - It is still important to prohibit people from identifying victims of sexual offences. This restriction should also be moved to the Open Courts Act.
 - The law should make clear that an adult victim can agree in writing to this material being published. If the victim is a child who agrees to publish, the court will need to decide if the matter can be published.
 - Victims should be given early advice, guidance and support to apply for suppression orders. Judicial officers should be under a duty to inquire, in cases involving family violence and sexual offences, whether there is a need for any suppression order. There should be no further temporary restriction for victims of family violence and sexual offences.
 - The Judicial Proceedings Reports Act should be repealed.
-

Why reform is needed

- 12.1 The *Judicial Proceedings Reports Act 1958* (Vic) makes it a summary offence¹ to publish four kinds of material about court proceedings.² It prohibits publishing:
- indecent matters calculated to injure public morals³
 - details about divorce or related proceedings⁴
 - details about criminal directions hearings and sentence indication hearings in the County Court and Supreme Court⁵
 - material identifying a person against whom a sexual offence is alleged to have been committed.⁶
- 12.2 A person can only be prosecuted under the Act if the Director of Public Prosecutions (DPP) consents.⁷ Prosecutions are rare.⁸
- 12.3 The consultation paper asked if any of these restrictions should be retained.⁹

Indecent matters and public morals

- 12.4 Section 3(1)(a) of the Act makes it unlawful to publish or cause to be published from court proceedings:
- 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.
- 12.5 This applies whether those court proceedings took place in Victoria or elsewhere.¹⁰ Attitudes have changed since this restriction was enacted in 1929.¹¹ At that time, other laws gave Victorian courts powers to close proceedings to the public and restrict reporting of proceedings on the grounds of public decency and morality.¹² These provisions have since been repealed.¹³
- 12.6 As discussed in the consultation paper,¹⁴ this restriction does not appear to have been prosecuted and may be ‘effectively a dead letter’.¹⁵

1 *Judicial Proceedings Reports Act 1958* (Vic) ss 3(3), 4(2). For a person, the maximum penalty is a fine of 20 penalty units and/or four months imprisonment; for a body corporate, the maximum penalty is a fine of 50 penalty units.

2 The prohibition in section 4(1A) on identifying a person against whom a sexual offence is alleged to have been committed operates more broadly than the other provisions. It restricts the publication of information likely to lead to the identification of a victim, whether the identifying information arises from, or is related to, a judicial proceeding.

3 *Judicial Proceedings Reports Act 1958* (Vic) s 3(1)(a).

4 *Ibid* s 3(1)(b).

5 *Ibid* s 3(1)(c).

6 *Ibid* s 4(1A).

7 *Ibid* ss 3(4), 4(4).

8 According to Annual Reports, the Director has only given consent to prosecute an offence under the *Judicial Proceedings Reports Act* four times since June 2000: Office of Public Prosecutions, *Annual Report 2002–2003* (2003) 12; Office of Public Prosecutions, *Annual Report 2009–2010* (2010) 70. All other Annual Reports for the period 2000 to 2018 record that there were no consents to prosecute offences under the *Judicial Proceedings Reports Act*.

9 Victorian Law Reform Commission, *Contempt of Court* (Consultation Paper, May 2019) 135–41, Questions 36–9.

10 *Judicial Proceedings Reports Act 1958* (Vic) s 3(6).

11 *Judicial Proceedings (Regulation of Reports) Act 1929* (Vic).

12 See, eg, *Supreme Court Act 1928* (Vic) s 29; *County Court Act 1928* (Vic) ss 89, 90; *Justices Act 1958* (Vic) ss 213, 214; *Supreme Court Act 1958* (Vic) s 29; *Magistrates Court 1971* (Vic) s 48 (all Acts repealed); *Supreme Court Act 1986* (Vic) ss 18–19; *County Court Act 1958* (Vic) s 81 (all sections repealed).

13 Jason Bosland, ‘Two Years of Suppression Under the *Open Courts Act 2013* (Vic)’ (2017) 39(1) *Sydney Law Review* 25, 30–1.

14 Victorian Law Reform Commission, *Contempt of Court* (Consultation Paper, May 2019) [9.11]–[9.19].

15 Stephen Cretney, ‘Disgusted, Buckingham Palace—The *Judicial Proceedings (Regulation of Reports) Act 1926*’ (1997) 9(1) *Child and Family Law Quarterly* 43, 59.

Responses

- 12.7 Most submissions, including that of the DPP, agreed that this provision no longer served any public interest.¹⁶ Dr Denis Muller called the provision ‘absurdly out of touch with contemporary community standards’.¹⁷ The Criminal Bar Association stated that the same restrictions should apply to the publication of material regardless of whether this material had been tendered or referred to in court.¹⁸
- 12.8 The County Court, however, said this offence should remain.¹⁹ While the Court could and did decide not to release ‘indecent material or surgical evidence’ to the media, there was still a need to prevent publication of material that was accidentally released. However, the Court said the offence should be modernised and consolidated.²⁰

Commission’s conclusions: abolish the offence of publishing indecent material

- 12.9 This provision no longer serves a purpose. Any ban on indecent publications should not depend on whether the material has been tendered or referred to in court. Rather, whether such material should be published should depend on the nature of the material and whether other circumstances mean such information should not be published.
- 12.10 The County Court can already decide not to release such material if requested. While there may be a risk of accidental release, it does not justify retaining this restriction.

Recommendation

- 93 The prohibition in section 3(1)(a) of the Judicial Proceedings Reports Act on the publication of indecent matter and indecent medical, surgical or physiological details in relation to any judicial proceedings should be repealed.

Divorce and related proceedings

- 12.11 Section 3(1)(b) of the Act prevents the publication of certain details about divorce or related proceedings.²¹
- 12.12 Two of these types of proceedings have since been abolished.²² Restrictions on publication in relation to the other types are now regulated by the *Family Law Act 1975* (Cth),²³ which overrides section 3(1)(b).²⁴
- 12.13 As with the earlier restriction, this section does not appear to have been prosecuted.²⁵

16 Submissions 17 (Dr Denis Muller), 18 (Commercial Bar Association Media Law Section Working Group), 27 (Australia’s Right to Know coalition), 28 (Director of Public Prosecutions).

17 Submission 17 (Dr Denis Muller).

18 Submission 20 (Criminal Bar Association).

19 Submission 31 (County Court of Victoria). Another submission supported retaining the provision but did not give reasons: Submission 19 (Forgetmenot Foundation Inc).

20 Submission 31 (County Court of Victoria).

21 The proceedings covered by this restriction include: the dissolution of marriage, for nullity of marriage, for judicial separation, or for restitution of conjugal rights. The section prohibits the publication of all except the following details: the names, addresses and occupations of the parties and witnesses; a concise statement of the charges, defences and counter-charges in support of which evidence has been given; submissions on any point of law arising in the course of the proceedings and the decision of the court or judge on them; and the summing-up of the judge and the finding of the jury (if any) and the judgment of the court and observations made by the judge in giving judgment.

22 *Family Law Act 1975* (Cth) s 8(2).

23 *Ibid* s 121.

24 *Australian Constitution* s 109.

25 Victorian Law Reform Commission, *Contempt of Court* (Consultation Paper, May 2019) 135 [9.25].

Responses

- 12.14 Most who addressed this issue agreed that this offence was no longer useful and should be repealed.²⁶
- 12.15 The Supreme Court of Victoria submitted that the Commission should consider the effect of any repeal on historical matters decided before the enactment of section 121 of the Family Law Act. The Court still receives requests to access historical divorce files.
- 12.16 The files are not made automatically available, on the basis that they should generally remain confidential between the parties. In deciding whether to release the files, the Court considers the privacy of those with an interest in the matter, even if the parties are no longer alive.²⁷

Commission's conclusions: repeal the offence of publishing divorce files

- 12.17 This offence should be repealed as it is no longer useful.
- 12.18 In repealing this restriction, transitional rules should apply to protect the interests of parties who may be affected. Existing rights should be preserved.
- 12.19 The Supreme Court should regulate access to these files. This addresses its concern about the privacy interests of others affected by the repeal, and better balances all interests than a blanket ban.

Recommendations

- 94 Section 3(1)(b) of the Judicial Proceedings Reports Act, prohibiting the publication of details of divorce and related proceedings, should be repealed, and transitional provisions should be enacted to continue protections for proceedings which predate the Family Law Act.
- 95 The Supreme Court should make rules to address requests for access to historical court files relating to divorce and other proceedings.

Directions hearings and sentence indications

- 12.20 Section 3(1)(c) of the Act limits what can be published about a directions hearing or a sentence indication hearing.²⁸ Directions hearings are held to narrow the matters in issue at a trial and decide how and what evidence will be presented to a jury. Sentence indication hearings occur if an accused is considering pleading guilty and involve the making of potential admissions of a type not necessarily made at a bail, committal or other pre-trial hearings. The risk of actual prejudice is therefore greater at a sentence indication hearing than other pre-trial hearings.

26 Submissions 17 (Dr Denis Muller), 18 (Commercial Bar Association Media Law Section Working Group), 20 (Criminal Bar Association), 27 (Australia's Right to Know coalition). One stakeholder supported consistency with section 121 of the *Family Law Act 1975* (Cth), but did not make any specific suggestions: Submission 11 (Victoria Legal Aid). One stakeholder supported retaining this, but did not state why: Submission 19 (Forgetmenot Foundation Inc).

27 Submission 29 (Supreme Court of Victoria).

28 *Criminal Procedure Act 2009* (Vic) pts 5.5 (directions hearings), 5.6 (sentence indications).

- 12.21 Section 3(1)(c) sets out what information can be lawfully published about these proceedings.²⁹ The restriction is limited in two important ways:
- It only applies until the end of the trial of the person charged, or of the last of the persons charged.³⁰
 - A court can lift the restriction if the accused person applies.³¹
- 12.22 This restriction allows those at a directions hearing or sentence indication hearing to speak freely without worrying that what they say will be published. This means the proceedings can be open to the public, but few details can be reported.
- 12.23 As the consultation paper discussed, these restrictions do not appear to be well known. Similar restrictions do not apply to other kinds of preliminary hearings, such as bail or committal hearings.³²

Responses

- 12.24 Many stakeholders including the County Court supported keeping this offence.³³ Victoria Legal Aid (VLA) said that it was an ‘important tool in early resolution case management practices’, and removing it could discourage offenders from seeking a sentence indication.³⁴
- 12.25 Similarly, the County Court said that this offence played a ‘central role in supporting its case management functions’. The offence was also ‘clear and unambiguous’.³⁵
- 12.26 The Commercial Bar Association Media Law Section Working Group (CommBar—Media Law Section) submitted that this provision was too restrictive. Instead, the offence should only restrict publication if needed to avoid prejudice to the administration of justice. The offence should include examples of the kind of information that could not be published.³⁶
- 12.27 Australia’s Right to Know coalition (ARTK) argued the offence was not needed. While some of this information may be prejudicial, the public could distinguish between allegations and statements of fact, and between the relevance of pre-trial matters and those heard at trial.³⁷
- 12.28 The Supreme Court noted few problems with reporting on these kinds of proceedings. Although it is difficult to be certain, the Court suggested that this was probably because people knew the law of sub judice contempt rather than because they knew of this offence. However, the Court was aware of cases where the restrictions had been breached, although this caused concern only where reporting might affect the trial.³⁸
- 12.29 Stakeholders had mixed views on whether the offence should be extended to other pre-trial proceedings. The Criminal Bar Association favoured extending the offence to other pre-trial proceedings.³⁹ The CommBar—Media Law Section supported extending the narrower offence which it proposed.⁴⁰

29 These are: the names of the court, judge and legal practitioners; the names, addresses, ages and occupations of the accused and witnesses; certain business information relating to the accused; the offence(s) charged or a summary of it or them; the date and place to which the proceedings are adjourned; and any bail arrangements that have been made.

30 *Judicial Proceedings Reports Act 1958* (Vic) s 3(1E).

31 *Ibid* s 3(1B).

32 Victorian Law Reform Commission, *Contempt of Court* (Consultation Paper, May 2019) 136–7 [9.29], [9.36], [9.40].

33 Submissions 11 (Victoria Legal Aid), 17 (Dr Denis Muller), 20 (Criminal Bar Association), 31 (County Court of Victoria).

34 Submission 11 (Victoria Legal Aid).

35 Submission 31 (County Court of Victoria).

36 Submission 18 (Commercial Bar Association Media Law Section Working Group).

37 Submission 27 (Australia’s Right to Know coalition).

38 Submission 29 (Supreme Court of Victoria).

39 Submission 20 (Criminal Bar Association).

40 Submission 18 (Commercial Bar Association Media Law Section Working Group).

- 12.30 On the other hand, Dr Denis Muller considered that, in other pre-trial proceedings, there were strong public interest arguments for public scrutiny.⁴¹ Similarly, ARTK strongly opposed extending the offence. The need for public scrutiny was essential in bail hearings, where the court exercised the important power of depriving a person of liberty.⁴²
- 12.31 Most also favoured moving the offence to other legislation to improve awareness. Some favoured moving the restrictions near the relevant provisions in the Criminal Procedure Act 2009 (Vic).⁴³ The Criminal Bar Association and the DPP preferred to move it to the Open Courts Act 2013 (Vic),⁴⁴ and the County Court to any proposed Act dealing with contempt.⁴⁵
- 12.32 ARTK suggested that notices should be placed on courtroom doors so people attending these hearings would know what could be published.⁴⁶
- 12.33 Some suggested changes to the scope of the prohibition. The Criminal Bar Association submitted that the list should be changed to prevent publication of the addresses of witnesses and allow publication of the reasons for an adjournment.⁴⁷
- 12.34 The DPP submitted that the offence should extend to prohibit publication of certain information about voir dire hearings, submissions and rulings on evidence, or any other information that would not be put before a jury, and that occurs close to trial.⁴⁸ The Commission makes a recommendation addressing this issue in Chapter 10.

Commission's conclusions: retain the restriction for directions hearings and sentence indications

- 12.35 Directions hearings and sentence indications play an important role in case management in the criminal law. Those taking part in these hearings must feel free to put forward material without fear that this may be published.
- 12.36 There is some attraction in narrowing the reporting restriction set out in section 3(1)(c) of the Act to be consistent with sub judice contempt. However, the case management purpose of these hearings means the balance between competing interests is different from a bail hearing or trial. The principle of open justice is of greater weight when reporting on a bail hearing or trial because decisions are made then about the liberty of the accused and their guilt or innocence.
- 12.37 This reporting restriction should remain. However, it should not be extended to other pre-trial hearings, because there is a greater public interest in reporting on those hearings.
- 12.38 The reporting restriction should also be amended to allow the publication of the reasons for adjournment. Such reasons promote open justice by helping the community to understand delays in the system and their publication would not undermine the purpose of the provision.⁴⁹
- 12.39 In addition, the reporting restriction should be amended to remove witnesses' addresses from the list of matters that may be published. This is needed to protect the privacy of witnesses.

41 Submission 17 (Dr Denis Muller).

42 Submission 27 (Australia's Right to Know coalition).

43 Submissions 11 (Victoria Legal Aid), 18 (Commercial Bar Association Media Law Section Working Group).

44 Submissions 20 (Criminal Bar Association), 28 (Director of Public Prosecutions).

45 The County Court also favoured consolidation but did not specify where: Submission 31 (County Court of Victoria).

46 Submission 27 (Australia's Right to Know coalition).

47 Submission 20 (Criminal Bar Association).

48 Submission 28 (Director of Public Prosecutions).

49 The publication of reasons for adjournment would still be subject to the sub judice rule, as defined in Chapter 10.

- 12.40 The reporting restriction should also be amended to require notices of hearings to which the reporting prohibition applies to be placed on court doors. This would promote compliance and is consistent with similar legislation.⁵⁰As this prohibition applies automatically, it is fair to place those attending the proceedings on notice of the restrictions.
- 12.41 To improve awareness of the reporting restriction, the Commission recommends that the provision be re-enacted in the Open Courts Act, together with its attendant provisions,⁵¹ amended as recommended in this report. This will allow for better consolidation of legislative provisions relating to publication restrictions and their enforcement. A legislative note could be inserted in the Criminal Procedure Act to ensure readers are aware of the offence.

Recommendations

- 96 The restriction on the publication of details of directions hearings and sentence indication hearings set out in section 3(1)(c) of the Judicial Proceedings Reports Act should be retained and re-enacted in the Open Courts Act, together with its attendant provisions, subject to the amendments recommended below.
- 97 The proposed provision should be amended to:
- remove witnesses' addresses from the list of matters that may be published
 - allow reasons for an adjournment to be published
 - require notice to be placed on the courtroom doors to indicate it is a hearing to which the provision applies.
- 98 The proposed provision should not extend to other preliminary hearings (such as bail hearings or committal proceedings).

Identifying victims of sexual offences

Need for and scope of the offence

- 12.42 Section 4(1A) of the Act bans publishing details likely to identify a person against whom a sexual offence is alleged to have been committed.⁵² This aims to protect the privacy of victims and to encourage the reporting and prosecution of sexual offences.
- 12.43 Section 4(1A) reflects the fact that sexual offences involve a personal violation of an intimate nature and sexual assault victims can often experience shame and social stigma. It also reflects the concern, expressed in the *Victims' Charter Act 2006* (Vic), that the criminal justice system should not cause victims further trauma.⁵³ Other states and territories have similar laws.⁵⁴

50 *Open Courts Act 2013* (Vic) s 31.

51 *Open Courts Act 2013* (Vic) ss 3(1B), (1C), (1D), (1E), (2), (3), (4), (5) and (6).

52 'Sexual offences' is defined by reference to subdivisions in the *Crimes Act 1958* (Vic) corresponding to sections 38 to 54C or under any corresponding previous enactment, and is defined to include an attempt to commit any such offence or an assault with intent to commit any such offence: *Judicial Proceedings Reports Act 1958* (Vic) s 4(1) (definition of sexual offence).

53 *Victims' Charter Act 2006* (Vic) s 4(1)(c).

54 Frank Vincent, *Open Courts Act Review* (Report, September 2017) 140 (Appendix 2) <<https://engage.vic.gov.au/open-courts-act-review>>; see also Appendix L.

- 12.44 Section 4(1A) does not list the types of information that cannot be published. This makes it hard to know what it covers. This is a strict liability offence,⁵⁵ so it is not necessary to prove that the publisher intended or was reckless as to whether they might identify the victim.
- 12.45 Unlike the other restrictions in the Act, section 4(1A) applies before proceedings commence and continues after they have concluded.⁵⁶ However, different defences apply depending on whether proceedings are pending or not. There is no definition or guidance as to when a proceeding is 'pending' in the Act.⁵⁷
- 12.46 If no proceedings are pending when the material is published, it is a defence if any of the following apply:
- No complaint about the alleged offence has been made to a police officer.
 - The matter was published with the permission of a court.
 - The matter was published with the permission of the person likely to be identified.⁵⁸
- 12.47 If proceedings were pending, it is a defence if it was published with the permission of the court holding the proceedings.⁵⁹
- 12.48 It is unclear if the offence applies when a victim has died. In practice, as recent high-profile cases show, the media often names deceased victims.⁶⁰ Although, in the DPP's view, the prohibition in section 4(1A) continues beyond death,⁶¹ no prosecutions have arisen from the reporting in those cases.
- 12.49 In New South Wales and the United Kingdom, the equivalent law applies only while an alleged victim is alive.⁶² However, the Tasmania Law Reform Institute recommended applying its equivalent prohibition after death, although a person could apply to lift the ban.⁶³
- 12.50 The consultation paper asked:
- whether this prohibition on the identification of sexual offence victims should apply automatically and indefinitely from the time of complaint
 - whether its scope should be made clearer
 - whether it should be moved to another Act⁶⁴
 - whether there was a need to make clear the fault element.⁶⁵

55 *Bailey v Hinch* [1989] VR 78, 91; *Hinch v DPP (Vic)* [1996] 1 VR 683, 69; *Doe v Fairfax Media Publications Pty Limited* [2018] NSWSC 1996.
56 *Hinch v DPP (Vic)* [1996] 1 VR 683, 689. However, in *Nixon v Random House Australia Pty Ltd* [2000] VSC 405, Hedigan J indicated that the prohibition may not apply indefinitely and that whether anonymity should be kept must be judged on a case-by-case basis: [16].

57 See *Hinch v DPP (Vic)* [1996] 1 VR 683, 686. In that case, information identifying the victim was published after the offender was convicted and sentenced but before relevant appeal periods had expired. There was no appeal on foot at time of publication. The Supreme Court stated, in those circumstances, that no proceedings were pending in any court at the time of publication.

58 *Judicial Proceedings Reports Act 1958 (Vic)* s 4(1B).

59 *Ibid* s 4(1C).

60 There has, for example, been extensive media coverage of the deaths of Aiiia Maasarwe, Eurydice Dixon and Jill Meagher.

61 Submission 28 (Director of Public Prosecutions).

62 *Crimes Act 1900 (NSW)* s 578A(4)(f). Similarly, the UK equivalent provides that the prohibition exists only during a person's lifetime: *Sexual Offences (Amendment Act) 1992 (UK)* s 1. Other equivalent provisions in Australia are silent on the issue.

63 Tasmania Law Reform Institute, *Protecting the Anonymity of Victims of Sexual Crimes* (Final Report No 19, November 2013) 43 [4.3.24].

64 Victorian Law Reform Commission, *Contempt of Court* (Consultation Paper, May 2019) 141, Question 39.

65 Victorian Law Reform Commission, *Contempt of Court* (Consultation Paper, May 2019) 172, Question 52.

Responses

The need for protections

- 12.51 Most stakeholders strongly supported the purpose of this restriction on publication.⁶⁶ Victim survivors told the Commission the restriction was important in reassuring victims and encouraging reporting of sexual offences. They also said it was important for the ban to apply automatically, because for many victims it would be 'one hurdle too many' to apply for an order.⁶⁷
- 12.52 Some stakeholders said the law was largely effective.⁶⁸ Several, however, were concerned the ban could indirectly protect offenders.⁶⁹ Government agencies told the Commission of cases where the law was breached.⁷⁰

Scope of the law

- 12.53 The Victims of Crime Commissioner noted difficulties with the scope of the law, which covers any particulars 'likely to lead to the identification' of the victim. The Commissioner was concerned victims could be identified through the surrounding circumstances, especially in rural areas,⁷¹ and, particularly in early stages, the parties and the judicial officer may not know what details could identify the victim. Further, the law did not prevent publication of the details of the offending, which could cause distress and trauma to victims and their families.⁷²
- 12.54 Some stakeholders addressed whether the offence should require some level of fault, such as whether the person intended to identify the victim. On basic principles of fairness, most argued that a person must be aware the published material was likely to identify the victim.⁷³
- 12.55 The Criminal Bar Association stated that intention and recklessness should apply to these offences.⁷⁴ The DPP saw no reason to change the fault element of the offence.⁷⁵
- 12.56 The DPP did support clarifying aspects of the offence,⁷⁶ including:
- whether the law continues to apply if the victim has died⁷⁷
 - when a proceeding was pending and when it had concluded.⁷⁸
- 12.57 ARTK also supported making clear when a proceeding was pending. It gave an example of a high-profile case where proceedings were underway to extradite an alleged offender from overseas to Australia. There was no certainty whether proceedings in that case were pending for the purposes of the section.
- 12.58 ARTK opposed any change that would extend the offence to victims who had died, highlighting recent reporting of cases which were of significant public interest.⁷⁹
- 12.59 The County Court supported modernising the language of the provision to remove the implication of moral judgment.⁸⁰

66 Submissions 11 (Victoria Legal Aid), 19 (Forgetmenot Foundation Inc), 28 (Director of Public Prosecutions), 31 (County Court of Victoria), 33 (Victims of Crime Commissioner, Victoria); Consultations 7 (DJCS Community Operations and Victims Support Agency), 16 (Victims of Crime Consultative Committee victims' representatives).

67 Consultations 3 (Representatives of victim survivors of family and sexual violence), 16 (Victims of Crime Consultative Committee victims' representatives), 23 (Survivors of sexual abuse advocacy groups).

68 Consultation 3 (Representatives of victim survivors of family and sexual violence).

69 Consultation 16 (Victims of Crime Consultative Committee victims' representatives).

70 Consultations 7 (DJCS Community Operations and Victims Support Agency), 18 (Victims of Crime Commissioner, Victoria).

71 This was raised by others: Consultation 7 (DJCS Community Operations and Victims Support Agency).

72 Submission 33 (Victims of Crime Commissioner, Victoria).

73 Submissions 18 (Commercial Bar Association Media Law Section Working Group), 19 (Forgetmenot Foundation Inc), 27 (Australia's Right to Know coalition).

74 Submission 20 (Criminal Bar Association).

75 Submission 28 (Director of Public Prosecutions).

76 Ibid.

77 In the DPP's view, it did, but there had been several high-profile examples where victims had been identified in such circumstances: *ibid.*

78 The term 'concluded' is introduced in the new section 4(1CA) as a result of the *Open Courts and Other Acts Amendment Act 2019* (Vic).

79 Submission 27 (Australia's Right to Know coalition).

80 Consultation 24 (County Court of Victoria).

Types of information

- 12.60 To provide guidance on the scope of the prohibition, the CommBar—Media Law Section favoured adding an inclusive list of the types of information that might identify a victim, like that provided in section 168 of the *Family Violence Protection Act 2008* (Vic).⁸¹ The County Court and the Criminal Bar Association also supported the addition of an inclusive list.⁸²
- 12.61 The DPP opposed this because what information might make someone identifiable always depends on the context.⁸³ The Supreme Court considered the provision was ‘readily interpreted and applied with a common-sense approach’.⁸⁴ This was also the view of some victim survivors.⁸⁵
- 12.62 Several stakeholders raised the issue of consistency. VLA supported consistency with other relevant Acts, although it did not suggest a specific form of the provisions.⁸⁶
- 12.63 Media academics suggested that harmonising laws across Australia would improve clarity and certainty, especially since online publishing makes state borders irrelevant.⁸⁷ The value of national consistency in publication restrictions is discussed in Chapter 13.

Improving awareness

- 12.64 Most who addressed the issue agreed that the offence should be moved to another Act to improve awareness.⁸⁸ However, they divided on which Act that should be, suggesting the Criminal Procedure Act,⁸⁹ the Open Courts Act,⁹⁰ or any Contempt of Court Act.⁹¹
- 12.65 The Victims of Crime Commissioner proposed including in the legislation a guiding principle to explain the purpose of the offence. The Commissioner suggested this could be that ‘the public reporting of such cases can cause some complainants further trauma, shame or embarrassment’.⁹² Forgetmenot Foundation named different agencies that would benefit from greater awareness of the offence.⁹³

Commission’s conclusions: retain the offence of identifying victims of sex offences

- 12.66 The Commission recommends that this publication restriction should remain, because it still serves an important purpose. The sense of personal violation and the intimacy of sexual offences means that there is a stronger privacy interest in protecting the anonymity of the victim than in other criminal offences. Further, the privacy protection afforded by the publication restrictions encourages victims to report these offences without fear that their identity will be published.

81 Submission 18 (Commercial Bar Association Media Law Section Working Group).

82 Submissions 20 (Criminal Bar Association), 31 (County Court of Victoria).

83 Submission 28 (Director of Public Prosecutions).

84 Submission 29 (Supreme Court of Victoria).

85 Consultation 3 (Representatives of victim survivors of family and sexual violence).

86 Submission 11 (Victoria Legal Aid). This submission identified the following Acts as relevant: *Children, Youth and Families Act 2005* (Vic); *Family Law Act 1975* (Cth); *Family Violence Protection Act 2008* (Vic).

87 Submission 6 (Professors Mark Pearson, Patrick Keyzer, Anne Wallace and Associate Professor Jane Johnston).

88 An exception was Dr Denis Muller, who thought these did not need to be moved: Submission 17 (Dr Denis Muller).

89 Submissions 11 (Victoria Legal Aid), 33 (Victims of Crime Commissioner, Victoria). The Commissioner suggested that the section should sit after section 11, which deals with the place of hearing the first listing of matters, or in Chapter 8 directly after the guiding principles.

90 Submissions 20 (Criminal Bar Association), 28 (Director of Public Prosecutions), 29 (Supreme Court of Victoria). The Supreme Court noted this provision also had a significant effect on civil proceedings.

91 Submissions 27 (Australia’s Right to Know coalition), 31 (County Court of Victoria).

92 Submission 33 (Victims of Crime Commissioner, Victoria). It was suggested this should be included as the last of the guiding principles in section 338 of the *Criminal Procedure Act 2009* (Vic).

93 Submission 19 (Forgetmenot Foundation Inc). These included other victim survivors and victim support agencies, mental health practitioners and other mental health agencies, the medical profession, migrant communities, the Australian Bureau of Statistics and the Office of Public Prosecutions.

Deceased victims

- 12.67 The purpose of this prohibition is to protect a victim's right to privacy. The balance between competing rights and interests changes once a victim has died, when the victim's right to privacy and the need to protect victims from re-traumatisation is no longer compelling.
- 12.68 Some rights or interests in favour of suppressing publication may continue after a victim's death. For example, family members of victims have their own rights to privacy, which may be affected by publication of the victim's identity. A recent Northern Ireland review recommended that the anonymity for complaints should apply even after death because of the distress that might otherwise be caused to families.⁹⁴ A Tasmanian review made the same recommendation, accepting submissions that 'there may be cogent reasons why a family would wish to preserve the victim's anonymity'.⁹⁵ The nature and weight of these considerations will vary from case to case. The assumption that anonymity should automatically continue beyond death may perpetuate a harmful myth that there is abiding shame attached to being the victim of sexual assault.
- 12.69 It is difficult to justify a prohibition that continues indefinitely. At some point, the balance of public interest must shift in favour of freedom of expression.
- 12.70 Further, these privacy and related concerns can be dealt with by means other than a blanket prohibition enforced by criminal sanction. For example, they are addressed in the ethical codes of journalists. The Australian Press Council's binding Statement of Principles provides that publishers must take reasonable steps to:
- avoid intruding on a person's reasonable expectations of privacy, unless doing so is sufficiently in the public interest
 - avoid causing or contributing materially to substantial offence, distress or prejudice, or a substantial risk to health or safety, unless doing so is sufficiently in the public interest.⁹⁶
- 12.71 It could be argued that if victims believed they could be identified after death, they might be discouraged from reporting the offence. This was a further reason given for recommending extending anonymity in Northern Ireland. It was suggested that the prospect of being identified after death might 'deter some victims coming forward if, for example, they have a terminal illness'.⁹⁷ However, in New South Wales and the United Kingdom similar restrictions on publication are limited to the life of the victim. The Commission found no evidence these limitations have discouraged victims from reporting.
- 12.72 This argument would not apply to victims who died without reporting the offence. The prohibition cannot encourage reporting by victims who die as a result of crimes that included sexual offences.
- 12.73 In those cases, there is a much stronger public interest in reporting the identity of the victim. The coverage of several recent high-profile cases of this kind in Victoria has raised public awareness about gender-based violence.
- 12.74 Although the details of the offending could have been published without it, the identity of the victim is an important part of the story. Understanding that the victim was a real person with unique attributes makes the story more compelling, helps the public relate to the victim, and gives victims the dignity they were denied in death.

94 Sir John Gillen, *Review of Law and Procedures in Serious Sexual Offences in Northern Ireland* (Report, May 2019) 129 [3.65] <<https://www.justice-ni.gov.uk/publications/gillen-review-report-law-and-procedures-serious-sexual-offences-ni>>

95 Tasmania Law Reform Institute, *Protecting the Anonymity of Victims of Sexual Crimes* (Final Report No 19, November 2013) 43 [4.3.24].

96 Australian Press Council, *Statement of General Principles* (Standards, July 2014) <<https://www.presscouncil.org.au/statements-of-principles/>>.

97 Sir John Gillen, *Review of Law and Procedures in Serious Sexual Offences in Northern Ireland* (Report, May 2019) 129 [3.65] <<https://www.justice-ni.gov.uk/publications/gillen-review-report-law-and-procedures-serious-sexual-offences-ni>>.

- 12.75 If the death is unrelated to the offending, for example, where the victim dies of natural causes some years after the offence and the resolution of any related court proceedings, there may be less public interest in identifying the victim after death. This may mean there is no media reporting identifying the deceased as a victim in these cases.
- 12.76 While the media should respect the privacy of the victim's family and the wishes of the victim, this should be dealt with as a matter of ethics rather than criminal law.
- 12.77 There is no compelling reason why a victim should not be able to be identified after death. The balance of protection should be reversed so that the default is that a victim can be identified.
- 12.78 This balance may need adjustment to reflect the facts of each case. For example, it may be appropriate to continue to protect the anonymity of a victim after death where there is a need to protect the privacy of any affected children of the deceased. The Commission therefore recommends that either the Criminal Procedure Act or the Open Courts Act be amended to allow for a person to apply for a suppression order to prohibit identification of a deceased victim who, had they been alive, would have been protected under the Judicial Proceedings Reports Act. The court should be able to make an order of this type where the public interest in disclosure is outweighed by the ongoing privacy interests of the deceased or other persons.⁹⁸

The scope of the offence

- 12.79 The Commission considers the scope of the legislation is otherwise clear. The phrase 'particulars likely to lead to the identification' of a person is a common formula in other legislation and is broad enough to capture the purpose of the provision.
- 12.80 The Commission considers that, similar to its conclusion in relation to sub judice contempt, adding an inclusive list of types of information would not be helpful. The scope of the material likely to identify a victim will always depend on the context. If the provision includes a list of types of information likely to identify a victim, some publishers may be too quick to conclude, without considering the circumstances, that anything not listed can be published, while anything that is listed is automatically prohibited. However, as with sub judice contempt, a legislative note with examples could be useful.⁹⁹
- 12.81 It is unnecessary to resolve the confusion about whether a proceeding is pending for the purposes of the section. This is relevant only to the availability of the victim's consent defence. The Commission has recommended changes to that defence that would make the status of the proceedings irrelevant.
- 12.82 It is not necessary to change the fault element of the offence. The offence does not require proof the publisher knew or was reckless as to whether the published material would be likely to identify the victim. However, the defendant can rely on the defence of honest and reasonable mistake of fact.¹⁰⁰ In addition, strict liability is more common and acceptable for summary offences—such as this—than for indictable offences.
- 12.83 It is reasonable to impose on anyone publishing information about sexual offences a positive duty to take due care not to inadvertently identify the victim. That is consistent with the protective purpose of the section. The public identification of a victim is irreversible and can cause long-term distress. To require an intent to identify or recklessness would undermine the effect of the ban. Unlike a suppression order, the prohibition operates automatically in all cases. Therefore, publishers are on notice that a restriction is in place.

98 The Coroners Court can make a proceeding suppression order where disclosure would be contrary to the public interest: *Open Courts Act 2013* (Vic) s 18(2)(b).

99 The list of identifying particulars included in section 534(4) of the Children, Youth and Families Act 2005 was amended in 2019 so that it does not unduly limit reporting: *Open Courts and Other Acts Amendment Act 2019* (Vic) s 13; Victoria, *Parliamentary Debates*, Legislative Assembly, 20 February 2019, 423 (Jill Hennessy, Attorney-General).

100 *Bailey v Hinch* [1989] VR 78, 86, 91.

- 12.84 Finally, the Commission recommends that this offence be moved to the Open Courts Act for the same reasons as the other remaining offence. A legislative note can be placed in the relevant section of the Criminal Procedure Act to ensure awareness of the prohibition.
- 12.85 As the Commission is recommending moving two offences to the Open Courts Act and repealing the others, the Judicial Proceedings Reports Act is no longer needed. It should therefore be repealed.

Recommendations

- 99 The prohibition in section 4(1A) of the Judicial Proceedings Reports Act on publishing any particulars likely to lead to the identification of a person against whom a sexual offence is alleged to have been committed should be retained and re-enacted in the Open Courts Act, together with its attendant provisions, subject to the later recommendations in this report relating to consent to publication, penalties and the definition of ‘publish’.
- 100 The provision should be amended to clarify that the provision ceases to apply where a victim has died, with interested parties able to apply to continue the prohibition where the public interest in disclosure is outweighed by the ongoing privacy interests of the deceased or other persons.
- 101 Prosecution for the offence under the provision should continue to require the consent of the Director of Public Prosecutions.
- 102 As a consequence of the above recommendations relating to the substantive provisions of the Judicial Proceedings Reports Act, the Act is no longer required and should be repealed.

The ability of victims to speak

- 12.86 Section 4(1A) is designed to protect victims but it can also prevent victims from talking about their experiences and restrict public discussion about the nature and prevalence of sexual offending.¹⁰¹ For example:
- In some cases, the ban also protects the offender, if identifying the offender is likely to identify the victim (for example, in cases of incest).
 - Automatic application may remove a victim’s agency and preserve the shame and stigma sometimes attached to victims of sexual offences.
 - While proceedings are pending, a victim must apply to the court for permission to be identified, as their consent alone is not a defence.¹⁰²
 - Child victims can only consent to publication if they have the capacity to understand the effects of identifying as a victim.¹⁰³

101 Victorian Law Reform Commission, *Contempt of Court* (Consultation Paper, May 2019) 139–144 [9.49]–[9.79].
102 *Judicial Proceedings Reports Act 1958* (Vic) ss 4(1B)(b)(ii), (1C).
103 Further, parents cannot consent on their behalf: *Hinch v DPP (Vic)* [1996] 1 VR 683, 691–6.

Changes to the law

- 12.87 In May 2019, Parliament passed the *Open Courts and Other Acts Amendment Act 2019* (Vic) in response to a review of the Victorian Open Courts Act conducted by the Hon. Frank Vincent.¹⁰⁴ The Act adds two new provisions to section 4 of the Judicial Proceedings Reports Act,¹⁰⁵ which are not yet in force.¹⁰⁶
- 12.88 The first of these makes it a defence to publish identifying material if proceedings have concluded, the offender has been convicted and both the adult victim and the court have given permission for the publication.¹⁰⁷ The second prevents a court from giving permission if:
- disclosing the identity of the victim would identify another victim who does not consent or is a child, or
 - disclosure is not appropriate in all the circumstances.¹⁰⁸
- 12.89 Although these changes are intended to help victims who want to tell their stories,¹⁰⁹ it is unclear how these provisions work alongside the existing defences in the Judicial Proceedings Reports Act. Although the Open Courts Act Review did not consider the operation of section 4 of the Act, it discussed whether victims should be able to consent to the disclosure of their identity. The review recommended that adult victims of sexual assault or family violence, or child victims who are now adults, should be able to choose to disclose their identity once an offender had been convicted. However, if there was more than one victim, the court should have to refuse an application or impose conditions on publication, so that any victim that did not consent to being identified remained anonymous.¹¹⁰
- 12.90 The defences in the Judicial Proceedings Reports Act, as noted earlier, already allow a victim to consent to publication if there are no pending proceedings, including once the proceedings have ended. No application to or involvement of the court is required. However, the changes seem to mean that, if the proceedings have ended in a conviction, victims will now need to get permission from a court to tell their story.
- 12.91 The consultation paper asked how the law should enable a victim to speak, and when a victim should be able to consent to publication.¹¹¹

Responses

Balancing publicity and privacy

- 12.92 The Victims of Crime Commissioner submitted that reporting of cases, especially sexual assault cases, encouraged other victims to report and helped challenge myths. However, each victim was different and may want different levels of privacy protection. This could change during the case or even over their lifetime.¹¹² It was ‘therefore essential that the legislation governing this area of the law [should] be flexible enough to protect each victim’.¹¹³ Other submissions echoed this view.¹¹⁴

104 Frank Vincent, *Open Courts Act Review* (Report, September 2017) <<https://engage.vic.gov.au/open-courts-act-review>>.

105 *Open Courts and Other Acts Amendment Act 2019* (Vic) s 15, inserting ss 4(1CA) and 4(1CB).

106 *Open Courts and Other Acts Amendment Act 2019* (Vic) s 2. The Act commences on a day to be proclaimed or, otherwise, on 7 February 2020. As of 11 December 2019, the Act had yet to be proclaimed.

107 *Open Courts and Other Acts Amendment Act 2019* (Vic) s 15, inserting s 4(1CA).

108 Ibid inserting 4(1CB).

109 Victoria, *Parliamentary Debates*, Legislative Assembly, 20 February 2019, 425 (Jill Hennessy, Attorney-General).

110 Frank Vincent, *Open Courts Act Review* (Report, September 2017) 133, Recommendation 15 <<https://engage.vic.gov.au/open-courts-act-review>>.

111 Victorian Law Reform Commission, *Contempt of Court* (Consultation Paper, May 2019) 144, Questions 40, 41.

112 Submission 33 (Victims of Crime Commissioner, Victoria).

113 Ibid.

114 Submission 13 (Shine Lawyers); Consultations 1 (Representatives of victims of crime support organisations), 24 (County Court of Victoria).

- 12.93 The Victims of Crime Commissioner said the law should continue to protect victims but make it simple for others to opt out of the process.¹¹⁵ This was supported by some victims and their representatives.¹¹⁶
- 12.94 All those who addressed the issue recognised the importance of allowing people to tell their story. Shine Lawyers, for example, said their clients found that the experience of coming forward to describe abuse could 'be as impactful on the future direction of their life as the experience of abuse itself'.¹¹⁷
- 12.95 Shine Lawyers also noted that the offence could apply to victims and survivors who identify themselves in online forums, even if the group is closed.¹¹⁸ Others told the Commission that people did not consider these laws when deciding what to share online.¹¹⁹
- 12.96 Others emphasised that victims telling their stories 'significantly influenc[e] the public narrative and ... dismantl[e] the stereotype of the passive victim'.¹²⁰ For example, a victim telling her story on the television program Four Corners led to a review of consent laws for sexual assault cases in New South Wales.¹²¹
- 12.97 However, the Victim Survivors' Advisory Council said that a common 'risk and pitfall' was the exploitation by the media of the 'trauma and tragedy of lived experience'.¹²² Some people supplied vivid examples of trauma caused by publications.¹²³
- 12.98 Many stakeholders agreed that the media needed to be more sensitive and ethical in its treatment of victims and there should be better support for victims in dealing with the media.¹²⁴ The Victims of Crime Commissioner identified this as a priority area for its work.¹²⁵ The Victim Survivors' Advisory Council argued that publishers should have to take reasonable steps to obtain the consent of those affected.¹²⁶

Consent and court supervision

- 12.99 Stakeholders differed on whether the courts should have a role in supervising consent to publication. Many said that for adult victims the court should not be involved.¹²⁷ However, some of these considered the position different where there were other victims who would be identified without their consent or where the victims were children.¹²⁸
- 12.100 Many victims emphasised that the criminal process stripped victims of control and involving the courts in the consent process would further undermine the autonomy and agency of victims.¹²⁹ Also, the media would only be interested while the matter was current, and identifying the victim was important to humanise the victim in the media.¹³⁰ The delay in seeking court approval may mean that stories are not reported.
- 12.101 Some stated that requiring court involvement in the consent process signalled that victims should be ashamed and required supervision to understand the gravity of being

115 Submission 33 (Victims of Crime Commissioner, Victoria).

116 Consultations 3 (Representatives of victim survivors of family and sexual violence), 7 (DJCS Community Operations and Victims Support Agency).

117 Submission 13 (Shine Lawyers). See also, eg, Consultation 23 (Survivors of sexual abuse advocacy groups).

118 Submission 13 (Shine Lawyers).

119 Consultations 14 (Victim Survivors' Advisory Council youth representative), 16 (Victims of Crime Consultative Committee victims' representatives).

120 Submission 24 (Victim Survivors' Advisory Council). This view was echoed by others: Consultations 1 (Representatives of victims of crime support organisations), 3 (Representatives of victim survivors of family and sexual violence).

121 Submission 27 (Australia's Right to Know coalition). The program was 'I Am That Girl', a Four Corners program which aired in May 2018.

122 Submission 24 (Victim Survivors' Advisory Council).

123 Ibid; Consultation 23 (Survivors of sexual abuse advocacy groups).

124 Submissions 24 (Victim Survivors' Advisory Council), 1 (Representatives of victims of crime support organisations).

125 Consultation 18 (Victims of Crime Commissioner, Victoria).

126 Submission 24 (Victim Survivors' Advisory Council).

127 Submissions 13 (Shine Lawyers), 18 (Commercial Bar Association Media Law Section Working Group), 19 (Forgetmenot Foundation Inc), 20 (Criminal Bar Association); Consultation 1 (Representatives of victims of crime support organisations).

128 Submissions 13 (Shine Lawyers), 20 (Criminal Bar Association).

129 Submission 24 (Victim Survivors' Advisory Council); Consultations 1 (Representatives of victims of crime support organisations), 3 (Representatives of victim survivors of family and sexual violence), 23 (Survivors of sexual abuse advocacy groups).

130 Consultation 3 (Representatives of victim survivors of family and sexual violence). Similar concerns were expressed in Consultation 16 (Victims of Crime Consultative Committee victims' representatives).

identified.¹³¹ Some considered advice, information and counselling to be a better way of assisting victims with the consent process.¹³² Others noted that the suggestion that victims required counselling before they could be deemed to know what was in their own best interest was another form of disempowerment.¹³³

- 12.102 ARTK said that a court should not be required to give approval before a victim could consent to being identified and this extra layer of protection is impractical and unnecessary. ARTK submitted that consent to identification should be enough to allow publication, whether proceedings were pending or not.¹³⁴
- 12.103 Others supported the court having some role. The Victims of Crime Commissioner supported a straightforward process to ensure informed consent and protect the interests of others. A victim should not have to pay to apply for consent and should be able to ask a prosecutor to make the application. There should be a written or signed authority by the victim. If there was more than one victim, there should be legal advice, preferably by a state-funded legal service for victims but otherwise by VLA or the Office of Public Prosecutions (OPP).¹³⁵ VLA took a similar position.¹³⁶
- 12.104 The Victim Support Agency and Child Witness Service acknowledged the difficulty of the balance. In its view, it was better to start by protecting victim survivors, because the victim could not reverse the decision and the criminal process could overwhelm some survivors.¹³⁷
- 12.105 Some victims agreed that a court process might work as a check, but emphasised that it needed to be as ‘non-legal’ and as simple as possible.¹³⁸ It could also be useful to include criteria to guide courts about when permission should be granted and to make sure the law did not imply it was shameful to be a victim.¹³⁹
- 12.106 The Victorian Equal Opportunity and Human Rights Commission suggested drawing upon the principles of free and informed consent in privacy law as well as the balancing test in the Charter of Human Rights. It observed that ‘privacy is not only about protection of information but also about control of information, and a victim’s choice to publish was an exercise of privacy rights’.¹⁴⁰
- 12.107 The DPP supported the court supervising consent both during and after the proceedings. This would ensure the victim received and understood advice about the effect of disclosure. Courts could resolve disputes between victims and between victims and the prosecution or defence. They could provide oversight for children and victims with cognitive impairment. Orders would also be recorded so potential publishers could know whether publication was allowed.¹⁴¹
- 12.108 The Supreme Court took a similar view to the DPP. It added that this would help the Court to know what the victim wanted and reflect these wishes in its internal processes.¹⁴² The Magistrates’ Court told the Commission it was essential to ensure informed consent. They were open to this being achieved in another way, such as counselling.¹⁴³

131 Consultation 23 (Survivors of sexual abuse advocacy groups).

132 Consultations 16 (Victims of Crime Consultative Committee victims’ representatives), 23 (Survivors of sexual abuse advocacy groups), 25 (Magistrates’ Court of Victoria).

