SUBMISSION BY A WORKING GROUP OF THE MEDIA LAW SECTION OF THE COMMERCIAL BAR ASSOCIATION OF THE VICTORIAN BAR

VICTORIAN LAW REFORM COMMISSION

CONTEMPT OF COURT: CONSULTATION PAPER

The Media Law Section of the Commercial Bar Association of the Victorian Bar makes this submission in response to the Victorian Law Reform Commission Contempt of Court: Consultation Paper (**the Consultation Paper**).

This paper has been prepared by a working group comprising Dr Matt Collins QC, David Gilbertson QC, Marcus Hoyne, Justin Castelan, Haroon Hassan, Gautam Mukherji, Elle Nikou-Madalin, Sally Whiteman and Evelyn Tadros (**the working group**).

The working group refers to the question numbers identified in the Consultation Paper and makes this submission in response to some (but not all) of the questions. These questions relate variously to the role of the media in relation to contempt of court laws and in the application of suppression orders. The submission addresses the Consultation Paper commencing from section 7– *Contempt by publication, sub judice contempt*.

27. Question 27

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

27.1 Yes. The right of an accused to have a fair trial is fundamental to our legal system. While it is no longer possible to quarantine potential jurors from all extraneous information,[1] the law of sub judice contempt should remain in place as

[1] For example in December 2018, overseas media reported the conviction of Cardinal George Pell and published numerous reports online even though suppression orders had been made in Victoria. The articles included: WashingtonPost.com published two articles on 12 December 2018: "*Australian court convicts once-powerful Vatican official on sex-abuse-related charges*" and "*A top cardinal's sex-abuse conviction is huge news in Australia. But the media can't report it there*."; thedailybeast.com published "*Vatican No.3 George Pell Convicted of Sexually Abusing Choir Boys*" on 11 December 2018; nypost.com published "*Australian media banned from covering cardinal's conviction for sex abuse*" on 12 December 2018 and ncronline.org published: "*Cardinal Pell found guilty of sex abuse, expected to appeal, reports say*" on 12 December 2018 (**Pell Articles**).

the primary layer of protection to deter conduct that would undermine the ability of accused persons to receive a fair trial.

28. Question 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?

28.1 The working group considers that codification of the common law should not be attempted, but that the law of sub judice contempt would be improved by the inclusion of a mental element of intent to cause prejudice to the administration of justice. That matter is addressed below.

28.2 The clear advantage of the common law is that it is flexible and able to adapt and evolve in response to new threats to the rights of accused persons to receive a fair trial. Codification may increase certainty but it would necessarily be at the expense of flexibility.

<u>28(a)(i)-(ii): The 'tendency test' and the definition of 'publication'</u>

28.3 It has been recognised by the New Zealand Law Commission that:[2]

> The advent of the internet and the consequential durability and potential reach of any publication now pose significant challenges for the Court when applying the 'real risk' test. Some internet-based publications and social media posts go viral. Consequently, they have much greater potential impact than those with more limited circulation and dissemination.

28.4 There are many types of online publications, and whether they meet the 'tendency test' might vary at different times. A social media post may not be contemptuous

[2] Consultation Paper at [7.33].

until it is widely distributed. It may have been originally uploaded well before any criminal proceedings are brought but go viral shortly before the commencement of a criminal trial. The common law is best equipped to deal with these types of possibilities without prescribing limitations.

28.5 There are many other questions that can arise from publication online. Over the last decade, the law of defamation has been grappling with the extent of liability for the publication of online material. Examples include: whether a search engine is a publisher of snippets that form part of automatically generated search engine results,[3] whether a search engine is a publisher of the underlying websites to which it links,[4] whether a person publishes material that it hyperlinks to,[5] whether the administrator of a Facebook page publishes material uploaded by third parties onto that Facebook Page[6] and whether a person who has an email address publishes emails sent by other people from that address.[7]

28.6 The test for publication for contempt of court is different from that of publication in defamation law, but these defamation examples illustrate some of the complexities that can arise.

28.7 There are also questions that arise because the act of publication is in practical terms a 'continuing act',[8] creating exposure for online publishers for their online archives.

28.8 The working group considers that the common law is best equipped to deal with these issues, rather than statutory provisions which may not cover the range of possibilities that may arise. The working group considers it would be difficult or impossible to formulate a statutory test capable of covering all relevant situations without giving rise to unintended consequences.

