Contempt of Court
2019 Victorian Law Reform Committee Review
Submission

VICTIMS OF CRIME COMMISSIONER

FINAL
PUBLIC DOMAIN

VICTORIA State Government

Contents

1 Introduction

In 2018, the former Victorian Attorney-General Martin Pakula MP requested the Victorian Law Reform Commission (VLRC) to undertake a review of the Contempt of Court provisions currently in operation in Victoria. In May 2019, the VLRC released a consultation paper, calling for submissions.

2 Scope of the Submission

The law relating to contempt of court is complex and somewhat archaic. The VLRC's discussion paper covers aspects of the law which are outside of the role of the Office of the Victims of Crime Commissioner.

However, the law relating to the prohibition of the publication of identifying details in sexual assault cases, is a topic that has been carefully considered by the Victims of Crime Commissioner. The Commissioner has a role in advocating for change to better support victims of sexual assault in the criminal justice system and helping to educate the public about the difficulties victims of crime experience, including the media reporting of sexual assault and family violence matters.

On 5 August 2019, the Victims of Crime Commissioner met with representatives from the VLRC to specifically discuss the law surrounding this issue.

3 Victims of Crime and their Voice

Many victims of crime have advised this office of the importance of their right to speak about their experience of both sexual assault and the court process, for a number of different reasons. Some want the community to know about the harm the offender caused to them. Others want to help educate the public. A large majority want to contribute to improving and reforming legal processes to assist future victims of crime. Many feel that they cannot do this if their right to speak out is prohibited.

However, other victims have advised this office that the media intrusion into the court case and their lives is yet another form of trauma that they are forced to endure. In sexual assault cases in particular, even if the victim's identity is hidden, the public reporting of the details of the offending can cause a victim and his or her family shame, embarrassment and fear of repercussions.

Each case and each victim may want different levels of protection of their details and of their case. The level of protection may change throughout the course of the case or even throughout the course of the victim's life. It is therefore essential that the legislation governing this area of law be flexible enough to protect each victim.

4 Current legislation

Section 4(1A) of the *Judicial Proceedings Reports Act 1958* currently prohibits the publication of any particulars likely to lead to the identification of a person against whom a sexual offence is alleged to have been committed. This prohibition extends to all persons and organisations, such as media groups and also includes the victim.

The penalty for offence is 50 penalty units ($8,261) for a corporation or 20 penalty units ($3,304.40) and/or 4 months imprisonment for an individual.

The available defences include that if there are no proceedings in a court pending at the time of the publication, that no complaint about the alleged offence had been made to a police officer before that time, an order had been made by the relevant court permitting such publication or the victim provided his or her permission for his or her details to be published.

4.1 Issues with the current legislation

4.1.1 Details of the alleged offending

The current legislation only prohibits publication of any particular likely to lead to the identification of the victim. Commonly, the victim's name is not reported which is the way in which their identity is commonly thought to be protected. However victims can be identified, particularly in rural areas, through the reporting of the surrounding circumstances of the offending. It may also be that at the filing hearing or first court mention of the matter, the informant, prosecutor or Magistrate has insufficient information to determine what 'particular' may likely lead to the identification of the victim. In addition, the legislation does not prohibit the publication of the actual details of the offending, which can cause distress and trauma to the victim and their family.

4.1.2 Inadvertent protection for the accused

In cases where the accused person is a close family member of the victim, the accused's details cannot be published as to do so would identify the victim. For example, if the accused was the victim's father, then the publication of the accused's name and the charge would reveal the identity of the victim.

4.1.3 Process for victim who wants to be identified

It is not a defence to the charge if the victim identifies themselves prior to the conclusion of the court proceedings without obtaining permission from the court.

Looking at the example in 4.1.2 above, if the victim wanted to be identified, then if there was a pending proceeding in court, the victim could only lawfully identify themselves after seeking permission by the relevant court. However there is no stipulated process as to how a victim could seek this permission and whether they would need to organise their own legal representation in the circumstances.

5 Recent amendments not yet in operation

Amendments to the *Judicial Proceedings Reports Act* will come into effect on 7 February 2020, or earlier if proclaimed by government. The amendments attempt to make it easier for victims to lawfully identify themselves and are the result of recommendation 15 of the *Open Courts Act Review*.

5.1 Issues with forthcoming amendments

The forthcoming amendments only operate in matters where the accused has been convicted of the relevant offence. It is not clear what occurs in cases where there has been an acquittal or in cases where charges have been withdrawn.

6 Suggested Reform

Victims may not be informed at the outset of a criminal investigation about the right of the parties to request a suppression order.

