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Mr Bruce Gardner PSM
Acting Chair
Victorian Law Reform Commission
GPO Box 4637
MELBOURNE VIC 3001

Dear Mr Gardner

Contempt of Court Consultation Paper

I write in response to the Contempt of Court Consultation Paper, published 17 May 2019. Victoria Legal Aid (VLA) welcomes the opportunity to contribute to this review.

VLA is the largest criminal defence practice in Victoria and VLA plays an important institutional role within the criminal justice system. VLA funds or appears in approximately 80% of criminal trials in Victoria.[1] In the 2017/18 financial year, VLA funded 840 trials.[2] VLA's criminal law services include:

- providing representation in the County and Supreme Courts through our in-house practice
- funding external private practitioners and barristers to provide representation
- specialist representation via VLA Chambers, our group of in-house courtroom advocates
- our specialist Youth Crime team, who provide representation to children charged with offences and conduct outreach services to youth justice facilities
- a specialist advice service for prisoners as part of our Legal Help telephone service.

Through our civil justice and family, youth, and children's law programs, VLA also provides:

- legal information, advice and representation in child protection and Commonwealth family law proceedings
- family violence court-based legal services to applicants and respondents in intervention order matters in the Magistrates' and Children's Courts

[1] Victoria Legal Aid, *Delivering High Quality Criminal Trials: Consultation and Options Paper*, January 2014, p4.
[2] Victoria Legal Aid, *Annual Report 2017/18*, p77, this includes all costs paid to barristers including circuit fees, travelling costs, and other expenses.

- independent children's lawyers in Family Law Court proceedings
- family dispute resolution services to help families make decisions about family law disputes away from court
- information, advice and representation to victims of crime seeking financial assistance from the Victims of Crime Assistance Tribunal or via court-ordered compensation from offenders
- support to people in the mental health system through non-legal advocates in our Independent Mental Health Advocacy service.

VLA has a significant interest in ensuring fairness in judicial proceedings, ensuring that courts have the tools needed to decide an accused's charges solely on the evidence presented and tested in court, that complainants are supported to come forward, and that (where appropriate) certain details are protected from publication pending the conclusion of proceedings.

The attached table outlines VLA's position on the questions you have raised which relate to the above matters. We have restricted our submissions to areas where we can make an informed contribution based on our practice experience.

Please contact me if you wish to discuss our contribution further.

Yours faithfully

LOUISE GLANVILLE
Chief Executive Officer

VLA response to consultation questions

Consultation Paper question	VLA feedback
Chapter 1: Introduction	
1 What other principles of law, if any, are relevant to the Commission's consideration of the laws the subject of this review?	
Chapter 2: Existing legal framework	
Chapter 3: General issues with the law of contempt of court	
2 Do the courts need a general power to punish any conduct that has a tendency to interfere with the proper administration of justice? Alternatively, should the law specify the conduct subject to sanction? If so, should only conduct that is *intended* to interfere with the administration of justice be subject to punishment?	The inherent jurisdiction of the higher courts to ensure the proper administration of justice should be maintained, to guarantee that courts can manage unforeseen types of conduct not covered by specific statutory offences. It should be readily understood from the statutory provisions that the inherent power is intended to be relied upon where the statutory provisions are not sufficient.
3 Should the procedure for filing and prosecuting a charge of contempt of court be the same as for other criminal offences? If not, what are the reasons necessitating a different procedure for contempt of court and what should be the features of that procedure?	The procedure for filing and prosecuting a charge of contempt of court should match that which applies to other criminal offences; this would increase transparency and consistency. The same procedure should apply to all accused subject to judicial proceedings of a criminal nature, rather than it being dependent upon the view taken by the judicial officer. The charges should be heard by a judicial officer who is not linked to either the alleged offending or the ongoing proceedings (if any).
4 Is there a need for statutory guidance on when the court may exercise its power to punish for contempt of court in circumstances where the conduct is also a statutory offence? If so, what guidance should be provided?	If the inherent jurisdiction is retained to ensure that unforeseen circumstances are covered, it should be readily understood from the statutory provisions that the inherent power is intended to be relied upon where the statutory provisions are not sufficient.