28(a)(iii) the beginning and end of the 'pending period'

28.9 Any specific 'pending period' would, necessarily, be arbitrary. The working group considers that the current rule of thumb of six months is adequate in most

[3] *Trkulja v Google LLC* [2018] HCA 25.
[4] *Google Inc v Duffy* [2017] SASFC 130 at [187].
[5] *Visscher v Maritime Union of Australia (No.6)* [2014] NSWSC 350 at [29]-[31]; *Crookes v Newton* [2011] 3 SCR 269.
[6] *Voller v Nationwide News Pty Ltd* [2019] NSWSC 766; *Von Marburg v Aldred & Anor* [2016] VSC 36.
[7] *Johnston v Holland (No.2)* [2017] VSC 597 at [78]-[94].
[8] Consultation Paper at [7.39].

circumstances, but favours leaving it to courts to determine and apply shorter or longer periods in the circumstances of particular cases.

28(b) The element of fault

28.10 The working group considers that as a matter of good public policy, and consistency with other areas of the law, criminal liability ought not to be imposed for contempt in the absence of intent, and that accordingly a mental element for liability for contempt ought to be prescribed in legislation. The working group's view is that the requisite intent should be intent to cause prejudice to the administration of justice. Sub judice contempt is a serious offence, giving rise to potentially serious penalties. It should not arise in the absence of an intent to cause prejudice to the administration of justice. The proposed test for intent is consistent with the harm which the offence is intended to avoid. Intention to publish ought not be enough to establish liability.

28(c) the public interest test

28.11 The working group considers that there is no need to expressly state the public interest principle in statute. The common law adequately balances the administration of justice and the public's interest in the free discussion of public affairs.[9]

28(d) upper limits for fines and imprisonment

28.12 The working group considers that it is not necessary for legislation to set out the upper limits for fines and imprisonment. The common law adequately deals with sanctions for contempt of court, and judicial officers are astute to ensure proportionality as between cases.

29. Question 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?

[9] *Hinch v Attorney-General (Vic)* (1987) 164 CLR 15 at 22-28 (Mason CJ), 37-45 (Wilson J), 46-53 (Deane J), 68-69 (Toohey J), 83-87 (Gaudron J).

(b) Are other mechanisms, for example pre-trial questioning of jurors, also required?

29.1 Yes, remedial options should be employed more frequently by courts. Social media is now ubiquitous. People pick and choose the media that they consume, and the influence of the mainstream media has waned.

29.2 The Consultation Paper noted that the law of contempt is underpinned by three assumptions, the third being:[10]

> The public accesses news information through traditional media such as newspapers, television and radio broadcasts and such news information can be controlled, 'taken-down' or prevented from being published.

29.3 The working group considers that it is no longer safe to make this assumption. With the growth of social media, citizen journalism and blogs, people who publish online are often beyond the actual or practical reach of the courts. The reality is that contemptuous publications are impossible to restrain fully (the Pell Articles published by overseas publishers in December 2018 are an example) and are more likely to be consumed by potential jurors than previously.

29.4 Another practical reality is that if courts suppress publications by the mainstream media, less reputable media sources become elevated in prominence. Without the presence of mainstream media reports in search results, for example, less reliable sources of information are more likely to occupy the first pages of search results.

29.5 Other mechanisms therefore must be considered in order to ensure that accused persons get a fair trial. The working group considers that those mechanisms ought to include more frequent use of jury directions and the introduction of pre-trial questioning of jurors by judges.

29.6 There is a growing belief in the robustness of juries,[11] but research so far has been limited. Further research ought to be done into the effects of pre-trial publicity, and in particular in relation to whether potential jurors are able to exclude pre-trial publicity from their minds. Judges and lawyers routinely assume that jurors are not so able, and are easily fatally infected by publicity. That assumption

[10] Consultation Paper at [7.9].
[11] Consultation Paper at [7.114].

ought, in the view of the working group, be tested. The relationship between the public and the media (both mainstream and social media) is rapidly evolving.

29.7 The working group considers that there would be dangers if pre-trial questioning of jurors were to be undertaken by Counsel. However, the working group considers that those dangers would be largely mitigated if judges were able to ask questions of potential jurors, after having heard submissions from Counsel in relation to the form of the questions, concerning their exposure to pre-trial publicity, including specific publications of particular concern.

