CONTEMPT OF COURT

SUBMISSION ON BEHALF OF MINTERELLISON

MEDIA GROUP

1. Background

1.1 On 16 May 2019, the Victorian Law Reform Commission (**VLRC**) released a consultation paper, seeking submissions on its review of the law of contempt of court (**Consultation Paper**).

1.2 This submission is primarily focused on sub judice contempt, take down orders and online publications, covered in Chapters 7-10 of the Consultation Paper.

1.3 MinterEllison is firmly of the view that the current approach of Victorian Courts to contempt by publication:

(a) has an extremely low threshold for liability, which is inconsistent with the level of trust we place in juries to perform their duties in accordance with the law; and

(b) discourages publication of matters that are in the public interest, thus contributing to a troubling, broader culture of suppression.

2. Sub Judice Contempt

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

2.1 The law of sub judice contempt should be retained. However, Its scope should not be increased. In its current form, it impermissibly restricts freedom of speech and infringes upon the principle of open justice.

2.2 This submission recognises that the public's right to be informed needs to be balanced against the accused's right to a fair trial.

Freedom of the press

2.3 The law of contempt seeks to balance the countervailing public interests in the proper administration of justice and freedom of speech / the press. The administration of justice must be reconciled with the principle that:

> *Speech should be free, so that everyone has the right to comment on matters of public importance, including the administration of justice, even if the comment is outspoken, mistaken or wrong-headed.*[1]

2.4 Freedom of expression is one of the fundamental rights protected by the Victorian Charter of Human Rights and Responsibilities.

2.5 Section 15(2) of the Charter states:

> *Every person has the right to freedom of expression which includes the freedom to seek, receive and impart information and ideas of all kinds, whether within or outside Victoria and whether orally; or in writing; or in print; by way of art; or in another medium chosen by him or her.*

2.6 The curtailment of freedom of speech is said to be justified by the need to prevent prejudice to particular proceedings, and thus to the administration of justice.[2] However, the operation of the sub judice rule restricts free speech more than is required to ensure a fair trial. The Consultation Paper states that the law in this area "*does not restrict the publication of material which is a fair and accurate report of court proceedings*" but merely "*restricts the publication of extraneous information which may be prejudicial until court proceedings are complete*".[3] In theory, a fair and

[1] *Gallagher v Durack* (1983) 152 CLR 238.
[2] Consultation Paper, 83.
[3] [7.5] NSWLRC, Contempt by Publication (Report No 100, 2003, 19).

accurate report of court proceedings, in the absence of a suppression order, cannot itself constitute a contempt. However, in our experience, the law has impermissibly restricted reporting.

2.7 Sub judice contempt has a deleterious effect on freedom of speech and discourages publication of content that is in the public interest, where there is a genuine or remote risk that those same matters will be subsequently litigated. In other words, journalists or the media often reconsider publishing stories of public interest because of the fear that they will later be prosecuted. In this contemporary landscape, Courts must be even more cognisant of the unintended but potentially insidious effect of a culture which stifles publication.

2.8 By way of comparison, the system in the United States does not limit what can be said during a trial. Instead, a conviction will be quashed which results from a prejudiced trial.[4] Unlike the US, Australia does not have a constitutionally enshrined right to freedom of speech, and this certainly accounts for a degree of the difference between our contempt laws. However, as identified above, Victoria also has a statutorily protected right to freedom of speech. Although certainly at the far end of the spectrum, the US position is certainly desirable in that freedom of speech is highly protected. The administration of justice is not neglected by this approach, in that Courts still have the ability to quash convictions in circumstances where there is prejudice.

Open justice

2.9 The concept of open justice is a corollary of freedom of speech, standing for the notion that court proceedings ought to be open and reportable.

2.10 In our experience, media entities understand and take most seriously their obligations as responsible publishers. They acknowledge their responsibility to ensure that proceedings are reported fairly and accurately, and that they too play a critical role in advancing the public interest in open justice.

2.11 The public perception that open justice is being done is equally as important as the fact and consequence of it being done in any particular case. On this point, Lord Chief Justice Hewart said that "*It… is of fundamental importance that justice should not only be done but should manifestly and undoubtedly be seen to be done".*[5] Public confidence in the scrutiny of our legal system, which depends on open justice, is critical to the proper administration of justice.[6]

Robustness of juries & effectiveness of jury directions

2.12 In our experience, some magistrates and judges have too quickly dismissed the effectiveness of jury directions in preventing prejudicial material from affecting the proper administration of justice. Directions may be given to jurors, reinforced by criminal offence provisions, prohibiting them from making enquiries about a case, and warning them about using the internet and social media during the trial.