133 Consultation 23 (Survivors of sexual abuse advocacy groups).

134 Submission 27 (Australia’s Right to Know coalition).

135 Submission 33 (Victims of Crime Commissioner, Victoria).

136 Submission 11 (Victoria Legal Aid). It noted that the Victorian Law Reform Commission and the Sentencing Advisory Council had already recommended a state-funded legal service for victims.

137 Consultation 7 (DJCS Community Operations and Victims Support Agency).

138 Consultations 16 (Victims of Crime Consultative Committee victims’ representatives), 18 (Victims of Crime Commissioner, Victoria).

139 Consultation 18 (Victims of Crime Commissioner, Victoria).

140 Consultation 20 (Victorian Equal Opportunity and Human Rights Commission).

141 Submission 28 (Director of Public Prosecutions).

142 Submission 29 (Supreme Court of Victoria).

143 Consultation 25 (Magistrates’ Court of Victoria).

Multiple victims and children

- 12.109 Other stakeholders favoured court supervision only when multiple victims and children were involved. All who addressed the issue agreed that courts were needed to resolve differences of view between multiple victims.¹⁴⁴ Some also thought a court should supervise consent in relation to some classes of adults,¹⁴⁵ such as those living with a disability.¹⁴⁶
- 12.110 Most stakeholders said that children should be able to consent but needed more protection than adults.¹⁴⁷ The Victims of Crime Commissioner considered that this should be made clear in the legislation.¹⁴⁸
- 12.111 The CommBar—Media Law Section thought the current law was ‘unworkable’ with respect to children and their capacity to consent.¹⁴⁹ ARTK said editorial policies or judgment already dealt with this issue.¹⁵⁰
- 12.112 Most agreed that court supervision would be appropriate for child victims to ensure they understood the consequences of their decision to be identified.¹⁵¹ However, one young victim stated that it was important not to underestimate the ability of young people to make decisions for themselves.¹⁵² Some supported free legal advice.¹⁵³ Others favoured qualified court-appointed advocates for child victims.¹⁵⁴
- 12.113 Several stakeholders said that parents should not be allowed to consent on behalf of the child,¹⁵⁵ although others disagreed.¹⁵⁶ Some also said it was important to ensure that those living with disability were not denied a voice and their guardians should not be able to consent on their behalf.¹⁵⁷

The role of support and advice

- 12.114 The Victims of Crime Commissioner emphasised the need for practical support and advice about the media for victims. It was ‘imperative’ for victims to be told that they could seek a suppression order. The Commissioner suggested that the courts should be obliged to ask victims whether they had been given support and advice about this.¹⁵⁸ The DPP noted that its office could not provide such advice or act on behalf of victims, because its role and interests may differ from those of victims’.¹⁵⁹
- 12.115 Victim survivors and others suggested instead that an independent advocate was needed to represent victims in the criminal process.¹⁶⁰
- 12.116 Some noted that, although the law was generally effective, victims would not know what to do if there was a breach.¹⁶¹ Others said there was a gap if there was no witness (for example, if there is no trial) and no primary victim (because they have died).¹⁶²

144 Submission 13 (Shine Lawyers); Consultations 7 (DJCS Community Operations and Victims Support Agency), 14 (Victim Survivors’ Advisory Council youth representative), 16 (Victims of Crime Consultative Committee victims’ representatives), 23 (Survivors of sexual abuse advocacy groups).

145 Submission 20 (Criminal Bar Association).

146 Consultation 23 (Survivors of sexual abuse advocacy groups).

147 Submissions 13 (Shine Lawyers), 20 (Criminal Bar Association); Consultations 3 (Representatives of victim survivors of family and sexual violence), 14 (Victim Survivors’ Advisory Council youth representative), 16 (Victims of Crime Consultative Committee victims’ representatives), 23 (Survivors of sexual abuse advocacy groups).

148 Submission 33 (Victims of Crime Commissioner, Victoria).

149 Submission 18 (Commercial Bar Association Media Law Section Working Group).

150 Submission 27 (Australia’s Right to Know coalition).

151 Submissions 20 (Criminal Bar Association), 28 (Director of Public Prosecutions), 33 (Victims of Crime Commissioner, Victoria); Consultations 3 (Representatives of victim survivors of family and sexual violence), 7 (DJCS Community Operations and Victims Support Agency), 14 (Victim Survivors’ Advisory Council youth representative); 23 (Survivors of sexual abuse advocacy groups).

152 Consultation 14 (Victim Survivors’ Advisory Council youth representative).

153 Submission 13 (Shine Lawyers).

154 Submission 19 (Forgetmenot Foundation Inc).

155 Submission 13 (Shine Lawyers); Consultations 3 (Representatives of victim survivors of family and sexual violence), 18 (Victims of Crime Commissioner, Victoria).

156 Submission 27 (Australia’s Right to Know coalition); Consultation 23 (Survivors of sexual abuse advocacy groups).

157 Consultation 16 (Victims of Crime Consultative Committee victims’ representatives).

158 Submission 33 (Victims of Crime Commissioner, Victoria).

159 Submission 28 (Director of Public Prosecutions).

160 Submission 19 (Forgetmenot Foundation Inc); Consultation 1 (Representatives of victims of crime support organisations).

161 Consultation 3 (Representatives of victim survivors of family and sexual violence).

162 Consultation 1 (Representatives of victims of crime support organisations).

Commission's conclusions: adult consent should be enough

- 12.117 Consent of an adult victim should be all that is needed for lawful publication. The offence exists to protect victims, so victims should be able to waive this protection. This applies whether proceedings have begun or ended.
- 12.118 The offence should balance the rights of victims by automatically banning publication, yet make it easy for victims to lift the ban. This means those who want to speak out can do so, while recognising the rights of others not to. In both cases, the victims choose how to exercise their privacy rights. The law should respect their choice.
- 12.119 Deciding whether to consent to publication and engage with the media can be a complex decision for victims, with attendant risks. Victims should be supported in this process and have access to advice to make informed choices.
- 12.120 However, requiring courts to supervise the consent process places a burden on victims and assumes they require supervision and protection rather than information and assistance.
- 12.121 The Commission does not consider that the need for court involvement in the consent process should change because proceedings are pending. The purpose of the provision is to protect the privacy of the victim and not the trial process. If publication restrictions are required for some other reason, then an order can be applied for. Victims in other criminal cases do not require court approval to identify themselves because proceedings are pending.
- 12.122 The Commission recognises the concerns about cases where there are multiple victims, some of whom do not consent to publication. However, the Act now has the effect that, if a victim consents to a publication, it would still breach the restriction if another victim who does not consent is identified in the process. The Commission therefore considers the law already effectively manages this risk and sees no reason to create another hurdle for consent.
- 12.123 Where children are the victims, the Commission considers there is a need to respect their autonomy while recognising that they may be unaware of the long-term effects of identifying as victims of sexual offences.¹⁶³ The law should also protect them against parental or other pressure. Each case will differ, so in these cases a court should determine whether publication should be authorised.

Recommendations

- 103 The prohibition in what is currently section 4 of the Judicial Proceedings Reports Act should be amended to provide that it is a defence to a charge under section 4(1A), including when proceedings are pending, to prove that:
- the matter was published with the consent of the victim, if the victim consents in writing and is an adult, and is not otherwise incapable of giving informed consent, or
 - the court authorised the publication, on its own motion or on application.
- 104 This defence should not apply where the publication of the identifying particulars of a consenting victim is likely to lead to identification of a non-consenting victim.
- 105 The prohibition in what is currently section 4 of the Judicial Proceedings Reports Act should be amended to provide that where the victim is a child, the court has the power to authorise publication of identifying particulars on application or on its own motion.

Reporting on ‘sensitive information’ about sex offences and family violence offences

The proposed restriction

- 12.124 The Commission has been asked to consider a proposal for another restriction on publication. This would restrict briefly the publication of sensitive information about alleged sexual and family violence criminal matters. This restriction would apply once charges are filed. Its purpose would be to give a person time to consider applying for a suppression order before sensitive information about them or the offence had already been published.
- 12.125 This proposal was recommended by the Open Courts Act Review. The review recommended that, in these cases, an interim suppression order should be issued at initial bail hearings automatically.¹⁶⁴
- 12.126 Under this proposal, the order would expire after five working days. While it was in force, a person could only publish lawfully the fact that the charge had been filed and the fact and date of the hearing. Alternatively, the Review recommended that the Judicial Proceedings Reports Act should be changed to achieve the same effect.¹⁶⁵
- 12.127 The proposal responded to the concern that victims did not know that they could apply for a suppression order or were not in a position to apply at this early stage.¹⁶⁶
- 12.128 The consultation paper discussed whether there were other ways of addressing this concern.¹⁶⁷ Further, if the proposal was adopted, the consultation paper discussed the need to define a ‘family violence criminal offence’ and ‘sensitive information’ in any proposed offence.¹⁶⁸

164 Frank Vincent, *Open Courts Act Review* (Report, September 2017) Recommendation 17 <<https://engage.vic.gov.au/open-courts-act-review>>.

165 Ibid.

166 Ibid 70–2 [273]–[274], 133 [529].

167 Victorian Law Reform Commission, *Contempt of Court* (Consultation Paper, May 2019) 146–7 [9.94]–[9.97].

168 Ibid 145–6 [9.86]–[9.92].

Responses

- 12.129 Stakeholders did not agree on whether this restriction should be introduced.
- 12.130 Domestic Violence Victoria opposed its introduction. The Commission was told that there was not enough evidence that the restriction was needed. Domestic Violence Victoria told the Commission it was concerned about possible unintended effects of the restriction, in particular that such a restriction could compound trauma and silence victims. In addition, the Commission was told the restriction was inconsistent with the trend of recent law reform, which sought to reinforce open justice.¹⁶⁹
- 12.131 The CommBar—Media Law Section and ARTK opposed the proposal because the issue was already dealt with under the Judicial Proceedings Reports Act which operates to protect a victim’s identity.¹⁷⁰ ARTK also pointed to other grounds available for suppression orders to protect victims.¹⁷¹
- 12.132 The CommBar—Media Law Section proposed that, for family violence offences, an amendment could be made to extend an existing protection on identifying participants in protection order proceedings to apply to bail applications involving an allegation of family violence.¹⁷² It also supported more education and guidance for victims.¹⁷³
- 12.133 Dr Denis Muller proposed instead that courts ask victims if they wanted to restrict publication and could tailor the protection.¹⁷⁴
- 12.134 Victoria Police expressed concern that the proposal could distort the coverage of the response of law enforcement to these cases. An incident might receive media coverage, but at the point an arrest was made, and charges filed, reporting would become restricted. Such reporting should not be restricted, as it reassured the public that the law was being enforced.¹⁷⁵
- 12.135 Others, including VLA and the Criminal Bar Association, supported the proposal.¹⁷⁶ VLA supported temporary restrictions on publication to protect the privacy of complainants and encourage disclosure and suggested any provisions should be consistent with the Family Violence Protection Act.¹⁷⁷ The Criminal Bar Association suggested it could be a presumption and that it should be in the Open Courts Act.¹⁷⁸
- 12.136 The Victims of Crime Commissioner supported the proposal for sexual assault victims. The Commissioner suggested that the reporting restriction should only allow the name of the accused, the date and place of the offence and the charges to be published. The order should be posted on the door of the court as well as provided to the media. When the order expired, the victim should be consulted about continuing the order. For other offences, victims should receive prompt advice to seek a suppression order.¹⁷⁹
- 12.137 In consultations, victims supported the proposal.¹⁸⁰ However, they also supported measures to ensure victims could find out how to seek a suppression order, especially those in regional areas and from Aboriginal and Torres Strait Islander families.¹⁸¹

169 Submission 16 (Domestic Violence Victoria).

170 Submissions 18 (Commercial Bar Association Media Law Section Working Group), 27 (Australia’s Right to Know coalition).

171 Submission 27 (Australia’s Right to Know coalition).

172 Section 166 of the Family Violence Protection Act makes it an offence to publish a report about proceedings or orders under the Act that includes any particulars likely to lead to the identification of any person involved in the proceeding or the subject of the order, unless the court orders that the particulars may be published.

173 Submission 18 (Commercial Bar Association Media Law Section Working Group).

174 Submission 17 (Dr Denis Muller).

175 Consultation 19 (Victoria Police).

176 Submissions 11 (Victoria Legal Aid), 20 (Criminal Bar Association), Consultation 6 (Victoria Legal Aid).

177 Submission 11 (Victoria Legal Aid).

178 Submission 20 (Criminal Bar Association).

179 Consultation 18 (Victims of Crime Commissioner, Victoria).

180 Consultations 1 (Representatives of victims of crime support organisations), 3 (Representatives of victim survivors of family and sexual violence), 23 (Survivors of sexual abuse advocacy groups).

181 Submission 33 (Victims of Crime Commissioner, Victoria); Consultations 3 (Representatives of victim survivors of family and sexual violence), 14 (Victim Survivors’ Advisory Council youth representative).

- 12.138 Some suggested the Victims Charter could be updated to include more information about suppression orders.¹⁸² Others considered that the police, or qualified support workers outside the police and the legal profession, should inform victims about suppression orders.¹⁸³ Victoria Police told the Commission that it provided information on suppression orders when a complainant requested it, and that otherwise the practice varied.¹⁸⁴
- 12.139 Some also told the Commission that any temporary restriction should be drafted to allow victims to waive its operation if they wished to permit the publication of sensitive information.¹⁸⁵ Others stated that, for the proposal to work, it would need to continue for a longer time, and suggested a period of 30 days.¹⁸⁶ The Magistrates' Court also considered this period to be appropriate.¹⁸⁷
- 12.140 The DPP was open to this proposal and noted examples where excessive and potentially identifying details about sexual offending had been published. The DPP suggested that the proposed offence should list what could be published. It could include a discretion to allow further reporting or to order that the temporary restriction did not apply. The courts could be obliged to state in open court when the restriction applied.¹⁸⁸
- 12.141 The DPP did not believe five days was enough time for the restriction to fulfil its purpose. The OPP would not be able to provide advice to victims, because of the timing and a possible conflict of interest.¹⁸⁹
- 12.142 Others, while supporting the ban in principle, thought there was also a need to protect the public interest in reporting. The scope of the restriction would therefore be critical in striking the right balance.¹⁹⁰

Commission's conclusions: more support and advice for victims; repeal the JPRA

- 12.143 The Judicial Proceedings Reports Act protects the anonymity of sexual offence victims. The Family Violence Protection Act also provides some automatic privacy protection to victims of family violence. These protections are supplemented by the Open Courts Act, which allows a suppression order to be made where it is necessary to:
- avoid causing undue distress or embarrassment to a complainant or witness in any criminal proceeding involving a sexual offence or a family violence offence
 - avoid causing undue distress or embarrassment to a child witness in any criminal proceeding.
 - protect the safety of any person.¹⁹¹
- 12.144 However, there can be a practical gap if a victim is unaware of the option to apply for a suppression order and does not seek the restriction of information in a timely way. There is evidence suggesting a lack of awareness by victims about their options. There is also a lack of support to assist victims to consider and exercise their options. Although such cases are rare, as illustrated by a recent Victorian case, they have traumatic consequences for those involved.¹⁹²
- 12.145 There are different ways to address this gap between the right to apply for an order, and the practical ability to exercise this right. One model is a temporary restriction on publishing sensitive information that operates automatically in relevant cases, but there are several difficulties with this model.

182 Consultation 3 (Representatives of victim survivors of family and sexual violence).

183 Submission 33 (Victims of Crime Commissioner, Victoria); Consultations 3 (Representatives of victim survivors of family and sexual violence), 14 (Victim Survivors' Advisory Council youth representative).

184 Consultation 19 (Victoria Police)

185 Consultation 18 (Victims of Crime Commissioner, Victoria).

186 Consultation 23 (Survivors of sexual abuse advocacy groups).

187 Consultation 25 (Magistrates' Court of Victoria).

188 Submission 28 (Director of Public Prosecutions).

189 Ibid.

190 Consultations 7 (DJS Community Operations and Victims Support Agency), 14 (Victim Survivors' Advisory Council youth representative).

191 *Open Courts Act 2013* (Vic) ss 18(1)(c)–(e).

192 'A Debate No Mother Should Have to Hear', *SBS Insight* (Web Page, 31 May 2019) <<https://www.sbs.com.au/news/insight/a-debate-no-mother-should-have-to-hear>>.

- 12.146 As the proposed ban would be automatic and create criminal liability on publishers, it is a greater infringement of the principles of open justice and freedom of expression than one that balances the facts in individual cases and specifies the information that should be prohibited.
- 12.147 It is difficult to define the scope of such an offence appropriately for all cases, especially the scope of ‘sensitive information’ that should be automatically suppressed.
- 12.148 Such a model appears contrary to the trend of law reform, which recognises the value of raising awareness about the nature and prevalence of sexual offending and family violence, and in countering the stigma attached to victims.
- 12.149 Victims of sexual and family violence should have agency in exercising their privacy rights. However, starting from the assumption that such information should be suppressed risks reinforcing harmful myths that certain types of offending are shameful for victims and should not be openly discussed.
- 12.150 There is also a question of defining the length of any automatic restriction. Submissions suggest that five working days would be well short of what is needed to allow a victim, at a time of great stress, to receive and consider advice and make an application. However, the longer the period, the greater the restriction on freedom of expression.
- 12.151 Finally, there remains the practical problem that, while a temporary restriction gives the victim more time, the victim still needs to be made aware of the right to apply for a suppression order and be supported in exercising that right effectively. It is not clear who should have responsibility to inform and assist victims in this way.
- 12.152 The DPP submitted that the OPP may not be involved in the case at this early stage or have had contact with the victim, and may also have a conflict of interest with the victim with respect to the suppression of information about the case. The Office of the Victims of Crime Commissioner is not a front-line agency and, as with the OPP, is also unlikely to be in contact with the victim at this early stage.
- 12.153 For these reasons, the Commission does not consider that a temporary publication restriction is the best way to address the concerns about a gap in victim privacy and protection. Rather, a better model would be to support victims to exercise their existing rights and ensure the right to apply for a suppression order is always considered by a court at the appropriate time.
- 12.154 The first point when information of a sensitive nature is likely to become public knowledge is when the case is discussed during early bail, mention or filing hearings in the Magistrates’ Court. The Commission considers there should be a requirement for the presiding judicial officer to inquire then whether the victim has been advised of the grounds on which a suppression order may be granted and whether an order is sought.
- 12.155 A similar duty is imposed in the *Bail Act 1977* (Vic) on decision makers. They must inquire of the prosecutor about family violence risks, including whether certain family violence orders are in place.¹⁹³ While this is relevant to the assessment of risk for a bail application, it is an example of how a positive duty to inquire may be used to give better effect to the rights and interests of the victim in the court process.
- 12.156 The advantage of such a model is that the magistrate presiding at the bail, mention or filing hearing will be aware of the details of the case. If present, the victim can be guided in making a decision. If the victim is absent and their views unknown, the magistrate can require that the victim’s views be ascertained. At this early stage of proceeding, the Commission considers that Victoria Police is in the best position to provide information and referrals to victims, as it will be in contact with the victim as the likely complainant.

- 12.157 However, victims must not only be aware of their rights in relation to publication restrictions, they must be able to assert them. For this reason, victims should be able to seek independent legal advice and, if appropriate, ongoing legal assistance from a visible service.¹⁹⁴
- 12.158 In August 2016, the Commission recommended that VLA should be funded to establish a service for victims of violent indictable crime to provide legal advice and assistance in relation to:
- substantive legal entitlements connected with the criminal trial process
 - asserting a human right, or protecting vulnerable individuals, in exceptional circumstances.¹⁹⁵
- 12.159 This recommendation has not been implemented.¹⁹⁶ The funding of such a service would help to fill the practical gap in protecting the privacy of victims.
- 12.160 The requirement for the court to inquire about whether the victim is seeking a suppression order could be inserted in the Bail Act or in the Criminal Procedure Act. However, a potential issue with placing the requirement in the Bail Act is that criminal proceedings for sexual and family violence offences can be commenced in different ways and may not always involve a bail hearing.
- 12.161 If an application for a suppression order is made by or on behalf of the victim, the magistrate can make suppression orders subject to certain procedural requirements under both the Bail Act¹⁹⁷ and the Open Courts Act.¹⁹⁸ Whether the order is made will depend on meeting the requirements of necessity as set out in the Act. This will ensure a more proportionate restriction on freedom of expression and open justice than an automatic, albeit temporary, reporting ban in every case.

Recommendations

- 106 There should not be a new temporary, automatic reporting restriction where an accused has been charged with a sexual or family violence offence. However, where charges have been filed in relation to sexual or family violence offences there should be a requirement, reflected in appropriate legislation, that at the first court mention of the matter the court inquire into the victim's position on suppression orders.
- 107 Victoria Police should be responsible for providing victims and child witnesses with initial information about the operation of automatic publication restrictions and referral to advice and support services to assist with suppression orders and engagement with the media.
- 108 As recommended by the Commission in the report on the Role of Victims of Crime in the Criminal Trial Process, a service for victims should be funded to provide legal advice and assistance in relation to:
- substantive legal entitlements connected with the criminal trial process
 - asserting a human right, or protecting vulnerable individuals, in exceptional circumstances.

194 Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process* (Report, August 2016), 122-126.
195 Ibid Recommendation 23.
196 Submission 11 (Victoria Legal Aid)
197 *Bail Act 1977* (Vic) s 7.
198 *Open Courts Act 2013* (Vic) ss 17-18.

PART FOUR: ENFORCING PUBLICATION RESTRICTIONS

Enforcement in the online age

202 Adapting to an online age

203 How should liability be harmonised across Australia and across areas of law?

206 How should the law adapt to online publishing?

13. Enforcement in the online age

Overview

- The law needs to adapt to online publishing.
- These challenges should be raised as part of other national reforms.
- People should not in general be punished for hosting the content of others.
- However, if they find out this material is in breach, they should take down the material. (See Chapter 14.)
- The laws should apply to material published overseas or interstate. This should apply in any of the following cases:
- A significant part of the conduct, such as the drafting, writing or uploading of the material, occurs in Victoria.
- A person intends to breach the restrictions in Victoria.
- A person knew or was reckless that it would undermine the purpose of the restriction in Victoria and did not take reasonable care to restrict its circulation in Victoria.
- There should be more cooperation to enforce restrictions on publication outside Victoria.

Adapting to an online age

- 13.1 Different laws restrict what can be published. These include the common law of contempt, the *Judicial Proceedings Reports Act 1958* (Vic) and the *Open Courts Act 2013* (Vic).¹ These restrictions exist for different, although overlapping, purposes.
- 13.2 This report recommends a new Contempt Act, including contempts that restrict publication. In Chapter 12, the Commission recommends repealing the *Judicial Proceedings Reports Act*. It recommends moving two of its offences to the *Open Courts Act*.
- 13.3 This part uses ‘restrictions on publication’ to refer to the restrictions in the proposed Contempt of Court Act and the *Open Courts Act* and the restrictions it proposes moving from the *Judicial Proceedings Reports Act*.
- 13.4 Publication restrictions need to be enforced to achieve their purposes. In the online age, it is difficult to enforce them.
- 13.5 Today, almost anyone can be a publisher, share and republish at a keystroke. Publication

happens nowhere and everywhere: publications can be impossible to trace yet accessible to anyone via the Internet. It is easy to find most publications no matter when and where they were published.

- 13.6 People can post on sites owned by others, in forums that are moderated and unmoderated, or through chat apps to large groups. Publications can reach huge audiences (or 'go viral') and publishers lose control of the information once it is published.
- 13.7 In these circumstances, is it even possible to enforce publication restrictions? The Commission has concluded there is still value in restricting publications (see Chapter 10). As discussed below, there is increasing political will to regulate online content.
- 13.8 Yet changes do have to be made to the way these restrictions are enforced. This chapter considers:
- how to harmonise liability across Australia and across areas of law
 - how to define 'publication'
 - how to deal with the liability of online intermediaries
 - how to deal with publications published interstate and overseas.

How should liability be harmonised across Australia and across areas of law?

- 13.9 Online publishing poses challenges in many areas of the law and in every country. These are likely to become more difficult in the coming years.²
- 13.10 It is becoming harder to address online abuses with existing legal tools. It is hard for those publishing online to keep up with the pace of laws and initiatives, especially as more countries are applying laws outside their jurisdiction.³
- 13.11 This inquiry should recognise the need for consistency. This will help people comply with laws.⁴ Further, it should recognise that 'the political will to regulate the internet is stronger than ever'.⁵
- 13.12 Recent developments include:
- proposals, calls and commitments to remove extremist and terrorist content⁶
 - investigations by governments into Google, Facebook and others⁷
 - the UK's White Paper on 'online harms'⁸ and Code of Practice for social media platforms⁹
 - Facebook's announcement of an independent board to review its decisions on content¹⁰

2 For a detailed discussion, see Dan Jerker B Svantesson, *Internet & Jurisdiction Global Status Report* (November 2019) <<https://www.internetjurisdiction.net/news/release-of-worlds-first-internet-jurisdiction-global-status-report>>.

3 Ibid Ch 1.

4 Submission 27 (Australia's Right to Know coalition). See also Dan Jerker B Svantesson, *Internet & Jurisdiction Global Status Report* (November 2019) 51

5 <<https://www.internetjurisdiction.net/news/release-of-worlds-first-internet-jurisdiction-global-status-report>>.

6 European Commission, *Proposal for a Regulation of the European Parliament and Council on Preventing the Dissemination of Terrorist Content Online* (Report No COM/2018/640, 12 September 2018); G7 Interior Ministers, *Combating the Use of the Internet for Terrorist and Violent Extremist Purposes* (Outcome Document, 6 April 2019) <<https://www.elysee.fr/admin/upload/default/0001/04/287b5bb9a30155452ff7762a9131301284ff6417.pdf>>; The Ministry of Foreign Affairs and Trade (NZ), *Christchurch Call* (Web Page) <<https://www.christchurchcall.com/>>; French Ministry for Europe and Foreign Affairs, *Paris Call for Trust and Security in Cyberspace* (Web Page, 11 December 2018) <<https://pariscall.international/en/>>.

7 Tony Romm, '50 US States and Territories Announce Broad Antitrust Investigation of Google', *Washington Post* (online, 10 September 2019) <<https://www.washingtonpost.com/technology/2019/09/09/states-us-territories-announce-broad-antitrust-investigation-google/>>. This investigation follows the US Justice Department's own antitrust review: Kari Paul and agencies, 'US Justice Department Targets Big Tech Firms in Antitrust Review', *The Guardian* (online, 24 July 2019) <<https://www.theguardian.com/technology/2019/jul/23/tech-companies-antitrust-review>>.

8 Her Majesty's Government (UK), *Online Harms White Paper* (CP 57, April 2019) <<https://www.gov.uk/government/consultations/online-harms-white-paper>>.

9 Department for Digital, Culture, Media and Sport (UK), *Code of Practice for Providers of Online Social Media Platforms* (Statutory Code of Practice, 12 April 2019) <<https://www.gov.uk/government/publications/code-of-practice-for-providers-of-online-social-media-platforms/code-of-practice-for-providers-of-online-social-media-platforms>>.

10 Brent Harris, 'Establishing Structure and Governance for an Independent Oversight Board', *Facebook Newsroom* (Web Page, 17 September 2019) <<https://about.fb.com/news/2019/09/oversight-board-structure/>> .

- Australia’s banning of overseas gambling websites.¹¹
- 13.13 In Australia, other inquiries are taking place. The New South Wales Law Reform Commission (NSW Commission) is reviewing suppression and non-publication orders.¹² Two Commonwealth Parliamentary Committees are reviewing the effects of law enforcement and intelligence legislation on press freedom.¹³
- 13.14 The Australian Competition and Consumer Commission (ACCC) has reported in its inquiry into digital platforms,¹⁴ and the Australian Government has produced its response to its recommendations.¹⁵ The Standing Committee of Attorneys-General is also reviewing Australia’s defamation laws.¹⁶ These reports are discussed next.

ACCC Digital Platforms Inquiry

- 13.15 The ACCC recommended a framework to regulate all media consistently, including digital platforms.¹⁷ It proposed a mandatory take-down code to help enforce copyright.¹⁸
- 13.16 It recommended:
- encouraging public interest journalism and local journalism¹⁹
 - measures to improve digital media literacy²⁰
 - setting up a body to monitor initiatives designed to help users assess news content²¹
 - a code of conduct to handle complaints about, and take down, disinformation.²²
- 13.17 The Australian Government announced its response to this report in December 2019,²³ after further consultation.²⁴ The Australian Government:
- committed to a staged process toward a media-neutral regulatory framework
 - will request the major digital platforms to develop a voluntary code of conduct for disinformation and news quality
 - will develop a pilot external dispute resolution scheme, to inform its decision whether to establish a Digital Platforms Ombudsman to resolve complaints
 - will enhance an existing program to better support public interest journalism
 - will develop a proposal for a network focusing on media literacy, and seek to have news and media literacy included within a review of the Australian curriculum.²⁵

11 Rob Harris, ‘Illegal Offshore Gambling Websites to be Blocked by Australian Internet Providers’, *Sydney Morning Herald* (online, 11 November 2019) <<https://www.smh.com.au/politics/federal/illegal-offshore-gambling-websites-to-be-blocked-by-australian-internet-providers-20191110-p53963.html>>.

12 Department of Justice (NSW), ‘Open Justice Review’, *Justice—Law Reform Commission* (Web Page, 3 June 2019) <https://www.lawreform.justice.nsw.gov.au/Pages/Irc/Irc_current_projects/Courtinformation/Project_update.aspx>.

13 Senate Standing Committee on Environment and Communications, Parliament of Australia, ‘Press Freedom’, *Parliamentary Business* (Web Page) <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Environment_and_Communications/PressFreedom>; Joint Committee on Intelligence and Security, Parliament of Australia, ‘Inquiry into the Impact of the Exercise of Law Enforcement and Intelligence Powers on the Freedom of the Press’, *Parliamentary Business* (Web Page, July 2019) <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Intelligence_and_Security/FreedomofthePress>.

14 Australian Competition & Consumer Commission, *Digital Platforms Inquiry* (Final Report, June 2019).

15 Treasury (Cth), *Regulating in the Digital Age: Government Response and Implementation Roadmap for the Digital Platforms Inquiry* (Report, 12 December 2019) <<https://treasury.gov.au/publication/p2019-41708>>.

16 ‘Review of Model Defamation Provisions’, *Department of Communities and Justice (NSW)* (Web Page, 29 November 2019) <<https://www.justice.nsw.gov.au/defamationreview>>.

17 Australian Competition & Consumer Commission, *Digital Platforms Inquiry* (Final Report, June 2019) Recommendation 6.

18 Ibid Recommendation 8.

19 Ibid Recommendations 9–11.

20 Ibid Recommendations 12–13.

21 Ibid Recommendation 14.

22 Ibid Recommendation 15. Disinformation was defined as false or inaccurate information that is deliberately created and spread to harm a person, social group, organisation or country: 352.

23 Treasury (Cth), *Regulating in the Digital Age: Government Response and Implementation Roadmap for the Digital Platforms Inquiry* (Report, 12 December 2019) <<https://treasury.gov.au/publication/p2019-41708>>.

24 Treasury (Cth), ‘Published Responses’, *Digital Platforms Inquiry* (Web Page, 2019) <<https://consult.treasury.gov.au/structural-reform-division/digital-platforms-inquiry/>>

25 Treasury (Cth), *Regulating in the Digital Age: Government Response and Implementation Roadmap for the Digital Platforms Inquiry* (Report, 12 December 2019) <<https://treasury.gov.au/publication/p2019-41708>>.

- 13.18 The Australian Government did not support a mandatory take-down code for copyright enforcement, noting that it needed more data and further consultation and that there was a review of copyright reforms scheduled for late 2020.²⁶

Uniform defamation law review

- 13.19 The Council of Attorneys-General is currently conducting a review of the uniform defamation laws adopted by all states and territories in 2005.²⁷ A discussion paper was published in July 2019²⁸ and draft amendments were published in November 2019 for further feedback.²⁹
- 13.20 As discussed below, the draft legislation includes a ‘single publication’ rule. Time limits for beginning a defamation action would start when material is first published, although the draft legislation also proposes that a court should have more discretion in extending this time limit.³⁰ The draft legislation also proposes a new defence of ‘responsible communication in the public interest’.³¹
- 13.21 The review is also considering how to deal with digital platforms. This includes whether to change the existing defence, create clear exclusions or set out procedures to take down material.³² This will now be considered as a separate stage in the review process to take into account the matters raised in the ACCC’s Digital Platforms inquiry.³³

How does the Commission’s inquiry fit in the larger picture?

- 13.22 Increasingly, governments recognise a need to cooperate in regulating content on the internet. In this, governments follow public awareness of harms caused by online content.³⁴
- 13.23 Contempt law forms a small part of this debate, which also includes online safety, extremist and hate speech, copyright, ‘fake news’ and defamation.
- 13.24 Victoria cannot meet this challenge on its own. Most of the large digital platforms and publishers are established overseas, making enforcement more challenging.
- 13.25 This can also make the law seem unfair, because Australian media must comply while overseas publishers are free to publish. For example, this means that publishers in Victoria may be unable to report on trials in Victoria, even though the same information has been published online and is available in Victoria.
- 13.26 The challenges discussed in this chapter are therefore better dealt with as part of broader reforms in defamation and of digital platforms. If take-down order regimes can be made to work in copyright and defamation, these could equally apply to contempt law. (See Chapter 14.)

26 Ibid.

27 ‘Review of Model Defamation Provisions’, *Department of Communities and Justice (NSW)* (Web Page, 29 November 2019) <<https://www.justice.nsw.gov.au/defamationreview>>.

28 Council of Attorneys-General, *Review of Model Defamation Provisions* (Discussion Paper, February 2019) <<https://www.justice.nsw.gov.au/justicepolicy/Documents/review-model-defamation-provisions/Final-CAG-Defamation-Discussion-Paper-Feb-2019.pdf>>.

29 Australasian Parliamentary Counsel’s Committee, Council of Attorneys-General, *Model Defamation Amendment Provisions (Draft for public consultation)* (Report Draft d15, 2019) <<https://www.justice.nsw.gov.au/justicepolicy/Documents/review-model-defamation-provisions/consultation-draft-of-mdaps.pdf>>.

30 Council of Attorneys-General, *Model Defamation Amendment Provisions 2020 (Consultation Draft)* (Background Paper, December 2019) 10–12, Recommendation 3 <<https://www.justice.nsw.gov.au/justicepolicy/Documents/review-model-defamation-provisions/defamation-final-background-paper.pdf>>.

31 Ibid 20–2, Recommendation 11.

32 Council of Attorneys-General, *Review of Model Defamation Provisions* (Discussion Paper, February 2019) Question 15 <<https://www.justice.nsw.gov.au/justicepolicy/Documents/review-model-defamation-provisions/Final-CAG-Defamation-Discussion-Paper-Feb-2019.pdf>>.

33 Council of Attorneys-General, *Model Defamation Amendment Provisions 2020 (Consultation Draft)* (Background Paper, December 2019) 4 <<https://www.justice.nsw.gov.au/justicepolicy/Documents/review-model-defamation-provisions/defamation-final-background-paper.pdf>>.

34 For an excellent summary of the issues, see Internet & Jurisdiction Policy Network, *Berlin Roadmap: Secretariat Summary and I&J Programs Work Plans* (Speech, 3rd Global Conference, 3–5 June 2019) <<https://www.internetjurisdiction.net/uploads/pdfs/Berlin-Roadmap-and-Secretariat-Summary-3rd-Global-Conference-of-the-Internet-Jurisdiction-Policy-Network.pdf>>; Dan Jerker B Svantesson, ‘*Internet & Jurisdiction Global Status Report*’, (November 2019) <<https://www.internetjurisdiction.net/news/release-of-worlds-first-internet-jurisdiction-global-status-report>>.

- 13.27 Some of the recommendations made by the ACCC could also address some of these challenges. Consistent regulation of media will help reduce the inequality experienced by traditional media. Measures to improve the quality of news may make information more reliable. Improving digital media literacy could reduce the risks created by online publications.
- 13.28 The time is right to place restrictions on publication within the broader agenda of regulating online content. For example, if take-down regimes are adopted following the Digital Platforms Inquiry, they can include court orders enforcing restrictions on publication.
- 13.29 Key countries including Australia are negotiating the mutual enforcement of suppression orders.³⁵ This could extend to other forms of publication restriction.
- 13.30 The Director of Public Prosecutions (DPP) submitted that in practice it was often difficult to identify in online publications the appropriate party to proceed against, which was a serious barrier to enforcement.³⁶
- 13.31 The issue of the identification of online publishers has implications for other areas of law, including defamation law. It can be dealt with in other ways, such as regulation of the media. The Commission therefore recommends this issue be considered as part of any broader national regulatory reform process.

Recommendation

- 109 The Victorian Government should raise the issue of the enforcement of restrictions on publications in any national regulatory reforms with respect to take-down orders and other regulation of digital platforms, including the issue of identifying publishers online.

How should the law adapt to online publishing?

- 13.32 The consultation paper discussed two ways to adapt to online publishing:
- changing the definition of ‘publication’
 - changing the approach to online intermediaries.³⁷

How should ‘publication’ be defined?

- 13.33 The definition of ‘publication’ differs in some minor respects between contempt law, the Judicial Proceedings Reports Act and the Open Courts Act.³⁸ The consultation paper asked whether the terms ‘publish’ and ‘publication’ should be defined consistently and, if so, how.³⁹
- 13.34 In Chapter 12, the Commission recommends repealing several offences in the Judicial Proceedings Reports Act. It recommends moving the rest to the Open Courts Act and therefore repealing the Judicial Proceedings Reports Act.

35 ‘NZ Suppression Orders May Become Enforceable Overseas’, *Otago Daily Times* (online, 10 August 2019) <<https://www.odt.co.nz/news/national/nz-suppression-orders-may-become-enforceable-overseas>>.

36 Submission 28 (Director of Public Prosecutions).

37 Victorian Law Reform Commission, *Contempt of Court* (Consultation Paper, May 2019) 155–60 [10.26]–[10.64].

38 *Ibid* 156–7 [10.35]–[10.43].

39 Victorian Law Reform Commission, *Contempt of Court* (Consultation Paper, May 2019) 160, Question 43.

- 13.35 In the Open Courts Act, ‘publish’ means disseminate or provide access to the public or a section of the public by any means, including by any of the following:
- publication in a book, newspaper, magazine or other written publication
 - broadcast by radio or television
 - public exhibition
 - broadcast or electronic communication.⁴⁰
- 13.36 The definition of ‘publish’ in section 4 of the Judicial Proceedings Reports Act is the same as in the Open Courts Act, but there is no definition of ‘publish’ or ‘publication’ in section 3 of the Judicial Proceedings Reports Act.⁴¹ However, unlike the Open Courts Act, the Judicial Proceedings Reports Act does not specify that ‘publication’ is to be construed according to the definition of ‘publish’. Under contempt law, publication occurs when material is made available to the public or to a section of the public.⁴²
- 13.37 While the definitions are broad and inclusive, they may sometimes be unclear, especially in the age of social media, whether information has been made ‘available to the public or a section of the public’. For example, is a post on a private Facebook page published to ‘a section of the public’?⁴³
- 13.38 The Australian Law Reform Commission (ALRC) recently addressed a similar issue in relation to the privacy protections for family law proceedings. It recommended redrafting the provision to exclude communications that were private in nature and to make it clear that it applies to publishing on the internet and on social media.⁴⁴
- 13.39 Most importantly, the courts have interpreted ‘publication’ as continuing while the material is available online.⁴⁵ As a result, a person can be punished for material that was lawful when it was first posted, and that is merely left online by the publisher as part of its online archive. However, the Victorian Court of Appeal has ruled that archived material of this kind is unlikely to be in contempt, as jurors are unlikely to be exposed to it.⁴⁶
- 13.40 The Council of Attorneys-General is proposing a ‘single publication’ rule for defamation law. The draft legislation provides that the cause of action accrues on the day of first publication, which for electronic material is defined as the day the matter was first posted or uploaded on a website. The draft legislation also makes it easier for a court to extend the limitation time for an action. The draft legislation does not otherwise redefine the term ‘publication’.⁴⁷

Responses

- 13.41 Those who addressed the issue agreed that the definitions of ‘publication’ and ‘publish’ should be applied consistently,⁴⁸ but they pointed to different legislative definitions as the desired model.

40 *Open Courts Act 2013* (Vic) s 3 (definition of ‘publish’).

41 The definition excludes publications ‘for a purpose connected with a judicial proceeding’. This issue is dealt with in Chapter 12.

42 Des Butler and Sharon Rodrick, *Australian Media Law* (Thomson Reuters, 5th ed, 2015) 373 [6.150], citing N Lowe and B Sufrin, *The Law of Contempt* (Butterworths, 3rd ed, 1996) 85.

43 Victorian Law Reform Commission, *Contempt of Court* (Consultation Paper, May 2019) 157 [10.44]. The Law Commission of England and Wales took the initial view that there are no hard and fast rules in this area, and the law should be left to develop: Law Commission (England and Wales), *Contempt of Court* (Consultation Paper No 209, 2012) 44 [3.29].

44 Australian Law Reform Commission, *Family Law for the Future—An Inquiry into the Family Law System* (Report No 135, March 2019) 439–42 [14.65]–[14.76], Recommendation 56.

45 *News Digital Media Pty Ltd v Mokbel* [2010] VSCA 51 [63]–[65] (Warren CJ and Byrne AJA); *R v Hinch (No 1)* [2013] VSC 520, [54]; *Fairfax Digital Australia and New Zealand Pty Ltd v Ibrahim* [2012] NSWCCA 125, [43] (Basten JA, Bathurst CJ and Whealy JA agreeing).

46 *News Digital Media Pty Ltd v Mokbel* [2010] VSCA 51.

47 Council of Attorneys-General (NSW), *Model Defamation Amendment Provisions 2020 (Consultation Draft)* (Background Paper, December 2019) 10–12, Recommendation 3 <<https://www.justice.nsw.gov.au/justicepolicy/Documents/review-model-defamation-provisions/defamation-final-background-paper.pdf>>.

48 Submissions 18 (Commercial Bar Association Media Law Section Working Group) (referring to the Open Courts Act and the Judicial Proceedings Reports Act only), 20 (Criminal Bar Association), 23 (MinterEllison Media Group), 28 (Director of Public Prosecutions), 31 (County Court of Victoria).

- 13.42 Australia's Right to Know Coalition (ARTK) and MinterEllison Media Group supported changing the definition to mirror defamation law.⁴⁹ The Criminal Bar Association and the Commercial Bar Association Media Law Section Working Group (CommBar—Media Law Section) favoured the definition in the Open Courts Act.⁵⁰ The Children's Court did not have concerns about the definition under its Act,⁵¹ which mirrors that in the Open Courts Act.⁵²
- 13.43 The DPP supported making clearer the meaning of 'disseminate or provide access to the public or a section of the public'.⁵³ The County Court supported an inclusive list of examples to make the definition clearer.⁵⁴ The Criminal Bar Association suggested that the legislation could usefully indicate communications that are excluded from the definition, such as private emails.⁵⁵
- 13.44 Several responses supported making clear when material had been published. The Criminal Bar Association and the DPP preferred that 'publication' be defined as a continuing act.⁵⁶
- 13.45 Media lawyers and academics and the Law Institute of Victoria (LIV) agreed that publishers could not be expected to monitor archived online materials. Removing such materials would also interfere with the public record, as they were unlikely to be restored afterwards. For these reasons, 'publication' should be defined as taking place when material is first published.⁵⁷ However, some stakeholders noted that this was less of an issue for sub judice contempt, as archived material did not usually create a real risk of prejudice.⁵⁸
- 13.46 ARTK and MinterEllison Media Group suggested defining online material as only having been published when downloaded by a third party. However, the definition for print and traditional media should stay the same.⁵⁹

Commission's conclusions: clarify and define publication consistently

Defining 'publication' consistently

- 13.47 There should be a consistent definition of 'publication' and 'publish' in the Open Courts Act and the proposed Contempt of Court Act. It is not necessary to apply this to the Judicial Proceedings Reports Act, because the Commission is recommending that offences in the Judicial Proceedings Reports Act should be either repealed or moved to the Open Courts Act.
- 13.48 The model for this should be the statutory definition of the Open Courts Act. This is clearer and more relevant than the definition in defamation law.⁶⁰

What is 'the public or a section of the public'?

- 13.49 There should be a clear meaning of 'providing access to the public or a section of the public'. Often used in legislation, this term is flexible enough to cater for changing forms of publication. However, it would be helpful to clarify its application in the online context, since many more people are likely to be subject to these sanctions.

49 Submissions 23 (MinterEllison Media Group), 27 (Australia's Right to Know coalition). The uniform defamation laws do not include a statutory definition of 'publication', and instead rely on the common law definition.

50 Submissions 18 (Commercial Bar Association Media Law Section Working Group), 20 (Criminal Bar Association).

51 *Children, Youth and Families Act 2005* (Vic) s 3(1).

52 Submission 14 (Children's Court of Victoria).

53 Submission 28 (Director of Public Prosecutions).

54 Submission 31 (County Court of Victoria).

55 Submission 20 (Criminal Bar Association).

56 Submissions 20 (Criminal Bar Association), 28 (Director of Public Prosecutions).

57 Submissions 17 (Dr Denis Muller), 22 (Law Institute of Victoria), 23 (MinterEllison Media Group); Consultation 5 (Media lawyers and academics on contempt by publication).

58 Submission 18 (Commercial Bar Association Media Law Section Working Group); Consultation 5 (Media lawyers and academics on contempt by publication).

59 Submissions 23 (MinterEllison Media Group), 27 (Australia's Right to Know coalition).

60 The common law definition of publication in defamation requires publication only to some person other than the plaintiff, and not necessarily to a 'section of the public': LexisNexis, *Halsbury's Laws of Australia* (online, 19 September 2019) 145 Defamation, '2 Cause of Action in Defamation' [145–330].

- 13.50 The Criminal Bar Association suggested excluding private communications, such as private emails. This is consistent with the approach taken by the ALRC. However, it may be misleading to focus on the medium. For example, email newsletters can be broadcast to the public.
- 13.51 The Commission recommends adding an inclusive list of factors to guide the meaning of dissemination to ‘the public or a section of the public’. These factors do not need to be considered in straightforward cases, such as publication in a newspaper, and will be most useful in the context of social media. This list may include:
- whether there is any established relationship between the parties
 - the nature of any relationship between the parties
 - the size of the audience
 - the ease with which a person unknown to the publisher can access the communication.⁶¹
- 13.52 These factors focus on the ‘public’ nature of the communication rather than the medium or platform. For example, a post to a WhatsApp group may be considered private where it is published only to family members, yet it may be available to the public if anyone can opt into the group.
- 13.53 Further, it may be useful to include in a legislative note examples of communications that are excluded. This could include emails between two individuals, and private WhatsApp groups between family and friends.