29.8 Pre-trial questions put by the judge to potential jurors, in a form agreed between Counsel or determined by the judge after hearing submissions, could assist the Court to identify unsuitable jurors.

30. Question 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?

30.1 Yes. The working group agrees with the approach in the UK[12] that education about sub judice contempt ought to be extended to the broader community, particularly to online publishers, potential jurors and judicial officers. The working group agrees that:[13]

> Many individuals publishing on the internet, particularly on social media, do not have the same level of training, expertise and knowledge about legal restrictions, and professionalism that court reporters have attained. The general public or freelance journalists also do not have the benefit of editorial input, fact checking and legal resources.

31. Question 31

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

31.1 The working group considers that a mental element to contempt should be introduced by legislation and that pre-trial questioning of jurors by a judge, on specific matters involving pre-trial publicity, are measures that ought to be engaged.

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[12] Consultation Paper at [7.191–7.196].
[13] Consultation Paper at [7.189].

32. Question 32

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

32.1 No, the law should be abolished.

32.2 The working group is aware of no empirical evidence to support the view that the law of scandalising contempt assists in maintaining public confidence in the court system or is essential for courts to properly undertake their role. Given the obvious chilling effect the law can have, convincing evidence of the supposed benefit of the law is required.

32.3 The law of scandalising contempt has been abolished or has never existed in a number of comparable jurisdictions (United Kingdom, New Zealand, USA and Canada), without any obvious impacts on the ability of the courts of those jurisdictions to perform their role. This strongly suggests that the law is not necessary to maintain public confidence in the legal system.

32.4 Further, it is very troubling in a democratic society that:

(a) criticism of one of the three arms of government can potentially amount to a criminal offence;

(b) the boundaries between what amounts to legitimate and illegitimate criticism are unclear; and

(c) a judge can be the prosecutor, witness and adjudicator in the summary determination of an issue that can result in a person being imprisoned.

32.5 These are elements of a law that one does not expect to see in a representative democracy. The problem is not overcome by stating that fair or accurate, or even robust, criticism of the courts is permitted. 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.

32.6 The remedy to ill-conceived criticism of the courts is not to criminalise the criticism – the proper remedy is publicly to identify why the criticisms are misguided. Historically, it was the Attorney-General's role to take the lead on the

defence of the judiciary, but that is increasingly uncommon and there have been notorious incidents where Ministers have instead engaged in trenchant criticism of the judiciary. For that reason, the Victorian Bar, and now the Australian Bar Association, have established guidelines as to when they will engage publicly in the defence of the judiciary, for example, to argue against attacks on judicial independence or to correct factually erroneous criticisms of court decisions. Some heads of jurisdictions have also, in recent times, shown a preparedness to publicly defend the decisions emanating from their courts.

33. Question 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?

33.1 As noted, the working group's view is that the law of scandalising contempt should be abolished.

33.2 However, if the law is to be retained, then the working group considers that a statutory version should replace the common law version so that:

(a) the terms of the offence are clarified; and

(b) defences of truth and an absence of malice are prescribed.

33.3 Any statutory offence should be limited to publications which are calculated to, and are likely to, result in a reduction of public confidence in the court system. The test should not be one of mere 'tendency'. Defendants should not be liable unless they are shown to have been aware of the facts that gave rise to the relevant restriction (although not the fact that it was an offence).

33.4 An apology should go to mitigation/penalty (and the discretion as to whether to prosecute) but should not be a defence (the offence having already occurred).

33.5 As noted, truth and absence of malice should be defences to any statutory scandalising offence. A defence of absence of malice could be established where the defendant showed that they made their statement for the purpose of expressing genuinely held opinions about the justice system or a particular case. If the defendant did not believe their statement to be true, or was recklessly indifferent to its truth, then (as with malice in defamation) malice would likely be established.

34. Question 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?

34.1 The working group is of the view that criticism of the judiciary is best dealt with by methods outside the law. This is dealt with under our response to question 32.

35. Question 35

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

35.1 The summary procedure by which defendants can be prosecuted should be abolished. It is unacceptable to have a judge acting as victim, prosecutor, witness and adjudicator. If it is true (and this is doubtful) that there is no practical way of dealing with the offence other than by summary prosecution[14] then, in the working group's view, that is another reason to abolish the offence.