2.13 In our view, the current sub judice test is too restrictive in seeking to balance freedom of speech against the administration of justice, as juries are robust, and judicial directions to juries are sufficient to prevent or cure prejudice (even that arising prior to empanelment), in nearly all cases.

2.14 Two incorrect assumptions made in formulating the doctrine are that:

(a) if jurors are exposed to publicity about a trial that does not form part of the evidence before them, they will be impeded in reaching an impartial and proper verdict, as their views will be prejudiced by media publicity; and

(b) the evidence in court, and jury directions, will not be able to neutralise any prejudice.[7]

2.15 We place a great deal of trust in juries, and they are well embedded in our judicial system. The jury system has been said to recognise the importance of the community being involved in the judicial process and to help protect the rights of the accused from the power of the state.[8] There is

[4] See e.g. *Sheppard v Maxwell* 1966 384 US 333.
[5] *R v Sussex Justices; Ex parte McCarthy* [1924] 1 KB 256 at 259.
[6] See *Re Applications by Chief Commissioner of Police* (2204) 9 VR 275 at [25], per Winneke P, Ormiston and Vincent JJA.
[7] NSWLRC Contempt by Publication, 32 [2.2].
[8] Victorian Law Reform Commission, *Jury Empanelment* (Report No 27, May 2014) 8.

strong support (judicial and otherwise) for the robustness of juries and the effectiveness of judicial directions in correcting misapprehension or prejudice.[9] The low threshold required to breach contempt laws is at odds with the trust that juries are given, as a matter of law, to perform their functions and follow directions. This trust is well-founded. In *Dupas v R* (2010) 241 CLR 237 (***Dupas***), the High Court noted that "*it is often said that the experience and wisdom of the law is that, almost universally, jurors approach their tasks conscientiously.*[10] In *Dupas,* the Court held that:

> *The possibility that a juror might acquire irrelevant and prejudicial information is inherent in a criminal trial, but the capacity of jurors to decide cases by reference only to admissible evidence led in court and relevant submissions, uninfluenced by extraneous considerations, is critical to ensuring that criminal proceedings are fair to an accused.*[11]

2.16 Given the trust we place in juries, in the High Court case of *Gilbert v R* (2001) 201 CLR 414, McHugh J noted:

> *Put bluntly, unless we act on the assumption that criminal juries act on the evidence and in accordance with the directions of the trial judge, there is no point in having criminal jury trials.*

2.17 Despite these observations from eminent High Court Judges, there are examples each week of trial Judges ignoring such observations from Australia's highest Court.

2.18 There are also safeguards in the selection process of jurors to ensure that they can be excused if they have a pre-existing prejudice against the accused, and offences exist under the *Juries Act 2000* (Vic) to deter jurors from making enquiries about trial matters.[12] Jurors are also frequently directed by trial judges not to conduct their own internet searches on defendants.

Redundancy

2.19 There is an argument to be made that sub judice contempt no longer serves the purpose for which it was created, having regard to the shifting media landscape, and increased reliance upon the internet (particularly social media).[13] Information now spreads across the internet like wildfire, with updates shared by individuals and the media alike on social media. As recognised in *Mokbel*, many search engines are based overseas and thus are beyond the jurisdiction of our Courts. Accordingly, other measures must be relied upon to ensure that juries make decisions based only on the admissible evidence before them. These measures include those referred to in questions 28 and 29 below.

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

2.20 If the law of sub judice contempt is to be retained, the existing common law principles should not be replaced by statutory provisions for the following reasons:

(a) Firstly, the media do not wish to prejudice a fair trial. Where there is doubt, they seek advice. Media lawyers and the news desk are well-versed in the parameters of acceptable publication, and this is the reason for which there are so few actions for contempt by publication, and that so few trials are aborted.

(b) Secondly, the *Open Courts Act 2013* (Vic) (**Open Courts Act**) saw an unprecedented, substantial increase in suppression orders, necessitating an independent review of the statutory provisions by former Court of Appeal Judge, Frank Vincent AO QC. We consider that it is likely that a '*Contempt Act'* would see a similar unintended rise in contempt proceedings. This was certainly the experience in the United Kingdom after the introduction of the *Contempt of Court Act 1981* (UK). Given that contempt proceedings carry potential criminal penalties for individuals, we consider this result to be highly undesirable.