Liability and the timing of publication

- 13.54 It is unfair for publishers to be punished for online material that at the time of original publication was lawful. To comply with the law, publishers must be aware of all the content they have previously published. They must also constantly monitor court proceedings so that they become aware as soon as court proceedings are pending.
- 13.55 There is a need to clarify the law to ensure publishers are not liable for material that was lawful when first published. There are two ways this can be achieved. ‘Publication’ could be defined as a single act; it occurs when the material is first made available. A person’s liability would be determined at the time the person first made the material available.
- 13.56 Alternatively, the legislation could state that a person is not liable for material that was lawful when first made available. This would have the same effect on the liability of archived material but would not change the underlying definition of ‘publication’, and therefore would not have unintended effects for other parts of the Victorian statute book.
- 13.57 The Commission recommends adopting the second approach of an express exclusion from liability for online intermediaries. This is clearer and more direct. This exclusion should apply if the material was lawful when it was first made available.
- 13.58 Publishers should still be liable if they take steps to republish the material once the material has become unlawful, such as promoting it on the homepage of the website or directing readers’ attention to it through a link in a new article. While this still places a burden on publishers to check archived material, this would only occur when there is an opportunity to check the material in the context of a related story.
- 13.59 However, it would be unfair to hold publishers liable for online material that has been made available, but which is removed before anyone has read it. The definition of ‘publication’ should therefore provide that publication of online material only occurs if the material has been downloaded or accessed by a third party.

61

Courts have considered in other contexts the distinction between ‘public’ and ‘private’ communications, such as in discrimination law: Australian Law Reform Commission, *Family Law for the Future—An Inquiry into the Family Law System* (Report No 135, March 2019) 440 [14.68].

- 13.60 Redefining 'publication' would be more attractive if the same reform was adopted as part of defamation law. However, as noted earlier, the draft legislation does not redefine the term 'publication', but instead specifies when a cause of action would accrue, so that a person could not be indefinitely liable for defamation. This is less relevant here. Other than for the offence of identifying victims of sexual offences, the duration of the restrictions on publications are already limited by the offence itself.

Recommendations

- 110 The Open Courts Act and the Commission's proposed Contempt of Court Act should provide that a publisher is not liable, other than under the proposed take-down order scheme, if:
- at the time the material was first made available, the material did not breach the relevant provisions, and
 - the publisher has not since taken any steps to republish the material.
- 111 The definitions of 'publish' and 'publication' in the Open Courts Act should be amended to include a list of factors the court may have regard to in determining whether the material has been disseminated to 'the public or a section of the public'. This list should include:
- whether there is any established relationship between the parties
 - the nature of any relationship between the parties
 - the size of the audience
 - the ease with which a person unknown to the publisher can access the communication.
- 112 The definition of 'publication' in the Open Courts Act should be amended to provide that the publication of online material occurs only if the material has been downloaded or accessed by a third party.
- 113 For consistency, the definitions of 'publish' and 'publication' in the Open Courts Act should be reflected in the Commission's proposed Contempt of Court Act.

Should online intermediaries be liable for publications?

- 13.61 The consultation paper asked if any reforms should be made to address the liability of online intermediaries.⁶²

What are online intermediaries?

- 13.62 Online or internet intermediaries:

bring together or facilitate transactions between third parties on the Internet. They give access to, host, transmit and index content, products and services originated by third parties on the Internet or provide Internet-based services to third parties.⁶³

62 Victorian Law Reform Commission, *Contempt of Court* (Consultation Paper, May 2019) 160, Question 46.

63 Organisation for Economic and Cultural Development (OECD), *The Economic and Social Role of Internet Intermediaries* (Report, April 2010) 9 <www.oecd.org/internet/ieconomy/44949023.pdf>. This definition has also been adopted in Manilapinciples.org, *Manila Principles on Intermediary Liability* (Background Paper, 30 May 2015) 6 <https://www.eff.org/files/2015/07/08/manila_principles_background_paper.pdf>; Rebecca Mackinnon et al, *Fostering Freedom Online: The Role of Internet Intermediaries* (UNESCO, 2014) 19 <<https://unesdoc.unesco.org/ark:/48223/pf0000231162>>.

- 13.63 They include search engines, portals and networking platforms that host users' content or allow users to communicate with each other.⁶⁴ The ACCC has used the term 'digital platforms' to describe this group. It defines 'digital platforms' as 'applications that serve multiple groups of users at once, providing value to each group based on the presence of other users.'⁶⁵
- 13.64 Digital platforms are now 'considerably more than mere distributors or pure intermediaries in the supply of news content in Australia'.⁶⁶ They select and curate content, evaluate content, and rank and arrange content. Some are increasingly creating or commissioning other content.⁶⁷
- 13.65 Most definitions exclude those that produce their own content, such as online news publishers. However, these may sometimes be intermediaries, such as when users comment on their articles, or when they host and distribute the videos of others.⁶⁸

The global context of intermediaries

- 13.66 The liability of these intermediaries is relevant to many areas of law, including copyright, defamation and the distribution of harmful material online.⁶⁹ Worldwide, there has been growing concern and interest in the regulation of intermediaries.⁷⁰
- 13.67 Online publishing makes it harder to identify or locate the original publishers. In many cases, the person making a comment may be unable to change or remove the offending material even if the person becomes aware that it is an offence. This makes it more attractive to pursue online intermediaries.
- 13.68 However, intermediaries are caught between opposing demands. On the one hand, they are asked to police content to respect laws and protect their users. On the other, people object to them deciding what can be published and limiting free speech.⁷¹
- 13.69 There has been much recent work on this issue.⁷² For example, the Manila Principles on Intermediary Liability state that:
- Intermediaries should be shielded by law from liability for third party content.
 - Content should only be restricted by an order from a judicial authority.
 - Requests for restrictions must be clear, be unambiguous, and follow due process.
 - Laws and content restriction orders and practices must be necessary and proportionate.
 - Laws and content restriction policies and practices must respect due process.
 - Laws, policies and practices must build in transparency and accountability.⁷³

64 Rebecca Mackinnon et al, *Fostering Freedom Online: The Role of Internet Intermediaries* (UNESCO, 2014) 21 <<https://unesdoc.unesco.org/ark:/48223/pf0000231162>>.

65 Australian Competition & Consumer Commission, *Digital Platforms Inquiry* (Final Report, June 2019) 41.

66 Ibid 166.

67 Ibid 170–3.

68 Rebecca Mackinnon et al, *Fostering Freedom Online: The Role of Internet Intermediaries* (UNESCO, 2014) 19 <<https://unesdoc.unesco.org/ark:/48223/pf0000231162>>.

69 For a detailed typology, see Internet & Jurisdiction Policy Network, *Operational Approaches—Norms, Criteria, Mechanisms* (Report, April 2019) 20–6 <<https://www.internetjurisdiction.net/uploads/pdfs/Papers/Content-Jurisdiction-Program-Operational-Approaches.pdf>>.

70 See, eg, Centre for Internet and Society, Stanford Law School, *World Intermediary Liability Map* (Web Page) <<https://wilmap.law.stanford.edu/>>; Internet & Jurisdiction Policy Network, *Operational Approaches—Norms, Criteria, Mechanisms* (Report, April 2019) <<https://www.internetjurisdiction.net/uploads/pdfs/Papers/Content-Jurisdiction-Program-Operational-Approaches.pdf>>.

71 Internet & Jurisdiction Policy Network, *Berlin Roadmap: Secretariat Summary and I&J Programs Work Plans* (Speech, 3rd Global Conference, 3–5 June 2019) 12 <<https://www.internetjurisdiction.net/uploads/pdfs/Berlin-Roadmap-and-Secretariat-Summary-3rd-Global-Conference-of-the-Internet-Jurisdiction-Policy-Network.pdf>>.

72 See, eg, Internet & Jurisdiction Policy Network, *I&J Retrospect Database* (Web Page) <<https://www.internetjurisdiction.net/publications/retrospect>>; Centre for Internet and Society, Stanford Law School, *World Intermediary Liability Map* (Web Page) <<https://wilmap.law.stanford.edu/>>; Dan Jerker B Svantesson, *Internet & Jurisdiction Global Status Report* (November 2019) <<https://www.internetjurisdiction.net/news/release-of-worlds-first-internet-jurisdiction-global-status-report>>; Internet & Jurisdiction Policy Network, *Operational Approaches—Norms, Criteria, Mechanisms* (Report, April 2019) <<https://www.internetjurisdiction.net/uploads/pdfs/Papers/Content-Jurisdiction-Program-Operational-Approaches.pdf>>; Rebecca Mackinnon et al, *Fostering Freedom Online: The Role of Internet Intermediaries* (UNESCO, 2014) <<https://unesdoc.unesco.org/ark:/48223/pf0000231162>>.

73 Manilapinciples.org, *Manila Principles on Intermediary Liability* (Background Paper, 30 May 2015) 6 <https://www.eff.org/files/2015/07/08/manila_principles_background_paper.pdf>.

- 13.70 This is consistent with the recommendations of the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression.⁷⁴
- 13.71 In New Zealand, there has been a recent example of the difficulties of enforcing suppression orders. Google emailed the name of an accused in a murder trial to subscribers to Google Trends, an online service listing trending searches in New Zealand, after the name of the accused had been suppressed. After the email was sent Google received notice of the suppression order. In response to the concerns raised by the New Zealand Government, Google met with the courts and the DPP and informed them of Google's processes for the take down of information in compliance with court orders. Google also suspended Google Trends in New Zealand.⁷⁵

Intermediary liability in Australia

- 13.72 As discussed in the consultation paper, the liability of intermediaries in Australia is 'confusing' and 'largely incoherent'.⁷⁶
- 13.73 The *Broadcasting Services Act 1992* (Cth) protects internet content hosts⁷⁷ and internet service providers from liability if they are not aware of the nature of the hosted internet content. The Act also provides that such providers are not required to monitor, inquire about or keep records of the content it hosts. The Act overrides any inconsistent laws, including state or territory laws and the common law.⁷⁸
- 13.74 Australian courts have not yet considered the liability of intermediaries in contempt law.⁷⁹ In other areas, such as defamation and copyright, courts are struggling to adapt legal rules to deal with intermediaries.⁸⁰
- 13.75 The law has not yet settled whether search engines are 'publishers' for the purposes of defamation law. It appears likely they may be treated as 'secondary publishers', although this depends on the facts of the case. This means they are only liable if they know the nature of the content and do not remove the publication within a reasonable time.⁸¹
- 13.76 However, for the purposes of defamation law, media companies have been held to be primary publishers of comments by third-party users on their public Facebook pages.⁸²
- 13.77 The review of uniform defamation law is also considering the liability of online intermediaries in defamation law, including whether to reform the defence of innocent dissemination, enact a clear exemption for online intermediaries, and introduce a take-down scheme.⁸³ As noted earlier, this issue will now be considered as a second stage in the reform process.⁸⁴

74 Human Rights Council, *Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression*, UN Doc A/HRC/38/35 (6 April 2018) 19–20 [66]–[68].

75 Minister for Justice (NZ), 'Justice Minister Welcomes Google's Change of Heart' (Media Release, 5 July 2019) <<https://www.beehive.govt.nz/release/justice-minister-welcomes-google%E2%80%99s-change-heart>>, and the attached letter.

76 Kylie Pappalardo and Nicolas Suzor, 'The Liability of Australian Online Intermediaries' (2018) 40 *Sydney Law Review* 469, 469.

77 This is defined as a person who hosts or proposes to host internet content in Australia, and 'internet content' is defined as meaning information kept on a data storage device and accessed, or available for access, using an internet carriage service. It excludes ordinary email or information transmitted in the form of a broadcasting service: *Broadcasting Services Act 1992* (Cth) sch 5 cl 3.

78 *Ibid* sch 5 cl 91. Laws can, however, be exempted from the Act: cl 91(2).

79 In a recent case, Google successfully had set aside an order referring it for contempt for failing to take down defamatory material published on Google Reviews, on the basis that it had not had effective notice: *KT v Google LLC* [2019] NSWSC 1015. This was not a case of sub judice contempt but rather a form of disobedience contempt.

80 Kylie Pappalardo and Nicolas Suzor, 'The Liability of Australian Online Intermediaries' (2018) 40 *Sydney Law Review* 469, 496.

81 The Victorian Court of Appeal considered that this would generally be the case in *Google Inc v Trkulja* [2016] VSCA 333 [349], [353], [357], (2016) 342 ALR 504. The High Court held that this was not an appropriate way to proceed, as this was a mixed question of fact and law: *Trkulja v Google LLC* [2018] HCA 25 [38]–[39], (2018) 263 CLR 149.

82 *Voller v Nationwide News Pty Ltd* [2019] NSWSC 766.

83 Council of Attorneys-General, *Review of Model Defamation Provisions* (Discussion Paper, February 2019) [5.49]–[5.64] <<https://www.justice.nsw.gov.au/justicepolicy/Documents/review-model-defamation-provisions/Final-CAG-Defamation-Discussion-Paper-Feb-2019.pdf>>.

84 Council of Attorneys-General, *Model Defamation Amendment Provisions 2020 (Consultation Draft)* (Background Paper, December 2019) 4 <<https://www.justice.nsw.gov.au/justicepolicy/Documents/review-model-defamation-provisions/defamation-final-background-paper.pdf>>.

- 13.78 The ACCC's Digital Platforms Inquiry considered the issue in the context of enforcing copyright law. The ACCC recommended that, in consultation with industry, a mandatory take-down code should be developed to help enforce copyright law.⁸⁵ As noted earlier, the Australian Government has not adopted this recommendation and will defer consideration to a review of copyright law scheduled for 2020.⁸⁶
- 13.79 Both the NSW Commission and New Zealand Law Commission recommended there should be, in sub judice contempt, a defence for internet service providers and internet content hosts. This would apply if they did not know of the nature of the content or, if they did, they took reasonable care to prevent publication.⁸⁷ This defence is included in New Zealand's contempt legislation.⁸⁸

Responses

- 13.80 Most stakeholders agreed that an online intermediary should only be liable if it has been made aware of the material and does not remove it within a reasonable time.⁸⁹ A higher standard would be inconsistent with the Broadcasting Services Act.⁹⁰
- 13.81 Others submitted that online intermediaries were not in a position to assess the lawfulness of material. A better approach would be to follow the British approach which presumes an intermediary is not liable, unless it is not practical to pursue the original publisher.⁹¹
- 13.82 The Law Institute of Victoria expressly endorsed the defence recommended by the NSW Commission. However, it noted this should be confined to certain intermediaries only.⁹² It suggested that, regarding social media platforms and search engines, a factor would be whether the intermediary had put in place a reasonable precautionary system.⁹³
- 13.83 The Criminal Bar Association suggested that online intermediaries could be required to provide information when a person signed up to use their services.⁹⁴
- 13.84 Several organisations said it was unfair to punish the owners of public internet pages for the comments of others if they did not have notice of the nature of the content.⁹⁵ However, the Criminal Bar Association considered that it would be appropriate for online intermediaries to be responsible for such conduct.⁹⁶
- 13.85 ARTK noted that online platforms differed in the control they gave users to moderate or block content posted by others. It also suggested there be an exemption for intermediaries rather than a defence, so that the resources of parties and courts would not be wasted.⁹⁷

85 Australian Competition & Consumer Commission, *Digital Platforms Inquiry* (Final Report, June 2019) Recommendation 8.

86 Treasury (Cth), *Regulating in the Digital Age: Government Response and Implementation Roadmap for the Digital Platforms Inquiry* (Report, 12 December 2019) <<https://treasury.gov.au/publication/p2019-41708>>.

87 New South Wales Law Reform Commission, *Contempt by Publication* (Report No 100, June 2003) [2.65] Recommendation 6; Law Commission (New Zealand), *Reforming the Law of Contempt of Court: A Modern Statute* (Report No 140, May 2017) Recommendation 9. These defences are not limited to intermediaries, but would extend to others in similar positions such as distributors. There is a minor difference between the two defences, in that the NZ recommendation does not require proof that the intermediary did not have control over the content.

88 *Contempt of Court Act 2019* (NZ) s 7(4)(b).

89 Submissions 18 (Commercial Bar Association Media Law Section Working Group), 22 (Law Institute of Victoria), 27 (Australia's Right to Know coalition); Consultation 5 (Media lawyers and academics on contempt by publication). Others expressed more general concern about the disproportionate effect on online intermediaries: Submission 19 (Forgetmenot Foundation).

90 Consultation 5 (Media lawyers and academics on contempt by publication). See *Defamation Act 2013* (UK) s 5.

91 Consultation 17 (Victorian Bar).

92 It identified the relevant intermediaries as internet service providers or internet content hosts: Submission 22 (Law Institute of Victoria).

93 Ibid.

94 Submission 20 (Criminal Bar Association).

95 Submissions 19 (Forgetmenot Foundation Inc), 23 (MinterEllison Media Group), 27 (Australia's Right to Know coalition). The latter two submissions cited *Voller v Nationwide News Pty Ltd* [2019] NSWSC 766. This was a defamation case in which the media companies had been held responsible for user comments on their Facebook pages.

96 Submission 20 (Criminal Bar Association).

97 Submission 27 (Australia's Right to Know coalition).

Commission's conclusions: online intermediaries

- 13.86 Legislation should directly address the liability of online intermediaries in respect of restrictions on publication. This issue should be resolved by Parliament.
- 13.87 In principle, online intermediaries should not be treated in the same way as the original publisher. The person who publishes the material should be punished, not the provider who makes publication possible.
- 13.88 It is unfair to expect online intermediaries to check that material published is not in breach of the law. This would stifle freedom of expression and impose an unfair burden, especially since these are criminal restrictions and the breach would often be unclear from the material.
- 13.89 This is true even though they may select, evaluate and rank content. While they are more than passive conduits, their responsibility is different, and the legal response should reflect this.
- 13.90 The position is different if a court determines the material should not be published or should be taken down, and the online intermediary is given notice and enough time to comply. This strikes a fairer balance by ensuring that intermediaries do not have the duty to assess themselves whether the material is in compliance with the law, but do have a duty to respond to notices.
- 13.91 The Commission recommends that online intermediaries be excluded from liability in relation to third-party content until they have received notice of a court order and have had enough time to comply. The recommendations governing take-down orders are covered in the next chapter.
- 13.92 Providing an exclusion from liability rather than a defence better reflects the responsibility of online intermediaries. It is easier to rely on an exclusion than a defence, as is evidenced by the difficulties that intermediaries have faced in trying to rely on defences in defamation law.⁹⁸
- 13.93 The same principles should apply to owners of public websites in relation to content posted by third parties. While they have more control and responsibility, this level of participation does not deserve to be punished under criminal law. In an age when everyone is sharing, tweeting and posting links, this would be too great a restriction on freedom of expression.
- 13.94 The law should not distinguish in this case between websites where posts can be approved and those where they are not. Material is often only unlawful because of its connection to legal proceedings or suppression orders, which may not be obvious on the face of the material. Further, it has the perverse result that owners who take more care are more likely to be punished.
- 13.95 These restrictions prevent harm by publication. This can be better served, in the case of online intermediaries, by an effective take-down order regime (see Chapter 14). Making it an offence to fail to take down material better reflects the responsibility of the online intermediary.
- 13.96 The Commission has considered whether this exclusion should apply if the owner knew that the content was unlawful at the time of original publication, or became aware later. Such publications could still be taken down under the scheme proposed in Chapter 14.
- 13.97 It could be argued that such a person should also be punished. However, this would make the exclusion less clear.

- 13.98 The Commission notes that, under the *Crimes Act 1958* (Vic), where a person is ‘involved in the commission’ of an offence in certain circumstances, they can be held responsible for the offence. For example, if the person intentionally assists, encourages or directs the commission of an offence, or arranges with another person to commit an offence, the person is taken to have committed that offence.⁹⁹ These provisions apply to both summary and indictable offences.¹⁰⁰
- 13.99 Such a mechanism would better capture the kind of conduct that deserves punishment. For example, if the owner of a public Facebook site arranged with a friend to publish material to identify a victim of a sexual offence, with the intention of assisting the friend to breach the law, the owner of the Facebook site could still be liable for that publication.
- 13.100 On balance, the Commission considers there is no need to limit the exclusion if it is clear that a person could still be liable under those provisions under the Crimes Act. In practice, it is unlikely the limitation would be of much use.
- 13.101 The Commission acknowledges the concerns that intermediaries should adopt precautions to prevent the publication of material. It also notes concerns that online intermediaries do not respond quickly to take-down orders.¹⁰¹
- 13.102 However, this is the role of regulation, not the criminal law. It is better for regulators rather than courts to deal with these concerns through the regulatory framework and take-down codes recommended by the ACCC.¹⁰²
- 13.103 The New Zealand example shows another way to resolve such issues. Online intermediaries would meet key stakeholders to address practical issues. This could be discussed as part of the formal relationship that the Victorian Government will set up between the media and the courts in response to the Vincent review.
- 13.104 For example, Victorian courts could take on the role of notifying Google of all suppression orders. This could be automated through the database discussed in Chapter 16. Court liaison officers or the DPP could also develop a procedure to notify online intermediaries of potential breaches.

Recommendation

- 114 Online intermediaries and the owners of public websites should be excluded from liability for third-party content under the Commission’s proposed Contempt of Court Act and the Open Courts Act (including those offences that should be moved from the Judicial Proceedings Reports Act). This exclusion should not apply where online intermediaries and the owners of public websites:
- have been given notice of a court order requiring that the material should not be published, and have had a reasonable time to comply with that notice
 - are ‘involved in the commission of the offence’ as defined in Part II Division 1 of the Crimes Act.

99 Ibid pt II div 1. These are also discussed in Chapter 4.

100 *Crimes Act 1958* (Vic) s 324(1).

101 Australian Competition & Consumer Commission, *Digital Platforms Inquiry* (Final Report, June 2019) 264–74.

102 Ibid Recommendations 6, 8.

Should prohibitions and restrictions extend outside Victoria?

Extraterritoriality

- 13.105 Anyone who can access the internet can read information posted online.¹⁰³ This may make it futile to enforce restrictions on publications in the online age if these restrictions only affect publication within Victoria.¹⁰⁴ The consultation paper therefore asked whether the restrictions on publication should apply outside Victoria and, if so, how.¹⁰⁵
- 13.106 Normally, Victorian laws only apply to conduct in Victoria. However, Parliament can apply its legislation beyond Victoria if the offence has a link to Victoria.¹⁰⁶ The Crimes Act typically defines those offences that occur outside Victoria but can be prosecuted in Victoria.¹⁰⁷
- 13.107 For example, under section 80A, there must be a ‘real and substantial link between’ the act or omission and Victoria. This is defined as including:
- where a significant part of the conduct or omission occurred in Victoria, or
 - if the conduct or omission occurred outside Victoria, it was intended that substantial harmful effects would arise in Victoria and such effects did arise.¹⁰⁸
- 13.108 The restrictions on publication have a clear link. The harm is the effect on, or on those involved in, court proceedings in Victoria.
- 13.109 The Open Courts Act already allows a court to apply an order anywhere in Australia. The court must be satisfied that extending it beyond Victoria is needed to achieve the purpose of the order.¹⁰⁹ In practice, it is still difficult to enforce such orders.
- 13.110 The Judicial Proceedings Act makes it unlawful to sell or distribute within Victoria publications published outside, if the publication would have breached section 3 of the Act if published in Victoria.¹¹⁰
- 13.111 This issue is relevant where:
- someone in Victoria publishes information on a site hosted or operated overseas
 - someone publishes outside Victoria, but within Australia
 - someone outside Australia publishes information overseas that is available in Victoria.
- 13.112 These may not be strictly cases of extraterritorial jurisdiction. ‘Publication’ in defamation law involves both making material available and someone accessing that material. Under this approach, at least part of the conduct occurs within Victoria.¹¹¹ Further, these are crimes that focus on the results rather than the conduct. Under the common law, such crimes can be punished where those results occur.¹¹²
- 13.113 However, there is still a question of policy as to when Victorian courts should be able to punish people for acts committed outside Victoria.

103 See *Dow Jones & Co Inc v Gutnick* [2002] HCA 56 [39] (Gleeson CJ, McHugh, Gummow and Hayne JJ), (2002) 210 CLR 575.

104 Victorian Law Reform Commission, *Contempt of Court* (Consultation Paper, May 2019) 162 [10.71]–[10.77].

105 *Ibid* 164, Question 47.

106 *Australia Act 1986* (Cth) s 2(1); *DPP v Sutcliffe* [2001] VSC 43 [43].

107 Offences that can be prosecuted beyond Victoria include: obtaining property or financial advantage by deception; false accounting and falsification of documents; false statements by company directors; suppression of documents; and blackmail: *Crimes Act 1958* (Vic) ss 81–7.

108 See also *ibid* s 321A. This extends the crime of conspiracy to offences against laws outside Victoria, if the necessary elements of the offence include elements which, if present or occurring in Victoria, would constitute a Victorian offence, and at least one of the parties to the conspiracy was in Victoria at the time of the agreement. It also extends the crime of conspiracy to conspiracies made by parties outside Victoria in cases where the effect of the agreement is to pursue conduct that will necessarily amount to or involve a commission of a Victorian offence.

109 *Open Courts Act 2013* (Vic) ss 21(2)–(3), 26(3)–(4).

110 *Judicial Proceedings Reports Act 1958* (Vic) s 3(2).

111 *Dow Jones & Co Inc v Gutnick* [2002] HCA 56 [25]–[28], [44].

112 *Thompson v The Queen* (1989) 169 CLR 1, 24–25 (Brennan J).

- 13.114 This question is most controversial where someone publishes material overseas. The challenges of online publication have led many governments to extend the reach of their laws even though it is difficult to enforce them. It has been argued that this practice means it is no longer useful to distinguish between territorial and extraterritorial claims.¹¹³

The challenge of enforcement

- 13.115 It is difficult to enforce restrictions against people who are not subject to Victorian law. In some cases, the restrictions can be enforced against local distributors.¹¹⁴ Companies may also choose not to contest the issue.
- 13.116 The mutual recognition of suppression orders in Australia has been on the national agenda,¹¹⁵ with the Australian Government reviewing suppression order laws across the country.¹¹⁶ However, it is unclear if any further work will be done within Australia.
- 13.117 There have been recent international discussions about the mutual recognition of suppression orders. These included Australia, New Zealand, the United Kingdom, Canada and the United States.¹¹⁷ These discussions were noted by the most recent meeting of the Council of Attorneys-General.¹¹⁸

Responses

- 13.118 Stakeholders disagreed on whether restrictions on publications should be enforced beyond Victoria. Some considered that these restrictions were becoming less relevant.¹¹⁹
- 13.119 Others considered that there was still value in enforcing the restrictions.¹²⁰ The Criminal Bar Association argued that an 'order that has some tangible effect is not futile'.¹²¹ The County Court said there would be some cases where the restrictions could be enforced against overseas publishers. Further, overseas publishers could choose to take down the material anyway.¹²²
- 13.120 ARTK considered the better response would be to rely more on remedial measures. (See Chapter 10.)¹²³
- 13.121 The Coroners Court and the Criminal Bar Association supported further work on the mutual recognition and enforcement of suppression orders in Australia.¹²⁴ Others suggested extending this to harmonise all publication restrictions.¹²⁵
- 13.122 The Criminal Bar Association supported extending offences beyond Victoria.¹²⁶ Media lawyers and others opposed extending offences, at least beyond Australia, as disproportionate and futile.¹²⁷ They argued that the laws also could not be effectively applied to social media users.¹²⁸

113 Dan Jerker B Svantesson, *Internet & Jurisdiction Global Status Report* (November 2019) 57–8 <<https://www.internetjurisdiction.net/news/release-of-worlds-first-internet-jurisdiction-global-status-report>>.

114 Victorian Law Reform Commission, *Contempt of Court* (Consultation Paper, May 2019) 162 [10.75].

115 Ibid 163 [10.80]–[10.83].

116 Attorney-General's Department (Cth), Council of Attorneys-General, 'Communiqué—Council of Attorneys-General' (23 November 2018) <<https://www.ag.gov.au/About/CommitteesandCouncils/Council-of-Attorneys-General/Documents/Council-of-Attorneys-General-communique-November-2018.pdf>>.

117 'NZ Suppression Orders May Become Enforceable Overseas', *Otago Daily Times* (online, 10 August 2019), 34 <<https://www.odt.co.nz/news/national/nz-suppression-orders-may-become-enforcable-overseas>>.

118 Attorney-General's Department (Cth), Council of Attorneys-General, 'Communiqué—Council of Attorneys-General' (23 November 2018) <<https://www.ag.gov.au/About/CommitteesandCouncils/Council-of-Attorneys-General/Documents/Council-of-Attorneys-General-communique-November-2018.pdf>>.

119 Submission 6 (Professors Mark Pearson, Patrick Keyzer, Anne Wallace and Associate Professor Jane Johnston); Consultation 17 (Victorian Bar).

120 Consultation 17 (Victorian Bar).

121 Submission 20 (Criminal Bar Association).

122 Consultation 24 (County Court of Victoria).

123 Submission 27 (Australia's Right to Know coalition).

124 Submissions 20 (Criminal Bar Association), 21 (Coroners Court of Victoria).

125 Submission 6 (Professors Mark Pearson, Patrick Keyzer, Anne Wallace and Associate Professor Jane Johnston).

126 Submission 20 (Criminal Bar Association).

127 Submissions 17 (Dr Denis Muller), 18 (Commercial Bar Association Media Law Section Working Group), 19 (Forgetmenot Foundation Inc), 23 (MinterEllison Media Group). The Media Law Section only opposed extending the application of offences beyond Australia.

128 Submission 6 (Professors Mark Pearson, Patrick Keyzer, Anne Wallace and Associate Professor Jane Johnston).

Commission's conclusions: extend restrictions beyond Victoria

- 13.123 Restrictions on publication should apply beyond Victoria in certain circumstances. These restrictions depend on harm being caused in Victoria, and the material must be accessed in Victoria for the harm to occur. Therefore, the link between the restrictions and Victoria is strong.
- 13.124 What is most important is not the place of publication but whether the material is available in Victoria. This is reflected in the Judicial Proceedings Reports Act, which penalises the sale or distribution into Victoria of offending material.
- 13.125 With online communication, there is no second step of distribution into Victoria. If you are publishing online, you are (usually) publishing to the world.
- 13.126 It is important to strike the right balance between the protection from harms and freedom of expression, especially when the conduct affects someone outside Victoria. This should be done by defining the link between the conduct and Victoria, as is done in the Crimes Act.
- 13.127 It is clear there is no harm if material is published overseas and never accessed in Victoria. On the other hand, a person in Victoria who publishes about a Victorian trial should not escape liability because the material was published on an overseas website.
- 13.128 The question is where to draw the line. The Commission concludes that criminal liability can be justified in any of the following circumstances:
- A significant part of the conduct, such as the drafting, writing or uploading of the material, occurs in Victoria.
 - The publisher intended that the prejudice or harm would occur in Victoria, and such prejudice or harm did occur.
 - The publisher was aware of a significant risk the material would circulate in Victoria and defeat the purpose of the restriction, and did not take reasonable steps to restrict such circulation.
- 13.129 In the first case, a person cannot escape liability only because the material was published outside Victoria. In the second case, a person cannot escape liability if the intention was to prejudice the trial.
- 13.130 In the second case, a person cannot avoid liability by publishing material elsewhere if the person intended to cause harm (such as a substantial risk of prejudicing a trial) in Victoria, and if such harm was in fact caused. This is a higher standard than that required under the proposed sub judice contempt.¹²⁹ This extension of liability can be justified in this case because the conduct is directed towards Victoria and the harm occurs in Victoria.
- 13.131 The third case combines two principles. It aims to make a person liable only for the distribution of the material into Victoria, as in the Judicial Proceedings Reports Act. It also limits this only to the extent needed to protect the purpose of the restriction, as in the Open Courts Act.
- 13.132 The risk must also be 'significant' rather than merely 'substantial'. In many cases, there will be a substantial risk that anything published online could be accessed in Victoria, even if only by a handful of people. A significant risk raises this threshold to make this protection for publishers outside Victoria more meaningful.
- 13.133 Foreign publishers should be able to publish lawfully to their audiences outside Victoria. For example, a publisher can choose to publish the material only in print form for distribution outside Australia. A publisher could implement geo-blocking to prevent its circulation within Victoria. A search engine could restrict publication only on the version of its search engine for Australian audiences.

- 13.134 This should also protect the blogger without a substantial audience in Australia. This can be readily determined using common software.
- 13.135 These mechanisms are not foolproof. Many people know how to avoid geo-blocking. Users can switch between different versions of Google. However, while harm cannot be avoided entirely, this will better balance the respective rights.
- 13.136 In practice, it will be exceptional for a trial in Victoria to be of interest overseas. Not many overseas publications have sufficient following in Australia to pose a significant risk to a trial. These organisations are usually in a position to manage this risk, using the suggested measures.

Improving enforcement

- 13.137 The Commission recognises the challenge of enforcing restrictions on publication, even within Australia.
- 13.138 The Victorian Government has accepted this recommendation and some work has been done already.
- 13.139 Cooperation with other countries may be coming. Some overseas publishers have already adopted measures, such as geo-blocking, even without a formal presence in Australia.
- 13.140 Other companies may choose to comply with Australian laws, even when not directly enforceable.¹³⁰ The ACCC's Digital Platforms inquiry may stimulate further cooperation.
- 13.141 These developments show that, while extraterritorial enforcement will be a challenge, it is too early to conclude that it is futile. As discussed earlier, the current trend is one of greater cooperation in regulating online content.
- 13.142 Extending restrictions on publication beyond Victoria is not a perfect solution. Prosecutions are likely to be rare. Efforts at cooperation nationally and beyond will not happen overnight. The more practical measure, therefore, is to pursue a more effective mechanism for taking down material.

Recommendation

115 The offences in the Open Courts Act, including offences currently in the Judicial Proceedings Report Act, and the scandalising and sub judice provisions of the proposed Contempt of Court Act, should be expressed to apply extra-territorially both within and outside Australia, where any of the following apply:

- a significant part of the conduct, for example, the writing or the uploading of material, occurred in Victoria
- the publication was made with the intention to cause harm in Victoria, and did cause such harm
- the publisher was aware of a significant risk that the material would circulate in Victoria in such a way as to defeat the purpose of the restriction and did not take reasonably available steps to restrict this circulation.

Take-down orders

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14. Take-down orders

Overview

- Courts can order a person to remove material that has been published ('take-down orders').
- Take-down orders can limit the harm caused by breaches of restrictions on publication. They may be more useful in the online age as it becomes harder to prevent publication.
- Take-down orders require the removal of material by online intermediaries and owners of public websites where third parties can comment.
- The Open Courts Act should state the powers of courts to order that publications be taken down and the procedure for applying for such orders.
- Since they restrict freedom of expression, such orders should only be made when necessary and no other measures can be taken.
- These powers should be available to take down material breaching a restriction on publication or on the grounds currently in the Open Courts Act in respect of suppression orders.
- A court should be able to make an interim take-down order in urgent cases.

The purpose of take-down orders

- 14.1 A 'take-down order' is made by a court requiring a person to remove material published in print or online. Unlike other kinds of restrictions on publications discussed in this report, take-down orders apply only to those named in the order and require material to be removed rather than restraining what can be published.
- 14.2 The purpose of a take-down order is to limit the harm caused by a breach of a restriction on publication. It is a remedy rather than a form of punishment.
- 14.3 Take-down orders can be used to require material to be taken down that was lawful when first published but now breaches a restriction on publication (for example, because a trial is now pending). In Chapter 13, the Commission recommended the law should be changed to make clear there was no liability for material that was lawful when first made available to the public.

- 14.4 Take-down orders are also used to remove material proved to be in breach of a restriction on publication. For example, if a publication causes a substantial risk to the right to a fair trial (sub judge contempt), the person can be punished and ordered to take down the publication.

Existing powers to make take-down orders

- 14.5 The Supreme Court of Victoria and the County Court of Victoria can make take-down orders under their powers to control court proceedings and protect a fair trial.¹ These powers and the grounds on which they are exercised are not set out in legislation.
- 14.6 A suppression order made under the *Open Courts Act 2013* (Vic) could also operate as a take-down order, on the basis that ‘publication’ is interpreted as continuing for as long as the material is made available.² Therefore, a suppression order made under the Act may require material maintained on the internet to be taken down.³
- 14.7 As noted in the consultation paper, courts consider a number of factors in deciding whether a take-down order is needed:
- 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 be available after the publication is 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 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.⁴

Responses

- 14.8 The consultation paper asked whether a court should be able to make orders for online materials to be taken down.⁵ Most stakeholders supported courts having such a power.⁶
- 14.9 The County Court said it used take-down orders to protect its proceedings and they ‘provide a speedy resolution to issues as they arise’, and that this ‘ultimately avoids complex and costly contempt proceedings’.⁷ The Commercial Bar Association Media Law Section Working Group (CommBar—Media Law Section) agreed that, in an appropriate case, such orders could be ‘a useful remedy’.⁸
- 14.10 The MinterEllison Media Group opposed take-down orders because they were not needed to prevent jurors from being prejudiced and were ineffective in the internet age. This was evidenced by cases where courts held that material archived online did

1 The Supreme Court has inherent power to make such orders: *DPP (Cth) v Brady* [2015] VSC 246 [75], (2015) 252 A Crim R 50; *News Digital Media Pty Ltd v Mokbel* [2010] VSCA 51, (2010) 30 VR 248 [63]–[67]. The County Court is given the same powers to ensure a fair proceeding under the *Open Courts Act 2013* (Vic) s 25.

2 *News Digital Media Pty Ltd v Mokbel* [2010] VSCA 51 [63]–[67]; Judicial College of Victoria, ‘6.3 Broad Suppression Orders’, *Open Courts Bench Book* (Online Manual, 6 February 2019) [16]–[20] <<http://www.judicialcollege.vic.edu.au/eManuals/OCBB/index.htm#67746.htm>>.

3 *Open Courts Act 2013* (Vic) ss 3, 17, 26. In this context, the Commission is recommending in Chapter 13 that there be no liability where the material did not breach a restriction on publication at the time it was initially published.

4 See, eg, *Nationwide News Pty Ltd v Qaumi* [2016] NSWCCA 97, (2016) 93 NSWLR 384 [83]–[90]; *DPP (Cth) v Brady* [2015] VSC 246 [75]; *Fairfax Digital Australia and New Zealand Pty Ltd v Ibrahim* [2012] NSWCCA 125, (2012) 83 NSWLR 52 [74]–[79]; *News Digital Media Pty Ltd v Mokbel* [2010] VSCA 51 [74]–[77]; *R v Rich (Ruling No 7)* [2008] VSC 437 [20]–[22].

5 Victorian Law Reform Commission, *Contempt of Court* (Consultation Paper, May 2019) 180, Question 57.

6 Submissions 14 (Children’s Court of Victoria), 18 (Commercial Bar Association Media Law Section Working Group), 20 (Criminal Bar Association), 28 (Director of Public Prosecutions), 31 (County Court of Victoria); Consultation 6 (Victoria Legal Aid).

7 Submission 31 (County Court of Victoria).

8 Submission 18 (Commercial Bar Association Media Law Section Working Group).

not pose a substantial risk to a fair trial.⁹ Further, such orders had ‘significant and wide-ranging implications’ for media organisations, ignored the value of public access of historical information, impinged on press freedom, and was incompatible with freedom of expression.¹⁰

- 14.11 Australia’s Right to Know coalition (ARTK) submitted that the law on take-down orders was clear and did not require reform. However, it noted that take-down orders will in many cases be ‘futile or of very limited utility’ as they do not bind overseas entities publishing the same information, which remains accessible to all.¹¹

Commission’s conclusions: take-down orders are useful

- 14.12 Courts should retain the power to make take-down orders. Despite the challenges posed by modern media technology including the internet, there are times when that power will be useful.
- 14.13 If a court became aware of published material putting a fair trial at risk which had not yet come to the attention of jurors, it would be more effective and proportionate to require the publication be taken down than to punish the publisher. As discussed in Chapter 10, such powers would usually be used only if the issue could not be resolved through informal communication from the court.
- 14.14 There will need to be a greater range of remedial measures available to address the difficulties of restraining publication in the online age (see Chapter 10).
- 14.15 Take-down orders are also needed so that, if a person is convicted of breaching a restriction, there is clear provision for making an order requiring the material to be removed.
- 14.16 It may be necessary to require the removal of material by online intermediaries or the owners of websites on which third parties can comment. They should not be liable for the material itself, only for failing or refusing to take down the material pursuant to a take-down order. (See Chapter 13.)

A statutory take-down order scheme

- 14.17 The consultation paper asked if there should be legislation to govern take-down orders.¹²
- 14.18 The *Contempt of Court Act 2019* (NZ) gives courts statutory powers to make take-down orders.¹³ Courts can make a take-down order where a person has been convicted of publishing certain criminal trial information,¹⁴ as well as in respect of statements that carry a real risk of undermining public confidence in the judiciary or a court.¹⁵
- 14.19 Under that Act, an online content host can be ordered to take down material provided the infringing material is under the content host’s control.¹⁶ As discussed in Chapter 13, such powers may sometimes be more effective than restrictions on publication. It may be in many cases more efficient and effective to order an online intermediary to take down the offending material than to pursue an unknown publisher.

9 The MinterEllison Media Group cited *Nationwide News Pty Ltd v Qaumi* [2016] NSWCCA 97; *News Digital Media Pty Ltd v Mokbel* [2010] VSCA 51; *AW v The Queen* [2016] NSWCCA 227.

10 Submission 23 (MinterEllison Media Group).

11 Submission 27 (Australia’s Right to Know coalition).

12 Victorian Law Reform Commission, *Contempt of Court* (Consultation Paper, May 2019) 180, Question 57(a).

13 *Contempt of Court Act 2019* (NZ) ss 9, 24, sch 2. Schedule 2 amends the *Criminal Procedure Act 2011* (NZ) to include powers to order the take-down of details of a defendant’s previous convictions and other trial-related information. At the time of writing, the *Contempt of Court Act 2019* (NZ) had not yet come into effect.

14 See the discussion in Chapter 10 about sub judice contempt. In New Zealand, sub judice contempt has been replaced by the statutory offence of publishing information that carries a risk of prejudicing an accused’s right to a fair trial in a criminal proceeding: *Contempt of Court Act 2019* (NZ) s 7.

15 See the discussion in Chapter 11 about scandalising contempt. In New Zealand, scandalising contempt has been replaced by the statutory offence of publishing a false statement about a judge or court: *Contempt of Court Act 2019* (NZ) s 24. This section allows courts to order this kind of offending material to be taken down if the case is proved on the balance of probabilities, rather than requiring that a person has been convicted of an offence.

16 *Contempt of Court Act 2019* (NZ) ss 9(1), 24(1), (4), sch 2, inserting s 199D(2).

Responses

- 14.20 Stakeholders who supported take-down powers did not agree on whether there was a need for legislation to govern take-down orders.
- 14.21 The Children’s Court, the Criminal Bar Association, the Director of Public Prosecutions (DPP) and Victoria Legal Aid (VLA) supported the take-down power being placed in legislation.¹⁷ The DPP submitted this would promote clarity and certainty in the law, and that necessity should be the ‘overarching consideration’ for granting a take-down order.¹⁸
- 14.22 On the other hand, ARTK submitted that legislation was not needed because the law was already clear, and the CommBar—Media Law Section considered existing powers were adequate.¹⁹ It stated that, before any legislation was introduced, further scrutiny was needed of statutory take-down order schemes in copyright law in other jurisdictions.
- 14.23 If take-down orders were provided for in a statutory scheme, the CommBar—Media Law Section noted there should be appropriate safeguards,²⁰ and ARTK supported making it plain that a separate application for a take-down order would need to be made.²¹

Commission’s conclusions: establish a legislative take-down order scheme

- 14.24 For the purposes of consistency, accessibility and clarity in the law, legislation should set out the courts’ power to make take-down orders.
- 14.25 Under the legislative provisions, courts should be able to order material to be taken down on the same grounds and subject to the same tests as for suppression orders under the Open Courts Act.²² The legislation should also empower the courts to order material to be taken down after it has been proved to breach a restriction on publication. This would include restrictions under the proposed Contempt of Court Act as well as those in the *Judicial Proceedings Reports Act 1958* (Vic) which the Commission is recommending should be retained and moved to the Open Courts Act.²³
- 14.26 These powers should extend to online intermediaries or the owners of public websites where third parties can post material. As discussed in Chapter 13, they should not be liable under the relevant restrictions on publication. Instead, they could be required to take down such material where necessary in the circumstances.
- 14.27 A take-down order should only be made against a party with the capacity to do so. For example, if a person publishes a comment on a public website, they may not be able to delete the material. It is unfair to impose liability when the party cannot comply, and this should be expressed in the legislation.
- 14.28 Some stakeholders were concerned that take-down order powers may be used unnecessarily. For example, take-down orders should be used rarely, if at all, for archived online materials. Further, in cases of widespread republication, a take-down order may be futile.
- 14.29 These concerns are reflected in the courts’ current approach to its powers. As with suppression orders under the Open Courts Act,²⁴ these are factors for assessing whether such orders are necessary, which can also involve considering whether no other measures are available to avoid the harm.

17 Submissions 28 (Director of Public Prosecutions), 20 (Criminal Bar Association), 14 (Children’s Court of Victoria), 6 (Victoria Legal Aid).

18 Submission 28 (Director of Public Prosecutions).

19 Submissions 18 (Commercial Bar Association Media Law Section Working Group), 27 (Australia’s Right to Know coalition).

20 Submission 18 (Commercial Bar Association Media Law Section Working Group).

21 Submission 27 (Australia’s Right to Know coalition).

22 *Open Courts Act 2013* (Vic) ss 18, 26.

23 See Chapter 12. The Commission is recommending that the restriction on publication of information in relation to directions hearings and sentence indications, and the prohibition on identifying victims of sexual offences, should be retained.

24 *Open Courts Act 2013* (Vic) ss 18, 26.

- 14.30 The Commission does not recommend a change to this sensible approach. Instead, the same factors should apply to take-down orders, so that they can only be ordered when necessary. The existing approach under common law means that such orders are unlikely to be necessary for archived material.
- 14.31 The most convenient location for these powers would be the Open Courts Act, given its similar subject matter. The exercise of this power would also be governed by the same tests as those currently in the Open Courts Act with respect to suppression orders—namely, that the order is necessary and, where the order is needed to protect the administration of justice, no other measures can avoid the harm.²⁵ This would reflect the current approach.
- 14.32 A person should be liable to a penalty if they fail to remove material from public access within a reasonable period of time.
- 14.33 A breach of a take-down order involves similar harms to offences such as breaching a suppression order under the Open Courts Act. Accordingly, the penalties for breaching a suppression order and for non-compliance with a take-down order should be consistent.
- 14.34 As take-down orders would be separate from suppression orders, a new offence involving non-compliance with a take-down order would be needed.
- 14.35 Take-down order powers are likely to be relevant for restrictions on publications in other Acts beyond the scope of this inquiry. If these proposed reforms are implemented, it would make sense to consider whether they should be extended to other restrictions on publication related to court proceedings.

Recommendations

- 116 The Open Courts Act should be amended to provide that the court can order material to be taken down by a publisher, an online intermediary or the owner of a public website, including where the online platform enables a third party to make comment, where the court is satisfied:
- the grounds specified in sections 18 and 26 of the Open Courts Act are met, or
 - the material breaches a restriction on publication in the Open Courts Act, the proposed Contempt of Court Act or those in the Judicial Proceedings Reports Act that should be retained, and
 - the order can reasonably be complied with.
- 117 The Open Courts Act should also be amended to provide that a failure to comply with a take-down order within a reasonable time is an offence with a maximum penalty of two years imprisonment and/or 240 penalty units for an individual, and 1200 penalty units for a body corporate.

