SUBMISSION OF THE CRIMINAL BAR ASSOCIATION ON THE VICTORIAN LAW REFORM COMMISSION "CONTEMPT OF COURT" CONSULTATION PAPER

(5 July 2019)

PART I INTRODUCTION

1. The Criminal Bar Association (the **CBA**) thank the Commission for the invitation to provide a submission on the Consultation Paper.

2. The CBA's submission is, generally, a public submission.

3. In addition to the 59 Questions set out at pp xix – xxv of the Consultation Paper, the Committee also asks a number of questions in the body of the paper. We address those individual questions first, before addressing each of the 59 Questions.

PART II RESPONSES TO INDIVIDUAL QUESTIONS

4. At paragraph [3.100], in the context of possible reforms to warnings for contempt:

   the Commission seeks the views of the courts, legal profession, court users, media and the community on whether there is sufficient transparency, clarity and consistency surrounding the use contempt warning in contempt proceedings.

5. In members' experience, warnings are rarely used. However, greater clarity around the threshold for them and their effect might encourage their use and have a positive effect on the work of the Courts.

6. At paragraph [4.81], the Commission observes:

The case law suggests that there may be some groups of people who are disproportionately more likely to be subject to proceedings for contempt in the face of the court or to be warned about the possibility of such proceedings, including self-represented litigants, and people who have mental health issues.

7. The CBA queries whether the use of warnings (or proceedings) are the correct response for persons with mental health issues. It may be of benefit for judicial officers to be aware that there are other options for persons in difficulty, including referral to the Crisis Assessment and Treatment Team or to other mental health services. Making that information available to judicial officers can only be of benefit.

PART III SUBMISSIONS ON THE 59 QUESTIONS

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

8. The CBA has not identified any other principles of law that are relevant. The principles set out in paragraphs [1.13]-[1.27] of the Consultation Paper are those relevant to the Commission's work.

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?

9. Courts should retain an inherent power to punish for contempt (the "special summary procedure"), however where possible the forms of contempt should be specified as should the sanction.

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?

10. Other than the "special summary procedure", the procedures should be the same. The purpose of enforcement is relevant here. If the purpose of the offence is to stop a contempt then that needs a different procedure (because it needs to have immediate effect) as opposed to the punishment of something that has happened but no longer has a present effect.

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?

11. Guidance should be provided. In addition, the CBA suggests that there be a presumption that the relevant statutory offence would be prosecuted. A referral power to the DPP may also be appropriate.

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?

12. There should be maximum penalties.

13. However, the penalty for the "special summary procedure" needs to remain flexible so that it has sufficient deterrent effect.

14. Different penalties would not be inappropriate for different forms of contempt.

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

15. Apologies should be taken into account like any mitigating factor. If coupled with a "purging" of the contempt (that is, a cessation of the conduct) then it might be that no penalty is required, but still a finding of the contempt having been proven.

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

16. In theory the relevant principles should apply. However, it will depend on the purpose of pursuing the contempt.

17. There is no reason for the *Sentencing Act 1991* not to apply to statutory offences, acknowledging that an apology / purging of the contempt will also be relevant factors.

18. The relevant principles of the *Sentencing Act 1991* do not so easily apply in relation to the "special summary procedure", which is directed towards bringing the contemptuous conduct to an immediate end in addition to punishment and denunciation.

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

19. In the CBA's experience, warnings are rarely, if ever, used.

9 When should contempt warnings be given?

20. Consideration should be given to defining when it is appropriate to give a warning, and what consequences might flow from such a warning.

21. In the case of a statutory contempt (for conduct that is concluded rather than ongoing), a warning may have less value (the boundaries of the offence are known), however a warning might still achieve the desired result.

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?

22. It is appropriate to provide guidance and that could be done via the judicial college website. The status of that guidance would, however, need to be clear (that is, whether the failure to follow any guidance founded any rights for judicial review by an alleged contemnor).

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?

23. Clarity about the effect of a warning would be helpful.

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

24. Yes.

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?