36. Question 36

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

36.1 Yes. The working group agrees that this prohibition is an outdated anomaly. It does not serve any legitimate public interest.

[14] *R v Dunbabin; Ex Parte Williams* [1935] 53 CLR 434, 447 (Dixon J).

36.2 The provision was enacted ninety years ago when Victorian Courts were able to close proceedings to the public or to restrict reporting of proceedings on public decency and morality grounds. Those provisions have since been repealed and community attitudes of matters that might be considered "indecent" have changed significantly.

36.3 There is no contemporary justification for a provision which prohibits the publication of matter or details "calculated to injure public morals".

37. Question 37

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

37.1 Yes. As noted in the Consultation Paper, two of the types of proceedings to which the provision is directed have been abolished by the *Family Law Act 1975* (Cth) (the **FLA**), and in respect of the other two types of proceedings, s 121 of the FLA operates, and does so in terms that are inconsistent with s 3(1)(b). For example, under s 3(1)(b) it is permissible, in relation to a proceeding for the dissolution of a marriage, to publish the names of the parties, whereas under s 121(1)(a) of the FLA, it is an offence to do so.

37.2 There is no identifiable benefit in maintaining the provision as part of the law of Victoria. Section 121 of the FLA adequately deals with the relevant prohibitions.

38. Question 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?

38.1 The current statutory prohibitions in s 3(1)(c) of the JPRA are overly restrictive and do not strike an optimum balance between freedom of expression and the

administration of justice. They are not consistent with the reporting of bail hearings and committal hearings.

38.2 The current provision prohibits publication of any matter other than the six enumerated ones. It should operate from a different starting point. The provision should prohibit the publication of any matter, if the court is satisfied that such an order is necessary to avoid prejudice to the administration of justice. The provision could then give examples, such as those enumerated below, the publication of which may cause prejudice to the administration of justice. Those examples are:

(a) statements as to the accused's guilt or innocence;

(b) sentencing indications, including, but not limited to, where the accused seeks a sentencing indication;

(c) prior convictions;

(d) confessions or admissions by the accused;

(e) statements about the character of the accused;

(f) statements relating to the strength or weakness of the prosecution or defence cases;

(g) interviews with witnesses; and

(h) photographs or video footage of an accused where it is reasonably probable that identification will be an issue at trial.

38.3 In order to optimise awareness of the provisions, they should be located in Parts 5.5 and 5.6 of the *Criminal Procedure Act 2009*. They are the Parts dealing with directions hearings and sentence indication hearings.

38.4 Bail hearings and committal hearings should be subject to the same reporting regime as directions hearings and sentence indication hearings. The primary rationale for prohibitions on reporting are the same for all of those types of proceedings, namely to avoid prejudice to the administration of justice.

39. Question 39

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

(a) What further legislative guidance should be provided about the scope of the prohibition?

(b) Should the prohibition continue to be located in the *Judicial Proceedings Reports Act 1958* (Vic) or is the provision more appropriately located in other legislation?

39.1 The prohibition should apply automatically from the time of complaint to the police until the conclusion of any proceedings. It should continue to apply after such conclusion (as to which, see below), unless the victim or alleged victim, being aged 18 years or over, gives their permission to being identified. The giving of permission should also be available if proceedings in relation to the alleged sexual assault have not been commenced, or if they are pending. Amendments should be made to the JPRA to give effect to this.

39.2 As the Consultation Paper notes,[15] the rationales for the prohibition are to ensure a fair trial for the alleged victim and to encourage the reporting and prosecution of sexual offences. In those circumstances, it is appropriate that the prohibition should commence from the time of a complaint to the police.

39.3 If no proceedings are pending in a court, either because proceedings have not been commenced or they have been concluded, a victim (or alleged victim) should have the autonomy to give permission to being identified. The working group considers that this should apply only to persons who, at the time of giving such permission, are aged 18 or over.

39.4 The current law in relation to persons under 18 giving permission, namely that they must have the capacity to comprehend what it means to identify themselves as a victim of a sexual offence and to comprehend the consequence of losing the

[15] Consultation Paper at [9.51]

anonymity otherwise afforded by section 4(1A)[16] is, in the view of the working group, unworkable.

39.5 There is no court supervision of the giving of permission. In the view of the working group, nor should there be. In the case of an adult, it should be up to a publisher to determine whether permission has in fact been given.

