Submission to the Victorian Law Reform Commission in response to the Consultation Paper - Contempt of Court

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This submission responds to the following questions from chapters 1, 3, 5, 6, 9 and 10 in the Consultation Paper.

Chapter 1: Introduction - Principles of law relevant to this inquiry
1 What other principles of law, if any, are relevant to the Commission's consideration of the laws the subject of this review?

We endorse Recommendation 5(1) of the Open Courts Act Review, that "The harmonisation of the law and practice relating to suppression orders be referred to the Council of Attorneys-General for further consideration." We suggest such a review should go further and extend to the issue of cross-jurisdictional variations in contempt and other publishing restrictions across Australia's nine jurisdictions. We appreciate the constitutional independence of both the legislature and the judiciary in Victoria and other jurisdictions and Australia's federal system of government, but suggest in the era of the Internet and social media where publishing defies jurisdictional boundaries that it is inappropriate to have such a confusing array of contempt, suppression order and other publishing restriction laws (sexual crimes, juveniles, mental health, interviewing prisoners, national security, coroners' courts, juries etc). We urge the VLRC to recommend an initiative by the Council of Attorneys-General to standardize all such laws nationally insofar as they relate to publishing restrictions. Such near-uniformity has been achieved in recent decades in a host of areas including defamation law.

Chapter 3: General issues with the law of contempt of court
Possible Reforms
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?

In our submission, the answers to these questions are no, yes and yes respectively.

In our submission, a general power to punish for contempt is an inherent power of every Australian court, and this power is reinforced by s 77 of the Constitution, which, relevantly, contemplates that State courts must be - and be seen to be - independent and impartial. The provision of impartial justice by independent State courts requires, by necessary implication, a power to protect the due administration of justice from contemptuous attacks. Since the authority to protect the courts is an immanent attribute of a court, the "general power" cannot be removed by legislation, at any rate.

Notwithstanding our answer to question one above, we submit that the Commission could develop a list of the most common contempt scenarios and explore, in consultation with judicial rules committees, suitable penalty ranges for the listed conduct. As a general

principle, it is preferable for provisions creating criminal liability to be clearly stated and enumerated.

Intention, or *mens rea*, is an important component of many, but not all, criminal offences. We favour reforms that emphasise the need for an intention component to provide alleged contemnors with the opportunity to lead evidence relating to intention. As Dr Suzie O'Toole has observed in *I Find You In Contempt (2017)*, there may be some cases where a contemnor has a mental health issue that affects conclusions that might be made about their culpability.

Procedural safeguards

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?

Contempt is a crime that is uniquely concerned with the protection of the authority of courts and the due administration of justice by those courts. As we have submitted above, the authority to punish for contempt comes from the courts themselves. Correlatively, we also submit that the registrars of the courts and the administrative apparatus of courts should be supported and resourced to engage in the legal and procedural steps necessary to charge contemnors on behalf of the courts. This is necessary in order to avoid the spectre of charges for contempt recommended by a court becoming a matter of discretion of ordinary prosecuting authorities, with the potential that has to embarrass the courts.

Overlap with criminal law

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?

Statutory guidance is appropriate, mainly for the benefit of alleged contemnors, in order to provide them with information that may be relevant to the posture they might adopt in defence to a charge. It may also have an educative purpose for new judges or judges who are unfamiliar with the jurisdiction. Statutory guidance would no doubt be based on prevailing approaches, and perhaps a legislative assessment of the appropriate punishment, which is of course, a constitutionally permissible approach to take (the legislature has the power to set punishment volumes, the courts have the power to decide whether punishment is warranted). Notwithstanding these constitutional principles, we recommend that any statutory guidance as to punishments retain a power for courts to determine a punishment within a range, to ensure appropriate discretion is retained by the judge or court concerned.

Penalties

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?
6 What weight, if any, should be given to apologies in determining whether and what penalty is imposed for contempt of court?
7 Should the Sentencing Act 1991 (Vic) apply to contempt proceedings?