[9] See e.g. *Alqudsi v R* (2016) 258 CLR 203, 208 [2], per French CJ.
[10] Dupas, [26].
[11] Dupas, [25]-[29].
[12] *Juries Act 2000* (Vic), s 78A.
[13] Consultation Paper, 101.

(c) Thirdly, although the current common law structure has arguably resulted in uncertainty and inconsistency, it has also allowed for the flexibility required to handle these complex matters. Given that this area of the law is so circumstance-dependant, a statutory scheme is likely to be too rigid to encompass all potentially relevant considerations.

(d) Fourthly, the judiciary are quite capable of assessing the impact of publicity upon a trial before the Courts. A statutory provision is thus unnecessary.

(e) Lastly, the public rely on the media to remain connected to the judiciary. The media thus plays a crucial role in maintaining the transparency and accountability of the Court system.

If so:

2.21 Sub judice common law principles should not be replaced by statute. However, in the event that this is deemed necessary, we have set out our position on the relevant principles below.

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

(i) ***the "tendency" test;***

The position on "tendency" is currently unsettled. We consider that the "substantial risk" approach, set out by Chief Justice Mason in *Hinch v A-G* (Vic) (1987) 164 CLR 15, 70,[14] is the most appropriate formulation, being that the publication must create a *substantial risk of serious interference* with particular proceedings. The test creates a higher threshold for liability, striking the appropriate balance between the administration of justice and freedom of expression. This position is supported by both the New South Wales Law Reform Commission (**NSWLRC**), and the Western Australian Law Reform Commission.[15]

We also consider that articles which are archived on a media outlet's website should be excluded from posing a substantial risk to the administration of justice. Support for this may be drawn from *News Digital Media v Mokbel* (2010) 30 VR 248 (***Mokbel***), which, although decided in the context of take-down orders, provides a useful illustration of the risk of prejudice posed by archived publications. In considering the utility of a takedown order, the Victorian Court of Appeal determined that, given that the material was archived, the "*prospect of such a potential juror making a search on the internet at this stage [was] negligible"*.[16]

(ii) ***the definition of publication;***

The Consultation Paper suggests that in the context of contempt, publication occurs when information is "made available to the general public" or "a section of the public which is likely to comprise those having a connection with the case".[17]

However, in our view, this is inconsistent with the decisions in *Dow Jones v Gutnick* (2002) 210 CLR 575 (***Gutnick***) (a defamation case) and *Fairfax Digital Australia and New Zealand Pty Ltd v Ibrahim* (2012) 83 NSWLR 52 (***Ibrahim***), in which the Courts confirmed that information must be accessed for it to be "published".[18] Indeed, it is difficult to see how a publication carries a risk of causing prejudice where it is not accessed by a potential or actual juror.

Furthermore, in our submission, Publication ought to be taken as occurring at the time of original publication. In other words, publication should not be defined as a continuing act. As recognised in the Consultation Paper, such a definition causes issues for online publishers in particular, including that they might be liable for archived material published before legal proceedings have commenced or

[14] *Hinch,* 27-28.
[15] NSWLRC, *Contempt by Publication* (Report No 100, 2003) 69 [4.13]; Law Reform Commission of Western Australia, *Review of the Law of Contempt* (Report, Project NO 93, June 2003) 29.
[16] Warren CJ and Byrne AJA [82].
[17] Consultation Paper, 87; citing Des Butler and Sharon Rodrick, *Australian Media Law* (Thomson Reuters, 5th ed, 2015) 373 [6.150], citing N Lowe and B Sufrin, *The Law of Contempt* (Butterworths, 3rd 3d, 1996) 85. See *Viner v Australian Building Construction Employees' and Builders Labourers Federation* (1963) 56 FLR 5, 22-3.
[18] *Mokbel*, 82.

material published which is relevant to proceedings in another jurisdiction.[19] It is clear that this places an unreasonable burden upon publishers to constantly monitor the contents of their archived materials.