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5 Should there be a statutory maximum penalty for contempt of court? If so: (a) What penalties should apply? (b) Should different penalties apply for different manifestations of contempt?	There should be a maximum penalty. The maximum penalty should reflect similar offences which address interfering with the administration of justice. Different penalties could attach to different fault elements – intention, recklessness, negligence.
6 What weight, if any, should be given to apologies in determining whether and what penalty is imposed for contempt of court?	It is not necessary to include this in statute; the court should retain discretion to take into account mitigating factors as appropriate.
7 Should the *Sentencing Act 1991* (Vic) apply to contempt proceedings?	Yes, and the *Children, Youth and Families Act 2005* for offences committed by children.
Warnings 8 In what circumstances do the courts give warnings for contempt? 9 When should contempt warnings be given? 10 Is there a need for guidance to the courts on the use of contempt warnings? If so, should such guidance be set out in statutory provisions? 11 Is there a need for greater clarity as to whether, when a court gives a contempt warning, there has been a finding that a contempt has in fact been committed and, if so, the status or effect of such a finding?	
Chapter 4: Contempt in or near the courtroom—contempt in the face of the court	
12 Is there a need to retain the law of contempt in the face of the court? 13 If the law of contempt in the face of the court is to be retained, should the common law be replaced by statutory provisions? If so, how should it be defined and what fault elements, if any, should be required?	It is not clear from the Consultation Paper whether this is a problem that needs to be addressed, that is, whether there is a common issue, or something which the courts manage on an infrequent basis. Creating statutory offences can improve clarity and predictability, however it may result in an increase in inappropriate charges. The reality of the court environment is that accused people and their family members or friends are often anxious and stressed, which may result in poor choices of language and behaviour. While we would not condone insulting or threatening behaviour, we would be concerned with

Consultation Paper question	VLA feedback
	the potential for overuse, and for contempt charges to become a tool which can be applied by police unnecessarily and oppressively. We note that any increase in the number of contempt prosecutions which result from creating statutory offences would have resource implications for VLA.
14 If the law of contempt in the face of the court is to be replaced by statutory provisions, should insulting or disrespectful behaviour be included within the scope of the offence?	We would be concerned with the possibility of contempt charges being overused, a risk which is increased if the provisions encompass minor disrespectful behaviour.
15 If the law of contempt in the face of the court is to be replaced by statutory provisions, should it be limited to conduct which is directly seen or heard by the presiding judicial officer? In other words, should the underlying test be whether the judicial officer can decide the contempt on the basis of their own observations, without the need to receive evidence from other witnesses?	No. The same procedure should apply to all accused subject to judicial proceedings of a criminal nature, rather than it being dependent upon the view taken by the judicial officer.
16 Should conduct covered by other criminal offences be excluded from any statutory offence of contempt in the face of the court?	
17 Should the procedure for initiating, trying and punishing a charge of contempt in the face of the court be set out in statutory provisions? If so, what should the procedure be? In particular: (a) Is there a need to preserve the power of the courts to deal with contempt in the face of the court summarily? (b) Should the process for dealing with a disruption to proceedings be separated from the process for trying and punishing the disruptive behaviour? (c) Who should try the offence? Should the offence be able to be tried by the judicial officer before whom the offence was committed?	The procedure for filing and prosecuting a charge of contempt of court should match that which applies to other criminal offences; this would increase transparency and consistency. In contempt proceedings the charges should be heard by a judicial officer who is not linked to either the alleged offending or the ongoing proceedings (if any).
18 What measures, if any, are required to ensure there is a consistent approach by judicial officers to disruptive behaviour in the courtroom?	