Who should be able to apply for an order?

- 14.36 The consultation paper asked who should be responsible for making applications for take-down orders.²⁶

- 14.37 The Children’s Court and the CommBar—Media Law Section generally agreed that anyone with a sufficient interest should be able to apply for a take-down order,²⁷ including parties. The Criminal Bar Association stated that the parties as well as police should be able to apply, and that consideration should be given to permitting non-parties with a sufficient interest to apply.²⁸ The Criminal Bar Association also supported the courts being able to seek such orders on their own motion, as did VLA.²⁹
- 14.38 Under the Open Courts Act, suppression orders may be made by a court or tribunal on its own motion or on the application of a party or any person with a sufficient interest,³⁰ an approach which the DPP said should be mirrored for take-down orders.³¹

Commission’s conclusions: the ability to apply for a take-down order

- 14.39 The parties in a matter, as well as anyone with a sufficient interest in the matter, should be able to apply for a take-down order. A court or tribunal should also be able to make an order on its own motion. This would promote consistency with suppression orders and provide appropriate protection to all those involved in or affected by a proceeding. If, as recommended above, these powers are located in the Open Courts Act, the existing provisions could also be extended to incorporate take-down orders.
- 14.40 These parties should also have the ability to apply for interim take-down orders.

Recommendations

- 118 The Open Courts Act should be amended to provide that a court or tribunal may make a take-down order:
- on application by a party to a proceeding or any other person considered by the court or tribunal to have a sufficient interest in the making of a take-down order, or
 - by the court or tribunal of its own motion.

Interim take-down orders

- 14.41 The consultation paper asked whether applications for take-down orders should be able to be determined on an adversarial basis, with both parties present, or on an ex parte basis, which would not require both parties to be present.³² Ordinarily procedural fairness requires parties to be heard on the making of orders.³³
- 14.42 Under the Open Courts Act, the court may make an interim proceeding suppression order on an ex parte basis before it determines the merits of an application after hearing from both parties.³⁴
- 14.43 This allows a court to prevent the publication of sensitive material in circumstances of urgency when it may be necessary to proceed with only one party present.³⁵

27 Submissions 14 (Children’s Court of Victoria) (with leave of the court), 18 (Commercial Bar Association Media Law Section Working Group).

28 Submission 20 (Criminal Bar Association).

29 Ibid; Consultation 6 (Victoria Legal Aid).

30 *Open Courts Act 2013* (Vic) s 19. This would include the prosecution, the defence, media organisations, as well as the court of its own motion.

31 Submission 28 (Director of Public Prosecutions).

32 Victorian Law Reform Commission, *Contempt of Court* (Consultation Paper, May 2019) 180, Question 57(d).

33 For example, courts are required to give notice to any ‘relevant news media organisation’ before making a final suppression order: *Open Courts Act 2013* (Vic) s 11.

34 Ibid s 20.

35 Victoria, *Parliamentary Debates*, Legislative Assembly, 27 June 2013, 2419 (Robert Clark, Attorney-General).

Responses

- 14.44 Some stakeholders supported the making of orders on an ex parte basis in appropriate circumstances.
- 14.45 The Children’s Court submitted that the application for a take-down order should operate in the same way as an application for an interlocutory injunction. That is, applications may be conducted on an ex parte basis ‘if the court considers it sufficiently urgent’.³⁶
- 14.46 The CommBar—Media Law Section submitted that such applications should ordinarily be determined on an adversarial basis but ex parte applications might sometimes be appropriate in urgent cases (for example, a publication posing an imminent threat to a person’s safety).³⁷
- 14.47 The Criminal Bar Association submitted that the interim order provisions in the Open Courts Act described above could also be adopted in respect of take-down order applications.³⁸
- 14.48 However, the DPP submitted that take-down order applications should be conducted on an adversarial basis, given that the determination affects public access to information.³⁹

Commission’s conclusions: interim take-down orders in urgent cases

- 14.49 Ordinarily the court will determine a take-down order on an adversarial basis. However, the option to make an interim take-down order should be available in circumstances of urgency, although it is likely to be rarely exercised.
- 14.50 The Open Courts Act already provides for such a power to make an interim order, and should be extended to take-down orders. As with final take-down orders, anyone with sufficient interest should be able to apply for an interim take-down order.

Recommendation

- 119 The Open Courts Act should also be amended to provide that if an application for a take-down order is made, the court or tribunal may make an interim take-down order.
- 120 The Open Courts Act should be amended to provide that the court may make:
- a final take-down order after hearing from both parties
 - an interim take-down order without notice to the parties, in urgent cases.

Penalties for breaches of restrictions on publication

230 Are the existing penalties adequate?

231 Penalties for breaching suppression orders

234 Penalties under the Judicial Proceedings Reports Act

235 Penalties for publication contempts—sub judge contempt and
scandalising contempt

15. Penalties for breaches of restrictions on publication

Overview

- The maximum penalty for an offence should reflect the worst case. It should be consistent with similar kinds of offences, including in other Australian states and territories.
- The maximum penalties for breaches of suppression orders should be reduced to two years imprisonment and a fine of 240 penalty units for an individual, and 1200 penalty units for a body corporate.
- The same maximum penalty should apply to contempt by publishing material prejudicial to legal proceedings and by publishing material undermining public confidence in the judiciary or courts.
- The maximum penalty for the offences under the *Judicial Proceedings Reports Act* for publishing information from sentence indications and directions hearings, and for identifying victims of sexual offences, should be increased to six months imprisonment and/or 60 penalty units for an individual, and 300 penalty units for a body corporate.

Are the existing penalties adequate?

- 15.1 An important consideration in the legal framework for enforcing restrictions on publication is ensuring the penalties are appropriate to deter conduct and indicate the relative seriousness of the offending.
- 15.2 The terms of reference asked the Commission to consider the adequacy of penalties for breaches of restrictions on publication.
- 15.3 The Commission has considered penalties for the following restrictions on publication:
- suppression orders made under the *Open Courts Act 2013* (Vic) and suppression and pseudonym orders made under the common law
 - restrictions on publication under the *Judicial Proceedings Reports Act 1958* (Vic) (see Chapter 12)
 - sub judge contempt and scandalising contempt.¹
- 15.4 The consultation paper asked whether the existing penalties for breaches of these restrictions on publication were appropriate.²

¹ See Chapters 10 and 11.

² Victorian Law Reform Commission, *Contempt of Court* (Consultation Paper, May 2019) 180, Question 55.

General principles of maximum penalties

- 15.5 Maximum penalties should:
- place a clear, legally defined upper limit on judicial power in sentencing a person who has committed an offence
 - clearly and accessibly set out the maximum consequence that a person will face if he or she engages in the conduct prohibited by the relevant offence
 - indicate the views of Parliament and the community—and provide guidance to the judiciary—about the relative seriousness of the offence compared with other criminal offences
 - establish the outer or upper limits of the punishment that is proportionate to the offence, providing adequate space for sentencing the worst example of the offence by the worst offender.³
- 15.6 As discussed in Chapter 5, the Commission is recommending maximum penalties for imprisonment and corresponding maximum fines using the default penalty scale in the *Sentencing Act 1991* (Vic).⁴ This underpins the recommendations in this chapter.
- 15.7 Consistently with the approach taken in Chapter 5, the Commission’s recommendations provide for maximum fines for bodies corporate that are five times the maximum imposed on an individual. This is consistent with the *Sentencing Act*, which applies to offences under the *Crimes Act 1958* (Vic),⁵ as well as the existing maximum penalties under the *Open Courts Act*.⁶
- 15.8 In assessing the proportionality of the maximum penalties discussed below, the Commission has reviewed the penalties of comparable restrictions on publication in Australia. (See Appendices L and M.)
- 15.9 These restrictions on publication differ in their scope and whether they require a person to be at fault (for example, whether they act with knowledge of the restriction). Some restrictions are imposed by court order, while others operate automatically. These differences are relevant to the appropriate maximum penalty.

Penalties for breaching suppression orders

Suppression orders made under the Open Courts Act

- 15.10 The maximum penalty for breaches of suppression orders made under the *Open Courts Act*⁷ is five years imprisonment and/or a fine of 600 penalty units or, in the case of a body corporate, 3000 penalty units.⁸ This makes these offences indictable, triable summarily.⁹ A person must know that the suppression order exists, or be reckless as to its existence, for an offence to be committed.¹⁰

Comparable offences

- 15.11 Victoria has the highest maximum penalty in legislation for breach of a suppression order in Australia (see Appendix M).

3 Sentencing Advisory Council, *Maximum Penalties: Principles and Purposes* (Preliminary Issues Paper, October 2010) 9–10 <<https://www.sentencingcouncil.vic.gov.au/publications/maximum-penalties-principles-and-purposes-preliminary-issues-paper>>.

4 *Sentencing Act 1991* (Vic) s 109. This identifies maximum fines in terms of penalty units, the value of which are set under the *Monetary Units Act 2004* (Vic).

5 *Sentencing Act 1991* (Vic) s 113D.

6 *Open Courts Act 2013* (Vic) ss 23, 27, 32.

7 These are: proceeding suppression orders, interim orders, or an order prohibiting the publication of any specified material (broad suppression orders).

8 *Open Courts Act 2013* (Vic) ss 23, 27. As at 1 July 2019, the amount of a penalty unit is \$165.22: Treasurer (Vic), ‘*Monetary Units Act 2004* (Vic)—Notice under Section 6, Fixing the Value of a Fee Unit and a Penalty Unit’ in Victoria, *Victoria Government Gazette*, No G 14, 4 April 2019, 544, 572.

9 *Sentencing Act 1991* (Vic) s 112; *Criminal Procedure Act 2009* (Vic) s 28.

10 *Open Courts Act 2013* (Vic) ss 23(1), 27(1).

- 15.12 There is little consistency across Australia in the elements of the offence or its maximum penalty. The New South Wales offence has a maximum penalty of 12 months imprisonment for an individual.¹¹ The South Australian equivalent has a maximum penalty of two years imprisonment.¹² Maximum fines for both individuals and bodies corporate vary across jurisdictions.
- 15.13 Appendix M also contains a table of comparable Victorian statutory offences, which relate to publishing information about or derived from proceedings in breach of an order of the court. The maximum penalties under the Open Courts Act are the highest for such offences in Victoria, set at the same level as equivalent offences relating to major criminal activity and criminal organisations.¹³
- 15.14 Victoria is the only Australian jurisdiction in which these offences can be heard on indictment. In the rest of Australia, they are summary offences.
- 15.15 The *Contempt of Court Act 2019* (NZ) introduces new powers to make orders to suppress certain trial-related information.¹⁴ The maximum penalty for breaching this kind of suppression order is six months imprisonment for an individual and a fine not exceeding \$100,000 for a body corporate.¹⁵

Responses

- 15.16 Stakeholders differed on the adequacy of the penalties under the Open Courts Act. Some stakeholders viewed the current penalties as appropriate.¹⁶
- 15.17 However, the Commercial Bar Association Media Law Section Working Group (CommBar—Media Law Section) submitted that the penalties were unduly harsh and inconsistent with similar offences. It supported the maximum penalty of one-year imprisonment for an individual or a fine of 600 penalty units for a body corporate in the *Serious Offenders Act 2018* (Vic), stating that this reflected a ‘reasonable balance between competing considerations’.¹⁷

Commission’s conclusions: reduce the penalty for breaching suppression orders

- 15.18 The Commission considers the maximum penalty in Victoria is significantly out of step with the rest of Australia and New Zealand. As discussed below, the maximum penalty is also much higher than the highest penalty recorded for sub judice contempt in Victoria.
- 15.19 Given the similarity of the harms and the jurisdictions, the Commission considers this penalty cannot be justified, especially in the age of online publication and in light of the need for national consistency, as discussed in Chapter 13.

11 *Court Suppression and Non-publication Orders Act 2010* (NSW) s 16. Like the offence in Victoria, a person must know of the order or be reckless as to its existence. The maximum penalty is 1000 penalty units for an individual, and 5000 penalty units for a body corporate. This Act was modelled on a draft model Bill developed by the Standing Committee of Attorneys-General for a nationally uniform scheme of legislation. The Commonwealth also substantially implemented the model legislation, with penalties of imprisonment for 12 months or 60 penalty units for breaches of suppression orders in federal courts: *Access to Justice (Federal Jurisdiction) Act 2012* (Cth) sch 2.

12 *Evidence Act 1929* (SA) ss 69A, 70. The maximum fine is \$10,000 for an individual, and \$120,000 in the case of a body corporate. The legislation does not specify any requirement to prove that the person knew of the order, or was reckless as to its existence.

13 *Major Crime (Investigative Powers) Act 2004* (Vic) ss 7, 43; *Criminal Organisations Control Act 2012* (Vic) ss 77, 83.

14 *Contempt of Court Act 2019* (NZ) sch 2. The schedule inserts new sections 199A–D into the *Criminal Procedure Act 2011* (NZ). At the time of writing, these provisions had not yet come into force.

15 *Criminal Procedure Act 2011* (NZ) s 211. The section provides a lower penalty for an offence which was not committed knowingly or recklessly, being a maximum fine for an individual of \$25,000 or for a body corporate \$50,000.

16 Submissions 14 (Children’s Court of Victoria), 19 (Forgetmenot Foundation Inc). The Children’s Court of Victoria indicated support for the existing penalties for breaches of restriction on publication more generally. However, it noted that the penalty for breach of a restriction under its governing Act was two years imprisonment or 100 penalty units for an individual, and 500 penalty units for a body corporate: *Children, Youth and Families Act 2005* (Vic) s 534. The Court noted that it was uncertain whether the Open Courts Act applied to the Children’s Court.

17 Submission 18 (Commercial Bar Association Media Law Section Working Group). It referred for comparison to the penalties for the following offences: *Serious Offenders Act 2018* (Vic) s 277; *Court Suppression and Non-publication Orders Act 2010* (NSW) s 16; *Children, Youth and Families Act 2005* (Vic) s 534.

- 15.20 A reduction in the maximum penalty will mean the offences become summary offences. However, it is not commonly the practice for this offence to be prosecuted on indictment. Accordingly, the Commission can see no reason for retaining the penalty at this level.

Recommendation

- 121 The maximum penalty for breach of a suppression order under the Open Courts Act should be reduced for an individual from five years imprisonment to two years imprisonment or 240 penalty units, or both, and for bodies corporate there should be a maximum penalty of 1200 penalty units.

Statutory penalties for breaches of common law suppression orders and pseudonym orders

- 15.21 The consultation paper asked whether the penalties for breaches of common law suppression orders and pseudonym orders should be set out in legislation.¹⁸
- 15.22 While abrogating the common law power to make a suppression order, the Open Courts Act preserves the inherent jurisdiction of the Supreme Court to make orders restricting the publication information in connection with any proceeding.¹⁹ The Act does not affect the power of any court or tribunal under the common law to make a pseudonym order, which conceals the identity of a person by restricting the way they are referred to in open court.²⁰

Responses

- 15.23 The Children’s Court and the Criminal Bar Association were in favour of setting maximum penalties for breaches of these kinds of order,²¹ while the DPP was open to this approach.²²
- 15.24 The CommBar—Media Law Section opposed such reform. In its view, the existing regime preserves flexibility and permits the courts to respond appropriately to the circumstances of each case.²³

Commission’s conclusions: a maximum penalty of two years

- 15.25 A maximum penalty would not unduly restrict the ability of the courts to respond appropriately to breaches of these orders. Parliament has set maximum penalties for other common law offences with the aim of modernising those offences and eliminating ‘at large’ penalties.²⁴ Maximum penalties would promote consistency and provide an indication of how seriously such a breach is viewed.
- 15.26 The seriousness of a breach of a common law suppression or pseudonym order is no different to a breach of a suppression order made under the Open Courts Act. The maximum penalty should be two years imprisonment, in line with the recommendations for those penalties discussed above.

18 Victorian Law Reform Commission, *Contempt of Court* (Consultation Paper, May 2019) 180, Question 56.
 19 *Open Courts Act 2013* (Vic) s 5(1); *Hogan v Hinch* [2011] HCA 4 [26]; *General Television Corporation Pty Ltd v DPP* [2008] VSCA 49 [28].
 20 *Open Courts Act 2013* (Vic) s 7(d)(i).
 21 Submissions 14 (Children’s Court of Victoria), 20 (Criminal Bar Association).
 22 Submission 28 (Director of Public Prosecutions).
 23 Submission 18 (Commercial Bar Association Media Law Section Working Group).
 24 *Crimes Act 1958* (Vic) s 320.

Recommendation

- 122 The Open Courts Act should be amended to specify a maximum penalty for breach of a common law suppression order or pseudonym order for an individual of two years imprisonment or 240 penalty units, or both, and for bodies corporate there should be a maximum penalty of 1200 penalty units.

Penalties under the Judicial Proceedings Reports Act

- 15.27 In Chapter 12, the Commission recommends retaining and relocating two of the restrictions on publication in the Judicial Proceedings Reports Act. These prohibit reporting on directions hearings and sentence indication hearings, and publishing details likely to identify a victim of a sexual offence.²⁵
- 15.28 As discussed in Chapter 12, these restrictions have different purposes. The restriction on reporting of directions hearings and sentence indication hearings is designed to enable early resolution of criminal cases, by allowing free discussion within pre-trial hearings of information that may prejudice a later trial. The restriction on identification is designed to protect victims against further stigma and trauma.
- 15.29 A breach of these restrictions is a summary offence. The maximum penalty for an individual is four months imprisonment and/or a fine of 20 penalty units and, for a body corporate, 50 penalty units.²⁶ Both are strict liability offences.
- 15.30 The maximum penalty for individuals for identifying victims of sexual offences is similar to maximum penalties in other Australian states and territories, except for South Australia and Western Australia, which do not provide for imprisonment. (See Appendix L).²⁷
- 15.31 There is significant disparity with respect to bodies corporate. In New South Wales, the maximum penalty for a body corporate is 500 penalty units, 10 times the penalty in Victoria.²⁸ In Queensland, the penalty is higher still, at 1000 penalty units.²⁹
- 15.32 As noted in the consultation paper, the restriction on reporting of directions hearings and sentence indication hearings is based on the restriction in the *Criminal Justice Act 1987* (UK).³⁰ There, the offence is also summary, and carries a maximum penalty of a fine of £5000.³¹ In New South Wales, publishing 'case conference material' is a summary offence, liable to a maximum penalty of 20 penalty units for an individual and 100 penalty units for a body corporate.³²

25 *Judicial Proceedings Reports Act 1958* (Vic) ss 3(1)(c), 4(1A).

26 *Ibid* ss 3(3), 4(2).

27 *Evidence Act 1929* (SA) s 71A; *Evidence Act 1906* (WA) s 36C.

28 Note, however, that the amount of a penalty unit in New South Wales is \$110 as at 1 July 2019, while in Victoria it currently stands at \$165.22: *Crimes (Sentencing Procedure) Act 1999* (NSW) s 17; Treasurer (Vic), 'Monetary Units Act 2004 (Vic)—Notice under Section 6, Fixing the Value of a Fee Unit and a Penalty Unit' in Victoria, *Victoria Government Gazette*, No G 14, 4 April 2019, 544, 572.

29 *Criminal Law (Sexual Offences) Act 1978* (Qld) s 6. The amount of a penalty unit in Queensland is \$133.45 as at 1 July 2019: *Penalties and Sentences Regulation 2015* (Qld) reg 3.

30 *Criminal Justice Act 1987* (UK) s 11.

31 *Ibid* s 11A; *Criminal Justice Act 1982* (UK) s 37.

32 *Criminal Procedure Act 1986* (NSW) s 80.

Responses

- 15.33 Several responses stated that the penalty for breaching the restriction on identifying victims of sexual offences was inadequate.³³ The Victims of Crime Commissioner submitted that the penalty needed to be increased to be an effective deterrent and ‘illustrate the importance of protecting victims from additional trauma, shame, embarrassment or unwanted attention’.³⁴
- 15.34 Stakeholders did not address the appropriateness of the penalty for breaching the restriction on reporting on directions hearings and sentence indication hearings.

Commission’s conclusions: increase the penalty for breach of Judicial Proceedings Reports Act restrictions

- 15.35 The Commission considers that the maximum penalties are too low for breaching restrictions on publication that currently appear in the Judicial Proceedings Reports Act (but which the Commission recommends moving to other Acts). They fail to reflect the seriousness of the harm that can result from a breach.
- 15.36 Further, where possible, the maximum penalties should be consistent with corresponding penalties in other Australian states and territories.
- 15.37 The Commission therefore considers that the maximum penalty for breaching the restriction on reporting on directions hearings and sentence indication hearings, and on publishing details likely to identify a victim of a sexual offence, should be raised to imprisonment for six months and/or 60 penalty units for an individual, and 300 penalty units for a body corporate. This is more consistent with penalties in other states and territories. As such, the offences will remain summary offences.

Recommendation

- 123 The maximum penalty for breach of the prohibitions on the publishing of information about directions hearings and sentence indications, or information likely to lead to the identification of a victim of a sexual offence, currently provided for in the Judicial Proceedings Reports Act should be increased to six months imprisonment and/or 60 penalty units for an individual, and 300 penalty units for a body corporate.

Penalties for publication contempts—sub judice contempt and scandalising contempt

- 15.38 As noted in Chapter 5, the penalties for contempt are currently unlimited.³⁵ The Commission recommends in that chapter that maximum penalties be specified for contempt of court. This section considers the two forms of publication contempt addressed in Chapters 10 and 11, namely:
- contempt by publishing material prejudicial to a fair trial (sub judice contempt)
 - contempt by publishing material undermining public confidence in the judiciary or courts (scandalising contempt).

33 Submissions 20 (Criminal Bar Association), 33 (Victims of Crime Commissioner, Victoria). The CBA Media Law Section also noted that the maximum penalties for this offence were ‘trifling in comparison’ to those under the Open Courts Act: Submission 18 (Commercial Bar Association Media Law Section Working Group).

34 Submission 33 (Victims of Crime Commissioner, Victoria).

35 See Appendix G for an illustrative list of sentences imposed for sub judice and scandalising contempt.

Maximum penalties in other jurisdictions

- 15.39 New Zealand and the United Kingdom have introduced maximum penalties for contempt. The offences in the *Contempt of Court Act 2019* (NZ) that replace contempt by publication have a maximum penalty for an individual of imprisonment for six months or a fine not exceeding NZD \$25,000 or, for a body corporate, a fine not exceeding NZD \$100,000.³⁶
- 15.40 The *Contempt of Court Act 1981* (UK) sets the maximum term for any contempt of court at two years in a superior court and one month in an inferior court. Fines are capped at £2500.³⁷

Responses

- 15.41 There was general support for a maximum penalty for sub judice contempt.³⁸
- 15.42 The Law Institute of Victoria supported removing imprisonment as a potential penalty for sub judice contempt. If this was not adopted, it supported imposing an upper limit for imprisonment. It preferred, however, a lower maximum penalty than the two years recommended by the Law Reform Commission of Western Australia, noting that the only term of imprisonment had been set at six weeks and later reduced to 28 days.³⁹
- 15.43 While open to the prospect of maximum penalties, MinterEllison Media Group expressed concern that, if the penalties were indexed as they were in defamation law, they could grow significantly.⁴⁰ However, the CommBar—Media Law Section considered setting a maximum penalty was unnecessary because the common law and judicial officers dealt adequately with this issue.⁴¹
- 15.44 The unlimited nature of penalties was one of the reasons put forward for the abolition of scandalising contempt.⁴²

Commission's conclusions: maximum penalty of two years for publication contempts

- 15.45 The maximum penalties for sub judice and scandalising contempt should be set at two years. This would be consistent with the Commission's recommendation for the maximum penalty for breach of a suppression order under the Open Courts Act, which deals with similar conduct and harm.

Recommendation

- 124** The proposed Act should provide that the maximum penalty for a sub judice contempt or a scandalising contempt is, for an individual, two years imprisonment or 240 penalty units, or both, and for bodies corporate, a maximum penalty of 1200 penalty units.

36 *Contempt of Court Act 2019* (NZ) ss 7(3), 22(2).

37 *Contempt of Court Act 1981* (UK) s 14.

38 Submissions 11 (Victoria Legal Aid), 18 (Commercial Bar Association Media Law Section Working Group), 20 (Criminal Bar Association), 22 (Law Institute of Victoria), 23 (MinterEllison Media Group), 27 (Australia's Right to Know coalition).

39 Submission 8 (Law Institute of Victoria). The case referred to is *Hinch v Attorney-General* [1987] VR 721. See Appendix G for a list of sentences imposed by courts for different categories of contempt.

40 Submission 23 (MinterEllison Media Group).

41 Submission 18 (Commercial Bar Association Media Law Section Working Group).

42 Submissions 10 (Bill Swannie), 23 (MinterEllison Media Group).

The recording of a conviction for breaches of restrictions on publication

- 15.46 Australia's Right to Know coalition submitted that recording convictions against individual journalists for contempt of court causes significant trauma and affects their capacity to work. It proposed laws to prevent the recording of convictions against individual journalists, unless it was found that the journalist intended to interfere with the administration of justice, or the journalist had a prior history of committing contempt.⁴³
- 15.47 In deciding whether to record a conviction, courts are guided by section 8 of the Sentencing Act.⁴⁴ This requires them to consider:
- the nature of the offence
 - the character and history of the offender
 - the impact of the recording of a conviction on the offender's economic or social well-being or on his or her employment prospects.
- 15.48 The Commission acknowledges the significant consequences of recording a conviction on the offender but the considerations in the Sentencing Act already adequately deal with these concerns. Accordingly, the Commission concludes there is no reason to change the law.

43 Submission 27 (Australia's Right to Know coalition).

44 *DPP (Vic) v Johnson & Yahoo!7 (No 2)* [2017] VSC 45. The discretion is limited by the type of sentence to be imposed: *Sentencing Act 1991* (Vic) s 7.

Promoting compliance with restrictions on publication

240 Awareness of restrictions on publication

246 Monitoring compliance with restrictions on publication

248 Instituting proceedings for breaches of restrictions

16. Promoting compliance with restrictions on publication

Overview

- To enforce restrictions on publication effectively, the community must be aware that the restrictions exist, and publications must be monitored for breaches.
- Improvements should be made to the current process of email notifications, and to widen access to an online searchable database of suppression orders that is being developed.
- More community education is needed about the role and purpose of restrictions on publication.
- Victim survivors should be given support to notify authorities of potential breaches.
- There is no need to establish a role to monitor publications formally, or to clarify who is responsible for prosecuting breaches of restrictions on publication.
- The consent of the Director of Public Prosecutions should be required to prosecute breaches of suppression orders under the Open Courts Act.

Awareness of restrictions on publication

- 16.1 People can only comply with a restriction on publication¹ if they are aware that this restriction exists. This chapter looks at ways to improve awareness of restrictions to promote compliance.
- 16.2 This chapter focuses on:
- improving awareness of suppression orders made by courts
 - improving education and guidance about these restrictions
 - whether there is a need for systemic monitoring of breaches of restrictions
 - the responsibility for commencing proceedings in relation to such breaches.
- 16.3 Some restrictions on publication are set out in legislation and apply automatically. In Chapters 10, 11 and 12, the Commission recommends making some of the restrictions in legislation clearer and more accessible by defining them in legislation or moving offences into other legislation.
- 16.4 Other restrictions depend on a court making an order. It is therefore more difficult for people to become aware of these orders so as to comply with them.

¹ In this part of the report, a 'restriction on publication' is defined to include those restrictions on publication in the *Open Courts Act 2013* (Vic), the proposed Act, and the restrictions in the *Judicial Proceedings Reports Act 1958* (Vic) that the Commission recommends should be retained and relocated.

Notification of suppression orders

- 16.5 In Victoria, the courts notify media organisations of suppression orders through an email list.² For example, a media organisation can nominate a single address to receive notifications by the Supreme Court, although this is not open to other parties.³ Members of the general public or journalists not affiliated with a media organisation cannot join this email list.
- 16.6 Under the *Open Courts Act 2013* (Vic), an offence of breaching a suppression order is only committed if a person is either aware that a suppression order is in force, or is reckless as to whether an order is in force. A person is presumed to be aware of an order if a court or tribunal has ‘electronically transmitted notice’ of the order to them.⁴
- 16.7 It is therefore crucial that people are made aware of suppression orders or at least can find out if one exists. While members of media organisations may be at greatest risk of breaching restrictions, the rise of online publishing and social media means it is increasingly important for others to be aware of suppression orders too.
- 16.8 As discussed in Chapter 13, a national approach should be taken to enforce restrictions on publication effectively. Similarly, a national approach to providing access to information about suppression orders would be useful.⁵
- 16.9 As part of the Victorian Government’s response to the Open Courts Review, the courts are currently creating a database of suppression orders.⁶ This will consolidate the existing databases of individual courts and tribunals across Victoria.
- 16.10 The consultation paper asked what processes should be in place for notifying or reminding the media and the wider community of restrictions on publication.⁷
- 16.11 There are three ways of improving awareness:
- improving the current process for notifying people of suppression orders
 - improving access to an online database of suppression orders
 - developing educational resources about restrictions on publication.

Improving the notification process

- 16.12 The Open Courts Act Review identified several issues with the current notification process:
- the text of suppression orders was not easily searchable
 - the content of the email attaching a suppression order may misspell key details
 - no record was kept of the notifications themselves, so tracking notifications would require searching the email inbox.⁸
- 16.13 Stakeholders also identified ways in which the notifications process could be improved.
- 16.14 Australia’s Right to Know coalition (ARTK) submitted that, when suppression orders are made, they should be sent by email to media representatives and their advisers. They should include the full terms of the order, the names to be suppressed and the grounds on which the order had been made. This should be complemented by a searchable online database.⁹

2 The Supreme Court’s Public Affairs team distributes notices of orders made through an email list of media outlets and media lawyers, while the County Court distributes suppression orders via its Communications Team: Submissions 29 (Supreme Court of Victoria), 31 (County Court of Victoria).

3 Supreme Court of Victoria, *Practice Note SC Gen 9: Notifications under the Open Courts Act 2013*, 30 January 2017, [6.4].

4 *Open Courts Act 2013* (Vic) ss 23(2), 27(2).

5 Submission 6 (Professors Mark Pearson, Patrick Keyzer, Anne Wallace and Associate Professor Jane Johnston).

6 Submissions 29 (Supreme Court of Victoria), 31 (County Court of Victoria).

7 Victorian Law Reform Commission, *Contempt of Court* (Consultation Paper, May 2019) 167, Question 48.

8 Frank Vincent, *Open Courts Act Review* (2017) 77 [291]–[294] <<https://engage.vic.gov.au/open-courts-act-review>>.

9 Submission 27 (Australia’s Right to Know coalition).

- 16.15 The Director of Public Prosecutions (DPP) was of the view that the existing email system was the most effective method of notification. The DPP also submitted that each email address on the distribution list should be paired with an individual or body corporate to help identify the recipient. If an individual or media organisation was not subscribed to the email list, it could be difficult to establish knowledge or recklessness for the purposes of the Open Courts Act.¹⁰

Commission's conclusion: improve email notifications

- 16.16 The process of email notifications should be improved. For example, it should be possible to pair email addresses in the email list with specific individuals or organisations and make it easier for more people within an organisation to subscribe. There is also scope to widen access to the email list.
- 16.17 Any improvements by the courts should be made in consultation with the media and the DPP. As discussed below, the current development of a new database by the courts provides an opportunity to consider how to improve the notifications process.

Recommendation

- 125 The courts should, in consultation with the DPP and representatives of the media, improve the current system of email notifications of suppression orders so that there is broader access to such notifications.

Online database of suppression orders

- 16.18 The Open Courts Act Review recommended the creation of a central, publicly accessible register of suppression orders made by all Victorian courts and tribunals.¹¹ This would replace the existing internal database used by the courts.¹²
- 16.19 The Victorian Government supported this recommendation in principle.¹³ The courts are currently developing this database.¹⁴
- 16.20 The development of this database should make it easier for people to comply with orders, and to prove knowledge of, or recklessness as to the existence of, suppression orders.

Approach in other jurisdictions

- 16.21 Other jurisdictions maintain a public register of suppression orders. These vary in how they restrict who can access the register and what information can be accessed.
- 16.22 The Supreme Court of Tasmania maintains a list of all suppression orders on its website, and this list includes the terms of the order.¹⁵ Scottish courts also publish a list of suppression orders on their website, but not the terms of their orders.¹⁶
- 16.23 In South Australia, the public can inspect the terms of a suppression order at kiosks located at the Courts Administration Authority's Transcripts Office.¹⁷

10 Submission 28 (Director of Public Prosecutions).

11 Frank Vincent, *Open Courts Act Review* (2017) Recommendation 7 <<https://engage.vic.gov.au/open-courts-act-review>>.

12 Submission 29 (Supreme Court of Victoria).

13 Department of Justice and Community Safety (Vic), *Open Courts Act Review Table of Recommendations* (March 2018) 1 <<https://engage.vic.gov.au/open-courts-act-review>>.

14 Submissions 29 (Supreme Court of Victoria), 31 (County Court of Victoria).

15 'For The Media', *The Supreme Court of Tasmania* (Web Page, December 2019) <<https://www.supremecourt.tas.gov.au/the-court/media/>>.

16 'Contempt of Court Orders', *Scottish Courts and Tribunals* (Web Page) <<http://www.scotcourts.gov.uk/current-business/court-notices/contempt-of-court-orders>>.

17 Media and Communications Office, Courts Administration Authority (SA), *A Guide for Media Reporting in South Australian Courts* (15 August 2019) 4 <<http://www.courts.sa.gov.au/ForMedia/Documents/A%20guide%20for%20media%20reporting%20in%20South%20Australian%20Courts.pdf>>.

- 16.24 The Supreme Court of Western Australia provides access to suppression orders made in that state through the eCourts portal.¹⁸ Accredited media representatives, verified by the courts, can register to use this portal.
- 16.25 Users can search for orders by the name of the accused, which is linked so that it can be found even if the case title bears only the accused's initials or a pseudonym. This feature is useful because orders that make the parties anonymous apply to many of the most sensitive cases.
- 16.26 In response to the question in the consultation paper on how to promote awareness of restrictions on publication,¹⁹ stakeholders discussed the issue of the appropriate level of access to the database.

Responses

- 16.27 There was some support for greater access to the database beyond the media. The Victims of Crime Commissioner submitted that the database should be 'publicly available'.²⁰ Victoria Legal Aid (VLA) submitted that defence lawyers found it difficult to determine whether a suppression order exists, had existed, or had been changed.²¹
- 16.28 The DPP opposed the online database being publicly accessible. In its view, this could create more issues than it addressed, and the database should be restricted to large media outlets as their publications would be most likely to come to the attention of jurors.²²
- 16.29 Both the Commercial Bar Association Media Law Section Working Group (CommBar—Media Law Section) and ARTK supported more restricted access. The CommBar—Media Law Section suggested that rules could permit different levels of access.²³ ARTK said that the database could be restricted to accredited media organisations and their legal representatives.²⁴
- 16.30 Some stakeholders favoured a publicly accessible database with limitations instead placed on access to the terms of the order.²⁵ Records of suppression orders would alert users of restrictions, and they would need to contact the courts for further details.²⁶
- 16.31 The County Court submitted that the court 'must retain control over how suppression orders are disseminated and the information that is redacted or de-identified'.²⁷
- 16.32 ARTK raised the difficulty of searching for orders where the parties are identified only by pseudonyms or letters. ARTK also submitted that orders on the database should be drafted in terms that specify the information that is suppressed.²⁸

Commission's conclusions: provide greater public access to suppression orders

- 16.33 The Commission endorses the recommendation of the *Open Courts Act Review* for a central, publicly accessible database of suppression orders. Such a database would improve the enforcement of suppression orders by enabling users to check whether an order is in place, and by helping to prove a person was reckless if a person did not check the database.

18 Courts Technology Group, *eCourts Portal of Western Australia* (Web Page) <<https://ecourts.justice.wa.gov.au/eCourtsPortal>>; Supreme Court of Western Australia, *Guidelines for the Media—Reporting in Western Australian Courts* (Guidelines, July 2019) <https://www.supremecourt.wa.gov.au/_files/Guidelines%20for%20the%20Media.pdf>.

19 Victorian Law Reform Commission, *Contempt of Court* (Consultation Paper, May 2019) 167, Question 48.

20 Submission 33 (Victims of Crime Commissioner, Victoria).

21 Submission 11 (Victoria Legal Aid).

22 Submission 28 (Director of Public Prosecutions).

23 Submission 18 (Commercial Bar Association Media Law Section Working Group).

24 Submission 27 (Australia's Right to Know coalition).

25 Submission 33 (Victims of Crime Commissioner, Victoria); Consultation 13 (Fiona K Forsyth QC, John Langmead QC).

26 Consultation 13 (Fiona K Forsyth QC, John Langmead QC).

27 Submission 31 (County Court of Victoria).

28 Submission 27 (Australia's Right to Know coalition).

- 16.34 If the database requires users to register, it could also log the activity of those on the site. This can prove whether a user took reasonable care to find out if an order was in place. The database should also log any applications made to register, including any refusals to register users, for evidentiary purposes.
- 16.35 The database needs to balance informing the public about what can and cannot be published with the risk of undermining the purpose of the order. This can be done through:
- requiring users to register
 - enabling different levels of access for different kinds of users
 - limiting the extent of information available on the database.
- 16.36 While the courts should have the power to regulate access to such information, they should provide access to the database beyond accredited media organisations and their lawyers. With the hollowing out of traditional media, the courts will also need to consider how to extend access to other types of publishers. Defence lawyers and victims also have an interest in verifying the existence and terms of orders.
- 16.37 Where possible, the database should allow users to search anonymised cases. Further, the full terms of the order should be included so that people know their legal obligations. If the terms of the order cannot be published, those accessing the database should be put on notice to make further inquiries to the court.

Recommendations

- 126 The courts should ensure, in developing their central database of suppression orders, that the database can facilitate public access to information about existing suppression orders.
- 127 The database should permit the media, legal practitioners and the wider community to determine whether a suppression order exists in respect of a proceeding. However, the court may limit the extent of information available through the database, as well as provide access through a registration process.
- 128 To address evidentiary issues in proving knowledge or recklessness in relation to the existence of a suppression order under the Open Courts Act, the database should have the technical capacity to log activity by registered users and any applications to register as a user.

Education about restrictions on publication

- 16.38 Stakeholders also identified room for more education about the reasons for restrictions on publication.
- 16.39 The DPP submitted there was an apparent decline in standards of media reporting on court proceedings driven by the changing media landscape. It suggested that media organisations could take steps to educate staff about reporting on criminal matters, including restrictions on publication.²⁹
- 16.40 Professor Mark Pearson et al supported developing a public manual outlining the types of information that are commonly suppressed.³⁰

- 16.41 In consultations, Victoria Police told the Commission there was no standard policy or procedure to ensure complainants in sexual offences were aware of the restrictions on publication.³¹
- 16.42 The Victim Survivors' Advisory Council also said there was a need to train professionals dealing with victims to improve how people dealt with and responded to breaches of these restrictions.³²

Commission's conclusion: develop further education programs

- 16.43 The Commission considers there is a need to develop programs and resources to improve community awareness and understanding of restrictions on publication. This is an important measure to prevent breaches from occurring.
- 16.44 Some resources already exist, including on the courts' websites.³³ The Supreme Court of Victoria has covered reporting restrictions in depth in its podcast.³⁴
- 16.45 Practical examples of information should be included in such materials. The courts already include training for journalists in court reporting as part of their media liaison work,³⁵ which could be extended or promoted more effectively. The media departments in courts could extend their community education to journalism schools and other forms of community education.
- 16.46 However, such resources should not focus solely on courts and the media. It would be useful to provide a simple guide for victims to understand their rights, and for restrictions on reporting to be included in media training involving victims. This should also extend to further education of professionals dealing with victims.
- 16.47 Such community education requires adequate resourcing. Some organisations already provide community education or media training. Victims' advocacy groups already conduct media training in relation to victims. Such funding could supplement such existing programs and resources.

Recommendation

- 129 To help raise awareness of the existence and reasons for restrictions on publication, further education and training should be developed and provided to members of the media and the general public, and should be appropriately funded by the Victorian Government. Such education and training could be provided by court media teams as well as by victims' advocacy groups.**

31 Consultation 19 (Victoria Police).

32 Submission 24 (Victim Survivors' Advisory Council).

33 County Court of Victoria, *Covering the Courts—A Q&A Guide for Journalists* (2016) <www.countycourt.vic.gov.au/files/documents/2018-09/covering-courts.pdf>.

34 'Reporting the Court—Part 1', *Gertie's Law* (Supreme Court of Victoria, 26 August 2019) <<https://www.supremecourt.vic.gov.au/podcast/>>; 'Reporting the Court—Part 2', *Gertie's Law* (Supreme Court of Victoria, 30 August 2019) <<https://www.supremecourt.vic.gov.au/podcast/>>.

35 See eg, County Court of Victoria, 'Media Guide', *County Court Victoria* (Web Page, 5 December 2019) <<https://www.countycourt.vic.gov.au/news-and-media/media-guide>>.

Monitoring compliance with restrictions on publication

- 16.48 Monitoring compliance with restrictions on publication can be challenging because:
- It is unclear who is responsible for monitoring publications to ensure they do not breach the restrictions.
 - The public are not aware of these restrictions.
 - The processes for monitoring compliance are unclear.

How are publications monitored?

- 16.49 No single body monitors whether people are complying with restrictions on publication, and no agency has a statutory duty to monitor or report in this way. Instead, the courts and defence monitor the media, and the DPP responds to breaches of which they become aware.³⁶
- 16.50 A victim survivor who becomes aware of a potential breach would usually bring it to the attention of Victoria Police.³⁷ The DPP stated that it also referred matters.³⁸
- 16.51 The media team in the County Court of Victoria monitors the media, including social media, daily. If there is a possible breach, the media team contacts the publisher to resolve the matter informally. According to the Court, this is often quick and effective and promotes a positive relationship with the media.³⁹
- 16.52 However, the Court only monitors the media in relation to matters before that Court, so there is a potential gap when proceedings are moved between courts.⁴⁰
- 16.53 While the DPP does not actively monitor the media, it usually becomes aware of media affecting its cases, either informally or on referral.⁴¹
- 16.54 VLA said that defence lawyers often personally maintained a watching brief on potential media about their clients. In its experience, this was a significant administrative burden.⁴²

Who should be responsible for monitoring publications?

- 16.55 The consultation paper asked if there should be a system for monitoring compliance with restrictions on publication. If so, it asked who should be responsible for monitoring such compliance, and how.⁴³
- 16.56 Stakeholders divided on whether a formal monitoring system was needed. Many stakeholders, including the DPP, thought there was no need to change the current process of monitoring,⁴⁴ since those with an interest already monitored the media. A victim representative thought the resources would be better spent elsewhere in the justice system.⁴⁵

36 Submissions 11 (Victoria Legal Aid), 20 (Criminal Bar Association), 28 (Director of Public Prosecutions); Consultation 24 (County Court of Victoria).

37 Submission 33 (Victims of Crime Commissioner, Victoria).

38 Submission 7 (The Victorian Civil and Administrative Tribunal).

39 Consultation 24 (County Court of Victoria).

40 Ibid.

41 Submission 28 (Director of Public Prosecutions).

42 Submission 11 (Victoria Legal Aid).

43 Victorian Law Reform Commission, *Contempt of Court* (Consultation Paper, May 2019) 169, Question 49.

44 Submissions 18 (Commercial Bar Association Media Law Section Working Group), 28 (Director of Public Prosecutions); Consultation 13 (Fiona K Forsyth QC, John Langmead QC).

45 Consultation 16 (Victims of Crime Consultative Committee victims' representatives).

- 16.57 VLA and the Criminal Bar Association supported a more formal mechanism.⁴⁶ VLA submitted that the current system contributed to an ‘accountability gap’⁴⁷ which imposed a burden on defence lawyers.⁴⁸ The Criminal Bar Association also indicated that new barristers may be unaware of previous publications, and there was inadequate monitoring to protect the interests of victims.⁴⁹
- 16.58 The potential gap for victim survivors was reflected in consultations. A youth representative confirmed that the absence of a formal monitor placed a burden on victim survivors.⁵⁰ Victim survivors were also reluctant to notify authorities of potential breaches because the process was complicated, and they could be perceived as ‘difficult’.⁵¹
- 16.59 Stakeholders who supported a monitoring system identified different bodies that should be responsible for it.
- 16.60 VLA submitted it would be appropriate for the courts (individually or through a central body) to monitor compliance with their own orders, if they were funded to do so. Courts had the most complete knowledge of any suppression orders and the cases involved, and this would prevent the need to disclose sensitive information to another body.⁵²
- 16.61 Other stakeholders said it was unreasonable to expect the courts to monitor all publications for potential breaches.⁵³ The County Court of Victoria expressed some support for the establishment of an independent body responsible for monitoring.⁵⁴
- 16.62 Other suggestions included the Office of the Victorian Information Commissioner⁵⁵ or a body established by the media itself which would also perform an educative role.⁵⁶ The Victims of Crime Commissioner noted it would be difficult for any person or organisation to take on such a role, and that ‘the policy implications of establishing a media monitoring role would require further consideration’.⁵⁷

Commission’s conclusions: victims should be given more support

- 16.63 The Commission did not find evidence of a significant gap in monitoring breaches of restrictions, other than in the protection of victims and, possibly, while proceedings are in between courts. The monitoring by the courts and the more informal monitoring by the prosecution and defence appear to be effective in identifying risks to trials.
- 16.64 A formal independent monitoring body would in many ways be less efficient and effective. It would require courts to send sensitive information about court proceedings constantly. The monitoring body would also not be in as good a position to assess the risk of any particular publication as those involved in proceedings.
- 16.65 There is not enough evidence to justify setting up a formal mechanism for monitoring the media. This does, however, place a burden on defence lawyers.
- 16.66 There is a practical gap in the protection of victim survivors. They should have access to a simple and supportive process for notifying authorities about a potential breach. As discussed earlier, they should be given information about the protections available to them at an early stage. At the same time, they should also be advised about what to do if they suspect that there has been a breach.

46 Submissions 11 (Victoria Legal Aid), 20 (Criminal Bar Association).

47 Submission 11 (Victoria Legal Aid).

48 Ibid; Submission 20 (Criminal Bar Association).

49 Submission 20 (Criminal Bar Association).

50 Consultation 14 (Victim Survivors’ Advisory Council youth representative).

51 Consultation 3 (Representatives of victim survivors of family and sexual violence).

52 Submission 11 (Victoria Legal Aid).

53 Consultations 7 (DJCS Community Operations and Victims Support Agency), 16 (Victims of Crime Consultative Committee victims’ representatives).

54 Consultation 24 (County Court of Victoria).

55 Submission 20 (Criminal Bar Association).

56 Consultations 7 (DJCS Community Operations and Victims Support Agency), 16 (Victims of Crime Consultative Committee victims’ representatives).

57 Submission 33 (Victims of Crime Commissioner, Victoria).

- 16.67 The Victims of Crime Commissioner plays an important role in representing and advocating for victims' interests in the criminal justice system. The Commission therefore recommends that the Victims of Crime should have responsibility for helping victim survivors to notify the authorities of potential breaches. As this would be a new role for the Commissioner, the office must be adequately resourced to undertake such a role.