Statutory maximum penalties are desirable, given the existence of outlier cases where particularly draconian penalties have been imposed. That said, penalties need to be calibrated to the seriousness of the contemptuous conduct. For example, disobedience contempt that

has a tendency to thwart the due administration of justice may be considered a far more serious contempt than any contempt in the face of the court or scandalizing contempt. We submit that the maximum penalty for each type of contempt should be two years' imprisonment (disobedience contempt), and one year of imprisonment (contempt in the face of the court) and one year of imprisonment (scandalizing), with provision for additional financial penalties for publishers of scandalizing contempt, respectively.
[Media representatives might well find such a recommendation harsh, but we ask that it be read in the context of our response to Chapter 6 below, where we argue that given the constitutional implied freedom to communicate on matters of politics and government, and the long-standing principle of open justice, we propose that any contempt charge emanating from an act of publishing or expression require proof that the publication recklessly or maliciously interfered with the administration of justice or wilfully disobeyed an order of the court in a manner contrary to the public interest.]

Warnings
8 In what circumstances do the courts give warnings for contempt?
9 When should contempt warnings be given?
10 Is there a need for guidance to the courts on the use of contempt warnings? If so, should such guidance be set out in statutory provisions?
11 Is there a need for greater clarity as to whether, when a court gives a contempt warning, there has been a finding that a contempt has in fact been committed and, if so, the status or effect of such a finding?

Warnings should be required to provide the opportunity of an apology. Warnings should include specified content to ensure procedural fairness. Warnings should be accompanied by adjournments to enable legal representation and the opportunity to take further advice and to increase the possibility that even a late apology will issue. Specific court procedural forms could be developed by rules committees for use by the registrars to formally warn litigants and set out next procedural steps.
As we outline in relation to suppression orders (Chapter 10) below, courts Public Information and Media Officers, if resourced appropriately, can play an important role in liaison with media and other 'quasi-professional' publishers (Johnston, 2017) which could well allay the need for formal warnings from the courts. We suggest the Commission review the role of such officers in the way courts communicate about potential contempt of court dangers for publishers, and the possibility for such officers to play a more pro-active role if they are properly resourced to do so. Given most Australian jurisdictions now employ such professional officers (Johnston, 2018), the network also offers the potential for sharing best practice and liaison capacities about upcoming high-profile cases which could be communicated widely across jurisdictions. This is in line with our advice to the NSWLRC (Johnston et al, 2019) that if this role was to be expanded then its resource implications would also need to be assessed and addressed.

Chapter 5: Juror contempt
20 Does the Juries Act 2000 (Vic) adequately regulate the conduct of jurors and potential jurors? If not, what amendments to the Juries Act 2000 (Vic) should be made?
21 To the extent courts have the power to deal with juror contempt at common law, is there a need to retain this power?
22 If the law of juror contempt is to be retained, should the common law be replaced by statutory provisions? If so:
(a) How should it be defined?

(b) What fault elements, if any, should be required?
(c) Should conduct already covered by other statutory offence provisions be excluded?
23 Do current jury directions adequately instruct juries about determining cases only on the evidence, prohibitions on research and disclosure and asking questions of the trial judge? If not, what reforms are required?

We propose that to more effectively mitigate the risks posed to the conduct of criminal trials, in particular, and reduce the need to rely on suppression orders, greater attention should be paid to improving the content, delivery and reinforcement of 'do not research' instructions to jurors. Consideration could be given to recommendations listed in our earlier submission to the Victorian Attorney General (Johnston et al 2013 p. 24) which includes the following consistent messaging to jurors on the following:

- Jury directions should specifically refer to social media;
- Jury directions should be written as well as oral;
- Jurors should have jury directions with them throughout the trial;
- Jury directions should clearly explain to jurors the rationale for the prohibition on doing their own research;
- Jury directions should clearly explain the possible consequences of failing to comply with the directions, including the possibility of the trial being aborted and the risk of criminal sanctions for disobeying directions;
- Jurors should be reminded of these directions on a daily basis;
- Jury rooms should be equipped with signage that explicitly prohibits digital and social media use in words and pictures; and
- Jury liaison personnel should remind jurors on a daily basis, using a scripted message, that digital and social media use are forbidden.

Further research should also be conducted with jurors to more thoroughly investigate how such instructions can be made more effective.

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?

We suggest drawing upon the latest online pedagogies to improve the methods of training for jurors to reinforce instructions to jurors and to inject a consistent baseline to juror knowledge in this area. One example would be to conduct pre-trial jury training modules, administered in the courthouse once the jury has been empaneled, to supplement the judge's directions to the jury (Further detail is included in our earlier report at Johnston et al 2013, p. 24-25.)