(iii) ***the beginning and end of the "pending" period;***

Criminal proceedings should be regarded as beginning at the time of charge,[20] ending at the time of conviction or acquittal at first instance, and beginning again in the event that a re-trial is ordered. For instance, we do not consider that the sub judice period should cover the time from when a summons or warrant for arrest is issued.[21]

Civil proceedings should be regarded as beginning when a writ, statement of claim or other initiating process is filed. Civil proceedings should only remain pending until judgment is handed down, or preferably when the Judge reserves his or her decision.

Anything further is an unreasonable restriction upon the media.

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

The strict liability standard is controversial and highly unjust. It is problematic that those found to have contravened these restrictions may be penalised even if they did not know (or could not reasonably be expected to have known) that proceedings were before the courts,[22] or if they mistakenly believed that proceedings had concluded.[23] Indeed, where a contempt of court is committed by publishing a newspaper article, the editor of that newspaper may be found liable regardless of whether he or she had any knowledge of the article being published.[24]

This is particularly concerning with respect to archived publications, which, as alluded to above, require an excessive level of proactive monitoring by media organisations.

In our submission, a fault element should be introduced to the sub judice rule. The intent should be stated as an intention to prejudice particular proceedings, rather than an intent to publish. There is currently very little that the media can do to avoid breaching this rule. A fault element would provide a greater incentive for the media to attempt to exercise reasonable care in publishing material relevant to Court proceedings.[25]

We also consider that defences should be introduced, where an individual and / or media outlet has done everything reasonable in the circumstances to avoid liability.

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

The public interest principle is essentially the only defence to sub judice contempt, permitting media to avoid liability where publication relates to a matter of public interest. The public interest must be sufficient to outweigh any potential prejudice to the administration of justice.[26] If the principles of sub judice contempt are to be legislated, the public interest principle should similarly be enshrined in legislation, to emphasise its continued significance.

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

There are currently no limits to the penalties for contempt. We consider that upper limits to penalties could be imposed to counteract our concerning culture of suppression. This

[19] Consultation Paper, 88.
[20] *Stirling v Associated Newspapers Ltd* [1960] Sc :T 5; *R v Clarke; Ex Parte Crippen* (1910) 103 LT 636; *Packer v Peacock* (1912) 13 CLR 577 at 586; *James v Robinson* (1963) 109) CLR 593 at 606; *Attorney-General* (NSW) v *TCN Channel Nine Pty Lt*d (1990) 20 NSWLR 368 at 374-375.
[21] Cf. *Packer v Peacock* (1912) 13 CLR 577 at 586.
[22] See, e.g. *R v Pearce* (1992) 7 WAR 395 at 429.
[23] *Attorney-General* (NSW) v Radio 2UE Sydney Pty Ltd (Unreported, New South Wales Court of Appeal, Priestley, Meagher and Powell JJA, 11 March 1998).
[24] *John Fairfax & Sons Pty Ltd v McRae* (1955) 93 CLR 351, 370, 372.
[25] Aniano Luzung "Contempt by Publication: Improving the Law on Court Reporting By" (2004) 85 ALRC Journal 27.
[26] *Hinch v Attorney-General (Victoria)* (1987) 164 CLR 15.

would ensure certainty for those who are most likely to interact with the principles of sub judice contempt, about the possible penalty if these rules are breached. We would be concerned, however, if the penalties are indexed. As we have seen with the 2005 Uniform Defamation Law, indexed damages / penalties grow over the years to significant figures.

Question 28: Is there a need for greater use of remedial options, for example jury directions or trial postponement?

2.22 As noted above at paragraph 2.13, jury directions are an effective method of combatting any prejudice caused by the media. As such, in preference to increasing the restrictions on publication, we consider that alternative measures (such as increased jury directions, pre-trial questioning and juror education) should be emphasised. In our view, broadening the scope of sub judice contempt principles should be a measure of last resort.

If so:

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

In our submission, measures such as increased pre-trial screening of jurors may serve the aims of freedom of speech, and open justice, while also recognising the importance of the administration of justice. A process such as that used in the United States might be adopted, whereby jurors are subject to a higher level of scrutiny, and are questioned thoroughly pre-trial to determine any underlying prejudices.

Question 29: 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?

2.23 Although effective in the majority of cases, we acknowledge that jury directions are not a perfect solution, and, at least to some extent, are subject to the shortcomings identified by the VLRC in the Consultation Paper.[27] Accordingly, jury directions might be supplemented by measures such as increased education to jurors, outlining the reasons for which it is important that they abide by their obligations.