Recommendation

- 130 The Victims of Crime Commissioner should be given dedicated responsibility and adequate resourcing to act on behalf of victims in liaising with the media, DPP and police and in notifying authorities of potential breaches of suppression orders or other restrictions on publication.**

Instituting proceedings for breaches of restrictions

- 16.68 As discussed in the consultation paper, different bodies are responsible for commencing proceedings for different restrictions on publication.⁵⁸ This could cause uncertainty about who is responsible for bringing such proceedings and may lead to a reported reluctance to prosecute breaches even when referred by courts.⁵⁹
- 16.69 Another issue is whether the consent of the DPP should continue to be required before charges can be filed under the Judicial Proceedings Reports Act.⁶⁰ This is not required for breaches under the Open Courts Act.

Responses

- 16.70 Stakeholders told the Commission that the low number of prosecutions was not caused by any uncertainty about who should commence proceedings. Rather, Victoria Police told the Commission this was because breaches were rarely reported, probably because people were unaware of the restrictions.⁶¹
- 16.71 Representatives of victim survivors indicated that another cause might be that victims did not know the process for notifying breaches or felt uncomfortable reporting breaches.⁶² The DPP explained that sometimes the framing of suppression orders can make it difficult to prosecute potential breaches.⁶³
- 16.72 Stakeholders divided on whether to retain the requirement that the DPP must consent to prosecution under the Judicial Proceedings Report Act. The Criminal Bar Association supported removing it because it created 'an added barrier to prosecution'.⁶⁴ However, the CommBar—Media Law Section and the DPP favoured retaining it.⁶⁵

58 Victorian Law Reform Commission, *Contempt of Court* (Consultation Paper, May 2019) 169–70 [10.119]–[10.130].

59 This reluctance was reported by the former Chief Justice of Victoria, Marilyn Warren, in the Open Courts Act Review: Frank Vincent, *Open Courts Act Review* (Report, September 2017) 70 [266] <<https://engage.vic.gov.au/open-courts-act-review>>.

60 *Judicial Proceedings Reports Act 1958* (Vic) ss 3(4), 4(4).

61 Consultation 19 (Victoria Police).

62 Consultations 1 (Representatives of victims of crime support organisations), 7 (DJCS Community Operations and Victims Support Agency), 16 (Victims of Crime Consultative Committee victims' representatives), 24 (County Court of Victoria).

63 For example, the drafting of the order may make it unclear whether the order applied to the publication: Submission 28 (Director of Public Prosecutions).

64 Submission 20 (Criminal Bar Association).

65 Submission 18 (Commercial Bar Association Media Law Section Working Group). Forgetmenot Foundation Inc. also favoured retaining the provision: Submission 19 (Forgetmenot Foundation Inc).

- 16.73 The DPP also supported extending this to the Open Courts Act.⁶⁶ Victoria Police told the Commission that, as the Office of Public Prosecutions (OPP) would usually be involved in any proceedings affected by a breach of a restriction on publication, it may be best placed to prosecute such breaches.⁶⁷

Commission's conclusions: the DPP should consent to prosecution under Open Courts Act

- 16.74 The low rate of prosecutions does not appear to stem from uncertainty about who is responsible for proceedings. Rather, the rate is likely to reflect a low level of understanding of the restrictions, and the need for greater support for victims to report breaches.
- 16.75 There is also no evidence to suggest that there are any practical problems in requiring the consent of the DPP before prosecuting offences under the *Judicial Proceedings Reports Act 1958* (Vic). This consent provision seems to be useful in practice.
- 16.76 Given the OPP's greater familiarity with the proceedings that are the subject of suppression orders, this requirement should also be extended to the Open Courts Act.

Recommendation

- 131 A 'DPP consent' provision should be introduced to the Open Courts Act for prosecutions for breach of suppression orders made under that Act.

Legacy suppression orders

252 What are legacy suppression orders?

253 Should there be an audit of legacy suppression orders?

254 Expiration of legacy suppression orders

17. Legacy suppression orders

Overview

- Legacy suppression orders are suppression orders made before the commencement of the Open Courts Act that do not contain an end date. Legacy suppression orders are not addressed in the Open Courts Act.
- Some of these orders may no longer fulfil a legitimate purpose. Continuing such orders therefore infringes the principle of open justice and carries significant risks for publishers.
- Other orders may still be serving a purpose. It would be difficult to identify which orders are still needed without hearing from those affected.
- It is unknown how many legacy suppression orders exist. The Commission recommends an audit be conducted of such orders.
- The Open Courts Act should also be changed to allow parties with a sufficient interest to apply for a court to review a legacy suppression order, with notice given to other interested parties.

What are legacy suppression orders?

- 17.1 Legacy suppression orders are suppression orders made before the commencement of the Open Courts Act 2013 (Vic) that do not have an end date. These orders would have been made under the common law or under Acts now repealed and are not affected by the Open Courts Act. The Commission has been asked to review these orders in this inquiry.
- 17.2 Suppression orders under the Open Courts Act must fix or identify a time when the order expires.¹ In contrast, legacy suppression orders do not have an end date so can continue indefinitely. This can make it difficult for publishers, who may unknowingly breach an order years after a proceeding.
- 17.3 As discussed in the consultation paper, allowing orders to continue when no longer justified infringes the principle of open justice.²

- 17.4 The consultation paper identified two reform options to resolve this:
- an audit to identify and review the need for legacy suppression orders
 - a mechanism to enable courts to revoke redundant legacy suppression orders.³

Should there be an audit of legacy suppression orders?

- 17.5 The consultation paper noted that the data about legacy suppression orders is incomplete and not readily available. Stakeholders were not able to precisely identify the number of legacy suppression orders in operation.⁴
- 17.6 The Supreme Court of Victoria and the County Court of Victoria submitted it would require substantial resources to identify and review existing legacy suppression orders.⁵
- 17.7 The Commercial Bar Association Media Law Section Working Group supported an audit. In its view, this would be the most efficient way to identify legacy suppression orders.⁶
- 17.8 As discussed in Chapter 15, the Supreme Court is creating a new database of suppression orders made across Victorian courts. The Court noted that, during the transfer of data from the previous database to the new database, there would be scope to review whether the orders had expired, been revoked or varied. However, this would require adequate resourcing.⁷
- 17.9 The Supreme Court submitted that a ‘substantive review’ of legacy orders would require ‘much more substantial resources’.⁸ The Supreme Court noted that orders made prior to the Open Courts Act do not necessarily record the basis on which they were made, and it would be ‘a significant logistical exercise’ to retrieve this information from files and transcript where available. The Supreme Court stated it was unclear how those with an interest in the review of an order could make submissions.
- 17.10 As noted in Chapter 15, the County Court supported establishing an independent body to monitor breaches of orders restricting publication. The County Court told the Commission this body could also audit and review legacy suppression orders.⁹

Commission’s conclusions: conduct an audit of legacy suppression orders

- 17.11 Uncertainty about the number of legacy suppression orders in operation in Victoria and their content undermines the rule of law and freedom of expression. The current project of establishing a new suppression order database provides an ideal remedy. Such an audit will need to be resourced adequately.
- 17.12 The Commission therefore recommends the Victorian Government provide funding to the courts to undertake a comprehensive audit of legacy suppression orders. Such an audit would improve the outcomes of the current project to establish a new suppression order database. Ideally, the audit would allow legacy suppression orders to be searchable alongside the suppression orders under the Open Courts Act.

3 Ibid 184 [10.220]–[10.223].

4 Submissions 18 (Commercial Bar Association Media Law Section Working Group), 20 (Criminal Bar Association), 27 (Australia’s Right to Know coalition), 31 (County Court of Victoria).

5 Submissions 29 (Supreme Court of Victoria), 31 (County Court of Victoria).

6 Submission 18 (Commercial Bar Association Media Law Section Working Group).

7 Submission 29 (Supreme Court of Victoria).

8 Ibid.

9 Consultation 24 (County Court of Victoria).

Recommendation

- 132 The courts should be resourced by the Victorian Government to conduct an audit of all existing legacy suppression orders.

Expiration of legacy suppression orders

- 17.13 The consultation paper asked whether there should be provisions in the Open Courts Act or another Act to specify the duration of legacy suppression orders. It identified two options:
- legislation deeming such orders to have been revoked from a specified date, subject to applications from interested parties to vary, continue or revoke the order earlier
 - legislation specifying procedures for notifying those interested of legacy suppression orders and enabling them to apply to revoke or vary such orders.¹⁰
- 17.14 Stakeholders agreed there should be a way to ensure legacy suppression orders ended when they became unnecessary.¹¹ Stakeholders approached this reform option in different ways.
- 17.15 Some stakeholders supported the first option.¹² Forgetmenot Inc supported a time limitation on legacy suppression orders.¹³ It submitted that such open-ended orders can have an intergenerational and traumatising effect. Australia's Right to Know coalition (ARTK) submitted that the mechanism should deem legacy suppression orders to have expired six years from the commencement of the Open Courts Act, subject to applications to revoke, vary or continue an order.¹⁴
- 17.16 However, others expressed concern that any deeming provision might:
- risk the safety and wellbeing of persons protected by a legacy suppression order¹⁵
 - be unconstitutional, as a potential breach of the separation of powers.¹⁶
- 17.17 The Supreme Court also noted it could be difficult to review legacy suppression orders if the orders did not include information about the grounds on which they were made. In the Court's experience, 'a significant number of orders remain in place and, upon review, remain justified'.¹⁷
- 17.18 Stakeholders generally supported the creation of a legislative procedure to notify interested parties of applications to vary or revoke legacy suppression orders.¹⁸ ARTK submitted that the notice requirements should be the same as those in the Open Courts Act.¹⁹

10 Victorian Law Reform Commission, *Contempt of Court* (Consultation Paper, May 2019) 184, Question 59.
11 Submissions 18 (Commercial Bar Association Media Law Section Working Group), 19 (Forgetmenot Foundation Inc), 20 (Criminal Bar Association); Consultation 1 (Representatives of victims of crime support organisations).
12 Submissions 18 (Commercial Bar Association Media Law Section Working Group), 19 (Forgetmenot Foundation Inc), 20 (Criminal Bar Association), 27 (Australia's Right to Know coalition); Consultation 1 (Representatives of victims of crime support organisations).
13 Submission 19 (Forgetmenot Foundation Inc).
14 Submission 27 (Australia's Right to Know coalition).
15 Submissions 7 (The Victorian Civil and Administrative Tribunal), 29 (Supreme Court of Victoria), 31 (County Court of Victoria), 33 (Victims of Crime Commissioner, Victoria).
16 Submissions 29 (Supreme Court of Victoria), 31 (County Court of Victoria).
17 Submission 29 (Supreme Court of Victoria).
18 Submissions 7 (The Victorian Civil and Administrative Tribunal), 27 (Australia's Right to Know coalition), 33 (Victims of Crime Commissioner, Victoria).
19 Submission 27 (Australia's Right to Know coalition).

Commission's conclusions: establish a procedure for revoking or varying legacy suppression orders

- 17.19 Deeming provisions that automatically revoke legacy suppression orders could have significant practical impacts. They could result in people losing protections they were unaware would end. The focus for reform should instead be ensuring that there is a clear process for those affected by a legacy suppression order to apply to vary or revoke them.
- 17.20 There should therefore be a legislative procedure to allow an interested party to apply to a court to review whether a legacy suppression order that it made is still needed. This provides a way to ensure suppression orders can end without putting anyone at risk.
- 17.21 This will mean that there are still some orders that will continue even though they do not serve any purpose, because there is no party with an interest in applying to change or revoke the order.
- 17.22 The legislative procedure should require notice to be given to interested parties. In the interests of accessibility, this procedure should be provided for in the Open Courts Act.
- 17.23 The Commission notes that court processes will need to be developed to allow an applicant and the court to access materials explaining the rationale for a suppression order. Such material may need to be provided to any respondent to the application.

Recommendations

- 133 The Open Courts Act should be amended to enable an interested party to apply to the court for the revocation or variation of a legacy suppression order made by that court.
- 134 The courts should develop processes allowing an applicant and the court to have access to materials providing evidence of the grounds on which a legacy suppression order was made.

Appendices

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Appendices

Appendix A: Advisory committee members

- 1 Marita Altman, Partner, Lethbridges Barristers & Solicitors, Member of the LIV Criminal Law Executive Committee
- 2 Peter Bartlett, Partner, MinterEllison
- 3 Associate Professor Jason Bosland, Deputy Director, Centre for Media and Communications Law, Director of Studies, Communications Law, Melbourne Law School, University of Melbourne
- 4 Dr Matthew Collins QC, President, Victorian Bar Council
- 5 Ross H. Gillies QC, Chairman, Common Law Bar Association
- 6 Abbey Hogan, Manager, Policy and Specialised Legal Division, Office of Public Prosecutions
- 7 Kerri Judd QC, Director of Public Prosecutions, Office of Public Prosecutions
- 8 Julia Kretzenbacher, Barrister, Victorian Bar, Liberty Victoria representative
- 9 Professor James Ogloff AM, Foundation Professor of Forensic Behavioural Science & Director, Centre for Forensic Behavioural Science, Swinburne University of Technology, Executive Director of Psychological Services & Research, Forensicare
- 10 Dr Suzie O’Toole, Lecturer, Law School, La Trobe University
- 11 Justin Quill, Principal Lawyer, Macpherson Kelley Lawyers, Chair, Media Law Committee, Law Council of Australia
- 12 Professor David Rolph, Professor of Law Sydney Law School, The University of Sydney
- 13 Rae Sharp, Barrister, Victorian Bar, Criminal Bar Association of Victoria representative
- 14 Belinda Thompson, Partner, Allens
- 15 Melinda Walker, Accredited criminal law specialist, Co-chair LIV Criminal Law Section Executive Committee

Appendix B: Submissions

- 1 Geoffrey Taylor
- 2 David S Brooks
- 3 Name withheld
- 4 Dr Suzie O’Toole
- 5 Barry Johnstone
- 6 Professors Mark Pearson, Patrick Keyzer, Anne Wallace and Associate Professor Jane Johnston
- 7 The Victorian Civil and Administrative Tribunal
- 8 Dr Rachel Jane Hews
- 9 Jesuit Social Services
- 10 Bill Swannie
- 11 Victoria Legal Aid
- 12 Timothy Smartt
- 13 Shine Lawyers
- 14 Children’s Court of Victoria
- 15 Office of the Victorian Information Commissioner
- 16 Domestic Violence Victoria
- 17 Dr Denis Muller
- 18 Commercial Bar Association Media Law Section Working Group
- 19 Forgetmenot Foundation Inc
- 20 Criminal Bar Association
- 21 Coroners Court of Victoria
- 22 Law Institute of Victoria
- 23 MinterEllison Media Group
- 24 Victim Survivors’ Advisory Council
- 25 Juries Victoria
- 26 Chief Examiner, Victoria
- 27 Australia’s Right to Know coalition
- 28 Director of Public Prosecutions
- 29 Supreme Court of Victoria
- 30 Liberty Victoria
- 31 County Court of Victoria
- 32 International Commission of Jurists, Victoria
- 33 Victims of Crime Commissioner, Victoria
- 34 Coroners Court of Victoria—supplementary submission

Appendix C: Consultations

The Commission conducted consultations with the individuals and organisations listed below.

- 1 Representatives of victims of crime support organisations: Crime Victims Support Association; Forgetmenot Foundation Inc
- 2 Academics on juror decision making and juror contempt: Associate Professor Jacqui Horan, Monash University; Professor Jonathan Clough, Monash University
- 3 Representatives of victim survivors of family and sexual violence: Eastern CASA; CASA House; Victim Survivors' Advisory Council
- 4 Juries Commissioner, Victoria
- 5 Media lawyers and academics on contempt by publication: Professor David Rolph, University of Sydney; Dr Denis Muller, University of Melbourne; Associate Professor Jason Bosland, University of Melbourne; Justin Quill, Chair Media Law Committee, Law Council of Australia; Peter Bartlett, MinterEllison
- 6 Victoria Legal Aid
- 7 DJCS Community Operations and Victims Support Agency
- 8 Law Institute of Victoria
- 9 Victorian Government Solicitor's Office
- 10 Judicial College of Victoria
- 11 Professor James Ogloff, Swinburne University
- 12 Professor David Rolph, University of Sydney
- 13 Fiona K Forsyth QC, John Langmead QC
- 14 Victim Survivors' Advisory Council youth representative
- 15 Children's Court of Victoria
- 16 Victims of Crime Consultative Committee victims' representatives
- 17 Victorian Bar
- 18 Victims of Crime Commissioner, Victoria
- 19 Victoria Police
- 20 Victorian Equal Opportunity and Human Rights Commission
- 21 Director of Public Prosecutions, Victoria
- 22 The Victorian Civil and Administrative Tribunal
- 23 Survivors of sexual abuse advocacy groups: Tzedek; South Eastern CASA; Bravehearts Foundation
- 24 County Court of Victoria
- 25 Magistrates' Court of Victoria
- 26 Supreme Court of Victoria

Appendix D: Legal advice

IN THE MATTER OF POTENTIAL REFORM TO VICTORIAN LAW REGARDING CONTEMPT OF COURT

JOINT MEMORANDUM OF ADVICE

INTRODUCTION

1. The Victorian Law Reform Commission (the **Commission**) is presently reviewing the law relating to contempt of court. Pursuant to the terms of reference, the Commission is to “consider whether, and how, the common law of contempt should be reformed, and whether and to what extent it should be replaced by statutory provisions”.
2. In May 2019, the Commission published a consultation paper, titled “Contempt of Court: Consultation Paper” (the **Consultation Paper**). In the Consultation Paper, the Commission noted that the Victorian Parliament has power to “amend the jurisdiction and powers” of the Supreme Court of Victoria. However, as also noted by the Commission, that power is subject to constitutional limits that “may curtail the extent to which the common law of contempt can be reformed”.¹
3. We are briefed to advise the Commission on a series of questions relating to those constitutional limits.
4. The specific questions we have been asked, and our short answers to them, are as follows:

Q1. To what extent can Parliament regulate the exercise of the Supreme Court’s inherent power to punish contempt of court?

*(a) Could it, for example, prescribe a maximum penalty, the form of an originating process, or provide that the Criminal Procedure Act 2009 (Vic) (the **Criminal Procedure Act**) should apply?*

(b) Would the power of the judge to direct a prosecution or to deal directly with contempt of court, need to be retained?

In our view, and subject to one limitation, the Parliament can legislate to regulate those aspects of the Supreme Court’s inherent power to punish for contempt.

¹ Consultation Paper at paragraph 2.13.

The limitation is that the regulation of the inherent power is not so substantial that it amounts to a removal of that power — so that the Supreme Court can be said to have been deprived of the power to punish for contempt (which may be a defining characteristic of the Supreme Court²). As we explain in paragraphs 28 to 29 below, the point at which legislation will be characterised as removing, rather than merely regulating, the inherent power is likely to be a “question of substance, and therefore of degree”.

Accordingly, as a general proposition, the Parliament could regulate the power in the way suggested in the examples identified in paragraph (a) above: see paragraphs 30 to 43 below. However, we think it would be necessary for the Court to retain its power to deal directly with contempt of court: see paragraph 40 below.

Q2. To what extent could the inherent jurisdiction of the Supreme Court to punish for contempt of court, or the common law of contempt of court, be excluded or abrogated by a statutory scheme?

(a) Can the inherent jurisdiction be replaced by a statutory scheme?

(b) Could proceedings for a statutory contempt of court offence be instituted by a charge filed by police?

(c) If the law of contempt of court is restated in statute, can it be restated in language that is more user-friendly, in a way that would not be seen as limiting the scope of the power to punish contempt of court?

A2. The Parliament can confer statutory power on the Supreme Court to punish for contempt. We think that statutory power could replace the inherent (or common law) power, so long as the statutory power is conferred in terms that substantially reflect the Court’s inherent power: see paragraphs 46 to 49 below.

Subject to the Supreme Court retaining the power to deal directly with a contempt of court, we see no difficulty in proceedings for a statutory contempt

² Whether that power is a defining characteristic of the Supreme Court is unclear: see paragraphs 17-26 below.

of court offence being instituted by a charge filed by the police: see paragraph 50 below.

We see no difficulty in restating the law in language that is more user-friendly, so long as that language captured the relevant concepts: see paragraph 51 below.

Q3. In considering the power of Parliament to establish a statutory scheme that excludes or abrogates the common law of contempt of court, can such an exclusion or abrogation be limited to specific identified manifestations of the common law of contempt of court (such as the manifestations identified in Part 2 of the Consultation Paper). In particular, is “scandalising” contempt to be treated in the same way as the rest of the law of contempt of court?

A3. There is some difficulty associated with dividing and regulating the various manifestations of contempt separately. Although it would be possible for statutory provisions to deal with each manifestation differently, proceeding in that way would not necessarily obviate any constitutional risk. It might still be said that such regulation would deprive the Supreme Court of a defining characteristic: see paragraphs 55 to 60 below.

There are reasonable arguments that scandalising contempt could be treated differently from some of the other manifestations of contempt. However, there is necessarily a degree of risk associated with those arguments: see paragraphs 61 to 68 below.

Q4. If specific identified manifestations of the common law of contempt of court were to be restated in statute and the corresponding common law abolished, how should any remaining residual manifestations of the common law of contempt of court be treated (so as to avoid any potential constitutional impediments to reform)?

(a) In this context, can the inherent jurisdiction of the Supreme Court to punish for contempt of court be expressly preserved to the extent that the provisions of any statutory restatement do not apply?

A4. If specified manifestations of contempt were not to be dealt with in the replacement statutory scheme, any residual inherent power might be abolished

or retained. There would be no constitutional difficulty in retaining any residual power. That could be done as a matter of drafting — for example, by stating that, if conduct is not covered by a statutory provision, then the Supreme Court may still punish that conduct in the exercise of its inherent power: see paragraphs 70 to 71 below.

If a law purported to abolish any residual manifestations, then the abolition of those manifestations might be held to deprive the Supreme Court of a defining characteristic: see paragraph 72 below.

Q5. If the law of contempt of court is restated in statute, and that statute is later repealed, does the common law of contempt of court revive?

A5. Yes — that result could be achieved as a matter of drafting: see paragraphs 52 to 54 below.

Q6. If the law of contempt of court is restated in a statute, and Parliament includes a provision, which states that, for the avoidance of doubt, the common law of contempt of court is not intended to be abrogated, would that be the safest option for ensuring there was no constitutional issue with codification?

A6. Yes — there would be very little constitutional risk associated with that course: see paragraphs 13 and 74 below.

Q7. If the inherent jurisdiction of the Supreme Court cannot be codified, could it be supplemented by a statutory scheme, which expressly preserves the inherent jurisdiction?

A7. The question might be thought not to arise — because it is our view that the inherent jurisdiction of the Supreme Court can be codified (see our answer to Question 2).

Q8. If the inherent jurisdiction of the Supreme Court to punish for contempt of court at common law were to be supplemented and/or regulated by statute, can the statute state the priority or circumstances in which the Supreme Court is to have recourse to its inherent jurisdiction to punish for contempt of court at common law?

It is our view that the Parliament can enact a statutory scheme that supplements the inherent power of the Supreme Court, and can give a form of priority to that statutory scheme — that is, provide that contempt proceedings are to be brought under the statutory scheme where that scheme makes provision for those proceedings: see paragraphs 75 to 76 below.

Q9. If the statute can state the priority or circumstances in which the Supreme Court is to have recourse to its inherent jurisdiction to punish for contempt of court at common law, how should this be expressed?

A9. This could be expressed, for example, by stating that, if conduct is punishable in the exercise of the inherent power or under the statute, then the conduct should be punished under the statute except in specified circumstances: see paragraph 76 below.

BACKGROUND

5. In this advice, we consider three constitutional limitations on the legislative power of the Victorian Parliament, namely:
 - 5.1 the principle first identified in *Kable v Director of Public Prosecutions (NSW) (Kable)*;³
 - 5.2 the principle first identified in *Kirk v Industrial Court (NSW) (Kirk)*;⁴ and
 - 5.3 the implied freedom of political communication first identified in *Nationwide News Pty Ltd v Wills (Nationwide News)*⁵ and *Australian Capital Television Pty Ltd v The Commonwealth (ACTV)*⁶ and refined in *Lange v Australian Broadcasting Corporation (Lange)*.⁷
6. We consider each of those limitations for the purpose of assisting the Commission in developing recommendations for the consideration of the Attorney-General. Our advice is necessarily preliminary, because the work of the Commission is also

³ (1996) 189 CLR 51.

⁴ (2010) 239 CLR 531.

⁵ (1992) 177 CLR 1.

⁶ (1992) 177 CLR 106.

⁷ (1997) 189 CLR 520.

preliminary. We are not asked to advise on the detail of any particular reform options, or by reference to any draft statutory provisions.

7. That observation is important because the first step in assessing the constitutional validity of a law is to construe the statute.⁸ Thus, the validity of any reform will ultimately depend on the drafting of the relevant statute.

THE *KABLE* PRINCIPLE

8. The *Kable* principle is potentially relevant to the question whether there is any constitutional difficulty with conferring on the Supreme Court a statutory power to punish for contempt (Questions 2 and 7).
9. In *Attorney-General (NT) v Emmerson*, six Justices of the High Court explained the operation of the *Kable* principle as follows:⁹

The principle for which *Kable* stands is that because the *Constitution* establishes an integrated court system, and contemplates the exercise of federal jurisdiction by State Supreme Courts ... State legislation which purports to confer upon such a court a power or function which substantially impairs the court's institutional integrity, and which is therefore incompatible with that court's role as a repository of federal jurisdiction, is constitutionally invalid.

10. The principle "is one which hinges upon maintenance of the defining characteristics of a 'court' or in cases concerning a Supreme Court, the defining characteristics of a State Supreme Court."¹⁰ It is to those defining characteristics that the reference to "institutional integrity" alludes.¹¹ Thus, "if the institutional integrity of a court is distorted, it is because the body no longer exhibits in some relevant respect those defining characteristics which mark a court apart from other decision-making bodies".¹²

⁸ See, for example, *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532 at 553 [11] (Gummow, Hayne, Heydon and Kiefel JJ).

⁹ (2014) 253 CLR 393 at 424 [40] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ) – citations omitted. See also *North Australian Aboriginal Justice Agency Ltd v Northern Territory (NAAJA)* (2015) 256 CLR 569 at 593-595 [39] (French CJ, Kiefel and Bell JJ), 617-620 [119]-[127] (Gageler J), 637 [183] (Keane J).

¹⁰ *Forge v Australian Securities and Investments Commission (Forge)* (2006) 228 CLR 45 at 76 [63] (Gummow, Hayne and Crennan JJ).

¹¹ *Forge* (2006) 228 CLR 45 at 76 [63] (Gummow, Hayne and Crennan JJ); *NAAJA* (2015) 256 CLR 569 at 594 [39(2)] (French CJ, Kiefel and Bell JJ)

¹² *Forge* (2006) 228 CLR 45 at 76 [63] (Gummow, Hayne and Crennan JJ).

11. Accordingly, the *Kable* principle will be infringed if the statutory conferral of a power to punish for contempt can be said to substantially impair the “institutional integrity” of the Supreme Court. Relevantly for present purposes, in *Condon v Pompano Pty Ltd*, French CJ identified a particular group of inherent powers¹³ possessed by “courts” generally and said:¹⁴

The existence of that group of inherent powers suggests that statutory analogues will not readily be regarded as impairing the defining or essential characteristics of the courts to which those analogues apply.

Bearing that observation in mind, we do not think the conferral of a statutory power to punish for contempt could be said to substantially impair the Supreme Court’s institutional integrity.

12. In our view, that conclusion holds regardless of whether the statutory power is conferred to supplement the existing inherent power,¹⁵ or is conferred to replace that power. Neither of those alternatives would infringe the *Kable* principle.
13. That does not mean that the two alternatives share the same level of constitutional risk (Question 6). The conferral of a supplementary power would not raise any potential infringement of the *Kirk* principle. In contrast, as we explain at paragraphs 44 to 51 below, the replacement of the existing inherent power by a statutory power would raise the potential for an infringement of that principle.

THE *KIRK* PRINCIPLE

14. The *Kirk* principle shares a common foundation with the *Kable* principle. Both principles are underpinned by the notion that certain characteristics necessarily attach to terms used in Ch III of the Constitution,¹⁶ which characteristics cannot be so altered by legislation that a State Supreme Court “ceases to meet the constitutional description”.¹⁷

¹³ They were the power to order that all or part of a case be heard in camera, the power to prohibit publication of all or part of a proceeding and the power to inspect, in private, documents the subject of a claim for public interest immunity.

¹⁴ (2013) 252 CLR 38 (*Pompano*) at 63 [46].

¹⁵ See *Thomas v Mowbray* (2007) 233 CLR 307 at 339 [51] (Gummow and Crennan JJ).

¹⁶ Such as “other courts” in s 71, “the Supreme Court of any State” in s 73, “the courts of the States” in s 77(ii) and “any court of a State” in s 77(iii).

¹⁷ See *Kirk* (2010) 239 CLR 531 at 580 [96] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

15. The *Kable* principle has been consistently applied to invalidate legislation that purports to confer functions or powers on a court, where that conferral has been held to have a distorting effect on a defining characteristic of a “court” (including but not limited to a State Supreme Court). In contrast, the *Kirk* principle can be understood as being concerned with legislation that purports to remove a defining characteristic of a State Supreme Court (although not of a “court” generally).
16. *Kirk* itself concerned a privative clause that, in its terms, appeared to prevent the Supreme Court of New South Wales from exercising its supervisory jurisdiction to grant prerogative relief for jurisdictional error made by the Industrial Court of New South Wales. The High Court reasoned that a provision with that effect would be invalid, including on the basis that such a provision “would remove from the relevant State Supreme Court one of its defining characteristics”.¹⁸ The defining characteristic of each State Supreme Court was identified as the “supervisory role of the Supreme Court exercised through the grant of prohibition, certiorari and mandamus (and habeas corpus)”.¹⁹

Defining characteristic?

17. The first question that arises is whether the power to punish for contempt is a “defining characteristic” of the Supreme Court. That question has not been the subject of judicial determination.²⁰
18. It is not controversial to suggest that the power to punish for contempt is an inherent power of the Supreme Court.²¹ But that is a different question from whether the power to punish for contempt is a “defining characteristic” for the purposes of the *Kirk* principle. Although there has been some academic commentary suggesting that the inherent powers of State Supreme Courts are relevantly “defining characteristics” of those Courts,²² that proposition is not established by *Kirk*.

¹⁸ *Kirk* (2010) 239 CLR 531 at 581 [99] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ) – emphasis added.

¹⁹ *Kirk* (2010) 239 CLR 531 at 581 [98] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

²⁰ In *Witness J A v Scott* [2015] QCA 285, this point was argued, but did not need to be decided by the Court: see at [99], [101] (Philip McMurdo JA).

²¹ See *Re Colina; Ex parte Torney* (1999) 200 CLR 386 (*Colina*) at 395-396 [16]-[19] (Gleeson CJ and Gummow J).

²² See Beck, “What is a ‘Supreme Court of a State’” (2012) 34 *Sydney Law Review* 295 at 303-308.

19. The High Court has identified a number of defining characteristics of “courts” in the context of the *Kable* principle.²³ However, the Court has provided little guidance as to the process for identifying those characteristics,²⁴ and has insisted that it is “neither possible nor profitable to attempt to make some single all-embracing statement of the defining characteristics of a court”.²⁵
20. That indeterminacy is heightened in the context of the *Kirk* principle. The defining features of a “court” for the purposes of the *Kable* principle cannot be equated with the defining characteristics of State Supreme Courts for the purposes of the *Kirk* principle. *Kirk* makes it clear that a State Supreme Court must possess at least one additional defining characteristic — a supervisory role exercised through the grant of prohibition, certiorari, mandamus and habeas corpus.²⁶
21. In *Kirk*, a significant strand of the Court’s reasoning was that State Supreme Courts possessed the relevant defining characteristic (the supervisory jurisdiction) at Federation.²⁷ The significance of that strand was highlighted by the New South Wales Court of Appeal in *Kaldas v Barbour (Kaldas)*.²⁸ There, the Court rejected a challenge to a New South Wales provision that limited the power of the Supreme Court of New South Wales to grant a declaration in aid of its supervisory jurisdiction. The Court concluded that the power of the Supreme Court to grant a declaration in those circumstances was not a defining characteristic, including because the Supreme Court did not possess that power at Federation.²⁹
22. In contrast, it is clear enough that, at Federation, the Supreme Court of Victoria had the power to punish for contempt.³⁰ Accordingly, any argument that attempted to

²³ See, for example, *Pompano* (2013) 252 CLR 38 at 71 [67] (French CJ).

²⁴ Cf *Pompano* (2013) 252 CLR 38 at 72 [68] (French CJ).

²⁵ *Forge* (2006) 228 CLR 45 at 76 [64] (Gummow, Hayne and Crennan JJ). See also *Pompano* (2013) 252 CLR 38 at 71-72 [67] (French CJ), 89 [124] (Hayne, Crennan, Kiefel and Bell JJ).

²⁶ See *Kirk* (2010) 239 CLR 531 at 581 [98] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

²⁷ *Kirk* (2010) 239 CLR 531 at 580-581 [97]-[98] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

²⁸ (2017) 326 FLR 122.

²⁹ *Kaldas* (2017) 326 FLR 122 at 168 [187], 169-170 [193] (Bathurst CJ), 206-208 [349]-[357] (Basten JA).

³⁰ See *Broken Hill Pty Ltd v Dagi* [1996] 2 VR 117 at 137 (Brooking JA); 154-157 (Tadgell JA). See also *Re Dunn* [1906] VLR 493.

challenge a law that purported to remove that power would clear the hurdle that stalled the challenge in *Kaldas*.

23. However, it remains unclear as to whether the possession of a power by the Supreme Court at Federation would alone be sufficient for the power to be characterised as a defining characteristic of the Supreme Court. That is because a second significant strand of the High Court’s reasoning in *Kirk* was the nature of the Supreme Court’s supervisory jurisdiction, being “the mechanism for the determination and the enforcement of the limits on the exercise of State executive and judicial power by persons and bodies other than the Supreme Court”.³¹ The High Court emphasised that the Supreme Court’s supervisory jurisdiction was “ultimately subject to the superintendence” of the High Court;³² and that to deprive a Supreme Court of that jurisdiction “would be to create islands of power immune from supervision and restraint”.³³
24. In light of that second strand of the reasoning in *Kirk*, it is an open question whether *Kirk* establishes any wider proposition than that a State Parliament cannot enact a law that “excludes any class of official decision, made under a law of the State, from judicial review for jurisdictional error by the Supreme Court of a State”.³⁴ As Basten JA said in *Kaldas*:³⁵

... any expansion of the principle established in *Kirk* beyond its sphere of operation should be undertaken with caution. That is because *Kirk* identified an irreducible characteristic of State Supreme Courts by reference to what was understood to be the scope of the supervisory jurisdiction in 1901. Further restraints on the legislative power of State Parliaments can only be imposed on a similar principled basis.

25. Bearing those comments in mind, there is at least one aspect of the Supreme Court’s power to punish for contempt that is very likely to be constitutionally entrenched, for that aspect is consistent with both strands of the reasoning in *Kirk*. That aspect is the Supreme Court’s power — as part of its supervisory jurisdiction — to punish for

³¹ *Kirk* (2010) 239 CLR 531 at 580 [98], see also at 583 [107] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

³² *Kirk* (2010) 239 CLR 531 at 581 [98] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

³³ *Kirk* (2010) 239 CLR 531 at 581 [99] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

³⁴ *Wainohu v New South Wales* (2011) 243 CLR 181 at 210 [46] (French CJ and Kiefel J); *NAAJA* (2015) 256 CLR 569 at 594 [39(4)] (French CJ, Kiefel and Bell JJ)

³⁵ *Kaldas* (2017) 326 FLR 122 at 209 [361] – emphasis added.

contempt of lower courts. As the High Court observed in *John Fairfax & Sons Pty Ltd v McRae*:³⁶

... the power to punish for contempt of inferior courts and the power to issue *mandamus* or *certiorari* to inferior courts are seen as in truth but different aspects of the same function — the traditional general supervisory function of the King’s Bench, the function of seeing that justice was administered and not impeded in lower tribunals.

26. Aside from that discrete supervisory role, it is difficult to say with any certainty whether power to punish for contempt is a defining characteristic of the Supreme Court of Victoria. Given that difficulty, we think it would be safest to proceed on assumption the power to punish for contempt is a defining characteristic of the Supreme Court.

Regulating the power to punish for contempt

27. We are asked about the extent to which the Parliament could regulate the exercise of the inherent power of the Supreme Court to punish for contempt (Question 1).
28. In our view, the Parliament has a reasonably wide latitude as to how it might regulate the inherent power of the Supreme Court. However, if the Parliament seeks to regulate the exercise of the power too extensively — such that the Supreme Court can no longer effectively exercise that power — it might be said that the Supreme Court has been deprived of the “power to punish for contempt” contrary to the *Kirk* principle.
29. The point at which regulation becomes too extensive will be a “question of substance, and therefore of degree”.³⁷ Thus, whether the *Kirk* principle is infringed will necessarily turn on the precise formulation of the statutory provisions and on an assessment of the practical impact of those provisions on the power of the court to punish for contempt. The more extensive the regulation, the more likely it is that the *Kirk* principle will be infringed.

³⁶ (1955) 93 CLR 351 at 363 (Dixon CJ, Fullagar, Kitto and Taylor JJ). See also *K-Generation v Liquor Licensing Court* (2009) 237 CLR 501 at 538-540 [129]-[131] (Gummow, Hayne, Heydon, Crennan and Kiefel JJ).

³⁷ See *Graham v Minister for Immigration and Border Protection* (2017) 263 CLR 1 at 27 [48] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ).

30. We are asked about a number of specific examples as to how the power to punish for contempt might be regulated, namely whether the Parliament can:
- 30.1 prescribe a maximum penalty;
 - 30.2 prescribe the form of an originating process; and
 - 30.3 provide that the Criminal Procedure Act should apply.
31. We doubt whether any of those statutory modifications to the existing law of contempt would amount to a departure so radical that it could be said that the Supreme Court was thereby deprived of a defining characteristic.
32. It is, however, desirable to say something further about each of the three points.

Maximum penalty

33. As to the first point identified at paragraph 30.1 above, we think that particular care should be taken in selecting any maximum penalty.
34. It is, of course, ordinarily the role of the Parliament to set a maximum penalty for offences, which provides a “yardstick” for the sentencing court.³⁸ However, the “offence” of contempt is not an ordinary criminal offence for two reasons.³⁹
- 34.1 First, the power to punish for contempt is “a power of self-protection or a power incidental to the function of superintending the administration of justice”.⁴⁰ It is a power reposed in the Supreme Court for that purpose.
 - 34.2 Secondly, a wide variety of circumstances might attract the power of the Supreme Court to punish for contempt.⁴¹

³⁸ See *Director of Public Prosecutions v Dalgliesh* (2017) 262 CLR 428 at 434-435 [10] (Kiefel CJ, Bell and Keane JJ).

³⁹ See *Colina* (1999) 200 CLR 386 at 428-429 [109]-[110] (Hayne J).

⁴⁰ *Porter v The King* (1926) 37 CLR 432 at 443 (Isaacs J), cited in *Colina* (1999) 200 CLR 386 at 395 [16] (Gleeson CJ and Gummow J), 428 [109] (Hayne J).

⁴¹ See, by analogy, the offence of manslaughter: *R v Lavender* (2005) 222 CLR 67 at 77 [22] (Gleeson CJ, McHugh, Gummow and Hayne JJ).

35. In light of those two reasons, we think any maximum penalty would need to be set at a level that did not drastically constrain the power of the Court to impose a penalty that was commensurate with the particular circumstances.
36. If the maximum penalty were set too low, it may preclude the Supreme Court from selecting a punishment that it thought adequate in the particular circumstances, thereby inhibiting its ability to protect itself or the due administration of justice. That might lead to the conclusion that the Supreme Court has been deprived of its “defining characteristic” to punish for contempt.

Originating process

37. As to the second point identified at paragraph 30.2 above, we note that far more substantive limitations on the commencement of contempt proceedings were imposed by s 46 (since repealed⁴²) of the *Public Prosecutions Act 1994* (Vic).
38. That provision was considered by a five-judge bench of the Victorian Court of Appeal in *Broken Hill Pty Co Ltd v Dagi* (**Dagi**).⁴³ As construed by three of the five members of the Court,⁴⁴ the provision mandated that, subject to limited exceptions, only the Attorney-General could bring proceedings for contempt, and only on the advice of the Solicitor-General. The decision in *Dagi* pre-dated the identification of both the *Kable* and *Kirk* principles.⁴⁵ Accordingly, *Dagi* does not authoritatively resolve the question whether a provision akin to s 46 would survive a challenge based on the *Kirk* principle.
39. Nonetheless, we think *Dagi* could be persuasively deployed to illustrate that the Parliament may regulate the power of the Supreme Court to punish for contempt in a way that tightly controls the exercise of that power. If a court were now to invalidate a provision akin to s 46 by reason of the *Kirk* principle, that would suggest that, for the period during which s 46 was in force, the Supreme Court lacked a defining characteristic and — unknown to anyone — was thus not a “Supreme Court of a State” within the meaning of s 73 of the Constitution. That would be a surprising conclusion.

⁴² By the *Public Prosecutions Act (Amendment) Act 1999* (Vic), s 7.

⁴³ [1996] 2 VR 117.

⁴⁴ See *Dagi* [1996] 2 VR 117 at 151-152 (Brooking JA), 164 (Tadgell JA), 183 (Phillips JA).

⁴⁵ Although two members of the Court noted the possibility that there might be limits on the legislative power of the State to regulate the law of contempt: see, for example, *Dagi* [1996] 2 VR 117 at 190 (Phillips JA), 205 (Hayne JA, dissenting).

40. We add one important qualification.

40.1 If the power to punish for contempt is a defining characteristic, we do not think the Parliament could pass a law that prohibited the Supreme Court from itself moving to punish for contempt, as opposed to regulating the way in which a person is able to commence contempt proceedings in the Court. As Hayne J observed in *Colina*, a “cardinal feature” of punishing for contempt is that it is an exercise of “judicial power *by the courts* ... not one to be exercised or controlled by the executive”.⁴⁶

40.2 We note that the Supreme Court’s power “to deal with a contempt summarily of its own motion” was expressly reserved by the provision considered in *Dagi*.⁴⁷

40.3 In contrast, we do not think there is any constitutional requirement that a court have the power to direct another body to commence a prosecution for contempt. (For the avoidance of doubt, we do not think there would be any constitutional difficulty in conferring such a power on a court).⁴⁸

Criminal Procedure Act

41. As to the third point identified at paragraph 30.3 above, we note that the High Court has repeatedly stated that all proceedings for contempt “must realistically be seen as criminal in nature”.⁴⁹ But the Court has been at “pains to make it clear” that this does not mean that proceedings for contempt “are, or are to be regarded as the equivalent of, a criminal trial”.⁵⁰

42. That is because there are “significant differences between the powers that are invoked against an alleged contemnor and those that are set in train under the criminal law”.⁵¹

⁴⁶ (1999) 200 CLR 386 at 429 [112] – emphasis in original, quoted in *Construction, Forestry, Mining and Energy Union v Boral* (2015) 256 CLR 375 at 388 [40] (French CJ, Kiefel, Bell, Gageler and Keane JJ) (*Boral*).

⁴⁷ See s 46(5)(c) of the *Public Prosecutions Act 1994* (Vic) as it then stood; *Dagi* [1996] 2 VR 117 at 178, 190 (Phillips JA), see also at 145-147 (Brooking JA)

⁴⁸ See (1999) 200 CLR 386 at 429 [111].

⁴⁹ (1995) 183 CLR 525 at 534 (Brennan, Deane, Toohey and Gaudron JJ), quoted in *Boral* (2015) 256 CLR 375 at 389 [42] (French CJ, Kiefel, Bell, Gageler and Keane JJ), see also at 393 [59] (Nettle J).

⁵⁰ *Boral* (2015) 256 CLR 375 at 389 [43] (French CJ, Kiefel, Bell, Gageler and Keane JJ), see also at 393 [59], 395 [65] (Nettle J).

⁵¹ *Colina* (1999) 200 CLR 386 at 428 [109] (Hayne J).

By way of example, a party to a civil proceeding “who wishes to complain that the other party has breached an order of the court is not in the same position as a prosecuting authority, which can gather evidence by compulsory processes of search and seizure before making a decision to charge the defaulting party with contempt”.⁵² Those comments were made in the course of a matter that “was at all times regulated by the laws relating to the civil jurisdiction”, including the Rules of Court.⁵³

43. We draw attention to the above example only to highlight the practical difficulties that might arise from seeking to apply the Criminal Procedure Act to all proceedings for contempt. But we do not think those practical difficulties amount to a constitutional difficulty. We do not think the authorities suggest that the Parliament could not regulate proceedings for contempt as criminal proceedings, if it chose to do so.

Replacement, not removal

44. We are asked whether the Parliament could legislate to replace the existing inherent power to punish for contempt with a statutory scheme (Question 2) — which we understand to contemplate incorporating the features of the inherent power in the statutory scheme (or codifying the inherent power).
45. That is a different question from whether the Parliament could remove altogether any power of the Supreme Court to punish for contempt.
46. As a general proposition, we do not think the *Kirk* principle would operate to preclude the Parliament from replacing the inherent power to punish for contempt with a statutory power to do the same thing. If there is to be a defining characteristic relating to the law of contempt, we see no reason to identify the “inherent character of the power to punish for contempt” as a defining characteristic of the Supreme Court.
47. Accordingly, so long as the Supreme Court retains the power to punish for contempt, we do not think that the source of that power (inherent or statutory) is relevant to the question whether the *Kirk* principle will be infringed.

⁵² *Boral* (2015) 256 CLR 375 at 389 [44] (French CJ, Kiefel, Bell, Gageler and Keane JJ).

⁵³ *Boral* (2015) 256 CLR 375 at 390 [46] (French CJ, Kiefel, Bell, Gageler and Keane JJ), 396 [66] (Nettle J).

48. However, similar to our analysis of the extent to which Parliament can regulate the inherent power,⁵⁴ there will be a point at which a statutory power to punish for contempt differs so markedly from the Court’s existing inherent power to punish for contempt that the statutory power cannot be characterised as a replacement for the inherent power. In those circumstances, it might be said that the Supreme Court has been deprived of the “power to punish for contempt” contrary to the *Kirk* principle.
49. Again, where that point lies will be a “question of substance, and therefore of degree”.⁵⁵ The answer will necessarily turn on the precise formulation of the replacement statutory power and on an assessment of the practical impact of the law on the power of the court to punish for contempt. The closer the statutory power is to the inherent power, the less likely is it that the *Kirk* principle will be violated.
50. We do not think there is anything to prevent the Parliament from legislating to require a proceeding for a statutory contempt to be instituted by a charge filed by the police, subject to the Supreme Court retaining the power to punish contempt on its own motion for the reasons (as explained at paragraph 40 above).
51. Finally, because the question whether the *Kirk* principle will be infringed is one of substance rather than form, there no impediment to the law being drafted in terms that are “user-friendly”. The challenge for the drafter will be to select language that captures the substantive concepts that are currently part of the common law.⁵⁶

“Revival” of inherent power

52. We are also asked a specific question as to whether, if the inherent power were replaced by a statutory scheme but that statutory scheme were later repealed, the inherent power would “revive” (Question 5).
53. We do not think that the inherent power would automatically “revive” as a result of the repeal of the statutory scheme. But we do not think there is any constitutional impediment that would prevent the Parliament from legislating to achieve that result.