Chapter 6: Non-compliance with court orders or undertakings
Disobedience contempt
25 Is there a need to retain the law of disobedience contempt?
26 If the law of disobedience contempt is to be retained:
(a) What benefit does the distinction between civil and criminal contempt provide? Should this distinction be maintained?
(b) Should the common law of disobedience contempt be replaced by statutory provisions? If so, should it be replaced by statutory offence provisions and/or a statutory procedure for civil enforcement of court orders and undertakings? In either case,
i. Who should be responsible for and/or be able to commence proceedings?

ii. What should the party commencing proceedings be required to establish and to what standard of proof?
iii. What penalties should apply?

Chapter 6 gives a useful description of the law of disobedience contempt, along with examples of suggested reforms by the ALRC, LRCWA and NZLC. However, missing from the discussion is the important media dimension of disobedience contempt.

This can take at least two important forms:

a. Disobeying a court order on ethical grounds for confidential source protection by either refusing to answer a question in court or refusing to provide documents or materials the subject of a court order;
b. Publication of material in breach of a suppression order for which the media publisher has had sufficient notice, but might claim publication was in the 'public interest'.

Each has relevance to broader free expression and open justice issues and links in some important ways to our discussion elsewhere in this submission.

a. The privilege accorded to journalists under s126K of the *Evidence Act 2008* (Victoria) has its own body of research and debate related to journalists, confidentiality of sources and shield laws, an issue triggered again recently by AFP raids on the ABC offices and a News Corporation journalist's home over leaks of national security information. Media organisations and free expression advocates are making a range of reform proposals in that area, but we suggest there are elements in the discussion of disobedience contempt law reform that are relevant.
    i. There are some parallels with our suggestions below on according standing to oppose suppression orders to those demonstrably engaged in 'journalism', rather than restricting standing to those deemed 'journalists'. Under s126J of the *Evidence Act*, the journalist privilege is limited to "journalists" who must be engaged for a substantial portion of their professional time in the profession or occupation of journalism for a news medium, and must be accountable via a complaints process to "recognised journalistic or media professional standards or codes of practice". [This effectively restricts the privilege to legacy media journalists who are members of the journalist's union, the MEAA.] As we state below in our discussion of standing to oppose suppression orders, we believe such an approach is overly restrictive in its definition and excludes those who might practice journalism and ascribe to the ethic of source protection but might only publish occasionally (such as a media professor) or even be publishing for the first time (such as a university journalism student).
    ii. Most Australian jurisdictions now have journalist shield laws feeding into their exemption from disobedience contempt consequences of refusal to reveal their sources but there are again variations as to who might qualify and under what circumstances (Fernandez & Pearson, 2015). This privilege is yet another area requiring harmonisation across jurisdictions which should be pursued via the Council of Attorneys-General.
b. The pursuit of disobedience contempt charges against those who publish material in breach of a suppression order can arise in a range of circumstances, ranging from

those in the mainstream media who argue their breach was part of their discussion of an important matter of public interest, as has been argued in the most recent charges stemming from the Pell trial and in *R v. Hinch*; through to those who wilfully and recklessly disobey an order as part of a clearly misplaced and misguided campaign as in where the defendant refused to obey court orders to take down from his website the names of women who had allegedly had sexual relationships with a high profile media executive such as in *Doe v Dowling*. Both situations are nevertheless 'publishing offences', and we suggest they are deserving of special consideration under a higher threshold in the realm of disobedience contempt law.

Given the constitutional implied freedom to communicate on matters of politics and government, and the long-standing principle of open justice, we propose that any contempt charge emanating from an act of publishing or expression require proof that the publication recklessly or maliciously interfered with the administration of justice or wilfully disobeyed an order of the court in a manner contrary to the public interest. Such a measure is not unusual. The action for breach of confidence requires government litigants to establish that any breach was contrary to the public interest, and such a recklessness component was introduced to s35P of the *ASIO ACT* 1979 as a mechanism for distinguishing the media's unauthorised disclosure of information from that of agency 'insiders'.