25. The "special summary procedure" (with the purpose of stopping conduct) should be retained as an aspect of the common law. It provides Courts with the power to regulate proceedings and ensure that ongoing proceedings are not jeopardised. All other forms of contempt could be replaced by statutory provisions.

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?

26. Insulting or disrespectful behaviour should be retained as a form of statutory contempt, that is not amenable to the "special summary procedure".

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?

27. 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 (although a judge could in theory act on information provided by court staff). If all other forms of contempt are replaced by statutory provisions, those offences might include conduct not directly seen or heard by the presiding judge.

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

28. It would not be appropriate to limit the scope of contempt in the face of the Court. However, when there exists a relevant statutory offence it would be appropriate for there to be a presumption that the statutory offence is charged and or a threshold required before contempt is charged rather than the statutory offence.

29. It may be that some of the existing offences which could apply to conduct that might also be contemptuous should be considered to regularise the penalties for consistency.

30. Regardless, consideration could be given to having all court related offences located in the one piece of legislation.

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?

31. Yes. It provides the Court with the power to manage its proceedings. Further, the possibility of being dealt with immediately may continue to have a deterrent effect.

32. However, as many of the forms of contempt that are identified could be set out in statutory provisions (that is, those forms of contempt that are known and well defined, the failure to comply with court orders etc).

33. Further, the process for the "special summary hearing" should be set out in legislation.

34. The process for those should be streamlined and consistent

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

35. Yes. The process for trying and punishing disruptive behaviour that is concluded is more amenable to the existing system of determining criminal liability.

36. The CBA favours retention of the "special summary procedure" to deal with disruption to proceedings.

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

37. Any statutory form of contempt (that is, any process other than the "special summary procedure") could be dealt with by any judicial officer.

38. The CBA notes that there are "certificate" processes used in some legislation (see, for example, ss 49(2) and (11) of the *Major Crimes (Investigative Powers) Act 2004*), but would not advocate use of those procedures for evidence other than objectively verifiable evidence, for example recordings.

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

39. The CBA would encourage as many of the parameters as possible being identified, including thresholds for the types of behaviour that can be dealt with, and the applicable procedural requirements.

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?

40. There are too few examples for the CBA to be able to assist, but notes that there are other options available to assist with persons who are experiencing significant mental health issues.

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?

41. The CBA cannot provide any useful assistance.

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

42. The CBA does not have a view, but notes that there are significant statutory offences that currently exist and can be used to deal with the conduct of a particular juror.

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?

43. The CBA does not have a view.

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?

44. The CBA does not have a view.

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?

45. Members of the CBA are not involved in this process, but the CBA suggests that information in writing should also be provided. If not already done, the form of the oath that jurors take should be in writing and in the jury room, including a list of the things that are prohibited (research and internet access).

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

46. The existing options for enforcement certainly provide avenues to enforce *compliance* with the orders, but don't deal with the impact of the failure to comply on the system. Compliance is arguably the function of the order, if the contempt power (or the concept) is no longer available, how does the system protect itself in the face of a disregard for its processes?

47. The CBA favours retention of the concept of an offence for failure to comply (in addition to the mechanisms to enforce compliance). Those mechanisms are important to ensure the smooth running of the criminal justice system, and could be used when (for example) Corrections fails to produce a person in custody for a court hearing notwithstanding a goal order or similar process.

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?

48. These matters are not of significant concern to the CBA.

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

49. Yes; it provides a mechanism to protect a fair trial.

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

50. The CBA favours the introduction of legislation to clarify the scope of sub judice contempt.

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?

51. The CBA favours an inclusive definition of the "tendency test" that lists certain information that is presumed to have the relevant tendency (see paragraph 7.31) and any other publication that has a substantial risk of serious interference.

52. The CBA acknowledges that the definition of "publication" is fraught. In an era when access to information is not limited by geography or time (there being no real ability to hinder the re-publishing of information), the effect of Victorian court orders is difficult to determine. However, that limitation should not preclude the making of a non-publication or

suppression order in the appropriate circumstances, or that an order with imperfect effect should not be made. An order that has some tangible effect is not futile.