39.6 The working group agrees that the giving of permission should be available where proceedings are pending.[17] Alleged victims should have the same autonomy as where proceedings have not been commenced, or they have been concluded.

39.7 Legislative guidance should be provided with respect to particulars that are "likely to lead to the identification" of the alleged victim of the offence. This could be similar to the non-exhaustive list contained in the *Family Violence Protection Act 2008* (Vic), s 168, appropriately adapted to the identification of persons against whom sexual offences are alleged to have been committed.

40. Question 40

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

40.1 See the response above to question 39.

41. Question 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?

41.1 See the response about to question 39.

42. Question 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:

[16] *Hinch v DPP (Vic); Television and Telecasters (Melbourne) Pty Ltd v DPP* [1996] 1 VR 683, 695
[17] Consultation Paper at [9.62]

(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?

42.1 The working group opposes the introduction of a further statutory prohibition to temporarily restrict reporting of cases where an accused has been charged with a sexual offence. The working group considers that s 4(1A) of the *Judicial Proceedings Reports Act 1958* (Vic), combined with the amendments that we propose (see the response to question 39 above), would deal adequately with the issues raised in the Consultation Paper concerning that type of offence.

42.2 As for family violence offences, an amendment could be made to s 166(1) of the *Family Violence Protection Act 2008* (Vic) (**FVPA**) to include any application under the *Bail Act 1977* (Vic.) that relates to or includes an allegation of "family violence" within the meaning of s 5 of the FVPA. In the working group's view, that would adequately deal with the concerns raised in the Consultation Paper and the Open Courts Act review.

43. Question 43

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

43.1 As the working group understands it, question 43 asks whether the definitions of "publish" and "publications" should be consistently applied for the purposes of the *Open Courts Act 2013* (Vic) and the *Judicial Proceedings Reports Act 1958* (Vic). The working group considers that the same definitions should apply. Whether the same definitions should apply for other purposes would need to be considered separately.

43.2 For practical purposes, whether a person has "published" material arises primarily where the person has been involved, in some way, in the publication process, but is not the author and does not have personal knowledge of the contents of the publication. The issue particularly affects online intermediaries such as ISPs,

search engine operators, and social media platforms, all of whom have the potential to be found liable if the definition of "publish" is a broad one.

43.3 The working group is of the view that the existing compromise of persons being potentially liable only if they knew of the content of the publication, and did not act expeditiously to remove the publication upon learning of its existence, is a sound one. In any event, no more stringent test can be imposed by reason of clause 91 of Schedule 5 to the *Broadcasting Services Act 1991* (Cth).

43.4 Otherwise, the working group is of the view that publication to the public or a section of the public (as per the *Open Courts Act 2013*) ought be a necessary requirement.

43.5 The defence of publication for a purpose connected with a judicial proceeding (per the JPRA) should remain.

44. Question 44

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

44.1 See the response to question 43.

45. Question 45

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

45.1 As the Consultation Paper makes clear, reforms to these definitions are limited by clause 91 of Schedule 5 to the *Broadcasting Services Act 1992* (Cth).

46. Question 46

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

46.1 This is dealt with above in the response to question 43.

47. Question 47

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

(a) in other Australian states and territories?

(b) in foreign jurisdictions?

If so, how should this be achieved?

Australian states and territories

47.1 Regardless of their original form, almost all publications that are likely to fall within the purview of the law of contempt are available online. As noted in the Consultation Paper, material published online is available to anyone who can access the internet without geographic limitations.

47.2 A prohibition or restriction on publication of material ordered by a court will only be fully effective if it restrains all sources and media of dissemination of the relevant material. It follows that, for any prohibition or restriction on publication to be effective, it must be enforceable anywhere publication can occur.

47.3 It is the working group's view that laws currently in place provide adequate mechanisms for courts to restrain the publication of material within Australia.

47.4 The *Open Courts Act 2013* (Vic) explicitly contemplates the making of orders that restrain conduct outside Victoria.[18]

47.5 The Supreme Court has wide inherent powers to order injunctions to restrain and prohibit publication of specified material. If orders are breached, contempt proceedings can be instituted which can result in criminal sanctions.

47.6 There does not appear to be any need for further offences to be added to the *Crimes Act 1958* (Vic), or elsewhere, to facilitate prosecutions.