Chapter 7: Contempt by publication (1)—sub judice contempt

27 Is there a need to retain the law of sub judice contempt?
28 If the law of sub judice contempt is to be retained, should the common law be replaced by statutory provisions? If so:
(a) How should the law and its constituent elements be defined, including:
i. The 'tendency' test
ii. The definition of 'publication'
iii. The beginning and end of the 'pending' period?
(b) Should fault be an element, or alternatively should there be a defence to cover the absence of fault?
(c) Should the public interest test be expressly stated?
(d) Should upper limits for fines and imprisonment be set?
29 Is there a need for greater use of remedial options, for example jury directions or trial postponement? If so:
(a) How should this be facilitated?
(b) Are other mechanisms, for example pre-trial questioning of jurors, also required?
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?
31 What other reforms should be made, if any, to this area of the law of contempt of court?

[See below under chapter 10 responses.]
We suggest an important consideration in the area of sub judice contempt is the hosting of prejudicial social media comments about the accused on government agency social media sites, particularly police Facebook pages. Pearson (2011 and 2012) has suggested that police Facebook pages might have proven social value with disaster management and with engaging the community in the search for suspects, but are inappropriate vehicles for announcing high profile arrests because of the tidal wave of prejudicial comments that members of the public sometimes post about the accused, at a pace beyond the moderation resources of the police communications department. We recommend that police agencies be counselled to announce

such arrests via traditional media channels where comments posted to their news sites are moderated, rather than implicating a state policing agency in the potential prejudice of the trial of the individuals they have arrested.

Chapter 9: Prohibitions on publication under the Judicial Proceedings Reports Act
Indecent matters and public morals
36 Should the prohibition in section 3(1)(a) of the Judicial Proceedings Reports Act 1958 (Vic)
on the publication of indecent matter and indecent medical, surgical or physiological details in relation to any judicial proceedings be repealed?
Divorce and related proceedings
37 Should the prohibition in section 3(1)(b) of the Judicial Proceedings Reports Act 1958 (Vic)
on the publication of the details of divorce and related proceedings be repealed?
The prohibition on reporting directions hearings and sentence indications
38 Are the statutory prohibitions in section 3(1)(c) of the Judicial Proceedings Reports Act 1958 (Vic) on the reporting of criminal directions hearings and sentence indication hearings necessary? If so:
(a) What should be the scope of such prohibitions?
(b) Where should such prohibitions be located to optimise awareness of their existence and operation?
(*c) Should other pre-trial hearings, such as bail hearings or committal proceedings also be subject to statutory reporting restrictions?*

Victims of sexual offences
39 Should the statutory prohibition on identifying victims of sexual offences under section 4(1A) of the Judicial Proceedings Reports Act 1958 (Vic) continue to apply automatically from the time of complaint, throughout proceedings and after proceedings have concluded? If so:
(a) What further legislative guidance should be provided about the scope of the prohibition?

We refer back to our recommendation in answer to Question 1 that the law and practice among the states and territories relating to suppression orders and other publication restrictions should be harmonised. Identification prohibitions in relation to serious sexual offences vary markedly across jurisdictions, with non-identification of victims required in all states and territories, but variation on if and when an accused might be identified (contrast Victoria with NT *Sexual Offences (Evidence and Procedure) Act* 1983, ss. 6, 7 and 11(2); Qld Criminal Law (Sexual Offences) Act 1978, ss. 6 and 7; and SA *Evidence Act 1929,* ss. 71A); and further inconsistencies over whether a victim might be allowed to self-identify, with or without the permission of the court (see Pearson, 2014). We suggest that standardizing laws where possible could provide greater clarity and certainty for all parties, particularly in this digital era where publications and social media posts defy jurisdictional borders and it is unrealistic to expect all journalists and social media publishers to be aware of the hundreds of publishing restriction laws across the nine Australian jurisdictions.

Chapter 10: Enforcement of prohibitions and restrictions on publication
Publication
43 Should the terms 'publish' and 'publication' be defined consistently? If so, how should these

terms be defined?
44 Are there any other issues arising out of the definitions of 'publish' and 'publication' that should also be addressed?
45 To what extent are potential reforms to the definition of the terms 'publish' and 'publication'
affected or limited by Commonwealth law?
46 What reforms, if any, should be made to address the liability of online intermediaries for the
publication of prohibited and restricted information?
Jurisdiction
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?
Awareness of prohibitions and restrictions
48 What processes should be in place for notifying or reminding the media and the wider community of the existence of prohibitions and restrictions on publication, including court orders and the operation of automatic statutory provisions?