Question 30: What other reforms should be made, if any, to this area of the law of contempt of court?

2.24 In our submission, there should be a clearer recognition in our contempt laws of the robustness of juries (as outlined above) to potentially prejudicial publications.

2.25 We do not support the introduction of automatic suppression of information relating to the criminal history of an accused, for similar reasons to those outlined below at paragraph 5 below. These reasons include that the imposition of an automatic suppression stifles freedom of speech to an impermissible level.

2.26 Publications detailing an accused's criminal history, published before a proceeding is commenced, should not be heavily restricted. A position to the contrary is likely to have unjust results in respect of archived material.

3. Scandalising the Court

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

3.1 In addition to the considerations outlined above in part 2 in relation to sub judice contempt, we have set out below, further reasons for which scandalising the court should not be retained. It is our strong belief that the law of scandalising the Court is no longer relevant in today's society, having regard to the global trends identified by the VLRC in its Consultation Paper.[28] As such, we have not considered Questions 33 and 35.

Questionable foundation

[27] Consultation Paper, 109.
[28] Consultation Paper, 121.

3.2 The contempt rests upon the assumption that in a democratic society, the judiciary sources its legitimacy from public approval. If the public ceases to have confidence in judicial figures, the effective administration of justice will be undermined.[29] Thus, publications and statements that bring the judicial system into serious disrepute are viewed as a threat to the long-term functioning of the courts. There is no restriction on the severity of the penalty that the court may impose for scandalising the Court.

3.3 The contempt arguably overstates the importance of maintaining "public confidence" in the judicial system. Oyiela Litaba contends there is a lack of empirical evidence to show that public confidence is directly correlated with the effective administration of justice.[30] The Australian Law Reform Commission (**ALRC**) reached the same conclusion in its 1984 review of contempt laws, noting in its report (**ALRC Report**) that "'there is no clear evidence that public confidence…could ever fall so low that for this reason alone the system would be destroyed".[31] In a particularly biting critique, it stated:

> *At the end of the day, a great deal of the argument in this area is pure speculation. At most, one can conclude that, while the maintenance of public confidence in the system is desirable in general terms, it is not an 'absolute good' to be pursued at all costs. In particular, it should not override the need for public education as to the genuine flaws in the system, even though the process of disclosing and remedying these may make significant inroads into public confidence for a significant period of time.*[32]

3.4 Further, even if it is accepted that public confidence is essential, the concept itself is difficult to define. Therefore, prosecution for scandalising the court is often irregular and inconsistent. Factors such as the defendant's public profile, occupation and perceived "credibility" often influence whether charges are pursued.[33] This inconsistency may itself impair public confidence in the fairness of contempt charges.

Operation of the doctrine

3.5 The content of the common law doctrine is also problematic, in that no fault element is required.[34] Unwitting publishers may therefore be subject to prosecution. Furthermore, the ALRC Report noted that there is confusion over what defences apply, making it harder for the accused to successfully defend a charge.[35]

3.6 Determining whether the court has been scandalised is also inherently subjective, and depends on the judge's view of what:

(a) the public thought of the courts *before* the statement; and

(b) what the public thought *after* the statement.

3.7 There is a risk the court may have an unrealistic perception of the public reaction, thus determining the matter based on "judicial ideology about judges and their role", rather than genuine public expectations.[36] It is therefore very hard to predict what publications will be held to be in contempt of court. Thus, liability is imposed 'without the offence being defined in sufficiently precise terms to give fair warning to individuals as to what types of statements are prohibited'.[37]

3.8 As a result, the ALRC Report concluded that the common law offence should be abolished, but replaced with a limited statutory offence.[38] In contrast, the United Kingdom and Canada have recently abolished scandalising contempt but have not enacted a statutory replacement.[39] A bill is

[29] Oyiela Litaba, 'Does the Offence of Contempt by Scandalising the Court Have a Valid Place in the Law of Modern Day Australia?' (2003) 8 *Deakin Law Review* 113, 114.
[30] Ibid 133.
[31] Australian Law Reform Commission (ALRC), *Contempt*, Report No 35 (1984) 246 [424].
[32] ALRC Report [425].
[33] Oyiela Litaba, 'Does the Offence of Contempt by Scandalising the Court Have a Valid Place in the Law of Modern Day Australia?' (2003) 8 *Deakin Law Review* 113, 115.
[34] Mark Pearson, 'Scandalising Media Freedom: Resurrection of an Ancient Contempt' (2008) 14(1) *Pacific Journalism Review* 64, 74; ALRC Report [414].
[35] ALRC Report [437].
[36] ALRC Report [437].
[37] ALRC Report [428].
[38] ALRC Report [460].
[39] See *Crime and Courts Act 2013* (UK) s 33(1); in Canada, the contempt was found to be incompat ble with the *Canadian Charter of Rights and Freedoms*.