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19 Under the current law, does the actual or threatened use of the power to punish for contempt in the face of the court affect certain groups of people unfairly? If so, how should this be addressed?	We do not have data to draw on, however experience from custodial and community contexts is that offensive behaviour and threatening language charges disproportionately affect young people, and people with mental illness and cognitive impairment. We would be concerned with the potential for disproportionate use on these cohorts of accused people and family members.
Chapter 5: Juror contempt	
20 Does the *Juries Act 2000* (Vic) adequately regulate the conduct of jurors and potential jurors? If not, what amendments to the *Juries Act 2000* (Vic) should be made?	The recommendation of the NZ Law Commission and the Law Commission of England and Wales—that the juror oath should encompass not undertaking private research and not disclosing deliberations—is a practical approach, and is unlikely to have negative consequences.
21 To the extent courts have the power to deal with juror contempt at common law, is there a need to retain this power?	The inherent jurisdiction of the higher courts should be maintained to ensure these courts can manage unforeseen types of conduct not covered by specific statutory offences.
22 If the law of juror contempt is to be retained, should the common law be replaced by statutory provisions? If so: (a) How should it be defined? (b) What fault elements, if any, should be required? (c) Should conduct already covered by other statutory offence provisions be excluded?	
23 Do current jury directions adequately instruct juries about determining cases only on the evidence, prohibitions on research and disclosure and asking questions of the trial judge? If not, what reforms are required?	The recommendations of the NZ Law Commission and the Law Commission of England and Wales—that regularly throughout trials the presiding judicial officers should encourage jurors to ask questions rather than conduct their own enquiries, and remind jurors about prohibitions and the importance of making their decision on the evidence presented in

Consultation Paper question	VLA feedback
	trial—are practical approaches which are unlikely to have negative consequences.
24 How well are jurors and potential jurors currently educated about their functions and duties during the selection and empanelment process? How should they be educated about, and assisted in performing, their functions and duties?	The NZ Law Commission recommendation that jurors be educated about the risks and dangers of conducting their own research and disclosing deliberations is a practical approach which is unlikely to carry negative consequences.
Chapter 6: Non-compliance with court orders or undertakings— disobedience contempt	
25 Is there a need to retain the law of disobedience contempt?	
26 If the law of disobedience contempt is to be retained: (a) What benefit does the distinction between civil and criminal contempt provide? Should this distinction be maintained? (b) Should the common law of disobedience contempt be replaced by statutory provisions? If so, should it be replaced by statutory offence provisions and/or a statutory procedure for civil enforcement of court orders and undertakings? In either case, i. Who should be responsible for and/or be able to commence proceedings? ii. What should the party commencing proceedings be required to establish and to what standard of proof? iii. What penalties should apply?	
Chapter 7: Contempt by publication (1)—sub judice contempt	
27 Is there a need to retain the law of sub judice contempt?	The consultation paper cites research which demonstrates that *generally*, jurors can be trusted to base their decision on the information at trial, and jurors are not fragile or prone to prejudice. This research suggests that while it is not likely to be possible to avert all inadvertent exposure to

Consultation Paper question	VLA feedback
	potentially prejudicial material, in typical matters jurors can be trusted to be sufficiently robust. However, research also indicates that intensity of media about a person of particular notoriety or extensive prejudicial publication about a generic issue (such as terrorism), can have a cumulative impact on jurors' impartiality. The consultation paper notes that numerous law reform commissions in Australia and elsewhere have recommended retaining sub judice contempt. Although this is challenging in the modern digital environment, it is an important tool for reinforcing the rule of evidence that the jury's decision must be based on the material before the court, and managing the impact of publicity on trials. From the discussion in the Consultation Paper, we conclude that: • There should be some form of restriction on publication while proceedings are pending. • This does not necessarily need to be in the current form of subjudice contempt, but the courts should retain some discretion to ensure that an accused's guilt or innocence is decided by an impartial jury. Publication postponement, takedown powers, and trial postponement or stays are practical tools which give the court flexibility to address unique and novel contexts and publications which may impact on the administration of justice. • Averting *all* inadvertent exposure to potentially prejudicial material is likely impossible, and research indicates that this is not necessarily a precondition for an impartial jury. This suggests that the threshold for discharging a jury or staying proceedings does not need to be extremely low. • However, for matters of particular notoriety or which are captured by widespread negative publicity about a particular theme, research indicates that impartiality is very difficult to guarantee. Other options should be available for these circumstances. Judge-alone trials would