⁵⁴ See paragraphs 28 to 29 above.

⁵⁵ See *Graham v Minister for Immigration and Border Protection* (2017) 263 CLR 1 at 27 [48] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ).

⁵⁶ See *R v Roach* [1988] VR 665 at 669-670 (Tadgell JA).

54. A variety of drafting techniques might be adopted to achieve that result. By way of example, the Parliament could expressly provide that, upon repeal of the relevant provisions, the power of the Court to punish for contempt is deemed to be what it was on the day before the statutory scheme took effect.⁵⁷ Such a provision could be included in the statutory scheme or in any later repealing statute.

Specific manifestations

55. As the Consultation Paper observes, at common law, courts “have long recognised different manifestations of contempt of court”.⁵⁸ The Commission has identified the “most common manifestations of contempt”⁵⁹ as follows:
- 55.1 contempt in or near the courtroom (that is, contempt in the face of the court);
 - 55.2 juror contempt;
 - 55.3 disobedience contempt arising from non-compliance with court orders or undertakings;
 - 55.4 contempt by publication that interfere with or prejudice pending proceedings (that is, sub judge contempt);
 - 55.5 contempt by publication that interferes with the administration of justice as a continuing process (that is, scandalising the court).
56. Our analysis above proceeds on the basis that the Supreme Court’s inherent power to punish for contempt is a single power, which constitutes a single defining characteristic of the Supreme Court.
57. On that hypothesis, it might be said that some manifestations of the power to punish for contempt are not essential to the maintenance of that defining characteristic. In *Colina*, Hayne J said:⁶⁰

⁵⁷ Or, indeed, at some other point in time: see *Colina* (1999) 200 CLR 386 at 397 [25] (Gleeson CJ and Gummow J), 429 [113] (Hayne J).

⁵⁸ Consultation Paper at paragraph 2.39.

⁵⁹ Consultation Paper at paragraph 2.43, see also at paragraph 1.36.

⁶⁰ (1999) 200 CLR 386 at 428 [111].

Although it may be that all forms of contempt are rooted in the need to protect the due administration of justice, some forms of contempt (like wilful disobedience of an order) are concerned more with the administration of justice in a particular case than other forms of contempt (like scandalising the court) which may be seen as more concerned with the general administration of justice.

58. Drawing on that type of reasoning, it might be possible to argue that say that the defining characteristic is primarily directed to those forms of contempt that are concerned more with the administration of justice in a particular case. The difficulty with that type of analysis would be two-fold:

58.1 first, it would be necessary to identify some explanation as to why the defining characteristic would be more concerned with one type of contempt than another; and

58.2 secondly, there would be difficulty in identifying where to draw the line between different forms of contempt.

59. Alternatively, it might be argued that it would be better to isolate more precisely particular identifying characteristics. Rather than the amorphous notion of the “power to punish for contempt” being a single defining characteristic, it might be said that each manifestation of the power to punish for contempt is a separate defining characteristic.

60. On that analysis, it would be necessary, at the very least, for it to be established that each manifestation of the power to punish for contempt existed at Federation. Assuming that it could be established that a particular manifestation of the power to punish for contempt is a defining characteristic:

60.1 We do not think there would be any difficulty in the Parliament regulating a particular manifestation of the power differently from other manifestations. However, consistent with the analysis at paragraphs 28 to 29 above, if the particular manifestation were regulated too extensively, there would be a point at which regulation might be better characterised as removal, in which case the *Kirk* principle would be infringed.

60.2 We do not think there would be any difficulty in the Parliament replacing a particular manifestation of the power with a statutory equivalent, so long as that

statutory equivalent did not differ too markedly from the existing power (as explained at paragraphs 44 to 49 above).

Scandalising the court

61. We are asked specifically about whether it would be possible to treat differently the power of the Supreme Court to punish for scandalising the court (Question 3).
62. On the first type of analysis identified at paragraphs 57 to 58 above, it might be possible to argue that the defining characteristic of the Supreme Court to punish for contempt is, at its core, not concerned with “scandalising contempt”, being a contempt concerned with the general administration of justice.
63. On the second type of analysis identified at paragraph 59 above, if it were established that the power to punish for scandalising contempt were a defining characteristic of the Supreme Court,⁶¹ then the *Kirk* principle may be infringed if that power were too extensively regulated, so as to constitute removal of that characteristic.
64. That possibility was specifically referred to by Basten JA in *Dowling v Prothonotary of the Supreme Court of New South Wales*.⁶² Speaking of the Supreme Court’s power to deal with “scandalising contempt” and with defiance of orders suppressing publication of statements made in the course of court proceedings, his Honour said:⁶³

A State law which deprived the Supreme Court of such powers would be likely to run foul of the principle established in *Kirk* ... because they would deprive the Court of an essential characteristic of a superior court of record.
65. However, more so than with respect to other manifestations of the power to punish for contempt, it may be possible to argue that the power to punish for scandalising contempt is not a defining characteristic of the Supreme Court.
66. In *Kirk*, the Court noted that the defining characteristic under consideration was in existence at both Federation and at the present day.⁶⁴ Drawing on that point, it might

⁶¹ As to which, see *Colina* (1999) 200 CLR 386 at 393-394 [12], 396 [20] (Gleeson CJ and Gummow J).

⁶² [2018] NSWCA 340 (*Dowling*).

⁶³ *Dowling* [2018] NSWCA 340 at [15] (Basten JA).

⁶⁴ See *Kirk* (2010) 239 CLR 531 at 581 [98] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

be possible to argue that, even if the power to punish for scandalising contempt were a defining characteristic as at Federation, it has since ceased to be a characteristic of that kind.

67. That argument might draw on the fact that the manifestation of the power has been abolished in the United Kingdom⁶⁵ — it could hardly be suggested that the superior courts in that jurisdiction have lost their capacity “to protect the administration of justice against contempts which are calculated to undermine it”.⁶⁶
68. On either type of analysis, there are reasonable arguments that the abolition of scandalising contempt would not infringe the *Kirk* principle. However, there is undoubtedly a degree of risk associated with those arguments.

Residual manifestations

69. We are asked, assuming specific identified manifestations of the common law of contempt of court were to be restated in statute and the corresponding common law abolished, how should any remaining residual manifestations of the common law of contempt of court be treated (Question 4).
70. If specified manifestations were not to be dealt with in the replacement statutory scheme, any residual inherent power might be abolished or retained.
71. There would be no constitutional difficulty in retaining any residual power that was not replaced by an equivalent statutory power. That could be done as a matter of drafting, for example, by stating that, if conduct is not covered by a statutory provision, then the Supreme Court may still punish that conduct in the exercise of its inherent power.
72. If a law purported to abolish any residual manifestation, then the abolition of those manifestation might be held to deprive the Supreme Court of a defining characteristic. That would depend on whether that manifestation was a separate defining characteristic of the Supreme Court, or whether it otherwise fell within the core of the

⁶⁵ See Consultation Paper at paragraph 8.10.

⁶⁶ Cf *Ahnee v Director of Public Prosecutions* [1999] 2 AC 294 at 3 (Lord Steyn), quoted in *Colina* (1999) 200 CLR 386 at 395 [17] (Gleeson CJ and Gummow J). See also McHugh J at 403 [48], noting that “it might be difficult at the present time to say that the offence of scandalising the court was part of the necessity jurisdiction”.

defining characteristic of the Court’s power to punish for contempt: see paragraphs 57 to 60 above.

Supplementary scheme

73. For the reasons explained at paragraphs 44 to 51 above, as a general proposition, we do not see any problem with the Parliament legislating to replace the existing inherent power of the Supreme Court to punish for contempt.
74. Proceeding in that way, however, carries more constitutional risk than merely supplementing the inherent power (as noted at paragraph 13 above). That is because we do not think that the conferral of supplementary powers would infringe the *Kirk* principle — by definition, supplementary powers could not be said to deprive the Supreme Court of a defining characteristic.
75. We are asked whether, if a supplementary scheme were introduced, the Parliament could legislate to state the priority or circumstances in which the Supreme Court is to have recourse to its inherent power to punish for contempt of court at common law (see Questions 7, 8 and 9).
76. We do not see any constitutional difficulty in the Parliament legislating to that effect. This could be achieved, for example, by stating that, if conduct is punishable in the exercise of the inherent power or under the statute, then the conduct should be punished under the statute except in specified circumstances.

Matters in federal jurisdiction

77. There are two points to make about the power of the Supreme Court to punish for contempt in proceedings that are in federal jurisdiction.
- 77.1 First, if a State law expressly confers a statutory power on the Supreme Court to punish for contempt, that power will need to be “picked up” and applied by the relevant provisions of the *Judiciary Act 1903* (Cth) (the **Judiciary Act**) in relation to criminal (s 68) and civil (s 79) proceedings that are in federal jurisdiction.⁶⁷

⁶⁷ See generally *Rizeq v Western Australia* (2017) 262 CLR 1; *Masson v Parsons* (2019) 93 ALJR 848.

77.2 Secondly, it has been said that the power to punish for contempt is an attribute of the judicial power of the Commonwealth (being the power that the Supreme Court necessary exercises in matters that are in federal jurisdiction).⁶⁸

78. In *Dupas v The Queen*, a case concerned with the inherent power to control abuse of process, the High Court observed:⁶⁹

Having regard both to the antiquity of the power and its institutional importance, there is much to be said for the view that in Australia the inherent power to control abuse of process should be seen, along with the contempt power, as an attribute of the judicial power provided for in Ch III of the Constitution.

79. The Court did not elaborate on the consequences that might flow from an inherent power being characterised as an attribute of the judicial power provided for in Ch III (that is, the judicial power of the Commonwealth). In *Dupas*, it was simply noted that “no question arises respecting the validity of any State legislation denying or limiting the inherent power of State courts to control abuse of their processes in matters not arising in federal jurisdiction”.⁷⁰

80. The fact that the contempt power is an attribute of the judicial power of the Commonwealth may limit the ability of State Parliament to regulate the exercise of the contempt power in proceedings that are in federal jurisdiction. Any law that purported to regulate that power in federal jurisdiction would necessarily need to be picked up and applied by the relevant provisions of the Judiciary Act. Those provisions are incapable of operating on laws that are inconsistent with the Constitution.

81. If a law purported to regulate the exercise of the contempt power too extensively, or purported to remove a particular manifestation of the contempt power, there is a risk that the High Court would hold that such a law was inconsistent with Ch III of the Constitution because the law purported to deny an attribute of the judicial power of the Commonwealth. Such a law would be incapable of applying in proceedings in federal jurisdiction because it could not be applied by the relevant provisions of the Judiciary Act.

⁶⁸ See *Colina* (1999) 200 CLR 386 at 395-396 [16]-[19] (Gleeson CJ and Gummow J), 429 [113] (Hayne J).

⁶⁹ (2010) 241 CLR 237 at 243 [15] (the Court) – emphasis added. See also *Hammond v Commonwealth* (1982) 152 CLR 188 at 206 (Deane J); *X7 v The Queen* (2013) 248 CLR 92 at 116 [38] (French CJ and Crennan J).

⁷⁰ *Dupas v The Queen* (2010) 241 CLR 237 at 243-244 [15] (the Court).

82. We think that the question whether a law infringes the *Kirk* principle is likely to involve a very similar analysis to the question whether a law is inconsistent with the nature of the judicial power of the Commonwealth. In practical terms, that means that, if a law is invalid because of the *Kirk* principle, it is unlikely that any further question will arise about the law's operation in proceedings in federal jurisdiction.
83. However, we note the (fairly slim) possibility that those questions are different, in which case a law might survive a *Kirk* challenge but not survive a direct Ch III challenge. That would result in the Supreme Court having different powers in relation to contempt depending on whether it was exercising federal jurisdiction or its inherent (State) jurisdiction.

IMPLIED FREEDOM OF POLITICAL COMMUNICATION

84. The implied freedom of political communication is a “restriction on legislative power which arises as a necessary implication from ss 7, 24, 64 and 128 and related sections of the *Constitution*”.⁷¹ To determine whether a law infringes that restriction, it is necessary to ask the following three questions:⁷²
1. Does the law effectively burden freedom of political communication either in its terms, operation or effect?
 2. Is the purpose of the law legitimate, in the sense that it is compatible with the maintenance of the constitutionally prescribed system of government?
 3. Is the law reasonably appropriate and adapted to advance that purpose in a manner compatible with the maintenance of the constitutionally prescribed system of government?
85. If the answer to the first question is “yes”, then it is necessary to consider the second and third questions. If the answer to either of those questions is “no”, the law will be invalid.
86. Differing approaches have been adopted by members of the Court to answering the third question. However, irrespective of which approach is adopted, the question is concerned with whether the burden imposed by the law is “justified”.⁷³

⁷¹ *Comcare v Banerji* [2019] HCA 23 at [20] (Kiefel CJ, Bell, Keane and Nettle JJ).

⁷² See *Clubb v Edwards* (2019) 93 ALJR 448 (*Clubb*) at 462 [5] (Kiefel CJ, Bell and Keane JJ), 504 [256] (Nettle J), 523 [354] (Gordon J).

⁷³ See *Clubb* (2019) 93 ALJR 448 at 469-470 [64] (Kiefel CJ, Bell and Keane JJ), 484 [162] (Gageler J), 504 [256] (Nettle J), 527 [369] (Gordon J), 544 [461] (Edelman J).

First question — burden?

87. In assessing whether a burden exists and, if so, the extent of any burden, it is important to recognise that an important distinction exists between political and non-political communication. The implied freedom only operates to protect the former kind of communication.
88. Relevantly for present purposes, McHugh J explained in *APLA v Legal Services Commissioner (NSW)* that there is “a difference between a communication concerning legislative and executive acts or omissions concerned with the administration of justice and communications concerning that subject that do not involve, expressly or inferentially, acts or omissions of the legislature or the Executive Government”.⁷⁴ His Honour continued:⁷⁵

Discussion of the appointment or removal of judges, the prosecution of offences, the withdrawal of charges, the provision of legal aid and the funding of courts, for example, are communications that attract the *Lange* freedom. That is because they concern, expressly or inferentially, acts or omissions of the legislature or the Executive Government. They do not lose the freedom recognised in *Lange* because they also deal with the administration of justice in federal jurisdiction. However, communications concerning the results of cases or the reasoning or conduct of the judges who decide them are not ordinarily within the *Lange* freedom. In some exceptional cases, they may be. But when they are, it will be because in some way such communications also concern the acts or omissions of the legislature or the Executive Government.

The distinction between communications concerning the administration of justice that are within the *Lange* freedom and those that are not may sometimes appear to be artificial. But it is a distinction that arises from the origins of the constitutional implication concerning freedom of communication on political and government matters. The *Lange* freedom arises from the necessity to promote and protect representative and responsible government. Because it arises by necessity, the freedom is limited to “the extent of the need.” Courts and judges and the exercise of judicial power are not themselves subjects that are involved in representative or responsible government in the constitutional sense.

⁷⁴ (2005) 224 CLR 322 at 361 [65].

⁷⁵ *APLA v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 361 [65]-[66] (McHugh J) – emphasis added. See also *Herald & Weekly Times Ltd v Popovic* (2003) 9 VR 1 at 10-11 [9]-[10] (Winneke ACJ).

89. That line of reasoning was expressly endorsed by six Justices of the Court in *Hogan v Hinch*.⁷⁶ It suggests that a statutory provision, which affects communications that relate only to the administration of justice, will not impose any burden on the implied freedom of political communication.⁷⁷
90. Some forms of contempt, such as disobeying the court, might not have any connection to political matters. It might therefore be possible for a statutory provision directed to that type of contempt to be framed in a way that did not impose any burden on the implied freedom. In contrast, other forms of contempt, particularly those relating to publication of material out of court, may often overlap with political matters.⁷⁸
91. Even if a law regulating contempt has the effect of limiting some political communication (as well as communication relating to the administration of justice), if the law mirrored the existing common law of contempt, it would be arguable that such a law does not impose any burden additional to the burden that is presently imposed by the common law (and any overlapping statutory law). In that case, the answer to the first question of the implied freedom analysis would be “no” and the law would be valid.
92. However, even if a law operated to impose a burden additional to the burden that is presently imposed by the common law (and any overlapping statutory law), it would be arguable that it would only be necessary to justify that additional burden.⁷⁹
93. Relatedly, we think that, if a law were directed to conduct that is punishable under the current law of contempt, that law could be characterised as having only an indirect or incidental effect on the implied freedom. An indirect or an incidental burden may be more readily justified.⁸⁰

⁷⁶ (2011) 243 CLR 506 at 554-555 [92]-[94] (Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ). See also *Clubb* (2018) 93 ALJR 448 at 465 [31] (Kiefel CJ, Bell and Keane JJ), 502 [249] (Nettle J), 540 [439] (Edelman J).

⁷⁷ See *Dowling* [2018] NSWCA 340 at [108]-[109] (Macfarlan JA).

⁷⁸ See *John Fairfax Publications Ltd v Attorney-General (NSW)* (2000) 158 FLR 81 at 98-99 [92]-[99] (Spigelman CJ).

⁷⁹ See *Brown v Tasmania* (2017) 261 CLR 328 at 409-411 [262]-[265] (Nettle J), 456-457 [401], 460 [411], 462 [419]-[421] (Gordon J), 507 [567] (Edelman J); *Comcare v Banerji* [2019] HCA 23 at [89] (Gageler J).

⁸⁰ See *Hogan v Hinch* (2011) 243 CLR 506 at 555-556 [94]-[96] (Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ); *Brown v Tasmania* (2017) 261 CLR 328 at 369 [128] (Kiefel CJ, Bell and Keane JJ).

Second question — legitimate purpose?

94. We think that a law that either regulated the existing power to punish for contempt or conferred a new power would be held to have a legitimate purpose.
95. That conclusion is supported by various statements made in intermediate appellate courts,⁸¹ as well as the reasoning of three Justices in *Nationwide News*.⁸² There, a majority of the High Court invalidated a provision that made it an offence to use words calculated to bring a member of the Industrial Relations Commission or the Commission as a whole into disrepute. Three members of the Court (Deane and Toohey JJ and, in a separate judgment, Gaudron J) reached that conclusion on the basis that the provision infringed the implied freedom. Their Honours, however, accepted that the provision served “the public interest” or “an end authorised by s 51(xxxv)”.⁸³

Third question — reasonably appropriate and adapted?

96. As a general proposition, we think that a law that either regulated the existing power to punish for contempt or conferred a new power would be held to be reasonably appropriate and adapted to achieving a legitimate purpose.
97. That conclusion is supported by a number of authorities. In *Theophanous v Herald v Weekly Times Ltd*, Deane J, in the course of holding that the common law of defamation was required to conform with implied freedom, said:⁸⁴

... nothing in this judgment should be understood as suggesting that the traditional powers of the Parliament and superior courts to entertain proceedings for contempt are not justifiable in the public interest. In that regard, it is important to remember that, while the distinction is not always as clear as it should be ... the justification of proceedings for contempt of court or parliament lies not in the protection of the reputation of the individual judge or parliamentarian but in the need to ensure that parliaments and courts are able effectively to discharge the functions, duties and powers entrusted to them by the people.

⁸¹ See *John Fairfax Publications Pty Ltd v Attorney-General (NSW)* (2000) 158 FLR 81 at 101 [110]-[111] (Spigelman CJ); *Dowling* [2018] NSWCA 340 at [110]-[112] (Macfarlan JA).

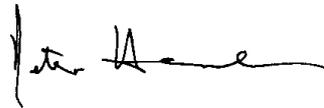
⁸² (1992) 177 CLR 1.

⁸³ See *Nationwide News* (1992) 177 CLR 1 at 78 (Deane and Toohey JJ), 95 (Gaudron J).

⁸⁴ (1994) 182 CLR 104 at 187 – citation omitted.

98. Those comments are consistent with various earlier and later statements in intermediate appellate courts, a number of which were collated by Spigelman CJ in *John Fairfax Publications Ltd v Attorney-General (NSW)*.⁸⁵
99. To the extent that any statutory scheme for the punishment of contempt imposes a greater burden than the existing common law, the reasoning of Toohey and Deane, and Gaudron J, in *Nationwide News* is again of relevance.⁸⁶ In reaching the conclusion that the impugned provision was not reasonably appropriate and adapted to achieving a legitimate purpose — and thus invalid — it was important to those Justices that the provision did not provide for defences available under the law of defamation and contempt.⁸⁷ That point highlights the potential difficulty that might arise if any replacement statutory scheme departs too far from the existing common law.

3 September 2019



Peter Hanks QC
Owen Dixon Chambers West



Thomas Wood
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⁸⁵ [2000] NSWCA 198 at [110]-[112]. See also *Dowling* [2018] NSWCA 340 at [15]-[16] (Basten JA), [112] (Macfarlan JA)

⁸⁶ (1992) 177 CLR 1.

⁸⁷ See (1992) 177 CLR 1 at 67-68, 78-79 (Deane and Toohey JJ), 92 (Gaudron J).

Appendix E: Recommended fault element and penalties

Recommended fault element and penalties for proposed Contempt of Court Act

| Categories of contempt | Fault element | Maximum penalty, including fine (for an individual and a body corporate) |
|--|---|--|
| General category of contempt | Intention or recklessness as to risk of interference | For an individual, 10 years imprisonment and/or 1200 penalty units For a body corporate, 6000 penalty units |
| Disruptive behaviour in or near the courtroom | Conduct must be intended Strict liability for consequence of conduct | For the Magistrates' Court, Children's Court and Coroners Court: for an individual, 6 months imprisonment and/or a fine of 25 penalty units. For the Supreme and County Courts: for the making of an unauthorised recording of a proceeding, including by taking photographs, filming or other recording; insulting behaviour; disrupting or interrupting a proceeding, or for defying an order or direction made by a judicial officer at and in relation to the hearing of the proceeding: for an individual, 12 months imprisonment and/or a fine of 120 penalty units, for a body corporate 600 penalty units for obstructing, threatening, abusing, assaulting or seeking to improperly influence any person in or near the court, or for witness misconduct: for an individual, 5 years imprisonment and/or a fine of 600 penalty units, for a body corporate 3000 penalty units. |
| Non-compliance | Knowledge of the order or undertaking Conduct must be intended Strict liability as to the breach of order | For an individual, 5 years imprisonment and/or a fine of 600 penalty units For a body corporate, 3000 penalty units or three times the value of any benefit, or if this cannot be determined, 10% of the annual turnover |
| Publishing material that prejudices a legal proceeding | Publication must be intended Strict liability for consequence of conduct (with statutory defence of reasonable care) | For an individual, 2 years imprisonment or 240 penalty units For a body corporate, 1200 penalty units |
| Publishing material undermining public confidence in the judiciary or courts | Intention or recklessness as to whether publication created a serious risk | For an individual, 2 years imprisonment or 240 penalty units For a body corporate, 1200 penalty units for bodies corporate |

Recommended penalties under the Open Courts Act

| Offence | Legislation | Maximum penalty, including fine (for an individual and a body corporate) |
|---|---|---|
| Breach of a statutory suppression order | Ss 23, 27 of the Open Courts Act | For an individual, 2 years imprisonment or 240 penalty units For a body corporate, 1200 penalty units |
| Breach of a common law suppression order or pseudonym order | Proposed new section | For an individual, 2 years imprisonment or 240 penalty units For a body corporate, 1200 penalty units |
| Publication of information about directions hearings and sentence indications | Now s 3(1)(c) of the Judicial Proceedings Reports Act | For an individual, 6 months imprisonment and/or 60 penalty units For a body corporate, 300 penalty units |
| Identification of victim of sexual offence | Now s 4(1A) of the Judicial Proceedings Reports Act | For an individual, 6 months imprisonment and/or 60 penalty units For a body corporate, 300 penalty units |

Appendix F: General category of contempt—comparable offences and penalties

In this Appendix and Appendices I–M, the maximum monetary penalty includes, if the legislation itself does not specify a maximum, any maximum that applies as a result of general legislation.¹ In Queensland, South Australia, Western Australia, and the ACT, the maximum monetary penalty that applies if none is specified in the legislation differs depending on the court, and so has not been specified.² For the purposes of facilitating comparison between jurisdictions, monetary penalty units have been calculated according to their respective values in the financial year 2019–20.

Providing false or misleading evidence or information

| Jurisdiction | Maximum penalty, including any applicable fine (for an individual) at 2019–20 value | Legislation |
|--------------|---|--|
| Vic | 12 months imprisonment and/or fine of 120 penalty units (\$19,826.40) ^{t3} | <i>Inquiries Act 2014</i> (Vic) ss 50, 90, 120; <i>Independent Broad-based Anti-Corruption Commission Act 2011</i> (Vic) s 182 |
| Vic | 6 months imprisonment and/or fine of 60 penalty units (\$9913.20) | <i>Victorian Civil and Administrative Tribunal Act 1998</i> (Vic) s 136 |
| Vic | Fine of 120 penalty units (\$19,826.40) | <i>Mental Health Act 2014</i> (Vic) s 205 |
| NSW | 5 years imprisonment and/or fine of 1000 penalty units (\$110,000) | <i>Crimes Act 1900</i> (NSW) ss 330, 335 |
| Qld | 12 months imprisonment and/or fine of 85 penalty units (\$11343.25) | <i>Crime and Corruption Act 2001</i> (Qld) ss 217(1), 218 |
| Qld | Fine of 100 penalty units (\$13,345) | <i>Queensland Civil and Administrative Tribunal Act 2009</i> (Qld) s 216; <i>Mental Health Act 2016</i> (Qld) s 761 |

| Jurisdiction | Maximum penalty, including any applicable fine (for an individual) at 2019–20 value | Legislation |
|--------------|--|--|
| SA | 5 years imprisonment and/or fine of \$22,000 | <i>Australian Crime Commission (South Australia) Act 2004 (SA) s 25</i> |
| SA | 4 years imprisonment and/or fine of \$20,000 | <i>Independent Commissioner against Corruption Act 2012 (SA) sch 2 cl 10</i> |
| WA | 7 years imprisonment ³ | <i>Criminal Code (WA) s 127</i> |
| WA | 5 years imprisonment and/or fine of \$100,000 | <i>Corruption, Crime and Misconduct Act 2003 (WA) s 168</i> |
| WA | Fine of \$10,000 | <i>State Administrative Tribunal Act 2004 (WA) s 98</i> |
| Tas | 21 years imprisonment ³ (all crimes in the Code which do not have a specified penalty of 21 years) ⁴ | <i>Criminal Code (Tas) s 95</i> |
| NT | 7 years imprisonment and/or fine of 700 penalty units (\$109,900) | <i>Criminal Code (NT) s 118</i> |
| ACT | 7 years imprisonment and/or fine of 700 penalty units (\$112,000) | <i>Criminal Code 2002 (ACT) s 705</i> |
| Cth | 5 years imprisonment and/or fine of 300 penalty units (\$63,000) | <i>Crimes Act 1914 (Cth) s 35</i> |
| Cth | 5 years imprisonment and/or fine of 200 penalty units (\$42,000) | <i>Royal Commissions Act 1902 (Cth) s 6H</i> |
| Cth | 12 months imprisonment and/or fine of 60 penalty units (\$12,600) | <i>Administrative Appeals Tribunal Act 1975 (Cth) s 62A</i> |
| Cth | Fine of 40 penalty units (\$8400) | <i>Native Title Act 1993 (Cth) s 173</i> |

Interfering with (destroying, fabricating, altering etc) evidence

| Jurisdiction | Maximum penalty, including any applicable fine (for an individual) at 2019–20 value | Legislation |
|--------------|---|---|
| Vic | 5 years imprisonment and/or fine of 600 penalty units (\$99,132) | <i>Crimes Act 1958 (Vic) s 254</i> |
| NSW | 10 years imprisonment and/or fine of 1000 penalty units (\$110,000) | <i>Crimes Act 1900 (NSW) s 317</i> |
| Qld | 7 years imprisonment ³ | <i>Criminal Code (Qld) ss 126, 129</i> |
| SA | 7 years imprisonment ³ | <i>Criminal Law Consolidation Act 1935 (SA) s 243</i> |
| WA | 7 years imprisonment ³ | <i>Criminal Code (WA) ss 129, 132</i> |
| WA | 3 years imprisonment and/or fine of \$60000 | <i>Corruption, Crime and Misconduct Act 2003 (WA) s 171</i> |
| Tas | 21 years imprisonment ³ (all crimes in the Code which do not have a specified penalty have a default penalty of 21 years) ⁴ | <i>Criminal Code (Tas) ss 97, 99</i> |
| NT | 7 years imprisonment and/or fine of 700 penalty units (\$109,900) | <i>Criminal Code (NT) s 99</i> |

| Jurisdiction | Maximum penalty, including any applicable fine (for an individual) at 2019–20 value | Legislation |
|--------------|---|--|
| NT | 3 years imprisonment and/or fine of 300 penalty units (\$47,100) | <i>Criminal Code</i> (NT) s 102 |
| ACT | 7 years imprisonment and/or fine of 700 penalty units (\$112,000) | <i>Criminal Code</i> (ACT) s 706 |
| Cth | 5 years imprisonment and/or fine of 300 penalty units (\$63,000) | <i>Crimes Act 1914</i> (Cth) ss 36, 39 |
| Cth | 2 years imprisonment and/or fine of 100 penalty units (\$21,000) | <i>Royal Commissions Act 1902</i> (Cth) s 6K |

Perjury

| Jurisdiction | Maximum penalty, including any applicable fine (for an individual) at 2019–20 value | Legislation |
|--------------|--|---|
| Vic | 15 years imprisonment and/or fine of 1800 penalty units (\$297,396) | <i>Crimes Act 1958</i> (Vic) s 314 |
| NSW | 10 years imprisonment and/or fine of 1000 penalty units (\$110,000) | <i>Crimes Act 1900</i> (NSW) s 327 |
| Qld | 14 years imprisonment ³ or life imprisonment, if done to procure conviction of another person for a crime punishable with imprisonment for life | <i>Criminal Code</i> (Qld) s 124(1) |
| SA | 7 years imprisonment ³ | <i>Criminal Law Consolidation Act 1935</i> (SA) s 242 |
| WA | 14 years imprisonment ³ | <i>Criminal Code</i> (WA) s 125 |
| Tas | 21 years imprisonment ³ (all crimes in the Code which do not have a specified penalty have a default penalty of 21 years) ⁵ | <i>Criminal Code</i> (Tas) s 94 |
| NT | 14 years imprisonment and/or fine of 1400 penalty units (\$219,800) | <i>Criminal Code</i> (NT) s 97 |
| ACT | 7 years imprisonment and/or fine of 700 penalty units (\$112,000) | <i>Criminal Code 2002</i> (ACT) s 703 |

Perverting the course of justice

| Jurisdiction | Maximum penalty, including any applicable fine (for an individual) at 2019–20 value | Legislation |
|--------------|---|------------------------------------|
| Vic | 25 years imprisonment and/or fine of 3000 penalty units (\$495,660) | <i>Crimes Act 1958</i> (Vic) s 320 |
| NSW | 14 years imprisonment and/or fine of 1000 penalty units (\$110,000) | <i>Crimes Act 1900</i> (NSW) s 318 |

| Jurisdiction | Maximum penalty, including any applicable fine (for an individual) at 2019–20 value | Legislation |
|--------------|---|--|
| Tas | 21 years imprisonment ³ (all crimes in the Code which do not have a specified penalty have a default penalty of 21 years) ⁴ | <i>Criminal Code</i> (Tas) s 105 |
| Qld | 7 years imprisonment ³ | <i>Criminal Code</i> (Qld) s 140 |
| SA | 4 years imprisonment ³ | <i>Criminal Law Consolidation Act</i> (SA) s 256 |
| WA | 7 years imprisonment ³ | <i>Criminal Code</i> (WA) s 143 |
| NT | 15 years imprisonment and/or fine of 1500 penalty units (\$235,500) | <i>Criminal Code</i> (NT) s 109 |
| ACT | 7 years imprisonment and/or fine of 700 penalty units (\$112,000) | <i>Criminal Code</i> 2002 (ACT) s 713 |
| Cth | 10 years imprisonment and/or fine of 600 penalty units (\$126,000) | <i>Crimes Act 1914</i> (Cth) s 43 |

Interference with witnesses, jurors and others involved in proceedings

Bribery or corruption

| Offence | Jurisdiction | Maximum penalty, including any applicable fine (for an individual) at 2019–20 value | Legislation |
|------------------------------------|--------------|---|---|
| Embracery | Vic | 15 years imprisonment and/or fine of 1800 penalty units (\$297,396) | <i>Crimes Act 1958</i> (Vic) s 320 |
| Corruption of witnesses and jurors | NSW | 10 years imprisonment and/or fine of 1000 penalty units (\$110,000) | <i>Crimes Act 1900</i> (NSW) s 321 |
| Corruption of jurors and witnesses | Qld | 7 years imprisonment ³ | <i>Criminal Code</i> (Qld) ss 122, 127 |
| Bribery or corruption of witness | SA | 10 years imprisonment ³ | <i>Criminal Law Consolidation Act 1935</i> (SA) s 244(1), (2) |
| Corruption of witness | WA | 7 years imprisonment ³ | <i>Criminal Code</i> (WA) s 130 |
| Corrupting or threatening jurors | WA | 5 years imprisonment ³ | <i>Criminal Code</i> (WA) s 123 |
| Bribery of witness | WA | 5 years imprisonment and/or fine of \$100,000 | <i>Corruption, Crime and Misconduct Act 2003</i> (WA) s 169 |

| Offence | Jurisdiction | Maximum penalty, including any applicable fine (for an individual) at 2019–20 value | Legislation |
|---|--------------|---|--|
| Corruption of witnesses | Tas | 21 years imprisonment ³ (all crimes in the Code which do not have a specified penalty have a default penalty of 21 years) ⁴ | <i>Criminal Code</i> (Tas) s 98 |
| Corruption of witnesses or jurors | NT | 7 years imprisonment and/or fine of 700 penalty units (\$109,900) | <i>Criminal Code</i> (NT) ss 96, 100 |
| Corrupting or threatening jurors | NT | 7 years imprisonment and/or fine of 700 penalty units (\$109,900) | <i>Criminal Code</i> (NT) s 95 |
| Corruption in relation to legal proceedings | ACT | 7 years imprisonment and/or fine of 700 penalty units (\$112,000) | <i>Criminal Code 2002</i> (ACT) s 707 |
| Bribery of jurors or potential jurors | Cth | 10 years imprisonment and/or fine of 600 penalty units (\$126,000) | <i>Federal Court of Australia Act</i> (Cth) s 58AG |
| Corruption or bribery of witnesses | Cth | 5 years imprisonment and/or fine of 300 penalty units (\$63,000) | <i>Crimes Act 1914</i> (Cth) s 37; <i>Royal Commissions Act 1902</i> (Cth) s 61 |

Deceiving witnesses

| Offence | Jurisdiction | Maximum penalty, including any applicable fine (for an individual) at 2019--20 value | Legislation |
|---|--------------|--|---|
| Deceiving witness | Qld | 3 years imprisonment ³ | <i>Criminal Code</i> (Qld) s 128 |
| Deceiving witness | SA | 10 years imprisonment ³ | <i>Criminal Law Consolidation Act 1935</i> (SA) s 244(5) |
| Deceiving witness | WA | 3 years imprisonment ³ | <i>Criminal Code</i> (WA) s 131 |
| Fraud on witness | WA | 3 years imprisonment and/or fine of \$60,000 | <i>Corruption, Crime and Misconduct Act 2003</i> (WA) s 170 |
| Deceiving witnesses | NT | 3 years imprisonment and/or fine of 300 penalty units (\$47,100) | <i>Criminal Code</i> (NT) s 101 |
| Deceiving witness, interpreter or juror etc | ACT | 5 years imprisonment and/or fine of 500 penalty units (\$80,000) | <i>Criminal Code 2002</i> (ACT) s 708 |

| Offence | Jurisdiction | Maximum penalty, including any applicable fine (for an individual) at 2019–20 value | Legislation |
|---------------------|--------------|---|---|
| Deceiving witnesses | Cth | 2 years imprisonment and/or fine of 120 penalty units (\$25,200) | <i>Crimes Act 1914</i> (Cth) s 38; <i>Royal Commissions Act 1902</i> (Cth) s 6J |

Influencing, threatening and victimising witnesses and jurors

| Offence | Jurisdiction | Maximum penalty, including any applicable fine (for an individual) at 2019–20 value | Legislation |
|--|--------------|---|--|
| Intimidation or reprisals relating to involvement in investigation or criminal proceedings | Vic | 10 years imprisonment and/or fine of 1200 penalty units (\$198,264) | <i>Crimes Act 1958</i> (Vic) s 257 |
| Detrimental action against inquiry members | Vic | 2 years imprisonment and/or fine of 240 penalty units (\$39652.8) | <i>Inquiries Act 2014</i> (Vic) ss 52, 92, 122 |
| Dismissal of employee because juror | Vic | 12 months imprisonment and/or fine of 120 penalty units (\$19,826.40) | <i>Juries Act 2000</i> (Vic) s 76 |
| Employers taking detrimental information against witnesses | Vic | 12 months imprisonment and/or fine of 120 penalty units (\$19,826.40) | <i>Inquiries Act 2014</i> (Vic) ss 51, 91, 121 |
| Threatening or intimidating judges, witnesses, jurors etc, or reprisals | NSW | 10 years imprisonment and/or fine of 1000 penalty units (\$110,000) | <i>Crimes Act 1900</i> (NSW) ss 322, 326 |
| Threatening or intimidating victims or witnesses | NSW | 7 years imprisonment and/or fine of 1000 penalty units (\$110,000) | <i>Crimes Act 1900</i> (NSW) s 315A |
| Influencing witnesses or jurors | NSW | 7 years imprisonment and/or fine of 1000 penalty units (\$110,000) | <i>Crimes Act 1900</i> (NSW) s 323 |
| Soliciting information from or harassing jurors or former jurors | NSW | 7 years imprisonment and/or fine of 1000 penalty units (\$110,000) | <i>Jury Act 1977</i> (NSW) s 68A |
| Unlawful dismissal of or prejudice to employees summoned for jury service | NSW | 12 months imprisonment and/or fine of 50 penalty units (\$5500) | <i>Jury Act 1977</i> (NSW) s 69 |
| Other offences relating to employment conditions of juror | NSW | 20 penalty units (\$2200) | <i>Jury Act 1977</i> (NSW) s 69A |

| Offence | Jurisdiction | Maximum penalty, including any applicable fine (for an individual) at 2019–20 value | Legislation |
|---|--------------|--|---|
| Retaliation against or intimidation of judicial officer, juror, witness in relation to prescribed offence | Qld | 10 years imprisonment ³ | <i>Criminal Code</i> (Qld) s 119B(1A) |
| Retaliation against or intimidation of judicial officer, juror, witness | Qld | 7 years imprisonment ³ | <i>Criminal Code</i> (Qld) s 119B(1) |
| Injury or detriment to witness | Qld | 3 years imprisonment and/or fine of 255 penalty units (\$34,029.75) | <i>Crime and Corruption Act 2001</i> (Qld) s 211 |
| Victimisation of witness or other person involved in proceedings | Qld | Fine of 85 penalty units (\$11,343.25) | <i>Crime and Corruption Act 2001</i> (Qld) s 212 |
| Offences relating to jurors with intention of influencing outcome of proceedings | SA | 10 years imprisonment ³ | <i>Criminal Law Consolidation Act 1935</i> (SA) s 245 |
| Threats or reprisals to those involved in criminal investigations or judicial proceedings | SA | 10 years imprisonment ³ | <i>Criminal Law Consolidation Act 1935</i> (SA) s 248 |
| Harassment to obtain information about jury's deliberations | SA | 2 years imprisonment and/or fine of \$10,000 | <i>Criminal Law Consolidation Act 1935</i> (SA) s 247 |
| Corrupting or threatening jurors | WA | 5 years imprisonment ³ | <i>Criminal Code</i> (WA) s 123 |
| Injury or detriment to witness, dismissal by employer of witness | WA | 5 years imprisonment and/or fine of \$100,000 | <i>Corruption, Crime and Misconduct Act 2003</i> (WA) ss 173, 174 |
| Victimisation of witness or other person involved in proceedings | WA | 3 years imprisonment and/or fine of \$60,000 | <i>Corruption, Crime and Misconduct Act 2003</i> (WA) s 175 |
| Threatening witness before Royal Commission | WA | 2 years imprisonment ³ | <i>Criminal Code</i> (WA) s 128 |
| Dismissal of employees because juror | WA | Fine of \$10,000 | <i>Juries Act 1957</i> (WA) s 56 |
| Interferences or reprisals against witness | Tas | 21 years imprisonment ³ (all crimes in the Code which do not have a specified penalty of 21 years) ⁶ | <i>Criminal Code</i> (Tas) s 100 |
| Influencing or threatening jurors | Tas | 5 years imprisonment and/or fine of 500 penalty units (\$84,000) | <i>Juries Act 2003</i> (Tas) s 63 |

| Offence | Jurisdiction | Maximum penalty, including any applicable fine (for an individual) at 2019–20 value | Legislation |
|--|--------------|---|--|
| Interference with witness or reprisals against witness | Tas | 2 years imprisonment and/ or fine of 100 penalty units (\$16,800) | <i>Commissions of Inquiry Act 1995</i> (Tas) s 33 |
| Dismissal by employers of witness | Tas | 2 years imprisonment and/ or fine of 100 penalty units (\$16,800) | <i>Commissions of Inquiry Act 1995</i> (Tas) s 33(3) |
| Interferences with and reprisals against witness | Tas | 12 months imprisonment and/or fine of 5000 penalty units (\$840,000) | <i>Integrity Commission Act 2009</i> (Tas) ss 80(1), ((2) |
| Corrupting or threatening jurors | NT | 7 years imprisonment and/ or fine of 700 penalty units (\$109,900) | <i>Criminal Code</i> (NT) s 95 |
| Threats or reprisals to those involved in criminal investigations or judicial proceedings or against public officers | NT | 7 years imprisonment and/ or fine of 700 penalty units (\$109,900) | <i>Criminal Code</i> (NT) s 103A |
| Unlawful dismissal of or prejudice to employees summoned for jury service | NT | 12 months imprisonment and/or fine of 40 penalty units (\$6280) | <i>Juries Act 1962</i> (NT) s 52 |
| Threatening etc witness, interpreter or juror | ACT | 5 years imprisonment and/ or fine of 500 penalty units (\$80,000) | <i>Criminal Code 2002</i> (ACT) s 710 |
| Preventing attendance etc of witness, interpreter or juror, or production of evidence | ACT | 5 years imprisonment and/ or fine of 500 penalty units (\$80,000) | <i>Criminal Code 2002</i> (ACT) ss 709, 711 |
| Threatening etc participant in criminal investigation | ACT | 5 years imprisonment and/ or fine of 500 penalty units (\$80,000) | <i>Criminal Code 2002</i> (ACT) s 709A |
| Reprisals against person involved in proceeding | ACT | 5 years imprisonment and/ or fine of 500 penalty units (\$80,000) | <i>Criminal Code 2002</i> (ACT) s 712 |
| Unlawful dismissal of or prejudice to employees summoned for jury service | ACT | 6 months imprisonment and/or fine of 50 penalty units (\$8000) | <i>Juries Act 1967</i> (ACT) s 44AA |
| Causing harm to jurors, potential jurors or former jurors | Cth | 10 years imprisonment and/or fine of 600 penalty units (\$126,000) | <i>Federal Court of Australia Act 1976</i> (Cth) s 58AH(1) |
| Threatening to cause harm to jurors, potential jurors or former jurors | Cth | 7 years imprisonment and/ or fine of 420 penalty units (\$88,200) | <i>Federal Court of Australia Act 1976</i> (Cth) s 58AH(2) |

| Offence | Jurisdiction | Maximum penalty, including any applicable fine (for an individual) at 2019–20 value | Legislation |
|--|--------------|---|--|
| Intimidation of witnesses etc | Cth | 5 years imprisonment and/or fine of 300 penalty units (\$63,000) | <i>Crimes Act 1914</i> (Cth) s 36A |
| Victimisation of witness or other person involved in proceedings | Cth | 2 years imprisonment and/or fine of 120 penalty units (\$25,200) | <i>Law Enforcement Integrity Commissioner Act 2006</i> (Cth) s 220 |
| Preventing witnesses from attending court | Cth | 12 months imprisonment and/or fine of 60 penalty units (\$12,600) | <i>Crimes Act 1914</i> (Cth) s 40 |
| Obstructing jurors or potential jurors | Cth | 12 months imprisonment and/or fine of 60 penalty units (\$12,600) | <i>Federal Court of Australia Act</i> (Cth) s 58AI |
| Dismissal by employers of witness, injury to witness | Cth | 12 months imprisonment and/or fine of 10 penalty units (\$2100) | <i>Royal Commissions Act 1902</i> (Cth) ss 6M, 6N |

1 These include: the application of the penalty scale in *Sentencing Act 1991* (Vic) s 109; the default monetary penalty of \$1000 in New South Wales: *Crimes (Sentencing Procedure) Act 1999* (NSW) s 15; the multiplier of 100 penalty units in the *Sentencing Act 1995* (NT) s 28; and the multiplier of 60 penalty units in the *Crimes Act 1914* (Cth).

2 See *Penalties and Sentences Act 2015* (Qld) ss 45–46; *Sentencing Act 2017* (SA) s 119; *Sentencing Act 1995* (WA) s 41; *Crimes (Sentencing) Act 2005* (ACT) s 15.

3 Penalty units are not specified, as in this jurisdiction maximum penalty differs depending on court (see n 2) or there is no default maximum penalty.

4 *Criminal Code Act 1924* (Tas) s 389(3).

5 Ibid.

6 *Criminal Code Act 1924* (Tas) s 389(3).

Appendix G: Selected sentences in contempt cases

This appendix provides an illustrative snapshot of the range of sentences imposed by Australian courts, with a focus on Victorian courts.