currently before the New Zealand parliament that would completely abolish the contempt.[40] Bearing in mind this trend, it is arguable that the contempt is not necessary, given the recent willingness of judges to discuss their decisions in public forums. Mark Pearson notes that "judges cannot adopt such a [public] stance and later hide behind the protections of ancient laws… to punish those who have publicly disagreed with them".[41] Doing so perpetuates the perception that the judiciary is a favoured institution that is immune from public critique.[42]

4. Enforcing laws that restrict publication

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

4.1 The Consultation Paper notes that there are a variety of definitions and references to the terms "publish" and "publication" which apply to the law of contempt, the *Judicial Proceeding Reports Act 1958* (Vic) and the Open Courts Act.[43] In our submission, these terms should be consistently defined, in accordance with the arguments we have set out above at paragraph 2.20 (a)(ii), such that, consistent with defamation law, material is considered to be published only if it is actually accessed.

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

4.2 We further note the recent case of *Voller v Nationwide News Pty Ltd & Ors* [2019] NSWSC 766 (***Voller***), which considered the scope of who might be considered a "publisher" under defamation law. In *Voller,* the Supreme Court of New South Wales determined that three media companies were, for defamation purposes, the primary publishers of third-party comments on their public Facebook pages. In this case, each defendant company would post a snippet of an article online, with a hyperlink that was usually accompanied by a photograph or a video, underneath which anyone with a Facebook account could post a comment.

4.3 While this case was considered in the context of defamation, and not contempt, we note that the decision forms part of a troubling trend towards overly expansive, anti-media definitions, which might well spill over into the law of contempt. In our view, this result is manifestly unjust for the following reasons:

(a) it is extraordinarily restrictive on freedom of speech, as media outlets are now expected to hide all comments on their posts, before approving each comment individually;

(b) it problematically assumes that in relation to a public Facebook page, comments authored by a third party user are solicited, invited and welcome; and

(c) media outlets rely on comments on their Facebook pages to increase interest and therefore advertising revenue.

4.4 If statutory provisions governing the laws of contempt are to be introduced, we consider that this situation should be expressly excluded, such that (except in extreme circumstances) owners of public internet pages (such as Facebook pages or online forums) should not be held liable for the comments of other individuals, where they do not have prior notice of any problematic content. Otherwise, the owner of that Facebook page (including the VLRC, which maintains a public page) could be charged with contempt for a comment on its page that it had never read, and was not even aware was on the site.

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

4.5 Commonwealth laws regulating liability of online intermediaries is inconsistent. Some areas require the service provider to have intended to breach the law, while other areas completely exempt online service providers from liability.[44] Academic commentators Kylie Pappalardo and

[40] Administration of Justice (Reform of Contempt of Court) Bill 2018 (NZ).
[41] Mark Pearson, 'Scandalising Media Freedom: Resurrection of an Ancient Contempt' (2008) 14(1) *Pacific Journalism Review* 64,
[42] ALRC Report [457].
[43] Consultation Paper, 156.
[44] s 116AG *Copyright Act 1968* limits the liability of service providers for copyright infringement. Damages cannot be awarded.. s 18C *Racial Discrimination Act 1975* (Cth) is capable of making online intermediaries and service providers liable for the publication

Nicolas Suzor argue "the basis on which third party intermediaries are liable for the actions of individuals online is confusing and, viewed as a whole, largely incoherent".[45] New laws must take this into account and propose a consistent model of liability

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

(a) ***In other Australian states and territories?***

(b) ***In foreign jurisdictions?***

4.6 The Consultation Paper suggests that in order to enable Victorian authorities to prosecute breaches of prohibitions on publication that occur beyond the state border, the legislature could enact criminal offence provisions in the Crimes Act, the Open Courts Act or another statute which have extraterritorial application.

4.7 We do not support this proposed reform. This approach further restricts the freedom of the press and freedom of communication and expression through silencing media located outside of the Victorian Courts' jurisdiction.