Foreign jurisdictions

47.7 Regulating conduct occurring outside Australia is much more problematic.

47.8 There is no international consensus as to the circumstances in which courts should be permitted to restrict the publication of information concerning court proceedings. Notoriously, Australian law is more restrictive in this area than the laws of most other Western democracies, and in particular the United States,

[18] Section 21(2) of the *Open Courts Act 2013* (Vic).

which hosts a disproportionate number of online sources of information, including ubiquitous social media platforms.

47.9 By virtue of the First Amendment to its Constitution, the United States has strong constitutional protections for freedom of speech and has repeatedly upheld the primacy of this freedom as against other interests. By analogy with legislation such as the *Securing the Protection of our Enduring and Established Constitutional Heritage (SPEECH) Act*,[19] it is almost certain that an American court would refuse to recognise and enforce any restriction on publication ordered by an Australian court.

47.10 For these and other reasons, in practical terms, non-publication and like orders made by Australian courts are not, and cannot be made, enforceable outside Australia.

48. Question 48

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

48.1 A central register of court orders that prohibit or restrict publication, which reflects the totality of the orders in force in as close to real-time as possible, and which permits searches by registered media organisations and other bodies or individuals (subject to rules allowing for different levels of access, as appropriate), would increase the transparency of the justice system in Victoria and allow for the means by which notice of orders is given.

48.2 The effectiveness of such a register would depend on sufficient resources being made available to the body that would be tasked with the responsibility of maintaining the register, and to court personnel who would be required to upload the orders or communicate them to those responsible for the register. The

[19] The *Securing the Protection of our Enduring and Established Constitutional Heritage (SPEECH) Act* passed in 2010 made defamation judgments from jurisdictions outside of the U.S. unenforceable in U.S. courts unless the foreign legislation offered at least as much protection as the constitutional protection given to speech in the U.S. pursuant to the first amendment to the U.S. constitution, or the defendant would have been found liable even if the case had been heard under U.S. law.

working group is agnostic as to who would be best placed to manage such a register, but considers that the suggestion made in the *Open Courts Act Review*, namely that the body responsible for such a register could be Court Services Victoria, has merit.

48.3 The working group considers it would be highly desirable for the terms of the relevant order to be searchable and capable of being downloaded from the register in the form authenticated by the relevant Court or Tribunal. This would minimise any potential uncertainty about the terms of such orders.

49. Question 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?

49.1 The working group does not consider that any such system is required. The parties in particular cases can be assumed to already have a sufficient interest in monitoring compliance with prohibitions and restrictions on publication.

50. Question 50

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

50.1 The working group considers that any party with a sufficient interest in the enforcement of a prohibition or restriction on publication, as determined by the court, ought to be entitled to institute proceedings, but only with the consent of the DPP.

51. Question 51

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

51.1 Yes. The DPP consent requirement is a protection against capricious or vexatious proceedings.

52. Question 52

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

52.1 No. The working group considers that liability should not arise where there is a lack of awareness of the relevant prohibition or restriction on publication. Liability in the absence of awareness of the existence of a prohibition or restriction on publication offends basic principles of fairness in a context where criminal sanctions can apply.

53. Question 53

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

53.1 The working group is not aware of any evidence to suggest that the exceptions for information-sharing agencies are not working as intended or that they unduly inhibit information sharing. However, to the extent there are legitimate concerns about these matters, they could be addressed by amending relevant legislation to include an express power for a court or tribunal of competent jurisdiction to authorise or issue directions in respect of the sharing of information that might otherwise be caught by legislation or an order that prohibits or restricts publication.

54. Question 54

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

54.1 As indicated earlier, it is the view of the working group that the law of sub judice contempt should be subject to a fault element of intent. Were it to remain a strict liability offence, the working group supports the retention of the common law defence of honest and reasonable mistake.

54.2 Consistent with our answer to question 52 (above), the working group considers that liability should not arise where there is a lack of awareness of the relevant prohibition or restriction on publication. If a central register of suppression orders were available (see our answer to question 48 above) that would make it easier

for the institutional media to have access to current restrictions on publication of information.