53. Publication, in relation to online material, should be a continuing concept.

54. Defining the "pending" period is also difficult and may result in conduct aimed at delaying or bringing forward the commencement to suit a particular purpose. The CBA favours consideration of the facts of each case to determine when a proceeding is "pending".

(b) Should fault be an element, or alternatively should there be a defence to cover the absence of fault?

55. There should be a fault element, including both intentional and reckless conduct. Consideration could be given to negligence also being a fault element, however that would depend on the circumstances of both the alleged contemnor and the conduct.

(c) Should the public interest test be expressly stated?

56. The CBA favours no public interest exception but supports provision for a defence of "necessity" (as proposed in paragraph [7.84] bullet point three).

(d) Should upper limits for fines and imprisonment be set?

57. Consistently with all other offences, there should be upper limits for fines and imprisonment, noting that if the special summary procedure is retained there is some flexibility in relation to the nature of imprisonment (that it can be until the contempt is purged).

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?

58. Jury directions should be used where appropriate and can be tailored to suit individual cases. Requiring acknowledgement in writing might also focus jurors' minds on their obligations more clearly (see paragraph [7.185] bullet point four).

59. Trial postponement is a costly and significant measure that may have other significant consequences (on the quality of evidence as it ages, and on the accused's right to a timely trial). However, in cases where postponing the trial is perceived to have a tangible effect it should be retained as an option.

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

60. The current model (providing for jurors to be excused) provides flexibility. In the context of certain trials, agreed questionnaires are put to jurors in relation to relevant issues. In cases of significant media attention, those questions could be tailored to address any perceived issues. Any mechanism or process should be transparent and (other than generic matters that apply to all jurors and all trials) should have the input of the parties.

61. The CBA would be concerned about any mechanism that tends towards the American model.

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?

62. Education is rarely wasted and the CBA supports education for judicial officers, those from the Jury Commissioner's office and for jurors. The CBA also supports education for the general public, as is the case in the UK (see paragraph [7.193]), and for engagement with companies whose platforms are used for the "publication" of information.

63. Another mechanism might be to require companies whose platforms provide for the "publication" of information to advise users of their obligations and require specific acknowledgement of those obligations.

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

64. The CBA is unable to assist with this question.

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

65. Yes.

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'?

66. The New Zealand Law Reform Commission position (set out at paragraph [8.99]), which strikes a balance between the right to free speech and the publication of false information that will undermine public confidence in the judiciary, could be further explored.

(b) Should truth be a defence?

67. As to the underlying facts: yes.

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

68. Given there is an element of falsity about the content of the publication, the fault element should be reckless.

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

69. An apology (and retraction) may be relevant to mitigation and (depending on the timing) might affect whether proceedings are taken. However, an apology should not be a complete defence.

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?

70. Public engagement with the judicial process is important and helps to promote the Rule of Law by providing opportunities for the public to better understand the judicial system and its place in our society. However, such engagement is not a complete answer to the problem.

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

71. Nil at this stage.

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?

72. Restrictions on the publication of material tendered or referred to in Court should be consistent with the restrictions on ordinary members of the community.

73. If the publication of material by an individual is otherwise prohibited, then the fact that such material is tendered in evidence (or referred to in Court) should not result in the publication of that materials being authorised (eg, contrary to section 17 of the *Summary Offences Act* 1966).

74. If s 3(1)(a) is repealed it should not result in the ability to report factual matters that would otherwise be prohibited.

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?

75. This question is not relevant to the CBA, however the CBA agrees with the analysis at paragraph [9.25], and sees no reason to retain the prohibition in s 3(1)(b).

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?

76. Yes.

If so:

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

77. The addresses of witnesses should be excluded from publication (*cf* s 3(c)(ii)). The reasons for an adjournment should be able to be published.

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

78. All such prohibitions should be located in the *Open Courts Act 2013* (Vic).

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

79. The prohibition on reporting should apply to all pre-trial hearings, including committal hearings, bail hearings and pre-trial hearings in the County Court, that is under Parts 4.2, 4.6 and 4.7 of the *Criminal Procedure Act 2009* (Vic).