Contempt in the face of the court

| State | Court | Case | Description | Sentence |
|-------|-----------------|---|--|--|
| VIC | Supreme Court | <i>Slaveski v The Queen</i> [2015] VSC 416 | Conviction on nine charges of threatening, violent, abusive and offensive language in calls, emails and in court to judicial officers, court employees, lawyers and their families. Prior convictions; mental health considerations. | 23 months imprisonment (for 9 charges), with sentences varying between 2–6 months imprisonment for each charge, other than 9 months for charge in relation to email. |
| Vic | Court of Appeal | <i>Slaveski v The Queen</i> [2012] VSCA 48 | Behaviour of abusing and threatening presiding judge; disturbing proceeding; making allegations improperly. Pleaded not guilty to one charge. | 2 months imprisonment. |
| NSW | Supreme Court | <i>Prothonotary of the Supreme Court of New South Wales v Mallegowda</i> [2016] NSWSC 1087 | Threatened witness in defamation proceeding that if he did not withdraw his affidavit, he would report him to the ATO and immigration department. | 9 months imprisonment, suspended. |
| NSW | Supreme Court | <i>Prothonotary of the Supreme Court of New South Wales v Katelaris (No 2)</i> [2008] NSWSC 702 | After jury convicted him, defendant made insulting remarks about the jury in their presence, describing them as ignorant. He later spoke to the media calling the jury a group of 12 sheep. | 6 months imprisonment on first charge (comments made in presence of jury), 12 months imprisonment on second charge (comments made to the media). Both terms wholly suspended on condition that defendant be of good behaviour. |

| State | Court | Case | Description | Sentence |
|-------|-----------------|--|--|--|
| NSW | Supreme Court | <i>In the matter of Bauskis</i> [2006] NSWSC 907 | Defendant was ordered that he should not remain in court whilst wearing a T-shirt containing the words in large letters 'Trial by jury is democracy'. He refused to take off his shirt or to leave the court and refused a lawful direction to leave made by the officers of the Sheriff. He later refused to apologise and remained defiant, maintaining his right to disobey court orders. | 14 days imprisonment. |
| NSW | Court of Appeal | <i>Wilson v Prothonotary</i> [2000] NSWCA 23 | Defendant threw bags of yellow paint at judge while judge was handing down judgment. | 2 years imprisonment. Appeal allowed, sentences on each charge reduced to 3 months and 20 days, which was time already served. Appellant released. |
| NSW | Supreme Court | <i>R v Herring</i> (Unreported, 3 October 1991) | Defendant escaped from the dock, climbed on to the bench and threatened the presiding judge. Judge avoided the attack and the defendant was forcibly restrained. | 2 years imprisonment. |

Witness misconduct

| State | Court | Case | Description | Sentence |
|-------|-----------------|--|--|------------------------|
| Vic | Court of Appeal | <i>Murray v The Chief Examiner</i> [2018] VSCA 144 | Witness to Chief Examiner refused to be sworn, because of his refusal to break the code of silence. Previous conviction for perverting the course of justice; risk of imprisonment in harsh restrictive management regime; no remorse; poor prospects of rehabilitation. | 8 months imprisonment. |
| Vic | Supreme Court | <i>R v Sherwani</i> [2017] VSC 147 | Refusal to give evidence in County Court by repeatedly falsely asserting failure to remember. Pleaded guilty; person already in custody. | 4 months imprisonment. |

| State | Court | Case | Description | Sentence |
|-------|-----------------|---|--|---|
| Vic | Court of Appeal | <i>Allen v The Queen</i> (2013) 26 VR 565; [2013] VSCA 44 | Witness refused to enter the witness box, be sworn or give evidence at trial for aggravated burglary and assaults perpetrated upon him, his mother and partner. Pleaded not guilty to contempt. Mitigating factor of fear of those he was called to give evidence against. | 8 months imprisonment. |
| Vic | Supreme Court | <i>R v Garde-Wilson</i> [2005] VSC 452 | Witness refused to give evidence at trial for murder of her de facto husband, where she feared retribution and threats. | Convicted but no further penalty imposed. |
| NSW | Supreme Court | <i>Trad v Pickles Auction Pty Ltd; in the Matter of Carl Trad</i> [2006] NSWSC 1177 | Refusal to answer question in civil proceedings. Fear of danger did not amount to duress. Principal proceedings settled; no apology but acknowledged wrongfulness of conduct; discount for early plea of guilty. | 21 days imprisonment. |
| Qld | Supreme Court | <i>Scott v Witness J A</i> (2015) 249 A Crim R 237, [2015] QSC 48 | Respondent refused twice to answer question about location of money in hearing about knowledge of wife's murder, although answering other questions. | 2 years and 6 months imprisonment. |
| SA | Court of Appeal | <i>Zappia v Registrar of the Supreme Court</i> (2003) 86 SASR 410 [2003] SASC 327 | Refusal to give evidence against co-accused in murder trial. Contempt interfered with trial and reduced chances of conviction. No explanation provided for refusal, no remorse. Already in custody. | 15 months imprisonment. |
| WA | Court of Appeal | <i>Kennedy v Lovell</i> [2002] WASCA 226 | Conviction on three counts of contempt of a Royal Commission, by failing to attend when summoned, refusing to be sworn or make an affirmation, and leaving without being released from attendance. No explanation for failure. Apology followed finding of guilt; previous convictions for contempt. | Fine \$10,000 for each contempt (\$30,000). |

Disobedience contempt

| State | Court | Case | Description | Sentence |
|-------|-----------------|--|--|--|
| Vic | Supreme Court | <i>Hera Project Pty Ltd v Bisognin (No 2)</i> [2019] VSC 625 | Non-compliance with freezing order by failing to provide relevant information or documents by the required date, in deliberate and contumacious attempt to delay court proceedings and undermine applicants' interests. | 6 months imprisonment. |
| Vic | Court of Appeal | <i>Harris v Marubeni Equipment Finance (Oceania) Pty Ltd</i> [2018] VSCA 211 | Non-compliance with order for delivery of excavator. Contempt was found to be defiant, there was a lack of remorse or acceptance of responsibility, no explanation, and no other mitigating factors. Leave to appeal against sentence refused. Not reasonably arguable that sentence manifestly excessive. No reasonable prospect of less severe sentence being imposed. | 3 months imprisonment. |
| Vic | Supreme Court | <i>Fortune Holding Group Pty Ltd v Zhang (No 3)</i> [2018] VSC 22 | Respondent found guilty of 21 charges of contempt arising from breach of freezing order. No prior convictions; impact on family and of costs order taken into account. | 4 weeks imprisonment. |
| Vic | Supreme Court | <i>Davey v Dessco Pty Ltd</i> [2017] VSC 743 | Breach of court undertaking by solicitor to pay sum to another solicitor by due date, but no harm caused by late delivery of cheque. | Charge proved. No penalty. Order to pay costs. |
| Vic | Supreme Court | <i>The Queen v Witt (No 2)</i> [2016] VSC 142 | Solicitor communicated by email with clients about a court order in a manner designed to frustrate attempts at service and the effect of the order. | Fine \$25,000 (90 days imprisonment in default). |

| State | Court | Case | Description | Sentence |
|-------|-----------------|--|---|--|
| Vic | Court of Appeal | <i>Haritopoulos Pty Ltd and Pantelis Charitopoulos v Alan Geoffrey Scott</i> [2007] VSCA 174 | Convictions for disobedience of two orders, in relation to taking possession of property and other assets which were under receivership. Sum had since been repaid and assets sold, but the payment had come almost a year after, and the appellants had continued to act as if the order was of no effect. Court of Appeal reduced sentence for first contempt, noting first offence and repayment, but upheld subsequent sentence given it was a second offence committed deliberately. | Fine \$100,000 for first contempt, reduced to \$30,000 on appeal. Fine \$100,000 for second contempt for company and 2 months imprisonment for director. |
| Vic | Supreme Court | <i>Pico Holdings Inc v Voss</i> [2005] VSC 319 | Breach of Mareva injunction (freezing order) by giving effect to contract of sale of land so as to put almost \$600,000 beyond reach. Found to be a deliberate and flagrant act, but only one contempt and accepted that defendant was unlikely to reoffend. | Fine \$25,000 and costs on solicitor–client basis of approximately \$30,000. |
| NSW | Supreme Court | <i>Al Muderis v Duncan (No 5)</i> [2019] NSWSC 461 | Non-compliance with orders in defamation proceeding restraining defendant from publishing defamatory material (criminal contempt) and non-compliance with freezing orders (civil contempt). | 2 years imprisonment for criminal contempt; fine of \$40,00 for breach of freezing order. |
| NSW | Supreme Court | <i>Scholefield Goodman (Australia) Pty Limited v Rutkowski (No 2)</i> [2018] NSWSC 453 | Breach of asset freezing order by disbursing proceeds of sale of property, and failure to swear and serve an affidavit setting out assets and liabilities in Australia within the prescribed time. Imposition of fine impractical because of defendant’s limited resources. No prior convictions and remorseful. | 96 hours community service. |
| NSW | Supreme Court | <i>NSW Commissioner for Fair Trading v Rixon (No. 4)</i> [2018] NSWSC 1 | Breach of consent orders preventing defendant from carrying on residential building work without a licence. The contempt breached the terms of an earlier suspended sentence. | 18 months imprisonment with 12 months non-parole period. |

| State | Court | Case | Description | Sentence |
|-------|-----------------|---|--|---|
| Qld | Court of Appeal | <i>Dubois v Rockhampton Regional Council</i> [2014] QCA 215 | Non-compliance with court orders restraining use of land for various purposes. Orders breached on 18 occasions. Previous conviction for contempt. Sentence was upheld on appeal. | 3 months imprisonment suspended after 1 month. |
| Qld | Court of Appeal | <i>Formal Wear Express Franchising v Roach</i> [2004] QCA 339 | Breach of undertaking not to carry on a mobile suit hire business. After first breach, defendant fined \$3000 for contempt. Further breaches resulted in sentence of 6 months imprisonment. Lack of remorse, and continued refusal to abide by undertaking. Futility of imposing a fine because of continuing to breach undertaking after being fined. Sentence reduced on appeal because manifestly excessive. First time in prison, business no longer operating, and family considerations. | 3 months imprisonment on each count, to be served concurrently (reduced from 6 months on appeal). |
| WA | Supreme Court | <i>The Owners of the Wills Building Strata Plan 38579 v Coleman</i> [2018] WASC 219 | Non-compliance with order to restore glazed wall removed without permission of plaintiff. Eighteen months had passed since order made. Contempt was contumacious. No attempt to comply until contempt proceedings commenced. | Fine \$10,000 and \$50 a day until order complied with and contempt purged. |

| State | Court | Case | Description | Sentence |
|-------|---------------------------------|--|--|---|
| Cth | Full Court of the Federal Court | <i>Kazal v Thunder Studios Inc</i> (2017) 256 FCR 90, [2017] FCAFC 111 | Breach of consent orders restraining publication of defamatory content, including by creating signs on vans to direct people to a defamatory website. Primary judge imposed sentence of concurrent terms of imprisonment for different publishing breaches. On appeal, two convictions were quashed as irrelevant considerations had been taken into account, requiring resentencing. Court noted that sentences for contempt are much less prevalent than sentences for federal offences. Therefore, it is difficult to discern any substantial pattern in the quantum of contempt sentencing to provide a meaningful yardstick. | Different sentences imposed for various breaches based on gravity of contempt. 9 months imprisonment for one charge (reduced from 15 months); 6 months imprisonment (reduced from 9 months); 6 months imprisonment (reduced from 12 months); and 12 months imprisonment (reduced from 18 months), with a total effective sentence of 1 year 3 months. |
| Cth | Federal Court | <i>Vaysman v Deckers Outdoor Corporation Inc</i> (2014) 222 FCR 387, [2014] FCAFC 60 | Breach of court orders restraining sale of counterfeit footwear. Ten charges of contempt proved. Various terms of imprisonment imposed with most being less than 6 months. For most serious contempt, sentence of 3 years imprisonment. Primary judge noted: deliberate and serious contempts carried out over long period of time; motivated by desire for financial gain; although the applicant apologised to the court, not considered genuinely remorseful. Court of Appeal acknowledged that the varied circumstances which may give rise to a contempt make it difficult to identify a range of appropriate sentences for contempt, or a standard sentence for a serious contempt. However, Court of Appeal noted that sentence was at least twice as long as the sentences imposed in other cases and concluded it was manifestly excessive. | 2 years imprisonment (reduced from 3 years). |

Interference with witnesses, jurors, judges etc

| State | Court | Case | Description | Sentence |
|-------|---------------|---|--|---|
| Vic | Supreme Court | <i>R v Bonacci (No 2)</i> [2015] VSC 134 | Posted on Facebook and made internet radio broadcasts encouraging people to contact the Judge and the County Court about a criminal proceeding before the court. Sent seven emails to the County Court and to the Judge intending to influence, place improper pressure, and intimidate or threaten. | 6 weeks imprisonment. |
| Vic | Supreme Court | <i>R v Vasiliou (No 2)</i> [2012] VSC 242 | Sent an email to the judge threatening that if the case was decided against him, he might start killing people. | 4 months imprisonment. |
| Vic | Supreme Court | <i>DPP v Dickson</i> [2011] VSC 9 | Contrary to trial judge's directions, defendant made contact with another witness and discussed their evidence during an adjournment in trial. As a result, defendant could no longer be called as a witness by the Crown. He had already received a significant sentence discount in his own trial because he had agreed to give evidence against co-accused. | 3 years imprisonment, two of which to be served cumulatively with existing sentence. |
| Vic | Supreme Court | <i>R v Drinkwater</i> Unreported 7 June 1991 | Prevented employee from attending jury service. | Fine \$1500. |
| NSW | Supreme Court | <i>Ulman v Live Group Pty Ltd</i> [2018] NSWCA 338 | Improper pressure imposed on the second respondent not to exercise his right to have a civil court determine an alleged commercial dispute. Threats were made that religious sanctions would be imposed if he persisted in asserting that the alleged commercial dispute be resolved in a civil court. | Fine \$7500 on first three defendants and \$2500 on the fourth. (Fines imposed at first instance were \$20,000, \$10,000, \$10,000 and \$10,000. These were reduced on appeal as manifestly excessive.) |
| NSW | Supreme Court | <i>Farahbakht v Midas Australia Pty Ltd</i> [2006] NSWSC 1322 | Improper pressure on witness not to give evidence. Witness in civil proceedings contacted and told that 'if you do say something it is going to hurt me and my family'. | Costs on an indemnity basis. |

Sub judice contempt

| State | Court | Case | Description | Sentence |
|-------|---------------|---|---|--|
| Vic | Supreme Court | <i>R (on the application of DPP) v Johnson</i> [2017] VSC 45 | Publication of material that caused murder trial to be aborted, requiring retrial, resulted in witnesses having to give evidence again. Apologies given but later contested charge. Court found contempt was accidental. Substantial steps taken to prevent re-offending. | Fine \$300,000 for company, and good behaviour for 2 years for journalist. |
| Vic | Supreme Court | <i>R v The Age Company Ltd</i> [2008] VSC 305 | Publication of chronology included reference to victim when trial on foot. Pleaded guilty and apologies, accidental publication, no prior convictions for journalists and editor and no harm actually caused. Apologies before the Court. Publishers unaware exactly how chronology came to be published. | Conviction recorded for the Age Company with fine of \$10,000, fine of \$2000 for Fairfax Digital Ltd, and no conviction or penalty for editor-in-chief. Costs agreed at \$33,500. |
| Vic | Supreme Court | <i>R v Herald & Weekly Times Pty Ltd</i> [2008] VSC 251 | Publication of graphic of victims of Melbourne's gangland criminals, including victim in trial where accused had not pleaded guilty. Accidental, no actual harm caused, legal advice sought, pleaded guilty and apology; no prior convictions for journalist; costs orders agreed. | Fine \$10,000. |
| Vic | Supreme Court | <i>R v The Age Co Ltd</i> [2006] VSC 479 | Publication of prejudicial material of accused on trial. Editor-in-chief found guilty but no conviction recorded. | Fine \$75,000. |
| Vic | Supreme Court | <i>R (Registrar of the County Court of Victoria) v Nationwide News</i> [2006] VSC 420 | Publication identifying accused as an underworld figure and a possible subject of incitement to murder in gangland wars, resulting in vacating trial date and adjourning matter. Material mistakenly published, immediate apology and remedial steps, few prior convictions. | Fine \$75,000, solicitor-client costs. |

| State | Court | Case | Description | Sentence |
|-------|---------------------------------|--|--|--|
| Vic | Full Court of the Supreme Court | <i>Hinch v Attorney-General (Vic)</i> [1987] VR 721 | Two radio broadcasts drew attention to priest's prior convictions. Primary judge imposed fines of \$25,000 on both Hinch and the radio station for the first charge, and 42 days imprisonment on Hinch and \$30,000 on radio station for the second charge. On appeal, penalty reduced in part because of irrelevant considerations. Previous convictions; highly prejudicial material with serious consequences; a very experienced journalist otherwise of good character. | Reduced on appeal to fine \$15,000 on first charge for both parties; 28 days' imprisonment for Hinch, fine of \$25,000 for radio station on second charge. |
| NSW | Court of Appeal | <i>Attorney General (NSW) v Radio 2UE Sydney Pty Ltd & Laws</i> Unreported, 11 March 1998 | Announcer broadcast over radio during criminal trial that accused was 'absolute scum' and guilty of murder. Very serious contempt of court; poor systems to prevent contemptuous or defamatory publications; unintentional contempt and sincere apologies. | Fine \$200,000 for radio station, \$50,000 for announcer. |
| NSW | Court of Appeal | <i>Registrar of the Court of Appeal v John Fairfax group Pty Ltd</i> Unreported, 21 April 1993 | Publication of full-page article making serious allegations against credibility of accused witness during proceedings. Publisher pleaded guilty, journalist did not plead guilty and argued had assumed it would be reviewed by lawyers. Publisher offered genuine apology but systemic failures of training and poor system of control. | Fine \$75,000 for publisher, and \$1000 for author. |
| WA | Court of Appeal | <i>61X Southern Cross Radio; Ex parte DPP (WA)</i> [1999] WASCA 254 | Broadcast of alleged confession in murder trial, where confession ruled inadmissible. Contempt admitted and apology made. | Fine \$2500. |

Scandalising the court

| State | Court | Case | Description | Sentence |
|-------|---------------|---|---|--|
| Vic | Supreme Court | <i>R v Hoser</i> [2001] VSC 480 | Publication of book alleging bias and corruption against magistrates and judges, where thousands of copies sold. | Fine \$3000 for author and \$2000 for his company. Appeal dismissed, cross-appeal allowed but no penalty imposed: [2003] VSCA 194. |
| Qld | Supreme Court | <i>A-G v Di Carlo</i> [2017] QSC 171 | Solicitor held in contempt for accusing court of being cranky, and then saying to the magistrate 'and that's why you don't do things according to law'. | Fine \$4000. |
| Tas | Supreme Court | <i>Martin v Trustrum (No 3)</i> (2003) 12 Tas R 131 | Contempt through filing of affidavit alleging judicial corruption. | Good behaviour bond for 3 years. |
| Cth | Federal Court | <i>Gallagher v Durack</i> (unreported, Northrop J, 21 September 1982) | Union secretary and another were held in contempt by suggesting in interview that union officials striking had been the main reason for the court changing its mind. No apology or remorse, or explanation given. | 3 months imprisonment. Special leave to appeal against conviction and sentence refused: (1983) 152 CLR 238. |

Appendix H: Contempt powers of courts in Australia

| Jurisdiction | Court | Contempt powers | Section/Act | Maximum penalty |
|--------------|--------------------|---|--|---|
| Vic | Supreme Court | <p>Superior court of record in Victoria with inherent jurisdiction to deal with all types of contempt, including contempt of a lower court.</p> <p>Procedure provided for by Supreme Court (General Civil Rules) 2015 Order 75.</p> | | <p>Not specified.</p> <p>The Court may punish a natural person for contempt by committal to prison or fine or both. The Court may punish a corporation for contempt by sequestration or fine or both.</p> <p>Supreme Court (General Civil Rules) 2015 (Vic) r 75.11</p> |
| Vic | County Court | <p>Same power to deal summarily with a contempt of the County Court as the Supreme Court has in respect of contempts of the Supreme Court.</p> <p>Procedure provided for by County Court Civil Procedure Rules 2018 Order 75.</p> | <i>County Court Act 1958</i> (Vic) s 54. | <p>Not specified.</p> <p>The Court may punish a natural person for contempt by committal to prison or fine or both. The Court may punish a corporation for contempt by sequestration or fine or both.</p> <p><i>County Court Civil Procedure Rules 2018</i> (Vic) r 75.11</p> |
| Vic | Magistrates' Court | <p>Power to deal summarily with contempt in the face of the court, and contempt by failing to attend, take the oath, answer questions or produce evidence.</p> <p>Limited power to fine or imprison a person while in default of an order.</p> <p>[NB The Children's Court has and may exercise in relation to all matters over which it has jurisdiction, all the powers and authorities that the Magistrates' Court has in relation to the matters over which it has jurisdiction.]</p> | <i>Magistrates' Court Act 1989</i> (Vic) ss 133, 134 and 135 | <p>6 months imprisonment and/or a fine of 25 penalty units (\$4130.50) for contempt in the face of the court.</p> <p>1 month imprisonment and/or fine of 5 penalty units (\$826.10) for failure to appear, swear or make affirmation, or answer questions.</p> |

| Jurisdiction | Court | Contempt powers | Section/Act | Maximum penalty |
|--------------|----------------|---|---|--|
| Vic | Coroners Court | Power to deal summarily with a contempt of the Coroners Court. Contempt of the Coroners Court defined to include any act that would, if the Coroners Court were the Supreme Court, constitute contempt of that Court. | <i>Coroners Act 2008</i> (Vic) s 103 | 12 months or a fine of 120 penalty units (\$19,826.40). |
| NSW | Supreme Court | Superior court of record in New South Wales with inherent jurisdiction to deal with all types of contempt, including contempt of a lower court. Procedure provided for by <i>Supreme Court Rules 1970</i> Part 55. | <i>Supreme Court Act 1970</i> (NSW) ss 22, 23 The Court shall have all jurisdiction which may be necessary for the administration of justice in New South Wales. | Not specified. The Court may punish a natural person for contempt by committal to a correctional centre or fine or both. The Court may punish a corporation for contempt by sequestration or fine or both. <i>Supreme Court Rules 1970</i> r 55.13 |
| NSW | District Court | Power to deal summarily with contempt in the face or hearing of the Court or to refer a contempt to the Supreme Court for determination. | <i>District Court Act 1973</i> (NSW) ss 199, 203 | 28 days imprisonment or fine of 20 penalty units (\$2200). |
| | | Power to commit a person for contempt where they have not complied with certain types of non-monetary orders. | <i>Uniform Civil Procedure Rules</i> pt 40 div 2 | Maximum penalty not specified. |
| NSW | Local Court | Same power as the District Court to deal summarily with contempt in the face or hearing of the Court or to refer a contempt to the Supreme Court for determination. | <i>Local Court Act 2007</i> (NSW) s 24 | 28 days imprisonment or fine of 20 penalty units (\$2200). |

| Jurisdiction | Court | Contempt powers | Section/Act | Maximum penalty |
|--------------|----------------|---|---|---|
| NSW | Coroners Court | Same contempt jurisdiction as the Local Court. (The provisions of section 24 of the Local Court Act 2007 are taken to apply to coronial proceedings as if any reference in those provisions to the Local Court or magistrate were a reference to the coroner or assistant coroner conducting the coronial proceedings.) | <i>Coroners Act 2009</i> (NSW) s 103 | 28 days imprisonment or fine of 20 penalty units (\$2200). |
| Qld | Supreme Court | Superior court of record in Queensland with inherent jurisdiction to deal with all types of contempt, including contempt of a lower court. Procedure provided for by the <i>Uniform Civil Procedure Rules 1999</i> Chapter 20, Part 7. | <i>Constitution of Queensland 2001</i> (Qld) s 58; <i>Supreme Court of Queensland Act 1991</i> (Qld) s 10 <i>Criminal Code Act 1899</i> (Qld) s 8 preserves the authority of a court of record to punish a person summarily for contempt of court. | Not specified. The Court may punish a natural person for contempt by making an order that may be made under the <i>Penalties and Sentences Act 1992</i> . The Court may punish a corporation by seizing corporation property or a fine or both. <i>Uniform Civil Procedure Rules 1999</i> r 930 |

| Jurisdiction | Court | Contempt powers | Section/Act | Maximum penalty |
|--------------|-------------------|--|--|---|
| Qld | District Court | <p>Same power to punish for a contempt of the District Court as the Supreme Court would have if the contempt were a contempt of the Supreme Court. Contempt of the District Court defined to include disobedience contempt; contempt by failing to attend, take the oath, answer questions or produce evidence; certain types of contempt committed in the face of the court and any other contempt of court.</p> <p>Procedure provided for by the <i>Uniform Civil Procedure Rules 1999</i> Chapter 20, Part 7.</p> | <i>District Court of Queensland Act 1967</i> (Qld) s 129 | <p>Not specified.</p> <p>The Court may punish a natural person for contempt by making an order that may be made under the <i>Penalties and Sentences Act 1992</i>. The Court may punish a corporation by seizing corporation property or a fine or both.</p> <p><i>Uniform Civil Procedure Rules 1999</i> r 930</p> |
| Qld | Magistrates Court | <p>Power to deal summarily with disobedience contempt as defined; contempt by failing to attend, take the oath, answer questions or produce evidence; certain types of contempt committed in the face of the court and any other contempt of court. Procedure provided for by the <i>Uniform Civil Procedure Rules 1999</i> Chapter 20, Part 7.</p> | <i>Magistrates Courts Act 1921</i> (Qld) s 50 | <p>3 years imprisonment or fine of 200 penalty units (\$26,690) for disobedience contempt.</p> <p>12 months imprisonment or fine of 84 penalty units for other contempts (\$11,209.80).</p> |
| | | | <i>Justices Act 1886</i> (Qld) s 40 | 12 months imprisonment and/or fine of 84 penalty units (\$11,209.80). |

| Jurisdiction | Court | Contempt powers | Section/Act | Maximum penalty |
|--------------|----------------|--|---|---|
| Qld | Coroners Court | Same contempt jurisdiction as the Magistrates Court (Section 50 of the <i>Magistrates Court Act</i> applies to the Coroners Court in the same way that it applies to a Magistrates Court, with all necessary changes.) | <i>Coroners Act 2003</i> (Qld) s 42 | 3 years imprisonment or fine of 200 penalty units (\$26,690) for disobedience contempt. 12 months imprisonment or fine of 84 penalty units (\$11,209.80). for other contempts. |
| SA | Supreme Court | Superior court of record in South Australia with inherent jurisdiction to deal with all types of contempt including contempt of a lower court. Procedure provided for by Supreme Court Civil Rules 2006 Ch 14 and Supreme Court Criminal Rules 2014 Ch 14 | <i>Supreme Court Act 1935</i> (SA) ss 6, 17 <i>Enforcement of Judgments Act 1991</i> (SA) s 12 | Not specified. The Court may punish a contempt by a fine or imprisonment (or both). <i>Supreme Court Civil Rules 2006</i> r 306 and <i>Supreme Court Criminal Rules 2014</i> r 133 |
| SA | District Court | Same power to deal summarily with a contempt of the District Court as the Supreme Court has in respect of contempts of the Supreme Court. This section extends not only to contempts committed in the face of the Court but also to acts and omissions that would, assuming the Court were the Supreme Court, amount to a contempt of that Court. Procedure provided for by <i>District Court Civil Rules 2006</i> Ch 14 and <i>District Court Criminal Rules 2014</i> Ch 14 | <i>District Court Act 1991</i> (SA) s 48 <i>Enforcement of Judgments Act 1991</i> (SA) s 12 | Not specified. The Court may punish a contempt by a fine or imprisonment (or both). <i>District Court Civil Rules 2006</i> r 306 and <i>District Court Criminal Rules 2006</i> r 133 |

| Jurisdiction | Court | Contempt powers | Section/Act | Maximum penalty |
|--------------|--------------------|---|---|--|
| SA | Magistrates' Court | Power to deal summarily with contempt in the face of the court, as defined, contempt by obstructing the Court in the exercise of a power of entry or inspection; contempt by dealing with property subject to a restraining order; contempt by failing to attend, take the oath, answer questions or produce evidence; and contempt by failure to comply with a non-monetary order of the Court.. | <i>Magistrates Court Act 1991(SA)</i> ss 21, 22, 45, 46 <i>Enforcement of Judgments Act 1991 (SA)</i> s 12 | Imprisonment for a term not exceeding Division 5 imprisonment (2 years) or Division 5 fine (\$8,000) <i>Magistrates Court Act 1991(SA)</i> s 46 |
| SA | Coroners Court | Power to deal summarily with contempt by hindering or obstructing or failing to comply with a direction of the Court, contempt by failing to attend, take the oath, answer questions or produce evidence, and contempt in the face of the court as defined | <i>Coroners Act 2003 (SA)</i> s 22, 23, 36 | 2 years imprisonment or a fine of \$10,000 <i>Coroners Act 2003 (SA)</i> s 36 |
| SA | Coroners Court | | | |
| WA | Supreme Court | Superior court of record in Western Australia with inherent jurisdiction to deal with all types of contempt including contempt of a lower court. Procedure provided for by Rules of the Supreme Court 1971 Order 55 | <i>Supreme Court Act (WA)</i> ss 6, 16 <i>Civil Judgments Enforcement Act 2004 (WA)</i> ss 90, 98 <i>Criminal Code Act 1913 (WA)</i> s 7 preserves the authority of a court of record to punish a person summarily for contempt of court. | Not specified The Court may punish a natural person for contempt by committal to prison or fine or both. The Court may punish a corporation for contempt by sequestration or fine or both. <i>Rules of the Supreme Court 1971 (WA)</i> r 55(7) |

| Jurisdiction | Court | Contempt powers | Section/Act | Maximum penalty |
|--------------|----------------|---|--|---|
| WA | District Court | Power to deal summarily with contempt in the face of the court, as defined; contempt by failing to attend, take the oath, answer questions or produce evidence. | <i>District Court Act 1969 (WA)</i> s 63 | 5 years imprisonment or a fine of \$50,000. |
| | | Power to deal with a person for contempt for disobedience to certain types of monetary and non-monetary judgements. | <i>Civil Judgments Enforcement Act 2004 (WA)</i> ss 90, 98 | 40 days imprisonment for non-compliance with a payment or instalment order. Maximum penalty not otherwise specified. |

| Jurisdiction | Court | Contempt powers | Section/Act | Maximum penalty |
|--------------|-------------------|--|---|--|
| WA | Magistrates Court | <p>Power to deal with contempt in the face of the court, as defined; contempt by failing to attend, take the oath, answer questions or produce evidence; and contempt by failure to comply with a non-monetary order.</p> <p>Procedure provided for by Magistrates Court (General) Rules 2005 Part 4.</p> <p>Rule 31 provides that the Court has power to deal with the contempt summarily if:</p> <p>it occurs while the Court is sitting or in respect of a magistrate or JP who is about to, or who has just, constituted the Court, and the Court is satisfied that the alleged contempt should be dealt with immediately because it is an immediate threat to the authority of the Court or to the integrity of the proceedings.</p> <p>Rules 32 and 33 provide that if the alleged contempt is not dealt with summarily it may be referred to the Attorney-General who may commence and conduct proceedings in the Magistrates Court in respect of the alleged contempt.</p> | <p><i>Magistrates Court Act (WA)</i> ss 15, 16</p> | <p>12 months imprisonment and/or a fine of \$12,000.</p> |
| | | <p>Power to deal with a person for contempt for disobedience to certain types of monetary and non-monetary judgments.</p> | <p><i>Civil Judgments Enforcement Act 2004 (WA)</i> ss 90, 98</p> | <p>40 days imprisonment for non-compliance with a payment or instalment order.</p> <p>Maximum penalty not otherwise specified.</p> |

| Jurisdiction | Court | Contempt powers | Section/Act | Maximum penalty |
|--------------|-------------------|--|---|--|
| WA | Coroner's Court | No power to punish for contempt conferred by the <i>Coroners Act 1996</i> (WA). The Act contains offence provisions which criminalise conduct often categorised as contempt of court. For example, disobeying a summons, order or direction of a coroner, and interrupting an inquest. | <i>Coroners Act 1996</i> (WA) ss 46A, 51 | 5 years imprisonment or a fine of \$100,000 for disobeying a summons, order or direction of a coroner. (Summary conviction penalty: imprisonment for 2 years and a fine of \$40,000.) A fine of \$5000 for interrupting an inquest. |
| Tas | Supreme Court | Superior court of record in Tasmania with inherent jurisdiction to deal with all types of contempt including contempt of a lower court. Procedure provided for by <i>Supreme Court Rules 2000</i> div 3 pt 36 | <i>Supreme Court Civil Procedure Act 1932</i> (Tas) s 6 | Not specified. The Court may punish a natural person for contempt by committal to prison or fine or both. |
| Tas | Magistrates Court | Power to deal summarily with contempt in the face of the court as defined. | <i>Magistrates Court Act 1987</i> (Tas) s 17A | 3 months imprisonment or a fine of 5 penalty units (\$840). |
| | | Power to deal summarily with contempt in the face of the court as defined and with failure of witness to answer a question. | <i>Justices Act 1959</i> (Tas) ss 25, 43 | 6 months imprisonment or a fine of 10 penalty units (\$1680) for contempt in the face of the court. 7 days imprisonment for failure to answer a question. |
| | | Power to deal summarily with contempt by failure to attend or produce evidence when ordered to under s 194C of the <i>Evidence Act 2001</i> (Tas). | <i>Evidence Act 2001</i> (Tas) s 194E(2) | 3 months imprisonment or a fine of 5 penalty units (\$840). |

| Jurisdiction | Court | Contempt powers | Section/Act | Maximum penalty |
|--------------|------------------|--|---|---|
| Tas | Coroners Court | <i>Coroners Act 1995</i> (Tas) includes an offence of contempt covering defined contempts in the face of the court. The Act does not specify if the offence may be tried summarily by the Coroner. | <i>Coroners Act 1995</i> (Tas) s 66 | 6 months imprisonment or a fine of 50 penalty units (\$8400). |
| NT | Supreme Court | Superior court of record in the Northern Territory with inherent jurisdiction to deal with all types of contempt including contempt of a lower court. Procedure provided for by <i>Supreme Court Rules 1987</i> Order 75. | <i>Supreme Court Act 1979</i> (NT) ss 12, 14 <i>Criminal Code Act 1983</i> (NT) s 8 preserves the authority of a court of record to punish a person summarily for contempt of court. | Not specified. The Court may punish a natural person for contempt by committal to prison or fine, or both. The Court may punish a corporation for contempt by sequestration or fine, or both. <i>Supreme Court Rules 1987</i> r 75.11 |
| NT | Local Court | Power to deal summarily with contempt in the face of the Court, disobedience contempt as defined and contempt by failing to attend, take the oath, answer questions or produce evidence. | <i>Local Court Act 2015</i> (NT) ss 45–47 | 6 months imprisonment or fine of 100 penalty units. |
| NT | Coroner's Office | Statutory offence of 'contempt' to insult a coroner, interrupt an inquest or create a disturbance near and inquest. | <i>Coroners Act 1993</i> (NT) s 46 | 6 months imprisonment or fine of 40 penalty units (\$6280). |

| Jurisdiction | Court | Contempt powers | Section/Act | Maximum penalty |
|--------------|-------------------|--|---|---|
| ACT | Supreme Court | <p>Superior court of record in the Australian Capital Territory with inherent jurisdiction to deal with all types of contempt including contempt of a lower court.</p> <p>Procedure provided for by <i>Court Procedures Rules 2006</i> Division 2.18.16</p> | <i>Supreme Court Act 1933</i> (ACT) ss 3, 20 | <p>Not specified.</p> <p>The Court may punish a natural person for contempt by making an order that may be made under the <i>Crimes (Sentencing) Act 2005</i>. The Court may punish a corporation by seizing corporation property or a fine or both.</p> <p><i>Court Procedures Rules 2006</i> r 2506</p> |
| ACT | Magistrates Court | <p>Same power to deal with contempt of the Magistrates Court as the Supreme Court has to deal with contempt of the Supreme Court. Contempt of the Magistrates Court defined as disobedience contempt, specified types of contempt in the face of the court and any other contempt of court.</p> | <i>Magistrates Court Act 1930</i> (ACT) s 307 | Not specified. |
| ACT | Coroner's Court | <p>Same power to deal with contempt of the Coroner's Court as the Supreme Court has to deal with contempt of the Supreme Court.</p> | <i>Coroners Act 1997</i> (ACT) s 99A | Not specified. |
| Cth | High Court | <p>Same power to punish contempts of its power and authority as that possessed by the Supreme Court of Judicature in England at 1903.</p> <p>Superior Court of record with jurisdiction to deal summarily with all types of contempt.</p> <p>Procedure provided for by <i>High Court Rules 2004</i> Part 11.</p> | <i>Judiciary Act 1903</i> (Cth) s 24; <i>High Court Act 1979</i> (Cth) s 5; Commonwealth Constitution s 71. | <p>Not specified</p> <p>The Court may punish a natural person for contempt by committal to prison or fine or both. The Court may punish a corporation for contempt by sequestration or fine or both.</p> <p><i>High Court Rules 2004</i> r 11.04</p> |

| Jurisdiction | Court | Contempt powers | Section/Act | Maximum penalty |
|--------------|-----------------------|---|--|---|
| Cth | Federal Court | <p>Same power to punish contempts of its power and authority as is possessed by the High Court in respect of contempts of the High Court. The jurisdiction of the Court to punish a contempt of the Court committed in the face or hearing of the Court may be exercised by the Court as constituted at the time of the contempt.</p> <p>Procedure provided for in <i>Federal Court Rules 2011</i> ch 6 pt 42.</p> | <i>Federal Court of Australia Act 1976</i> (Cth) s 31. | Not specified. |
| Cth | Federal Circuit Court | <p>Same power to punish contempts of its power and authority as is possessed by the High Court in respect of contempts of the High Court. The jurisdiction of the Court to punish a contempt of the Court committed in the face or hearing of the Court may be exercised by the Court as constituted at the time of the contempt.</p> <p>Procedure provided for by <i>Federal Circuit Court Rules 2001</i> pt 19.</p> | <i>Federal Circuit Court of Australia Act 1999</i> (Cth) s 17. | Not specified. |
| Cth | Family Court | <p>Same power to punish contempts of its power and authority as is possessed by the High Court in respect of contempts of the High Court.</p> <p>Procedure provided for in <i>Family Law Rules 2004</i> ch 21.</p> | <i>Family Law Act 1975</i> (Cth) s 35 | Orders that may be made by the court vary depending on the nature of the contempt—see <i>Family Law Act 1975</i> ss 67X, 70NBA, 70NCB, 70NDB, 70NDC, 70NEB, 70NFB, 70NFF, 112AD, 112AH and 112AP. |

Appendix I: Contempt in the face of court and witness contempts—comparable offences and penalties

See Appendix H for an explanation of the calculation and references to maximum monetary penalties.

Contempt in the face of court

| Jurisdiction | Offence | Maximum penalty, including any applicable fine (for an individual) at 2019–20 value | Legislation |
|--------------|---|---|--|
| Vic | Contempt of Tribunal ¹ | 5 years imprisonment and/or fine of 1000 penalty units (\$165,220) | <i>Victorian Civil and Administrative Tribunal Act 1998</i> (Vic) s 137 |
| Vic | Contempt of coroner, ¹ hindering and obstructing inquiry | 12 months imprisonment and/or fine of 120 penalty units (\$19,826.40) | <i>Coroners Act 2008</i> (Vic) s 103 <i>Inquiries Act 2014</i> (Vic) ss 49, 89, 119 |
| Vic | Hindering or obstructing Chief Examiner or disrupting examination | 12 months imprisonment and/or fine of 10 penalty units (\$1,652.20) | <i>Major Crime (Investigative Powers) Act 2004</i> (Vic) s 44 |
| Vic | Contempt in the face of the court | 6 months imprisonment and/or fine of 25 penalty units (\$4,130.50) | <i>Magistrates' Court Act 1989</i> (Vic) s 133(4) |
| Vic | Contempt of Tribunal ¹ | Fine of 120 penalty units (\$19,826.40) | <i>Mental Health Act 2014</i> (Vic) s 206 |
| NSW | Contempt of Commission | 2 years imprisonment and/or fine of 100 penalty units (\$11,000) | <i>Crime Commission Act 2012</i> (NSW) s 47 |
| NSW | Contempt in the face of the court | 28 days years imprisonment and/or fine of 20 penalty units (\$2200) | <i>Coroners Act 2009</i> (NSW) s 103 <i>Local Court Act 2007</i> (NSW) s 24 <i>District Court Act 1973</i> (NSW) s 199 |

| Jurisdiction | Offence | Maximum penalty, including any applicable fine (for an individual) at 2019–20 value | Legislation |
|--------------|--|---|--|
| NSW | Disrespectful behaviour | 14 days years imprisonment and/or fine of 10 penalty units (\$1100) | <i>Coroners Act 2009</i> (NSW) s 103A <i>District Court Act 1973</i> (NSW) s 200A <i>Land and Environment Court Act 1979</i> (NSW) s 67A <i>Local Court Act 2007</i> (NSW) s 24A <i>Supreme Court Act 1970</i> (NSW) s 131 |
| Qld | Penalty for insulting or interrupting justices | 12 months imprisonment and/or fine of 84 penalty units (\$11,209.80) | <i>Justices Act 1886</i> (Qld) s 40 |
| Qld | Contempt of recognised courts ¹ | 3 months imprisonment ² | <i>Evidence Act 1977</i> (Qld) s 390 |
| Qld | Contempt of Commission if chair is not a Supreme Court judge | Fine of 2 penalty units (\$266.90) | <i>Commissions of Inquiry Act 1950</i> (Qld) s 10 |
| SA | Contempt of Commissioner | 4 years imprisonment and/or fine of \$20,000 | <i>Independent Commissioner against Corruption Act 2012</i> (SA) sch 2 cl 19 |
| SA | Contempt of coroner | 2 years imprisonment and/or fine of \$10,000 | <i>Coroners Act 2003</i> (SA) ss 23(4), 36 |
| SA | Contempt of Magistrates Court | 2 years imprisonment and/or fine of \$8,000 | <i>Magistrates Court Act 1991</i> (SA) ss 45, 46 |
| WA | Contempt of court | 5 years imprisonment and/or fine of \$50,000 | <i>District Court of Western Australia Act 1969</i> (WA) s 63(a), (b), (f) |
| WA | Contempt in the face of the court | 12 months imprisonment and/or fine of \$12,000 | <i>Magistrates Court Act 2004</i> (WA) s 16(1), (4) |
| WA | Contempt in the face of the court | 12 months imprisonment and/or fine of \$5000 | <i>Children's Court of Western Australia Act 1988</i> (WA) ss 29(3), (4) |
| WA | Misbehaviour and obstruction | Fine of \$10,000 | <i>State Administrative Tribunal Act 2004</i> (WA) s 99 |

2

Penalty units are not specified, as in this jurisdiction maximum penalty differs depending on court or there is no default maximum penalty: see Penalties and Sentences Act 2015 (Qld) ss 45-46; Sentencing Act 2017 (SA) s 119; Sentencing Act 1995 (WA) s 41; Crimes (Sentencing) Act 2005 (ACT) s 15.

| Jurisdiction | Offence | Maximum penalty, including any applicable fine (for an individual) at 2019–20 value | Legislation |
|--------------|--|---|---|
| Tas | Contempt | 6 months imprisonment and/or fine of 50 penalty units (\$8400) | <i>Coroners Act 1995</i> (Tas) s 66 |
| Tas | Contempt | 6 months imprisonment and/or fine of 10 penalty units (\$1680) | <i>Justices Act 1959</i> (Tas) s 25 |
| Tas | Contempt in the face of court | 3 months imprisonment and/or fine of 5 penalty units (\$840) | <i>Magistrates Court Act 1987</i> (Tas) s 17A |
| Tas | Contempt of Commission ¹ | Fine of 2000 penalty units (\$336,000) | <i>Integrity Commission Act 2009</i> (Tas) s 80(3) |
| NT | Contempt of Board, Commissioner, or interstate entity ¹ | 6 months imprisonment and/or fine of 100 penalty units (\$15,700) | <i>Inquiries Act 1945</i> (NT) s 11 <i>Evidence Act 1939</i> (NT) s 49ZC |
| NT | Contempt of court | 6 months imprisonment and/or fine of 40 penalty units (\$6280) | <i>Coroners Act 1993</i> (NT) s 46 |
| NT | Contempt of Tribunal | 6 months imprisonment and/or fine of 20 penalty units (\$3140) | <i>Mental Health and Related Services Act 1998</i> (NT) s 135A |
| ACT | Obstructing etc legal proceeding | 12 months imprisonment and/or fine of 100 penalty units (\$16,000) | <i>Criminal Code 2002</i> (ACT) s 724 |
| ACT | Contempt of inquiry, commission or recognised courts | 12 months imprisonment and/or fine of 100 penalty units (\$16,000) | <i>Inquiries Act 1991</i> (ACT) s 36 <i>Judicial Commissions Act 1994</i> (ACT) s 56 <i>Royal Commissions Act 1991</i> (ACT) s 46 |
| Cth | Obstructing or hindering Commission or examiner | 5 years imprisonment and/or fine of 200 penalty units (\$42,000) | <i>Australian Crime Commission Act 2002</i> (Cth) s 35 |
| Cth | Obstructing or hindering conduct of hearings | 2 years imprisonment and/or fine of 120 penalty units (\$25,200) | <i>Law Enforcement Integrity Commissioner Act 2006</i> (Cth) s 94 |
| Cth | Contempt of Tribunal (obstructing or hindering or contempt) | 12 months imprisonment and/or fine of 60 penalty units (\$12,600) | <i>Administrative Appeals Tribunal Act 1975</i> (Cth) s 63 |
| Cth | Contempt of Royal Commission ¹ | 3 months imprisonment and/or fine of 2 penalty units (\$420) | <i>Royal Commissions Act 1902</i> (Cth) s 60 |

| Jurisdiction | Offence | Maximum penalty, including any applicable fine (for an individual) at 2019–20 value | Legislation |
|--------------|-----------------------------------|---|--|
| Cth | Contempt of Tribunal ¹ | Fine of 40 penalty units (\$8400) | <i>Native Title Act 1993</i> (Cth) s 177 |