Consultation Paper question	VLA feedback
	give Victorian courts a further tool for managing these matters. We support the general rule that trial should be by jury, but in exceptional circumstances fair trial rights may best be served by judge-only trials.
28 If the law of sub judice contempt is to be retained, should the common law be replaced by statutory provisions? If so: (a) How should the law and its constituent elements be defined, including: i. The 'tendency' test ii. The definition of 'publication' iii. The beginning and end of the 'pending' period? (b) Should fault be an element, or alternatively should there be a defence to cover the absence of fault? (c) Should the public interest test be expressly stated? (d) Should upper limits for fines and imprisonment be set?	We support statutory provisions as they provide greater certainty, predictability and transparency. This extends to setting out offences, fault elements or exceptions and defences, maximum penalties and procedure. As a general rule, fault elements, defences and maximum penalties should be as consistent as possible with other Australian jurisdictions, and this is particularly pertinent in the subjudice contempt context. Whatever form statutory provisions take, an inherent jurisdiction should be retained to ensure that novel circumstances can be addressed. The NSW Commission's recommendation for a substantial risk formulation will require the court to assess the risk of the publication being viewed and recalled by the jury. This will provide the flexibility required to address different levels and types of publications. It also reflects juror research that highlights the importance of recency and prominence of exposure, and is not prescriptive in setting out specific types of subjudice contempt.
29 Is there a need for greater use of remedial options, for example jury directions or trial postponement? If so: (a) How should this be facilitated? (b) Are other mechanisms, for example pre-trial questioning of jurors, also required?	Publication postponement, takedown powers, and trial postponement or stays are practical tools which give the court flexibility to address unique and novel contexts and publications that may impact on the administration of justice. The recommendations of the NZ Law Commission that the courts should have powers to address the implications of online publications are supported. Pretrial questioning of jurors is not an effective approach. Research suggests that impartiality is difficult to guarantee where there has particularly intense publicity about a theme or a person. Judge-alone trials, where both parties agree or the judicial officer determines that it is in the interests of justice, would give Victorian courts a further tool for

Consultation Paper question	VLA feedback
	managing these circumstances. We note that the Department of Justice and Community Safety is conducting a review of judge-alone trials, and therefore make no specific suggestions.
30 Is there a need for education about the impact of social media on the administration of justice and sub judice contempt to be targeted to particular groups, for example judicial officers and jurors?	Education about the speed and reach of social media could be beneficial for judicial officers who may not themselves regularly use social media platforms or typically consume their news via more traditional outlets.
31 What other reforms should be made, if any, to this area of the law of contempt of court?	
Chapter 8: Contempt by publication (2)— scandalising the court	
32 Is there a need to retain the law of scandalising contempt?33 If the law of scandalising contempt is to be retained, should the common law be replaced by statutory provisions? If so: (a) How should the law and its constituent elements be described, including: i. The 'tendency' test ii. What constitutes 'fair comment'? (b) Should truth be a defence? (c) What fault elements, if any, should be required? (d) What weight, if any, should be given to an apology?	
34 In stakeholders' experience, is criticism of the judiciary on social media a problem that should be dealt with by a law such as scandalising contempt or is it best managed outside of the law?	
35 What other reforms, if any, should be made to this area of law?	