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?

80. The prohibitions should be retained, but should be located in the *Open Courts Act 2013* (Vic). The CBA is not opposed to further guidance being provided (for example that identified in paragraph [9.55]).

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

81. Victims (ie adult victims and adults who were child victims) should have the ability to consent to publication of their identity.

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?

82. In principle it is difficult to see why the Court should be involved in an adult's decision to consent to the publication of their identity (whether they were a victim as an adult or a child).

83. Any prejudice to the fair trial of the accused can be addressed in other ways (via a suppression order for example). Victims of other offences that can be quite personal are named (assaults, burglary, theft etc).

84. However, in the case of vulnerable adults it would not be inappropriate for there to be court supervision of that decision.

(b) What, if any, special provision should be made for child victims?

85. Child victims (who are still children) should also have the opportunity to consent to their name being made public, however in order to protect the interests of the child there should be some mechanism to ensure that the child understand the implications. It would not be inappropriate for there to be court supervision of that decision. Cleary, the views of the victim will carry great weight, as too would the views of the victim's parent(s) or legal guardian(s).

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?

86. A temporary prohibition would have the effect of ensuring victims' rights were adequately protected. If such a prohibition was legislated, it should be located in the *Open Courts Act 2013* (Vic).

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

87. Yes. The concepts of "publish" and "publication" should be defined consistently, for all relevant purposes (including any statutory contempt provisions, the *Open Courts Act 2013* (Vic) and the *Judicial Proceedings Reports Act 1958* (Vic) (if retained)).

88. The CBA favours use of the definition of "publish" and "publication" in the *Open Courts Act 2013* (Vic).

89. The definition could also usefully include an indication of the communications that are excluded from the definition (for example a private email between two (or more) individuals).

90. The definition should also include the temporal element (see **Q28 If the law of sub judice contempt is to be retained, should the common law be replaced by statutory provisions?** above).

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

91. Not at this stage.

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

92. In so far as the definitions relate to the content they do not appear to be in conflict with existing Commonwealth legislation (as set out in paragraphs [10.52] – [10.54]). However, depending o the temporal aspect to "publish" (that is, whether it includes maintaining the information in a form accessible to the public) it may impose a burden on so called "online intermediaries". To the extent that it does, the definition would not be operative. It would operate in that context as a defence to a charge for the online intermediary.

93. That is not necessarily a reason not to define "publish" in a particular way. It is only to note that scope of the definition (and prohibition) are limited by operation of s 109 of the Constitution.

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

94. To the extent that there is Commonwealth legislation providing protection to online intermediaries, Victoria has limited power to legislate.

95. However, requiring online intermediaries to provide information to those who use their services (in the form of an acknowledgement when an individual signs-up to use the service), does not appear to be inconsistent with any Commonwealth law.

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?

96. The ability to enforce orders globally is the only realistic way to ensure compliance with Victorian orders, however the CBA accepts that there are significant legal and practical impediments to that course.

97. The CBA supports offences for breaches of relevant prohibitions having effect outside Victoria (as proposed in paragraph [10.79]). The CBA also supports continued efforts for a system of interstate and territory recognition (as discussed in paragraphs [10.80] – [10.83]).

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?

98. The CBA favours a searchable database of all suppression orders accessible via the Supreme Court and County Court websites. Such a page could also include information about automatic prohibitions. Those agencies and individuals interested in orders could sign on for notification of the inclusion of new orders.

99. The CBA notes that both the High Court and the Federal Court publish all public orders in relation to ongoing matters online without restriction. Further, Supreme Court judgments (and more and more County Court judgments) are published on Austlii in a timely fashion.

100. The CBA has no view about who should maintain such a database / website, but suggests it should be searchable and contain all orders currently in force.

101. Further, information should be publicly available at courts about what information can be published by those attending.

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?

102. Although CBA members are alive to issues of ongoing media publication in the lead up and during the trial phase, it is insufficient and inappropriate to rely on them to be the main group responsible for monitoring breaches because:

(a) They should be focussed on preparation of their cases for hearing and monitoring media imposes another (likely unfunded) obligation.