4.8 In particular, the proposal to restrict journalists based internationally from reporting on legal matters that are considered global news, would be an unjustifiable expansion of the current regime. This has the effect of preventing populations of people around the world from learning of significant developments in the public interest. As these international audiences are not going to be selected to be on a jury panel in Victoria, the restriction on the freedom of the press is unjustifiable. This would also encroach on different nations' constitutional or statutory rights to such freedoms.

4.9 The Consultation Paper refers to the recent scenario where international media organisations published information about the conviction of Cardinal George Pell for child sex offences. At the time of writing, the DPP has charges against 34 Australian media organisations and journalists for allegedly breaching a suppression order for Pell's trial, and committing sub judice contempt. If the DPP had the power to prosecute internationally based media, it would be many more. This would have meant that the news that one of the most senior figures in the Catholic Church – a global institution with approximately 1.3 billion baptised Catholics worldwide – had been found guilty of committing child sex offences, would not have been reported. This is an example of news clearly in the public interest to be reported to global audiences that are at little to no risk of being empanelled to a Victorian jury.

4.10 Due to the globalised nature of the internet, it is said that these international reports could still prejudice a trial of the accused. As explained above, this wrongfully assumes that juries make decisions on extraneous evidence and discussion, as opposed to the evidence before them in court.

4.11 We submit that the ability to enforce contempt of court beyond the State border and restrict publication in other Australian states and territories, and foreign jurisdictions, is an unwarrantable restriction on the dissemination of reports on significant legal developments and decisions.

4.12 Not only must justice be done; it must also be seen to be done.

4.13 It should also be recognised that many of these servers are in the United States of America. No US court will assist Victorian courts to penalise any US citizen or company.

5. Take down orders

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

of vilifying material by others. However, the service provider must have had some intent to vilify the plaintiff. Establishing this intent is difficult. In *Google v ACCC* (2013) 249 CLR 435 stated that online intermediaries are not liable for the content of advertisements that breach the Australian Consumer Law if the content of the ads is determined by the advertiser and published by the service provider automatically. As Google did not endorse the misleading content of the ads, the ACL did not apply.

[45] Kylie Pappalardo & Nicholas Suzor, 'The Liability of Australian Online Intermediaries' (2018) 40 *Sydney Law Review* 469, 469).

5.1 The court has the power to make take-down orders through issuing a broad suppression order under the Open Courts Act that compels the removal of historical articles from websites and online archives.

5.2 We submit that a court should not be able to achieve this end. This is for many reasons, namely because take-down orders:

(a) Are not necessary to achieve the underlying purpose of preventing prejudiced jury members;

(b) Impose significant and wide-ranging practical ramifications for media organisations;

(c) Are ineffective because of the globalised nature of online media;

(d) Ignore the utility in allowing members of the broader public to access historical recordings of events, often for research purposes;

(e) Impinge on the freedom of the press; and

(f) Are incompatible with the right to freedom of expression (enshrined in section 15 of the Victorian *Charter of Human Rights and Responsibilities Act 2006*).[46]

5.3 Take-down orders are usually sought because there is a concern of risk of prejudice to the proper administration of justice. In applications for take down orders, it is argued that historical articles should be removed because if they were read by a potential juror, that juror may be prejudiced. In this regard, we refer to the discussion around the robustness of juries above at paragraphs 2.12 to 2.17. In our submission, a Court should not make an order unless it is satisfied *based on proper evidence or credible information*[47] that a jury direction would not adequately cure the effect of prejudicial material or reduce the risk from being a real and substantial one. This means that if an applicant for a suppression order fails to properly meet the burden, a suppression order should not be made.

5.4 As (then) Chief Justice Warren AC recognised extra-judicially in late 2013:

> *The Courts have an obligation to find ways to protect the right to a fair trial in spite of the challenges posed by new media. The Victorian approach has been to seek control of information flowing to jurors, rather than the flow of information to the public at large. This will be the main challenge in ensuring a fair trial in the digital age."*[48]

5.5 The inherent contradiction with the rationale for making take-down orders is that it presupposes that a juror will commit an offence under the *Juries Act 2000* (Vic) or disregard a judge's direction. Historical articles are not actively advertised on media websites and do not appear on the front pages of the websites. In practicality, they will only be published if actively searched for and downloaded. Therefore, the only way a juror could access an historical article is by actively searching for it.