Consultation Paper question	VLA feedback
Chapter 9: Prohibitions on publication under the Judicial Proceedings Reports Act	
36 Should the prohibition in section 3(1)(a) of the *Judicial Proceedings Reports Act 1958* (Vic) on the publication of indecent matter and indecent medical, surgical or physiological details in relation to any judicial proceedings be repealed?	
Divorce and related proceedings 37 Should the prohibition in section 3(1)(b) of the *Judicial Proceedings Reports Act 1958* (Vic) on the publication of the details of divorce and related proceedings be repealed?	We support consistency with s 121 of the *Family Law Act 1975* (Cth); we do not make any specific suggestions.
Prohibition on reporting directions hearings & sentence indications 38 Are the statutory prohibitions in section 3(1)(c) of the *Judicial Proceedings Reports Act 1958* (Vic) on the reporting of criminal directions hearings and sentence indication hearings necessary? If so: (a) What should be the scope of such prohibitions? (b) Where should such prohibitions be located to optimise awareness of their existence and operation? (c) Should other pre-trial hearings, such as bail hearings or committal proceedings also be subject to statutory reporting restrictions?	The provisions are an important tool in early resolution case management practices. It is important that both: • a person's continuing matters are not prejudiced by the publication of details about a sentence indication or directions hearing; and • people are not discouraged from seeking a sentence indication due to the potential for publication. A logical location of the prohibitions to optimise awareness of their existence and operation would be the Criminal Procedure Act, adjacent to the relevant procedural provisions. We support open justice principles and do not propose restricting publication of other proceedings such as bail hearings or committal proceedings.
Victims of sexual offences 39 Should the statutory prohibition on identifying victims of sexual offences under section 4(1A) of the *Judicial Proceedings Reports Act 1958* (Vic) continue to apply automatically from the time of complaint, throughout proceedings and after proceedings have concluded? If so: (a) What further legislative guidance should be provided about the scope of the prohibition?	We support open justice principles and highlight the importance of reporting on these matters to ensure public awareness of these crimes and to reduce stigma. However, the protections afforded by these provisions are critical for protecting the privacy of complainants and encouraging disclosure.

Consultation Paper question	VLA feedback
(a) Should the prohibition continue to be located in the *Judicial Proceedings Reports Act 1958* (Vic) or is the provision more appropriately located in other legislation?	We support consistency with the Family Violence Protection Act, Children Youth and Families Act, and the Family Law Act (Cth); we do not make any specific suggestions as to the form of the provisions. The provisions could be located in the Criminal Procedure Act, adjacent to the special provisions for sexual offences procedure.
A victim's ability to speak 40 How should the law accommodate a victim's ability to speak? 41 When should a victim be able to consent to publication of identifying material? (a) Should the court's supervision and permission also be required? (b) What, if any, special provision should be made for child victims?	Exceptions to publication prohibitions, which enable complainants to tell their own story, are positive for transparency, accountability and empowering complainants. We note the recent amendments to the *Judicial Proceedings Act 1958* contained in the *Open Courts and Other Acts Amendment Act 2019,* which enable victims over 18 years to consent to a court order lifting the prohibition on publishing the victim's identity. These provisions have not yet commenced and further amendment at this stage may be premature. Due to the complexities of these matters, particularly in matters involving more than one victim, exceptions to publication prohibitions should continue to be supervised by the court. However we highlight the importance of ensuring that application processes are not too onerous for complainants. Complainants and the courts and support services would significantly benefit from the availability of legal advice, and in some circumstances legal representation. However, such a service does not exist. The VLRC and the Sentencing Advisory Council have both recommended that a victims legal advice service be created and funded. With appropriate resourcing, Victoria Legal Aid could manage a victims legal service. Aside from the creation of a victims legal service, we note that any reforms to complainants' rights and responsibilities will impact on the court and would therefore likely have resource implications for VLA.
Temporary restrictions—sex offences and family violence	We support open justice principles and highlight the importance of reporting on these matters to ensure public awareness of these crimes

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42 Is a statutory prohibition required to temporarily restrict reporting in cases where an accused has been charged with a sexual or family violence criminal offence? If so: (a) What information should be permitted to be published—should the court have discretion to order that additional or less information be published? (b) When should the temporary prohibition apply? (c) Should the temporary prohibition only apply to cases where the accused has been charged with a sexual or family violence criminal offence?	and to reduce stigma. However, we support creating temporary restrictions on publication to protect the privacy of complainants and encourage disclosure. We support consistency with similar provisions in the *Family Violence Protection Act*, including the s 168B exception to the restriction on publication for adults.
Chapter 10: Enforcement of prohibitions and restrictions on publication	
43 Should the terms 'publish' and 'publication' be defined consistently? If so, how should these terms be defined? 44 Are there any other issues arising out of the definitions of 'publish' and 'publication' that should also be addressed?	
45 To what extent are potential reforms to the definition of the terms 'publish' and 'publication' affected or limited by Commonwealth law?	
46 What reforms, if any, should be made to address the liability of online intermediaries for the publication of prohibited and restricted information?	
47 Should the law seek to enforce prohibitions and restrictions on publication: (a) in other Australian states and territories (b) in foreign jurisdictions? If so, how should this be achieved?	