(b) Barristers may change in the lead up to a case and may change very close to the hearing of a matter. As such, an incoming barrister might not be aware of previous publications that are relevant to the case.

(c) It is not only the parties to criminal proceedings that have an interest in the maintenance and compliance with court orders. Victims also have an interest.

103. A new (or existing) body should be identified as being responsible for monitoring and compliance. Although focussed on the public sector the Office of the Victorian Information Commission deals with the use and sharing of information.

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

104. Victoria Police should have the power to lay charges for the breach of any statutory prohibition on publication, including any orders made under the *Open Courts Act 2013* (Vic).

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

105. No. They create an added barrier to prosecution.

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

106. The Discussion Paper considers a number of different types of prohibitions on publication. The CBA favours a model where liability depends on the nature of the prohibition:

(a) Statutory offences (for example those currently found in the *Judicial Proceedings reports Act 1958* and the breach of court orders) should have a reckless fault element (in addition to intentional conduct).

(b) Statutory contempt offences should have intentional and reckless fault elements, and possibly negligence. See the answer to **Q28 If the law of sub judice contempt is to be retained, should the common law be replaced by statutory provisions?** Subparagraph **(b)** above).

107. However, the question of intent behind any publication should not impact the ability of parties to obtain suppression and or non-publication (and or take-down) orders if appropriate.

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

108. Exceptions based on a lawful duty to communicate information should be maintained.

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

109. It would not be inappropriate for a victim's consent to be a defence to publication, noting that the question of consent may be a disputed question of fact and in situations where the victim is vulnerable such consent might not be freely given.

110. It would not be inappropriate for online intermediaries to be responsible for conduct that is published on their platform by third parties. In that regard, we draw the Commission's attention to the recent case of *Voller v Nationwide News Pty Ltd; Voller v Fairfax Media Publications Pty Ltd; Voller v Australian News Channel Pty Ltd* [2019] NSWSC 766 where online intermediaries were held liable in defamation for comments published on their public Facebook pages.

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?

111. No. The penalties under the *Judicial Proceedings Reports Act 1958* (Vic) in particular are inadequate. The penalties should be commensurate with the impact of the offending, in particular in cases where trial dates are vacated because of the offending.

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

112. Yes.

57 Should a court be able to issue an order for internet materials to be taken down ('takedown order')?

113. Yes.

If so:

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

114. Yes.

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

115. Any person can monitor whether material should be the subject of a take down order. The CBA thinks the more relevant question is (c), that is: who should have standing to make an application for such an order.

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

116. The parties to a proceeding, police and the Court of its own motion should be able to make an application for such an order. In addition, consideration could be given to permitting individuals (not being a party to the proceeding) with a sufficient interest to apply for such an order (for example victims).

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

117. The *Open Courts Act 2013* (Vic) model permitting ex parte temporary orders being made could be used in this context.

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

118. The CBA is unable to answer but presumes a significant number.

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

119. Yes.

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?

120. The CBA favours a mechanism that would bring all legacy suppression orders under the *Open Courts Act 2013* (Vic), including requiring them to have an end date.

121. However, as to the mechanism to achieve that, the CBA submits only that such a mechanism must include notice to those in whose favour the order is made, and must extend to those persons the ability to address the Court as to whether the order should be maintained.

122. The CBA notes that Courts, media parties and police may be aware of legacy suppression orders.

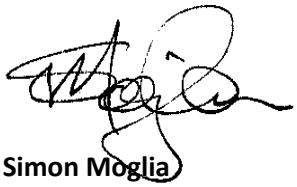
123. Coupled with a database of ongoing orders, this would go some way to assisting media and members of the public what information may or may not be published.

(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?

124. Yes. Such a procedure could be in the *Open Courts Act 2013* (Vic).

The CBA gratefully acknowledges the work done by Raelene Sharp in the preparation of this submission. Further, it welcomes any further opportunity to assist the Commission in relation to this Consultation.

Yours sincerely,



Simon Moglia
Secretary
Criminal Bar Association