We recommend the establishment of a national framework for the implementation of suppression and non-publication orders and access to court information to provide clarity for courts' external stakeholders. Following our submission to the NSWLRC (see Johnston et al 2019) we further recommend the development of a publicly available manual outlining the types and categories of information that might be made the subject of suppression and non-publication orders.

The recent trial of George Pell in the Supreme Court of Victoria highlighted "the difficulties faced by courts enforcing such orders in an age where information flows freely and immediately around the globe" (Birmingham & Bennet, 2018) and media frustrations with the court's imposition of suppression orders. The commentary also highlighted a lack of understanding on the part of the media about the nature and purpose of suppression orders. In that respect, it is not clear what provisions were put in place to explain the non-publication and suppression orders and whether the court took a proactive position in explaining its reasons. Moreover, lack of consistency across jurisdictions compounds media and public (mis)understanding about policies, protocols and practices.

The four authors of this submission were among six who provided a report to the Victorian Attorney General on *Social Media and Juries* (Johnston et al, 2013) relevant to this review. At that time, we noted escalating issues relating to the law of *sub judice* contempt arising from the easy publication and distribution of social media and the pervasive and ubiquitous nature of all internet republishing. Qualitative research that our team conducted among judges and court workers found: "Social media has created intense challenges for the law and judicial administration" (Keyzer et al, 2013, p. 47).

We note that action for breach of a suppression order against social media users is unlikely to occur or be viable because users might not be aware of the existence of suppression or non-publication orders or might be willing, like some international media outlets, to openly flaunt them, knowing that they are effectively beyond the reach of any enforcement action. Court orders to take down earlier reportage on websites ('take down orders') are also typically futile, because online dissemination is so widespread. So, the bizarre situation exists where

the prior character evidence and coverage of earlier proceedings still sits online for anyone to access with a simple search of an accused's name, and this detail can be shared easily on social media.

We note developments in the courts in the appointment of courts Public Information and Media Officers provide potential for increasing awareness of prohibitions and restrictions. These professional communication staff have already been found to assist courts with advising in the media and 'quasi-professional' media (e.g. bloggers) who attend and cover court proceedings (Johnston, 2017). We note this blurring of the role between professional, legacy journalists and independent bloggers has become an issue for courts to contend with and has raised definitional issues of who should be classed as a journalist – see, for example *Slater v Blomfield* [2014] 3 NZLR 835 in which the New Zealand High Court found that a blogger could be classed as a journalist for the purposes of the benefit of the privilege conferred on journalists under the New Zealand *Evidence Act* (see discussion in Johnston & Wallace 2017; 2018). Developments such as this have added significantly to the challenges faced by courts in striking an appropriate balance between the proper administration of justice and the public interest in open justice.

In light of this, we propose that for suppression orders to remain effective, there is a need to review the contribution that the communication and media role within courts might have on how courts communicate about suppression and non-publication orders in the current, fragmented and pervasive digital media environment. Due to the major media and technological changes that have occurred over recent years we suggest there may be potential for courts to take a stronger, more pro-active, role through these communication experts. As we advised the NSWLRC (Johnston et al, 2019), we stress the important role of professional communication and media workers within Australian courts and the potential to make greater use of this resource to promote open justice and communicate to the media and the public about suppression and non-publication orders. We suggest a review of the resourcing of this role in consideration of its broader potential for managing suppression and non-publication orders more proactively or mitigating the damage of breaches.

Monitoring compliance with prohibitions and restrictions
49 Should there be a system for monitoring compliance with prohibitions and restrictions on publication? If so:
(a) How should such compliance be monitored?
(b) Who should be responsible for monitoring such compliance?
Responsibility for instituting proceedings
50 Who should be responsible for instituting proceedings for breach of prohibitions and restrictions on publication?
51 Should the 'DPP consent' requirements under the Judicial Proceedings Reports Act 1958 (Vic) be retained?
Fault elements to prove breach of prohibitions and restrictions
52 Should liability arise where there is a lack of awareness of the relevant prohibition or restriction on publication?

Defences and exceptions
53 Are the existing exceptions for information-sharing agencies appropriate? Alternatively, do they inhibit information-sharing? If so, how should these barriers be addressed?
54 What defences, if any, should be available to people who have published information which is prohibited or restricted?