Necessity

5.6 A take-down order should only be made insofar as it is necessary to achieve its purpose. In other words, in this context, orders should only seek to remove material where it is necessary to protect against a real and substantial risk of prejudice.

5.7 In 2010, the Court of Appeal analysed the utility of take-down orders in the case relating to Tony Mokbel.[49] A majority of the Court of Appeal found that a take-down order had no utility and was thus unnecessary based on the following considerations:

(a) because the articles were stored in historical archives and no longer promoted by the media outlet, there was no risk that a juror would inadvertently access the articles; and

---

[46] *Charter of Human Rights and Responsibilities Act 2006* (Vic) section 15(2) states: *'Every person has the right to freedom of expression which includes the freedom to seek, receive and impart information and ideas of all kinds, whether within or outside Victoria and whether orally, or in writing, or in print…'*.
[47] As required under section 14 of the Open Courts Act.
[48] M Warren, "Open Justice in the Technological Age" 40(1) *Monash University Law Review* 45 at 55-56.
[49] *News Digital Media Pty Ltd v Mokbel* [2010] VSCA 51.

(b) it could not readily be accepted that a juror sitting in a trial would deliberately disobey a direction by the trial judge to refrain from actively searching for information about the accused or act in contravention of their judicial oaths, enshrined in section 78A of the *Juries Act 2000* (Vic).

5.8 This view is summarised from the following passage from the decision of Warren CJ and Byrne AJA (at paragraph 94):

> *We respectfully doubt the necessity for making that part of the order requiring the applicants take down the material from their websites provided the articles, the subject of the order, were no longer sufficiently current or were not presented in such a way as to be forced upon a visitor to the site who was not searching for them. We are of the opinion that a juror in this case would not be likely to have inadvertently come across material adverse to Mr Mokbel which was archived and not readily available to such a visitor. Nor do we readily accept that a juror would deliberately set about searching for such material in defiance of the trial judge's warning and direction. Moreover, if, as the evidence shows, the removal of the offending material did not prevent a determined searcher from accessing the same material from a cached website, it cannot be said that the order was necessary for the protection of the court process with respect to Mr Mokbel's pending trials.*

5.9 Warren CJ and Byrne AJA also made some additional observations which are instructive (at paragraphs 80 and 82):

> *It has never been suggested that a suppression order should be made requiring ... libraries to embargo these articles or references in some other way, stopping the searcher from having access to them. Such an order would, of course, be impractical.*
> *...*
>
> *The risk that a potential juror's mind might at this stage be further and irremediably tainted by the presence in a library of an article or reference adverse to him must be negligible. There is no evidence that any such person would be likely to seek out this information in a library. Subject to the difference which we have identified,* ***the prospect of such a potential juror making a search on the internet at this stage must also be negligible.***
> (our emphasis added)

5.10 In accordance with the Court of Appeal's findings, the risk of a juror deliberately breaching their legal obligations by conducting independent searches should not be considered *as real and substantial*. On this basis, the relevant ground for making an order[50] should not be satisfied and a take-down order should never be made under the Open Courts Act.

5.11 The New South Wales Court of Criminal Appeal has also consistently arrived at the same conclusion as the Victorian Court of Appeal did in *Mokbell*, for instance in *Ibrahim*, *Nationwide News Pty Ltd v Quami* (2016) 93 NSWLR 384 and *AW v R* [2016] NSWCCA 227.

Practical ramifications of take-down orders

5.12 Take-down orders are an imposition on the business of media organisations. There is significant time spent by technical support staff to ensure material is permanently removed from the website. There is also the expense of external legal fees where appropriate to ensure an order has been complied with or to consider the scope or appropriateness of such an order.

5.13 We do not consider this is a cost that should be borne by the media, particularly, in circumstances where there is no suggestion that any reporting has been unfair or inaccurate.

Other factors

5.14 For similar reasons to those outlined above in part 2, such orders are a significant impost on freedom of the press and freedom of expression.

5.15 This can have further consequences for broader society who rely on the press to record accessible accounts of the operation of the justice system. It is important that archives of these historical snapshots of legal cases, are preserved for researchers, students, historians, legal

[50] Section 18(1)(a).

professionals and members of the wider public to access. A take-down order is an order to delete a part of history from the record.

5.16 Ultimately, it is our submission that the power to make take-down orders is not in the public interest.

MinterEllison

July 2019