There are good reasons why court proceedings should be open to the public and be able to be reported on in the media. Justice needs to be seen to be done. Reporting of cases, particularly sexual assault cases, encourages other victims to come forward and report their matter to police. In addition, allowing a victim to share their story is an important part of changing the stereotypical myths the public possess, particularly in relation to victims of sexual assault and family violence.

But depending on the victim, the case and the timing of such reports, publicising the matter can cause extreme distress, anxiety and more trauma to a victim of crime. It is therefore the view of the Commissioner that the protection against publication should be retained, and indeed expanded to include details of the offending for victims of sexual

assault. However, a victim should be able to opt out of such protection, at any stage of the matter, through a simple process.

To assist in the education of the public, the media and the adjudication of such matters, there should be clearer statutory expression of the policy underlying the prohibitions on publication, for example by the inclusion of guiding principles.

6.1.1 Support and advice

Victims of crime often need practical as well as emotional and psychological support in the immediate aftermath of a crime. Victims of sexual assault are often deeply distressed in both the few days after the offences and when making their report to police.

Victims going through this trauma need advice as to what can be put in place for their protection. In some matters, this amounts to police obtaining an intervention order against the accused. In others, it may be that new accommodation is found for the victim. But often what is not considered is the additional trauma and intrusion media reporters and reports can cause to the victim and his or her family. The Commissioner has been told by more than one victim that the media attention the day after their loved one was killed was unwanted, inappropriate and insensitive. However at that time, they did not know how to deal with the media attention and no support or advice was provided.

It is therefore imperative that victims be advised of the option for the prosecution to seek a suppression order at the outset, if there is any suggestion or inclination that the matter will be reported.

While the Commissioner understands that it is not the role of legislation per se to provide such support and advice to victims, legislation can be effective by imposing obligations on the courts to inquire with the prosecution is such support and advice has been provided to the victim at the first court hearing of the matter.

6.1.2 Location of the legislative provisions

The *Criminal Procedure Act 2009* sets out, in a chronological order, the processes and involved in every criminal proceeding must abide by. The Act contains special provisions relating to child and cognitively impaired sexual assault victims, as well as protections for adult victims of family violence and sexual assault. For example, the provisions concerning special hearings, alternative arrangements for the giving of evidence and the restrictions on cross-examining a complainant about their sexual history.

Having the provisions relating to publication of details contained in this Act would make it easier for prosecutors and judicial officers to turn their mind to the issue at the very earliest court stage of the proceedings.

Section 10 of the Act concerns the first listing of matters, which would either be a mention or a filing hearing. Section 11 deals with the place of hearing. It is suggested that provisions prohibiting publication of identifying details and the like, could be inserted in the Act after section 11, in keeping with the chronological steps involved in a criminal prosecution.

Alternatively, it may be that the provision could be inserted in Chapter 8 of the Act, directly after s338 containing the Guiding Principles.

6.1.3 Inserting a new guideline principle

To assist in the education of the public, the media and the adjudication of such matters, there should be clearer statutory expression of the policy underlying the prohibitions on publication, for example by the inclusion of an additional guiding principle in the relevant Act. It is respectfully suggested that such a guiding principle could be included in the current s338 of the *Criminal Procedure Act 2009*.

Section 338 of the *Criminal Procedure Act 2009* contains the following guiding principles:

Guiding principles

It is the intention of Parliament that in interpreting and applying this Part in any criminal proceeding that relates (wholly or partly) to a charge for a sexual offence, courts are to have regard to the fact that—

(a) there is a high incidence of sexual violence within society; and

(b) sexual offences are significantly underreported; and

(c) a significant number of sexual offences are committed against women, children and other vulnerable persons including persons with a cognitive impairment; and

(d) offenders are commonly known to their victims; and

(e) sexual offences often occur in circumstances where there is unlikely to be any physical sign of an offence having occurred.

The suggested principle could be:

(f) the public reporting of such cases can cause some complainants further trauma, shame or embarrassment.

6.1.4 Immediate protection

In all cases of sexual assault there should be a mandatory 5-day suppression order in place to cover any reporting, apart from the accused's name, date and place of the offence and the charges. The reporting of any specific details of the either the offending or the alleged victim (including their age, ethnicity, occupation, etc) should be prohibited and included in the order, which should be posted on the door of the court as well as provided to any representatives from any media outlets who are present in the courtroom.

This mandatory 5-day period would allow victims the opportunity to receive advice on the issue and to have some time to consider the matter. They would then be in a much better position to be able to make an informed decision.