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Awareness of prohibitions and restrictions 48 What processes should be in place for notifying or reminding the media and the wider community of the existence of prohibitions and restrictions on publication, including court orders and the operation of automatic statutory provisions?	A better process for updating the media, practitioners and the community should improve compliance. We note that defence practitioners find it difficult to identify whether a suppression order exists, and if one has existed (if it has changed).
Monitoring compliance with prohibitions and restrictions 49 Should there be a system for monitoring compliance with prohibitions and restrictions on publication? If so: (a) How should such compliance be monitored? (b) Who should be responsible for monitoring such compliance?	As noted in the Consultation Paper, there is currently no system for monitoring compliance, and this contributes to an accountability gap. Any system would be an improvement on the current situation, however we note that it is important there be appropriate rigour in the system. Defence practitioners often personally maintain a watching brief on potential media about their clients, which is a significant administrative burden. The courts themselves would be a suitable body to monitor compliance with their own matters, as long as they are appropriately funded to do so. The courts manage their own cases via electronic case management databases, and have the most up to date knowledge about the status of any particular matter and any suppression orders issued in their jurisdiction. The courts already maintain a register of suppression orders. Passing on this sensitive information to an external agency for the purpose of monitoring only creates a risk of inadvertent disclosure. With appropriate technology updates to ensure that matters with legislative restrictions are automatically flagged for monitoring, and funding to create specific monitoring roles, monitoring could be carried out via google alerts (or similar media alerts) on accused and victim names.

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Responsibility for instituting proceedings 50 Who should be responsible for instituting proceedings for breach of prohibitions and restrictions on publication? 51 Should the 'DPP consent' requirements under the *Judicial Proceedings Reports Act 1958* (Vic) be retained?	
Fault elements to prove breach of prohibitions and restrictions 52 Should liability arise where there is a lack of awareness of the relevant prohibition or restriction on publication?	
Defences and exceptions 53 Are the existing exceptions for information-sharing agencies appropriate? Alternatively, do they inhibit information-sharing? If so, how should these barriers be addressed? 54 What defences, if any, should be available to people who have published information which is prohibited or restricted?	
Penalties and remedies 55 Are the existing penalties and remedies for breaches of prohibitions and restrictions on publication appropriate? If not, what penalties and remedies should be provided?	
56 Should penalties for breaches of common law suppression orders and pseudonym orders be set out in statutory provisions?	
57 Should a court be able to issue an order for internet materials to be taken down ('takedown order')? If so: (a) Should the process for seeking and making such orders be embodied in legislation? (b) Who should be responsible for monitoring the Internet (and social media) for potential 'take-down' material?	

Consultation Paper question	VLA feedback
(c) Who should be responsible for making applications for take-down orders? (d) Should such applications be conducted on an adversarial or ex parte basis?	
Legacy suppression orders 58 How many legacy suppression orders with no end date issued by the Supreme, County and Magistrates' courts are currently in force?	
59 Should there be provisions in the *Open Courts Act 2013* (Vic), or another statute, which specify the duration of legacy suppression orders? If so: (a) should there be a deeming provision in the *Open Courts Act 2013* (Vic), or another statute, which provides that legacy suppression orders are deemed to have been revoked from a particular date, subject only to applications from interested parties to: i. vary the order? ii. continue the order for a further specified time? iii. revoke the order at an earlier date? (b) Should there be provisions in the *Open Courts Act 2013* (Vic), or another statute, which specify procedures for notification of legacy suppression orders and applications for continuation or revocation of such orders?	