Offences by witnesses (failures to attend, swear or affirm, produce documents or answer questions)

| Jurisdiction | Offence | Maximum penalty, including any applicable fine (for an individual) at 2019–20 value | Legislation |
|--------------|---|--|---|
| Vic | Failure to attend and answer questions or produce documents or things | 5 years imprisonment and/ or fine of 600 penalty units (\$99,132) | <i>Major Crime (Investigative Powers) Act 2004</i> (Vic) s 37 |
| Vic | Failure to attend and answer questions or produce documents or things, swear or affirm | 2 years imprisonment and/ or fine of 240 penalty units (\$39,652.80) | <i>Independent Broad-based Anti-corruption Commission Act 2011</i> (Vic) ss 135, 136, 137, 138 <i>Inquiries Act 2014</i> (Vic) ss 46, 47, 86 |
| Vic | Failure to attend, swear or make affirmation, or answer questions | 6 months imprisonment and/ or fine of 60 penalty units (\$9,913.20) (and 5 penalty units for each day the offence continues) | <i>Victorian Civil and Administrative Tribunal Act 1998</i> (Vic) ss 134, 135 |
| Vic | Failure to produce document or other thing required by witness summons | 6 months imprisonment and/ or fine of 60 penalty units (\$9,913.20) | <i>Independent Broad-based Anti-corruption Commission Act 2011</i> (Vic) s 590 |
| Vic | Failure to attend and answer questions or produce documents or things, wilful disobedience of order to give evidence, or prevarication ³ | 1 month imprisonment and/ or fine of 5 penalty units (\$826.10) | <i>Magistrates' Court Act 1989</i> (Vic) s 134 |
| Vic | Failure to attend or produce documents | Fine of 60 penalty units (\$9,913.20) | <i>Mental Health Act 2014</i> (Vic) s 204 |

| Jurisdiction | Offence | Maximum penalty, including any applicable fine (for an individual) at 2019–20 value | Legislation |
|--------------|--|---|--|
| NSW | Failure of witnesses to attend or answer questions | 2 years imprisonment or 20 penalty units (\$2200) | <i>Crime Commission Act 2012 (NSW) s 25</i> |
| Qld | Non-compliance with summons or production of books etc | 12 months imprisonment and /or fine of 200 penalty units (\$26,690) | <i>Commissions of Inquiry Act 1950 (Qld) s 5(2)</i> |
| Qld | Offences by witnesses | Fine of 100 penalty units (\$13,345) | <i>Queensland Civil and Administrative Tribunal Act 2009 (Qld) s 214, Mental Health Act 2016 (Qld) s 760</i> |
| SA | Failure of witness to attend and answer questions or produce evidence | 4 years imprisonment and/or fine of \$20000 | <i>Independent Commissioner against Corruption Act 2012 (SA) sch 2, cls 5(5), 8</i> |
| WA | Failure to attend, give evidence, swear or answer questions, and prevarication ³ | 5 years imprisonment and/or fine of \$50,000 | <i>District Court of Western Australia Act 1969 (WA) s 63(1)(c)–(e)</i> |
| WA | Failure to attend or produce documents | 12 months imprisonment and / or fine of \$12,000 | <i>Magistrates Court Act 2004 (WA) ss 16(2), (4)</i> |
| WA | Failure to attend or answer questions | 12 months imprisonment and / or fine of \$5000 | <i>Children's Court of Western Australia Act 1988 (WA) ss 29(2), (4)</i> |
| WA | Failure to answer questions or for giving false information about use of or access to firearms | 12 months imprisonment ² | <i>Criminal Organisations Control Act 2012 (WA) s 105</i> |
| WA | Failure to attend or to give evidence as required | Fine of \$5000 | <i>State Administrative Tribunal Act 2004 (WA) ss 96, 97</i> |
| Tas | Failure of witness to appear | 6 months imprisonment and/ or fine of 20 penalty units (\$3360) | <i>Criminal Procedure (Attendance of Witness) Act 1996 (Tas) s 19</i> |
| Tas | Failure to attend or produce evidence (other than at Supreme Court) | 3 months imprisonment and/ or fine of 5 penalty units (\$840) | <i>Evidence Act 2001 (Tas) s 194E(2)</i> |

| Jurisdiction | Offence | Maximum penalty, including any applicable fine (for an individual) at 2019–20 value | Legislation |
|---------------------|--|--|---|
| Tas | Failure to take oath or answer questions | 7 days imprisonment ² | <i>Justices Act 1959</i> (Tas) s 43 |
| Tas | Failure to attend or produce evidence | Fine of 5000 penalty units (\$840,000) | <i>Integrity Commission Act 2009</i> (Tas) s 80(5) |
| Tas | Failure of witness to attend | Fine of 5 penalty units (\$840) | <i>Justices Act 1959</i> (Tas) s 42 |
| NT | Failure of witness to attend, give evidence or wilful prevarication | 6 months imprisonment and/or 100 penalty units (\$15,700) | <i>Local Court Act 2015</i> (NT) ss 45, 47 <i>Northern Territory Civil and Administrative Tribunal Act 2014</i> (NT) ss 86, 87 |
| NT | Failure of witness to attend, produce or give evidence | 6 months imprisonment and/or 50 penalty units (\$6280) | <i>Coroners Act 1993</i> (NT) s 41 |
| ACT | Failure to attend, take oath, answer questions or produce documents | 6 months imprisonment and/or fine of 50 penalty units (\$800) | <i>Criminal Code 2002</i> (ACT) ss 719–723 |
| Cth | Failure of witness to attend and answer questions | 5 years imprisonment and/or fine of 200 penalty units (\$42,000) | <i>Australian Crime Commission Act 2002</i> (Cth) s 30 |
| Cth | Failing to appear before the court | 2 years imprisonment and/or fine of 120 penalty units (\$25,200) | <i>Federal Court of Australia Act 1976</i> (Cth) s 58FA |
| Cth | Failure to swear or affirm, answer questions, or produce document or thing | 2 years imprisonment and/or fine of 120 penalty units (\$25,200) | <i>Law Enforcement Integrity Commissioner Act 2006</i> (Cth) ss 93(2), (4) |
| Cth | Failure to attend, swear or affirm, or answer questions | 12 months imprisonment and/or fine of 60 penalty units (\$12,600) | <i>Administrative Appeals Tribunal Act 1975</i> (Cth) ss 61, 62 |
| Cth | Failure to attend | 12 months imprisonment and/or fine of 60 penalty units (\$12,600) | <i>Law Enforcement Integrity Commissioner Act 2006</i> (Cth) s 93(1) |
| Cth | Failure to attend | 12 months imprisonment and/or fine of 20 penalty units (\$4200) | <i>Competition and Consumer Act 2010</i> (Cth) s 160 |

| Jurisdiction | Offence | Maximum penalty, including any applicable fine (for an individual) at 2019–20 value | Legislation |
|--------------|---|---|--|
| Cth | Failure of witness to attend, swear and affirm and answer questions or produce evidence | 6 months imprisonment and/or fine of 30 penalty units (\$6300) | <i>Federal Court of Australia Act 1976</i> (Cth) s 58 <i>Federal Circuit Court of Australia Act 1999</i> (Cth) s 65 |
| Cth | Failure to answer questions or produce documents | Fine of 30 penalty units (\$6300) | <i>Competition and Consumer Act 2010</i> (Cth) s 135C |
| Cth | Failure of witness to attend, swear or answer questions, or produce documents | Fine of 20 penalty units (\$4200) | <i>Native Title Act 1993</i> (Cth) ss 171, 172, 174 |
| Cth | Failure of witness to attend | Fine of 10 penalty units (\$2100) | <i>Competition and Consumer Act 2010</i> (Cth) s 95T |

Appendix J: Disobedience contempt—comparable offences and penalties

Note: See Appendix H for an explanation of the calculation and references to maximum monetary penalties.

| Jurisdiction | Offence | Maximum penalty, including any applicable fine (for an individual) at 2019–20 value | Legislation |
|--------------|--|---|---|
| Vic | Contravening family violence intervention order, personal safety intervention order | 2 years imprisonment and/or fine of 240 penalty units (\$39,652.80) | <i>Family Violence Protection Act 2008</i> (Vic) s 123 <i>Personal Safety Intervention Orders Act 2010</i> (Vic) s 100 |
| Vic | Non-compliance with court order not to have a dog or cat, or disqualification order for dog or cat | 2 years imprisonment and/or fine of 240 penalty units (\$39,652.80) | <i>Domestic Animals Act 1994</i> (Vic) ss 84WAB, 84XH |

| Jurisdiction | Offence | Maximum penalty, including any applicable fine (for an individual) at 2019–20 value | Legislation |
|--------------|---|---|---|
| Vic | Breach of suppression or protection orders, orders to protect interstate operative's identity | 2 years imprisonment ¹ and/or fine of 240 penalty units (\$39,652.80) | <i>Evidence (Miscellaneous Provisions) Act 1958</i> (Vic) ss 42BQ, 42BN |
| Vic | Non-compliance with court orders relating to fishing | 12 months imprisonment and/or fine of 200 penalty units (\$33,044) | <i>Fisheries Act 1995</i> (Vic) ss 130, 130A, 130B |
| Vic | Non-compliance with court orders prohibiting recreational fishing | 6 months imprisonment and/or fine of 100 penalty units (\$16,522) | <i>Fisheries Act 1995</i> (Vic) s 130AA |
| Vic | Contravention of seizure warrant, attachment of earnings order, enforcement warrant | 6 months imprisonment and/or fine of 25 penalty units (\$4,130.50) | <i>Magistrates' Court Act 1989</i> (Vic) s 111(7B) <i>Fines Reform Act 2014</i> (Vic) s 118 |
| Vic | Non-compliance with non-monetary Tribunal order | 3 months imprisonment and/or fine of 50 penalty units (\$8,261) ² | <i>Victorian Civil and Administrative Tribunal Act 1998</i> (Vic) s 133 |
| Vic | Powers of Supreme Court if non-compliance with requirement to require information | 3 months imprisonment and/or fine of 30 penalty units (\$4,956.60) | <i>Taxation Administration Act 1997</i> (Vic) s 73A |
| Vic | Failing to obey order to abate pollution | Fine of 300 penalty units (\$49,566) for every day of non-compliance | <i>Environment Protection Act 1970</i> (Vic) s 64 |
| Vic | Offence for contravening orders banning or excluding people | Fine of 60 penalty units (\$9,913.20) | <i>Major Events Act 2009</i> (Vic) s 87 <i>Sustainable Forests (Timber) Act 2004</i> (Vic) s 94F <i>Wildlife Act 1975</i> (Vic) s 58O |

1 Penalty units are not specified, as in this jurisdiction maximum penalty differs depending on court or there is no default maximum penalty: see Penalties and Sentences Act 2015 (Qld) ss 45-46; Sentencing Act 2017 (SA) s 119; Sentencing Act 1995 (WA) s 41; Crimes (Sentencing) Act 2005 (ACT) s 15.

2 The initial maximum fine is 20 penalty units, but this can accrue for each day of non-compliance another 5 penalty units until a maximum of 50 penalty of units.

| Jurisdiction | Offence | Maximum penalty, including any applicable fine (for an individual) at 2019–20 value | Legislation |
|--------------|--|---|--|
| Vic | Court power to penalise contravention of order or injunction | Fine of 20 penalty units (\$3304.40) | <i>Relationships Act 2008</i> (Vic) s 70 |
| NSW | Contravention of restraining order, dealing with forfeited property | 2 years imprisonment and/or fine of equivalent to value of interest | <i>Criminal Assets Recovery Act 1990</i> (NSW) ss 16, 23A |
| NSW | Failure to comply with injunction | 6 months imprisonment and/or fine of 500 penalty units (\$55,000) | <i>Property (Relationships) Act 1984</i> (NSW) s 54 |
| NSW | Contempt of tribunal or magistrate | Fine of 50 penalty units (\$5500) | <i>Mental Health Act 2007</i> (NSW) s 161; <i>Drug and Alcohol Treatment Act 2007</i> (NSW) s 44 |
| NSW | Enforcement of other orders etc | Fine of 20 penalty units (\$2200) | <i>Property (Relationships) Act 1984</i> (NSW) s 59 |
| Qld | Non-compliance with court order or undertaking | 3 years imprisonment and/or fine of 200 penalty units (\$26,690) | <i>Magistrates Court Act 1921</i> (Qld) ss 50(1)(a), (3)(a) |
| Qld | Disobedience to lawful order issued by statutory authority | 12 months imprisonment ¹ | <i>Criminal Code</i> (Qld) s 205 |
| Qld | Contravening decision of Tribunal | Fine of 100 penalty units (\$13,345) | <i>Queensland Civil and Administrative Tribunal Act 2009</i> (Qld) s 213 |
| SA | Breach of firearms order | 10 years imprisonment and/or fine of \$50,000 | <i>Criminal Procedure Act 1921</i> (SA) s 180(4)(a) |
| SA | Contravention of restraining order | 4 years imprisonment and/or fine of \$20,000 | <i>Serious and Organised Crime (Unexplained Wealth) Act 2009</i> (SA) s 28(1) |
| SA | Contempt including breach of restraining order | 2 years imprisonment and/or fine of \$15,000 | <i>Magistrates Court Act 1991</i> (SA) ss 26, 46 |
| SA | Breach of offensive weapons order, contravention of restraining order without knowledge of order | 2 years imprisonment and/or fine of \$10,000 | <i>Criminal Procedure Act 1921</i> (SA) s 180(4)(b) <i>Serious and Organised Crime (Unexplained Wealth) Act 2009</i> (SA) s 28(2) |

| Jurisdiction | Offence | Maximum penalty, including any applicable fine (for an individual) at 2019–20 value | Legislation |
|--------------|--|---|---|
| SA | Contempt of court by contravening or failing to comply with Act or condition | 6 months imprisonment and/or fine of \$10,000 | <i>Gambling Administration Act 2019</i> (SA) ss 40, 41 <i>Liquor Licensing Act 1997</i> (SA) ss 24B, 24C |
| SA | Contravention of various orders of courts under Act | Fine of \$100,000 | <i>Fisheries Management Act 2007</i> (SA) s 102 <i>Native Vegetation Act 1991</i> (SA) s 31D |
| SA | Contravention of 'make good' order | Fine of \$60,000 | <i>Development Act 1993</i> (SA) s 106A(8) |
| SA | Contravention of orders under Act | Fine of \$20,000 | <i>Planning, Development and Infrastructure Act 2016</i> (SA) s 228(8) <i>Wilderness Protection Act 1992</i> (SA) s 34 |
| SA | Hindering or obstructing person complying with 'make good' order | Fine of \$15,000 | <i>Development Act 1993</i> (SA) s 106A(9) |
| SA | Hindering or obstructing person complying with 'make good' order | Fine of \$5000 | <i>Planning, Development and Infrastructure Act 2016</i> (SA) s 228(9) |
| WA | Dealing with seized or frozen property | 5 years imprisonment and/or fine of \$100,000 | <i>Criminal Property Confiscation Act 2000</i> (WA) s 50 |
| WA | Non-compliance with court order | 12 months imprisonment and/or fine of \$12,000 | <i>Magistrates Court Act 2004</i> (WA) ss 16(2), (4) |
| WA | Failure to comply with order not to have dog or to attend dog training course | 12 months imprisonment and/or fine of \$5000 | <i>Dog Act 1976</i> (WA) s 46A |
| WA | Failure to comply with decision | Fine of \$10,000 | <i>State Administrative Tribunal Act 2004</i> (WA) s 95 |
| WA | Non-compliance with order to comply with finance official's duties or to offer employee choice of employment | Fine of \$5000 and daily penalty of \$500 | <i>Industrial Relations Act 1979</i> (WA) ss 74, 77–78, 97YC |

| Jurisdiction | Offence | Maximum penalty, including any applicable fine (for an individual) at 2019–20 value | Legislation |
|--------------|--|---|---|
| Tas | Person not to deal with restrained property | 5 years imprisonment and/ or fine of 1000 penalty units (\$168,000) | <i>Crime (Confiscation of Profits) Act 1993</i> (Tas) s 132 |
| Tas | Contravention of restraint order | 6 months imprisonment and/ or fine of 10 penalty units (\$1680) | <i>Justices Act 1959</i> (Tas) s 106I |
| Tas | Failure to comply with order under Act | Fine of 50 penalty units (\$8400) | <i>Health Practitioners Tribunal Act 2010</i> (Tas) s 53(4) |
| NT | Prohibited dealings with seized or restrained property | 5 years imprisonment and/ or fine of 1000 penalty units (\$157,000) | <i>Criminal Property Forfeiture Act 2002</i> (NT) s 55 |
| NT | Non-compliance with injunction | Fine of 1000 penalty units (\$157,000) | <i>Workplace Health and Safety Act 2007</i> (NT) s 79 |
| Cth | Non-compliance with court orders for the purpose of preserving property or money | Fine of 180 penalty units (\$37,800) | <i>Competition and Consumer Act 2010</i> (Cth) s 137G |

Appendix K: Juror offences in Victoria and comparable statutory offences and penalties

Note: See Appendix H for an explanation of the calculation and references to maximum monetary penalties.

Offences under the *Juries Act 2000* (Vic)

| Offence | Who | Maximum penalty, including where specified for body corporates | Procedure specified | Section |
|--|--|--|--|---------|
| Secrecy | Persons performing a function or exercising a power under the Act, registered medical practitioner or psychologist | 12 months imprisonment and/or 120 penalty units | | 65 |
| Offences by officials | A person who performs a function or exercises a power under the Act | 5 years imprisonment and/or 600 penalty units | Yes—indictable offence. | 66 |
| Questionnaire | Potential juror | 30 penalty units | Yes—can be dealt with as a summary offence—see s 80. | 67 |
| Obligation to answer questions or produce document | Potential juror | 3 months imprisonment and/or 30 penalty units | Yes—can be dealt with as a summary offence—see s 81. | 68 |
| Failure to inform Juries Commissioner of disqualification or ineligibility | Potential juror | 30 penalty units | Yes—can be dealt with as a summary offence—see s 81. | 69 |
| Supply of false or misleading information | A person | 30 penalty units 150 penalty units (body corporate) | Yes—can be dealt with as a summary offence—see s 80. | 70 |
| Failing to attend for jury service—summoned for jury service | Potential juror | 3 months imprisonment and/or 30 penalty units | Yes—can be dealt with as a summary offence—see s 81. | 71(1) |
| Failing to attend for jury service—empanelled on a jury service | Juror | 6 months imprisonment and/or 60 penalty units | Yes—can be dealt with as a summary offence—see s 81. | 71(3) |
| Failure to attend as supplementary juror | Potential juror | 3 months imprisonment and/or 30 penalty units | Yes—can be dealt with as a summary offence—see s 81. | 72 |

| Offence | Who | Maximum penalty, including where specified for body corporates | Procedure specified | Section |
|--|-----------------------|---|--|---------|
| Refusal to be sworn or make affirmation | Juror | 3 months imprisonment and/or 30 penalty units | Yes—can be dealt with as a summary offence—see s 81. | 73 |
| Impersonation of a person for the purpose of jury service | A person | 12 months imprisonment and/or 120 penalty units | Yes—can be dealt with as a summary offence—see s 82. | 74 |
| Extra payment for jury service | Juror | 12 months imprisonment and/or 120 penalty units | Yes—can be dealt with as a summary offence—see s 82. | 75 |
| Employment not to be terminated or prejudiced because of jury service | An employer | 12 months imprisonment and/or 120 penalty units 600 penalty units (body corporate) | Yes—can be dealt with as a summary offence—see s 83. | 76 |
| Restriction on publishing names of jurors | A person (incl juror) | 5 years imprisonment and/or 600 penalty units 3000 penalty units (body corporate) | Yes—indictable offence. | 77 |
| Confidentiality of jury deliberations—must not publish or cause to be published—includes statements made, opinions expressed etc | A person (incl juror) | 5 years imprisonment and/or 600 penalty units 3000 penalty units (body corporate) | Yes—see s78(4). DPP or Juries Commissioner may request police to investigate complaint about deliberations of a jury or the disclosure of information by a juror about their deliberations. But if complaint made during trial, Juries Commissioner must refer the complaint to the trial judge. Indictable offence. Prosecution can only be brought with the written consent of the DPP. | 78 |

| Offence | Who | Maximum penalty, including where specified for body corporates | Procedure specified | Section |
|--|-----------------|--|---|---------|
| Panel member or juror must not make enquiries about trial matters—includes anything done by a juror in contravention of a direction given to the jury by the trial judge | Juror | 120 penalty units | Yes—see s 78B. A judge may examine on oath or affirmation a person referred to in section 78A to determine whether a person has engaged in conduct that may constitute an offence against s78A(1). | 78A |
| Supply of false or misleading information | A person | 30 penalty units 150 penalty units (body corporate) | The court in a summary way. | 80 |
| Failure to attend, be sworn or give evidence and giving false answers | Juror | 3 months imprisonment and/ or 30 penalty units 6 months imprisonment and/or 60 penalty units (if person empanelled on a jury) | The court in a summary way. NB the procedure for an application to have a person dealt with in a summary way under section 81 is set out in Part 2 of the <i>Supreme Court (Miscellaneous Civil Proceedings) Rules 2018</i> r 12.10 and requires that the application be made by the Juries Commissioner (r 12.09) | 81 |
| Impersonation of jurors and extra payment for jury service | A person/ juror | 12 months imprisonment and/ or 120 penalty units | The court in a summary way. | 82 |
| Employers terminating or threatening to terminate or otherwise prejudice employment of juror | An employer | 12 months imprisonment and/ or 120 penalty units | The court in a summary way. | 83 |

Comparative statutory penalties

Failure to attend

| Jurisdiction | Offence | Maximum penalty, including any applicable fine (for an individual and if specified a body corporate) at 2019–20 value | Legislation |
|--------------|---|---|---|
| Vic | Failure to attend for jury service if empanelled | 6 months imprisonment and/or fine of 60 penalty units (\$9913.20) | <i>Juries Act 2000</i> (Vic) s 71(3) |
| Vic | Failure to attend for jury service, or as supplementary juror | 3 months imprisonment and/or fine of 30 penalty units (\$4956.60) | <i>Juries Act 2000</i> (Vic) ss 71(1), 72 |
| NSW | Failure to attend for jury service | Fine of 20 penalty units (\$2200) | <i>Jury Act 1977</i> (NSW) s 63 |
| Qld | Failure to attend for jury service | 2 months imprisonment and/or fine of 10 penalty units (\$1334.50) | <i>Jury Act 1995</i> (Qld) s 28 |
| SA | Failure to attend or does not answer to his or her name | Fine of \$1250 | <i>Juries Act 1927</i> (SA) s 78(1)(a) |
| WA | Failure to attend as juror or for jury service | Fine of \$5000 | <i>Juries Act 1957</i> (WA) ss 55(1), (3) |
| NT | Failure to attend for jury service or as juror | Fine of 4 penalty units (\$628) | <i>Juries Act 1962</i> (NT) ss 50, 51 |
| ACT | Failure to attend for jury service or as juror | Fine of 10 penalty units (\$1600) | <i>Juries Act 1967</i> (ACT) ss 41, 42 |
| Cth | Failure to attend for jury service | Fine of 30 penalty units (\$6300) | <i>Federal Court of Australia Act 1976</i> (Cth) s 58AA |

Failure to answer questions, questionnaire or comply with directions

| Jurisdiction | Offence | Maximum penalty, including any applicable fine (for an individual and if specified a body corporate) at 2019/20 value | Legislation |
|--------------|---|---|--|
| Vic | Failure to answer questions or produce documents, swear or affirm | 3 months imprisonment and/or fine of 30 penalty units (\$4956.60) | <i>Juries Act 2000</i> (Vic) ss 68, 73 |
| Qld | Failure to answer questions | 4 months imprisonment and/or fine of 20 penalty units (\$2669) | <i>Jury Act 1995</i> (Qld) s 68 |

| Jurisdiction | | Offence | Maximum penalty, including any applicable fine (for an individual and if specified a body corporate) at 2019020 value | Legislation |
|--------------|-----------------------------------|---|---|--|
| Tas | | Failure of juror to answer questions | 3 months imprisonment and/or fine of 30 penalty units (\$5040) | <i>Juries Act 2003</i> (Tas) s 54 |
| Vic | | Failure of juror to answer juror questionnaire | Fine of 30 penalty units (\$4956.60) | <i>Juries Act 2000</i> (Vic) s 67 |
| NSW | | Failure of juror to answer juror questionnaire | Fine of 10 penalty units (\$1100) | <i>Jury Act 1977</i> (NSW) s 61 |
| SA | | Failure of juror to answer juror questionnaire or false and misleading information in questionnaire | Fine of \$1250 | <i>Juries Act 1927</i> (SA) s 25(2) |
| Cth | | Failure of juror to answer juror questionnaire | Fine of 30 penalty units (\$6300) | <i>Federal Court of Australia Act</i> (Cth) s 58AE |
| WA | Failure to comply with directions | | Fine of \$5000 | <i>Juries Act 1957</i> (WA) s 55(12) |
| ACT | | Failure to comply with conditions as a juror | Fine of 10 penalty units (\$1600) | <i>Juries Act 1967</i> (ACT) s 42A |
| Cth | | Failing of jurors or potential jurors to comply with directions by persons attending for jury service or jurors | Fine of 30 penalty units (\$6300) | <i>Federal Court of Australia Act 1976</i> (Cth) ss 58AB, 58AC |

Inquiries about trial matters

| Jurisdiction | Offence | Maximum penalty, including any applicable fine (for an individual and if specified a body corporate) at 2019–20 value | Legislation |
|--------------|---|---|---|
| Vic | Inquiries by jurors about trial matters | Fine of 120 penalty units (\$19,826.40) | <i>Juries Act 2000</i> (Vic) s 78A |
| Qld | Inquiries by juror about accused | 2 years imprisonment ¹ | <i>Jury Act 1995</i> (Qld) s 69A |
| NSW | Inquiries by juror about trial matters prohibited | 2 years imprisonment and/or fine of 50 penalty units (\$5500) | <i>Jury Act 1978</i> (NSW) s 68C |
| Cth | Inquiries by juror about trial matters | Fine of 60 penalty units (\$12,600) | <i>Federal Court of Australia Act 1976</i> (Cth) s 58AM |

Confidentiality of jury deliberations

| Jurisdiction | Offence | Maximum penalty, including any applicable fine (for an individual and if specified a body corporate) at 2019/20 value | Legislation |
|--------------|---|--|---|
| Vic | Confidentiality of jury deliberations | 5 years imprisonment and/or fine of 600 penalty units (\$99,132) | <i>Juries Act 2000</i> (Vic) s 78 |
| NSW | Disclosure of information by jurors etc (for a benefit) | Fine of 50 penalty units (\$5500) | <i>Jury Act 1978</i> (NSW) s 68B(2) |
| NSW | Disclosure of information by jurors etc | Fine of 20 penalty units (\$2200) | <i>Jury Act 1977</i> (NSW) s 68B(1) |
| Qld | Confidentiality of jury deliberations | 2 years imprisonment ¹ | <i>Jury Act 1995</i> (Qld) s 70 |
| SA | Confidentiality of jury deliberations | 2 years imprisonment and/or fine of \$10,000 In the case of a body corporate, \$25,000 | <i>Criminal Law Consolidation Act 1935</i> (SA) s 246 |
| WA | Confidentiality of jury deliberations | Fine of \$5000 | <i>Juries Act 1957</i> (WA) ss 56B, 56D |
| Tas | Confidentiality of jury deliberations | 2 years imprisonment and/or fine of 600 penalty units (\$100,800) In the case of a body corporate, 3000 penalty units (\$504,400) | <i>Juries Act 2003</i> (Tas) s 58 |

¹ Penalty units are not specified, as in this jurisdiction maximum penalty differs depending on court or there is no default maximum penalty: see Penalties and Sentences Act 2015 (Qld) ss 45-46; Sentencing Act 2017 (SA) s 119; Sentencing Act 1995 (WA) s 41; Crimes (Sentencing) Act 2005 (ACT) s 15.

| Jurisdiction | Offence | Maximum penalty, including any applicable fine (for an individual and if specified a body corporate) at 2019/20 value | Legislation |
|--------------|---|--|--|
| NT | Confidentiality of jury deliberations | 2 years imprisonment and/or fine of 85 penalty units (\$13,345) In the case of a body corporate, 440 penalty units (\$69,080) | <i>Juries Act 1962</i> (NT) s 49A |
| ACT | Confidentiality of jury deliberations | 6 months imprisonment and/or fine of 50 penalty units (\$8000) | <i>Juries Act 1967</i> (ACT) s 42C |
| Cth | Confidentiality of jury deliberations (for a benefit) | 6 months imprisonment and/or fine of 30 penalty units (\$6300) | <i>Federal Court of Australia Act 1976</i> (Cth) s 58AL(2) |
| Cth | Confidentiality of jury deliberations | Fine of 60 penalty units (\$12,600) | <i>Federal Court of Australia Act 1976</i> (Cth) s 58AL(1) |

Identification of jurors

| Jurisdiction | Offence | Maximum penalty, including any applicable fine (for an individual and if specified a body corporate) at 2019–20 value | Legislation |
|--------------|---|--|---|
| Vic | Identification of jurors | 5 years imprisonment and/or fine of 600 penalty units (\$99,132) | <i>Juries Act 2000</i> (Vic) s 77 |
| NSW | Disclosure etc of identity or address of jurors | 2 years imprisonment and/or fine of 50 penalty units (\$5500) In the case of a body corporate, \$250,000 | <i>Jury Act 1977</i> (NSW) s 68 |
| Qld | Identification of jurors | 2 years imprisonment | <i>Jury Act 1995</i> (Qld) s 70 |
| SA | Identification of jurors | 2 years imprisonment and/or fine of \$10,000 In the case of a body corporate, \$25,000 | <i>Criminal Law Consolidation Act 1935</i> (SA) s 246 |
| WA | Identification of jurors | Fine of \$5000 | <i>Juries Act 1957</i> (WA) ss 56B, 56D |
| WA | Photographing jurors | Dealt with as a contempt of court | <i>Juries Act 1957</i> (WA) s 57 |
| Tas | Identification of juror | 2 years imprisonment and/or fine of 600 penalty units (\$100,800) In the case of a body corporate, 3000 penalty units (\$504,400) | <i>Juries Act 2003</i> (Tas) s 57 |

| Jurisdiction | Offence | Maximum penalty, including any applicable fine (for an individual and if specified a body corporate) at 2019–20 value | Legislation |
|--------------|--|--|---|
| NT | Identification of jurors, including by health practitioner | 2 years imprisonment and/or fine of 85 penalty units (\$13,345) In the case of a body corporate, 440 penalty units (\$69,080) | <i>Juries Act 1962</i> (NT) s 49B |
| ACT | Identification of jurors | 6 months imprisonment and/or fine of 50 penalty units (\$8000) | <i>Juries Act 1967</i> (ACT) s 42C |
| Cth | Identification of juror | Fine of 50 penalty units (\$10,500) | <i>Federal Court of Australia Act 1976</i> (Cth) s 58AJ |

Impersonation of jurors

| Jurisdiction | Offence | Maximum penalty, including any applicable fine (for an individual and if specified a body corporate) at 2019/20 value | Legislation |
|--------------|---|---|--|
| Vic | Impersonation of jurors | 12 months imprisonment and/or fine of 120 penalty units (\$19,826.40) | <i>Juries Act 2000</i> (Vic) s 74 |
| NSW | Impersonation of jurors | Fine of 50 penalty units (\$5500) | <i>Jury Act 1977</i> (NSW) s 67 |
| Qld | Impersonation of jurors | 2 years imprisonment ¹ | <i>Jury Act 1995</i> (Qld) s 66 |
| SA | Impersonation of jurors with intention of influencing proceedings | 10 years imprisonment ¹ | <i>Criminal Law Consolidation Act 1935</i> (SA) s 245(5) |
| SA | Impersonation of jurors | 2 years imprisonment ¹ | <i>Criminal Law Consolidation Act 1935</i> (SA) s 245(5) |
| WA | Impersonation of jurors | Fine of \$5000 | <i>Juries Act 1957</i> (WA) s 55(4) |
| Tas | Impersonation of jurors | 12 months imprisonment and/or fine of 120 penalty units (\$20,160) | <i>Juries Act 2003</i> (Tas) s 62 |
| NT | Impersonation of jurors | Fine of 17 penalty units (\$2669) | <i>Juries Act 1962</i> (NT) s 55 |
| ACT | Impersonation of jurors | 6 months imprisonment and/or fine of 50 penalty units (\$8000) | <i>Juries Act 1967</i> (ACT) s 43 |
| Cth | Impersonation of jurors | 2 years imprisonment and/or fine of 120 penalty units (\$25,200) | <i>Federal Court of Australia Act 1976</i> (Cth) s 58AD |

Other jury offences

| Jurisdiction | Offence | Maximum penalty, including any applicable fine (for an individual and if specified a body corporate) at 2019–20 value | Legislation |
|--------------|--|---|--|
| Vic | Dismissal by employers of juror | 12 months imprisonment and/or fine of 120 penalty units (\$19,826) | <i>Juries Act 2000</i> (Vic) s 76 |
| NSW | Dismissal or prejudice by employers of juror | 12 months imprisonment and/or fine of 50 penalty units (\$5500) In the case of a body corporate, 200 penalty units | <i>Jury Act 1978</i> (NSW) s 69 |
| NSW | Other offences relating to employment conditions of jurors | 20 penalty units (\$2200) | <i>Jury Act 1978</i> (NSW) s 69A |
| Qld | Dismissal by employers of juror | 12 months imprisonment ¹ | <i>Jury Act 1995</i> (Qld) s 69 |
| WA | Dismissal by employers of juror | Fine of \$10,000 For a body corporate, a fine of \$50,000 | <i>Juries Act 1957</i> (WA) s 56 |
| Tas | Dismissal by employers of juror | 12 months imprisonment and/or fine of 120 penalty units (\$20,160) For a body corporate, 600 penalty units (\$100,800) | <i>Juries Act 2003</i> (Tas) s 50 |
| NT | Dismissal or prejudice by employers of juror | 12 months imprisonment and/or fine of 40 penalty units (\$6280) | <i>Juries Act 1962</i> (NT) s 52 |
| ACT | Dismissal or prejudice by employers of juror | 6 months imprisonment and/or fine of 50 penalty units (\$8000) | <i>Juries Act 1967</i> (ACT) s 44AA |
| Vic | Embracery | 15 years imprisonment and/or fine of 1800 penalty units (\$297,396) | <i>Crimes Act 1958</i> (Vic) s 67A |
| Vic | Extra payment for juror | 12 months imprisonment and/or fine of 120 penalty units (\$19,826.40) | <i>Juries Act 2000</i> (Vic) s 75 |
| SA | Extra payment for juror | Fine of \$1250 | <i>Juries Act 1927</i> (SA) s 78(1)(d) |
| Tas | Extra payment for juror | 12 months imprisonment and/or fine of 120 penalty units (\$20,160) | <i>Juries Act 2003</i> (Tas) s 64 |
| NT | Extra payment for juror | Fine of 4 penalty units (\$628) | <i>Juries Act 1962</i> (NT) s 56 |

| Jurisdiction | Offence | Maximum penalty, including any applicable fine (for an individual and if specified a body corporate) at 2019–20 value | Legislation |
|--------------|---|--|---|
| Vic | Failure to inform of exclusion from jury service | Fine of 30 penalty units (\$4956.60) | <i>Juries Act 2000</i> (Vic) s 69 |
| NSW | Failure to inform of exclusion from jury service | Fine of 10 penalty units (\$1100) | <i>Jury Act 1977</i> (NSW) s 62A |
| Tas | Failure to inform of exclusion from jury service | Fine of 30 penalty units (\$5040) | <i>Juries Act 2003</i> (Tas) s 55 |
| Vic | False or misleading information to avoid jury service | Fine of 30 penalty units (\$4956.60) | <i>Juries Act 2000</i> (Vic) ss 70, 80 |
| NSW | False or misleading information to sheriff | Fine of 50 penalty units (\$5500) | <i>Jury Act 1977</i> (NSW) s 62 |
| Tas | False and misleading information | Fine of 50 penalty units (\$8400) For a body corporate, 100 penalty units (\$16,800) | <i>Juries Act 2003</i> (Tas) s 61 |
| Cth | False or misleading information to avoid jury service | Fine of 60 penalty units (\$12,600) | <i>Federal Court of Australia Act 1976</i> (Cth) s 58AF |
| Qld | Falsification of jury lists | 2 years imprisonment ¹ | <i>Jury Act 1955</i> (Qld) s 67 |
| NSW | Inspection of panel or card prepared by sheriff | Fine of 10 penalty units (\$1100) | <i>Jury Act 1977</i> (NSW) s 67A |
| NSW | Soliciting information from or harassing jurors or former jurors | 7 years imprisonment ¹ | <i>Jury Act 1977</i> (NSW) s 68A |
| Qld | Harassing juror to obtain information about deliberations of jury | 2 years or \$10,000 In the case of a body corporate, \$25,000 | <i>Criminal Law Consolidation Act 1935</i> (SA) s 247 |
| WA | Soliciting or obtaining protected information | Fine of \$5000 | <i>Juries Act 1957</i> (WA) s 56C |
| NT | Soliciting or obtaining jury deliberations or identity of jurors | 2 years imprisonment and/or fine of 85 penalty units (\$13,345) In the case of a body corporate, 440 penalty units (\$69,080) | <i>Juries Act 1962</i> (NT) ss 49A(3), 49B(3) |

| Jurisdiction | Offence | Maximum penalty, including any applicable fine (for an individual and if specified a body corporate) at 2019–20 value | Legislation |
|--------------|--|---|--|
| ACT | Soliciting or obtaining protected information | 6 months imprisonment and/or fine of 50 penalty units (\$8000) | <i>Juries Act 1967</i> (ACT) s 42C(3) |
| Cth | Soliciting information from jurors for benefit | 6 months imprisonment and/or fine of 30 penalty units (\$6300) | <i>Federal Court of Australia Act 1976</i> (Cth) s 58AK(2) |
| Cth | Soliciting information from jurors | Fine of 60 penalty units (\$12,600) | <i>Federal Court of Australia Act 1976</i> (Cth) s 58AK(1) |

Appendix L: Restrictions on publication under the Judicial Proceedings Reports Act—comparable offences and penalties in Victoria and interstate

Note: See Appendix H for an explanation of the calculation and references to maximum monetary penalties.

Comparable Victorian offences

| Offence | Fault element | Maximum penalty | Legislation |
|--|----------------|--|---|
| Publish material likely to lead to the identification of a child, or identification of other persons, or publishing pictures | Not specified. | 2 years imprisonment or 100 penalty units | <i>Family Violence Protection Act 2008</i> (Vic) s 166 |
| Publish report of proceeding under the <i>Guardianship and Administration Act 1986</i> (Vic) that identifies, or could reasonably lead to the identification of, a party to the proceeding | Not specified. | 20 penalty units | <i>Victorian Civil and Administrative Tribunal Act 1998</i> (Vic) sch 1 cl 37 |
| Publish material likely to lead to the identification of a party to adoption without consent | Not specified. | 2 years imprisonment or 100 penalty units 1000 penalty units for a body corporate | <i>Adoption Act 1984</i> (Vic) s 121(2) |

| Offence | Fault element | Maximum penalty | Legislation |
|--|----------------|--|--|
| <p>Publish a report of a proceeding in the Children's Court or a proceeding in any other court arising out of a proceeding in the Children's Court that contains particulars likely to lead to the identification of:</p> <p>the particular venue of the Children's Court</p> <p>a child or other party to the proceeding</p> <p>a witness in the proceeding</p> <p>a child that is the subject of an order made by the Court.</p> | Not specified. | <p>2 years imprisonment or 100 penalty units</p> <p>500 penalty units for a body corporate</p> | <i>Children, Youth and Families Act 2005</i> (Vic) s 534 |

Restriction on identifying victims of sexual offences: equivalent statutory offences in other jurisdictions

| Jurisdiction | Offence | Fault element | Maximum penalty (for individual and body corporate) | Legislation |
|--------------|--|----------------------------------|--|--|
| Vic | Publish particulars likely to lead to the identification of a person against whom a sexual offence is alleged to have been committed | Not specified (strict liability) | <p>4 months imprisonment or 20 penalty units (\$3304.40)</p> <p>50 penalty units for a body corporate (\$8261)</p> | <i>Judicial Proceedings Reports Act 1958</i> (Vic) ss 4(1A), (3) |
| NSW | Publish any matter which reveals the identity of, or is likely to lead to the identification of, a person against whom a prescribed sexual offence is alleged to have been committed | Not specified | <p>6 months imprisonment and/or 50 penalty units (\$5500)</p> <p>500 penalty units for a body corporate (\$55,000)</p> | <i>Crimes Act 1900</i> (NSW) s 578A |
| Qld | Publish report revealing name, address, school or place of employment of a complainant or any other particular likely to lead to the identification of a complainant | Not specified | <p>2 years imprisonment or 100 penalty units (\$13,345)</p> <p>1000 penalty units for a body corporate (\$133,450)</p> | <i>Criminal Law (Sexual Offences) Act 1978</i> (Qld) s 6 |

| Jurisdiction | Offence | Fault element | Maximum penalty (for individual and body corporate) | Legislation |
|--------------|---|---------------|--|---------------------------------------|
| SA | Publish any statement or representation which reveals the identity of a person alleged in any legal proceedings to be the victim of a sexual offence, or from which their identity might reasonably be inferred | Not specified | Fine of \$10,000 Fine of \$120,000 for a body corporate | <i>Evidence Act 1929 (SA) s 71A</i> |
| Tas | Publish, in relation to any proceedings in a court, the name, address or any other reference or allusion likely to lead to the identification of: any person in respect of whom a sexual offence is alleged to have been committed any witness or intended witness, other than the defendant in those proceedings | Not specified | Offence punished as a contempt in the face of the court | <i>Evidence Act 2001 (Tas) s 194K</i> |
| WA | Publish a matter in relation to an accusation of a sexual offence likely to lead members of the public to identify the complainant and, in the case of a complainant who is attending a school, no matter likely to lead members of the public to identify the school which the complainant attends | Not specified | Fine of \$5000 Fine of \$25,000 for a body corporate | <i>Evidence Act 1906 (WA) s 36C</i> |

| Jurisdiction | Offence | Fault element | Maximum penalty (for individual and body corporate) | Legislation |
|--------------|---|------------------|--|--|
| ACT | <p>Publish, in relation to a sexual offence proceeding:</p> <p>the complainant's name</p> <p>protected identity information about the complainant</p> <p>a reference or allusion that discloses the complainant's identity</p> <p>a reference or allusion from which the complainant's identity might reasonably be worked out.</p> | Strict liability | 6 months imprisonment and/or 50 penalty units (\$8000) | <i>Evidence (Miscellaneous Provisions) Act 1991 (ACT) s 74</i> |
| NT | <p>Publish report concerning an examination of witnesses or a trial which reveals the name, address, school or place of employment of a complainant or any other particular likely to lead to the identification of a complainant</p> | Recklessness | 6 months imprisonment or 40 penalty units (\$6280) | <i>Sexual Offences (Evidence and Procedure) Act 1983 (NT) ss 6, 11¹</i> |

Appendix M: Suppression orders—comparable offences and penalties, and sentences in Victorian cases

Note: See Appendix H for an explanation of the calculation and references to maximum monetary penalties.

Comparable Victorian offences

| Offence | Section/Act | Classification of offence | Fault element | Maximum penalty (for individual and body corporate (if specified)) |
|---|---|---------------------------|---|---|
| Breach of suppression order | <i>Independent Broad-based Anti-corruption Commission Act 2011</i> (Vic) s 129A | Indictable offence | Knowledge or recklessness as to existence of order | 5 years imprisonment and/or 600 penalty units 3000 penalty units for a body corporate |
| Breach of suppression order | <i>Major Crime (Investigative Powers) Act 2004</i> (Vic) s 43 | Indictable offence | Not specified | 5 years imprisonment and/or 600 penalty units |
| Breach an order restricting publication of material (of proceedings or identifying person appearing at a hearing) | <i>Victims of Crime Assistance Act 1996</i> (Vic) s 43 | Summary offence | Not specified | 2 years imprisonment and/or 100 penalty units 500 penalty units for a body corporate |
| Breach a suppression and protection order relating to interstate operatives | <i>Evidence (Miscellaneous Provisions) Act 1958</i> (Vic) s 42BQ | Summary offence | Knowing or reckless as to fact that order has been made and intentionally, knowingly or recklessly contravene the order | 2 years imprisonment and/or 240 penalty units |
| Breach a suppression order | <i>Confiscation Act 1997</i> (Vic) ss 17(3)–(5) | Summary offence | Not specified | 12 months imprisonment and/or 1000 penalty units |
| Breach a proceeding suppression order | <i>Crimes (Mental Impairment and Unfitness to be Tried) Act 1997</i> (Vic) s 75 | Summary offence | Not specified | 12 months imprisonment and/or 120 penalty units 500 penalty units for a body corporate |

| Offence | Section/Act | Classification of offence | Fault element | Maximum penalty (for individual and body corporate (if specified)) |
|---------------------------------------|---|---------------------------|---------------|--|
| Breach a proceeding suppression order | <i>Public Health and Wellbeing Act 2008</i> (Vic) s 133 | Summary offence | Not specified | 120 penalty units 600 penalty units for a body corporate |

Comparable offences in other jurisdictions

| Jurisdiction | Offence | Fault element | Legislation | Maximum penalty (for individual and body corporate (if specified)) |
|--------------|---|--|---|---|
| NSW | Breach a suppression order or non-publication order | Reckless as to whether the conduct constitutes a contravention | <i>Court Suppression and Non-publication Orders Act 2010</i> (NSW) s 16 | 12 months imprisonment and/or 1000 penalty units (\$110,000) 5000 penalty units for a body corporate (\$550,000) |
| SA | Disobey a suppression order | Not specified | <i>Evidence Act 1929</i> (SA) ss 69A, 70 | 2 years imprisonment or \$10,000 fine \$120,000 fine for a body corporate |
| WA | Breach a suppression order | Not specified | <i>Criminal Procedure Act 2004</i> (WA) s 171(10) | 12 months imprisonment or \$12,000 fine \$60,000 fine for a body corporate |
| Tas | Breach an order forbidding the printing of evidence, argument or particulars | Not specified | <i>Evidence Act 2001</i> (Tas) s 194J(2) | Treated as a contempt in the face of the court |
| NT | Breach an order prohibiting publication of evidence or the name of a party or a witness in a proceeding | Reckless as to whether the conduct results in a contravention | <i>Evidence Act 1939</i> (NT) ss 57–59 | 12 months imprisonment or 40 penalty units (\$6280) |

| Jurisdiction | Offence | Fault element | Legislation | Maximum penalty (for individual and body corporate (if specified)) |
|--------------|---|---------------|--|--|
| ACT | Fail to comply with order prohibiting publication of evidence or the name of a party or a witness in a proceeding | Not specified | <i>Evidence (Miscellaneous Provisions) Act 1991</i> (ACT) ss 111–112 | 6 months imprisonment and/or 50 penalty units (\$8000) |
| Cth | Contravention of suppression or non-publication order | Not specified | <i>Administrative Appeals Tribunal Act 1975</i> (Cth) s 62C <i>Federal Circuit Court of Australia Act 1999</i> (Cth) s 88M <i>Federal Court of Australia Act 1976</i> (Cth) s 37AL <i>Family Law Act 1975</i> (Cth) s 102PK <i>Judiciary Act 1903</i> (Cth) s 77RK | 12 months imprisonment and/or 60 penalty units (\$12,600) |

Selected sentences in Victorian cases

| State | Court | Case | Conduct | Penalty |
|-------|---------------|--|--|----------------|
| Vic | Supreme Court | <i>R v Derryn Hinch (No 2)</i> [2013] VSC 554 | Maintained article on website for a day that breached suppression orders in a murder trial despite knowledge of orders. Publication did not prejudice fair trial; apology made and of good character but had previous convictions for contempt of court.. | \$100,000 fine |
| Vic | Supreme Court | <i>R v Herald & Weekly Times Pty Ltd</i> [2009] VSC 85 | Publication of article identifying person in breach of suppression order. Significant breach with serious possible consequences but no harm to relevant trial. No intention to harm the trial, plea of guilty and apology, community service and limited history of contempts. | |

| State | Court | Case | Conduct | Penalty |
|-------|---------------|---|--|--|
| Vic | Supreme Court | <i>R v General Television Corporation Pty Ltd</i> [2009] VSC 84 | Breach of suppression orders prohibiting disclosure of identity of witnesses in gangland murder trial during interview with author of book on TV. Risk considered obvious and risk to safety of those identified, only partially addressed by remedial steps. | \$15,000 fine plus costs order of \$37,500, conviction recorded. |
| Vic | Supreme Court | <i>R v Australian Broadcasting Corp</i> [2007] VSC 498 | Media alert publishing information derived from proceedings where suppression order granted in relation to pre-trial hearing, where court did not follow protocol for disseminating orders. Mitigating factors also included guilty plea and apology at first opportunity, no prior convictions, no actual interference with the trial, and lack of intention. | \$30,000 fine (\$10,000 for each of the two charges of disobedience to the suppression order, \$20,000 for each of the two charges of interference with the administration of justice- a total of \$60,000 but reduced). |



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**Contempt of Court
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