After this 5-day period the victim can be consulted to ascertain their view of the continuation of the suppression order. In the event that they request that the order be continued, the prosecution can make the application to the court.

Whilst this protection should be mandatory in cases of sexual assault, victims of other crimes against the person should be advised of the option to seek a suppression order at the outset of the case.

6.1.5 Permission to identify should be easy

If a victim wishes to identify themselves at any stage of the legal proceeding, the process should be simple, straightforward. In order to ensure that a victim has made an informed decision and to protect other potential victims in the matter, such an application should be made to the court in which the matter is then listed.

The victim should be able to request that the application be made on their behalf by the prosecutor of the matter. The test for the court should involve some type of written or signed authority by the victim confirming that they consent to their identity being revealed.

6.1.6 Cases involving more than one victim

In cases involving more than one victim, if there are concerns that revealing the identity of one victim would lead to the identification of another victim, then the court would need to take this into account, which may necessitate a hearing. Once again, it would be important that such a hearing should be at no cost to the victim. As to who should be responsible for appearing on behalf of any or all victims, it is noted that if there was a state funded legal service for victims, this would not be an issue. However, it may be that designated representatives from Victoria Legal Aid or the OPP could appear on behalf of the victim(s).

6.1.7 Child victims

It is noted that at present, the current provisions do not differentiate between adult and child victims, but that pursuant to a court judgment[1], children can give permission for publication only if they 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 anonymity otherwise afforded by the provisions.

To avoid any doubt, it is suggested that this is legislated.

6.1.8 Awareness of orders made

As referred to in 6.1.3 above, in the event that a suppression order is made in a case, then a copy of the order and notice should be posted on the court door so that the existence of the order is clear to those who may be physically in the courtroom.

In the event that suppression orders do not become mandatory for sexual assault cases, a copy of the relevant provisions of 4(1A) of the *Judicial Proceedings Reports Act 1958*, a copy of the legislation should also be posted on the court door at the first court event.

In addition to the physical posting of the orders, a publicly available database should be created, in which the court reference number and the accused name appears. The entry should contain details of the date the order was made, what is able to be published (if anything)

6.1.9 Penalties and remedies for breach of publication restrictions

Unlike the penalties and remedies available for breaching a suppression order or for contempt of court, the current penalties for breaching the publication restriction in the *Judicial Proceedings Reports Act 1958* are inadequate to provide sufficient deterrent, particularly in the case of a corporation. At the current penalty rate amount, the maximum penalty (50 penalty units) a news outlet could receive for breaching the rule is $8,261. Such a penalty needs to be increased so as to be an effective deterrent.

The penalty in respect of an individual should also be increased to illustrate the importance of protecting victims from additional trauma, shame, embarrassment or unwanted attention.

In addition, the relevant court should also have the power to issue a range of orders in an attempt to remedy the situation, similar to what is available for breaches of suppression orders. Such orders may include the requirement of the removal of the publication or the issuing of a public or private apology.

6.1.10 Monitoring and prosecuting breaches

At present there is no organisation or person assigned to actively monitor compliance with the legislation. Currently if a victim becomes aware of a report, they bring it to the attention of police. Before any charges are filed, they must be authorised by the Director of Public Prosecutions (DPP). As such, it would be difficult for any person or organisation to monitor, not just commercial publications, but any publication on any forum for potential breaches.

Information provided to the VLRC by the Office of Public Prosecutions reveals that since June 2000, the DPP has consented to 4 prosecutions.[2]

While it has been suggested that an automatic computer generated search engine could be developed to search different platforms, the development and monitoring of such a system would be expensive. In addition, the policy implications of establishing a media monitoring role would require further consideration.

[1] *Hinch v DPP (Vic); Television and Telecasters (Melbourne) Pty Ltd v DPP* [1996] 1 VR 683, 695.
[2] 'Contempt of Court,' VLRC Consultation Paper, May 2019 pg 153

6.1.11 Legacy suppression orders

In circumstances where many years have passed since the making of a suppression order and a party applies to lift the order, then such notice to do so should be provided to all relevant parties (for example, the OPP, the accused person, Victoria Police and media organisations). This hopefully would provide for the victim in any such case to:

1. be aware that an application has been made; and
2. have an opportunity to either consent to or oppose such an application.

To automatically revoke historical suppression orders without first contacting victims of the offences may cause trauma, distress or embarrassment to the victims and/or their families. The same could be said for the accused and their families. For this reason, the safest course of action would be to leave such orders in place, subject to further order of the court.

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