Penalties and remedies

55 Are the existing penalties and remedies for breaches of prohibitions and restrictions on publication appropriate? If not, what penalties and remedies should be provided?
56 Should penalties for breaches of common law suppression orders and pseudonym orders be set out in statutory provisions?
57 Should a court be able to issue an order for internet materials to be taken down ('takedown order')? If so:
(a) Should the process for seeking and making such orders be embodied in legislation?
(b) Who should be responsible for monitoring the Internet (and social media) for potential 'take-down' material?
(c) Who should be responsible for making applications for take-down orders?
(d) Should such applications be conducted on an adversarial or ex parte basis?

Legacy suppression orders

58 How many legacy suppression orders with no end date issued by the Supreme, County and Magistrates' courts are currently in force?
59 Should there be provisions in the Open Courts Act 2013 (Vic), or another statute, which specify the duration of legacy suppression orders? If so:
(a) Should there be a deeming provision in the Open Courts Act 2013 (Vic), or another statute, which provides that legacy suppression orders are deemed to have been revoked from a particular date, subject only to applications from interested parties to:
i. vary the order?
ii. continue the order for a further specified time?
iii. revoke the order at an earlier date?
(b) Should there be provisions in the Open Courts Act 2013 (Vic), or another statute, which specify procedures for notification of legacy suppression orders and applications for continuation or revocation of such orders?

The Open Courts Act Review dealt with the issue of standing for the media to make submissions regarding suppression orders. This is another matter that requires a harmonious approach throughout Australia. We submitted to the NSWLRC's Open Justice Review the failure to implement the *Court Information Act 2010* (NSW), coupled with the unduly restrictive approach taken to dealing with requests for access to court information that is non-contentious, is undermining open justice in NSW and fails to strike the right balance between the considerations outlined in its terms of reference (Johnston et al, 2019). In light of the changing media landscape, the rise of freelancing and new reporting models, in part outlined above under the 'definitional issues' discussion above, we further recommended standing to oppose a suppression order or non-publication order be available to anyone 'demonstrably engaged in journalism', not just news organisations.

In our NSWLRC submission (Johnston et al, 2019) we drew attention to the need to review standing to oppose suppression orders, which is now restricted to representatives of the legacy media. We proposed this be reviewed to remove the limitation on the right to be heard on the making of suppression orders to 'media organisations' and allow open standing for any person who opposes the making of such orders who can advance a serious argument that the suppression or non-disclosure order should not be made, having regard to the objects of the legislation. We noted that the relevance and potential effectiveness of suppression orders was impaired by the current narrow scope for individual journalists to be heard in relation to

their making, which does not sufficiently recognise the legitimate interests of non-legacy media interests.

Open standing has been a feature of trade practices litigation for many years without any evidence that this practice has opened a floodgate of meritless claims (Truth About Motorways, 2000). The importance of determinations under the Act to open justice and the public right to know militates in favour of an open approach to standing. The difficulty with merely expanding the definition of journalist or media organisation beyond the legacy media to a wider group is that at some point a blogger will be denied access to court to make serious submissions about open justice at the threshold, even though their contentions may be perfectly consistent with the objects of the legislation. Expanding standing without removing it simply shifts the goalposts to a new place and enables opponents to advance arid arguments about whether a *person* or *organisation* should have the opportunity to make submissions, rather than focusing on the *merits* of those arguments (Keyzer, 2010). Suppression orders affect everyone and anyone, so, correlatively, anyone and everyone should have standing. Furthermore, litigation over standing can and has been used by governments to stifle debate and intimidate impoverished or public interest litigants from seeking access to justice. For that additional reason, applicants for a suppression order should not be expected to bear the costs of a "winner" in a decision about open justice if they "lose", unless a court rules that their *argument* is destitute of foundation or without merit. The parties should bear their own costs. All of this obviates the need for any test of whether a person is demonstrably engaged in journalism, not just news organisations.

Finally, the issue of 'super injunctions' was not dealt with to any significant extent in the Open Courts Act Review, and it is worthy of mention in the wake of the high profile criminal trial in Victoria last year, where an injunction was issued prohibiting mentioning "the fact of this order and the contents of this order". Such a blanket ban stands in stark contrast to the principles of open justice and the right to free expression and should not be issued except in the rarest of cases after media representation and judicial review.

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