55. Question 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?

55.1 The existing penalties and remedies for breach of the *Open Courts Act 2013 (Vic)* appear to be excessive in the opinion of the members of the working group. Whilst a breach is undoubtedly a serious matter, we consider the existing penalties are unduly harsh and inconsistent with similar offences under other statutory regimes prohibiting or restricting publication of material. For example:

55.1.1 a contravention of the *Courts Suppression and Non-publication Orders Act 2010 (NSW)* attracts a maximum penalty of 1,000 penalty units or 12 months imprisonment (or both) for an individual, or 5,000 penalty units for a body corporate;

55.1.2 an offence under s 277 of the *Serious Offenders Act 2018 (Vic)* attracts a maximum penalty of 120 penalty units or 12 months imprisonment (or both) for an individual, or 600 penalty units for a body corporate;

55.1.3 an offence under s 534 of the *Children Youth and Families Act 2005 (Vic)* attracts a maximum penalty of 100 penalty units or 2 years imprisonment for an individual, or 500 penalty units for a body corporate; and

55.1.4 as noted in the Consultation Paper at [10.172], the offences under the *Judicial Proceedings Reports Act 1958 (Vic)* are trifling by comparison.

55.2 The working group is of the view that fines and imprisonment should be alternatives and that a breach should not render an individual liable to both. It also appears the grading of the offence as a level 6 matter is unduly severe when compared with like offences.

55.3 The working group agrees that there is scope for harmonisation of penalties under the existing statutory regimes but considers that such harmonisation should occur within the existing statutory regimes. It is ultimately a matter for the Parliament to balance the competing considerations in setting appropriate penalties for these offences. The penalties set out under the *Serious Offenders Act 2018* (Vic) appear to reflect a reasonable balance between competing considerations.

56. Question 56

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

56.1 No. Consistent with our answer to question 28, we do not favour codification of the common law in this area. The existing regime preserves flexibility and permits the courts to respond appropriately to the particular circumstances of each case.

57. Question 57

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

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

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

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

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

57.1 As the Consultation Paper notes at [10.180], the Court already has such a power. The working group shares many of the reservations expressed in the Consultation Paper about the utility of take-down orders in the internet age. That said, we agree that in an appropriate case a take-down order may be a useful remedy and it should remain a tool in the armoury of courts (and potentially quasi-judicial tribunals) to ensure compliance with orders or legislation restricting or prohibiting publication of prejudicial material. We address the subsidiary questions posited by the Consultation Paper in turn.

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

57.2 We note that the Consultation Paper did not have regard to experience of take-down orders under: the *Telecommunications Act 1997* (Cth), the *Copyright Act 1968* (Cth) and Part 3A of the *Copyright Regulations 1969* (Cth); the *Digital Millennium Copyright Act* in the United States; the *EC Directive on Electronic Commerce (2000/31/EC)* (which has recently been the subject of review); or the Canadian experience under the notice provisions of the *Copyright Modernization Act 2012*.

57.3 The working group believes further scrutiny of the practicalities and pitfalls of take-down notice regimes in the copyright arena are warranted before embarking on a process of statutory reform in respect of contempt and suppression orders. It considers the existing powers of courts to issue take-down orders are adequate. However, if upon further consideration, codifying a take-down procedure is deemed desirable, then the safeguards contemplated by the Law Commission of England and Wales at [10.194] of the Consultation Paper would appear to be prudent.

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

57.4 Consistent with our answer to question 49 (above), we do not think this is achievable or practical. The parties with a sufficient interest to attract the court's jurisdiction can be assumed to already have a sufficient interest in undertaking such monitoring.

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

57.5 Consistent with our answer to part (b) (above), we consider a party with a sufficient interest to attract the court's jurisdiction may make such an application.

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

57.6 Unless a court is persuaded that an ex parte application is appropriate (perhaps due to urgency or imminent threat to a person's safety), in the ordinary course we would expect such an application would be on notice. That has the added

advantage of providing an opportunity for the matter to be resolved by consent as opposed to requiring a contested hearing.

58. Question 58

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

58.1 The working group is not a position to answer this question. We can infer from the research cited in the Consultation Paper and based on our collective experience that the number in question is likely to be substantial. We agree that an audit conducted by each court and tribunal appears to be the most efficient way of ascertaining this information. The working group considers the funding and resourcing of such audits are matters for each court and tribunal.

59. Question 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?

59.1 Yes. The working group considers that these are sensible proposals for reform, regardless of whether an audit of legacy suppression orders is conducted. We agree that these provisions should be included in the *Open Courts Act 2013* (Vic).